The University of the State of New York

The State Education Department
State Review Officer
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No. 19-090

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

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Matthew A. Ulmann, Esq.

Cuddy Law Firm, PLLC, attorneys for respondent, by Jason H. Sterne, Esq.

DECISION

I. Introduction

This proceeding arises under Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which awarded compensatory educational services to the student. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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 related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process

provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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 student in this case began receiving special education services—speech-language therapy and occupational therapy (OT)—through the Early Intervention (EI) program (see Parent Ex. F at p. 1). The student attended a nonpublic school for preschool through eighth grade, and during that time, received special education services—speech-language therapy, OT, and

counseling—through IEPs or IESPs as a student with a speech or language impairment (id. at p. 2). After eighth grade, the student transferred to a different nonpublic school for high school (2015-16 school year, ninth grade), and remained eligible for special education services until March 2017 when he was "declassified" by the district (2016-17 school year, 10th grade) (id.).

At the start of the 2016-17 school year, the evidence in the hearing record indicates that the parent (referring solely to student's mother throughout this decision), in a letter dated September 6, 2016, wrote to the district to request the following "comprehensive independent evaluations" of the student: a neuropsychological evaluation, a speech-language evaluation (including auditory processing), an OT evaluation, and an assistive technology evaluation (Parent Ex. N at p. 4). Thereafter, the parent filed a complaint with the New York State Education Department (NYSED) (received on or about September 26, 2016), which alleged, among other things, that the district failed to arrange for a mandated three-year reevaluation of the student during the 2015-16 school year and failed to conduct an annual review in 2014 (see Parent Ex. O at pp. 3-5). According to the results of NYSED's investigation into the parent's complaint, the district had sent a letter dated August 19, 2016 to the student's father indicating that a mandated three-year reevaluation was required, and the district received consent for the reevaluation from the student's father on or about October 20, 2016 (id.). In addition, the parent had alleged that she had not received "all parental notices beginning in the 2015-16 school year to [the] present" (i.e., September 2016) (id. at pp. 4-5).

The evidence in the hearing record also reveals that, on October 26, 2016, the district conducted a psychoeducational evaluation of the student as part of the mandatory three-year reevaluation (see Dist. Ex. 11 at p. 1).[1] In addition, the district conducted—in January 2017—a speech-language evaluation, an OT evaluation, and an assistive technology evaluation of the student as part of the mandated three-year reevaluation (see Parent Ex. N at p. 8; see generally Parent Exs. G; I; Dist. Exs. 9-10).[2] According to the evidence, after the parent received a copy of the psychoeducational evaluation of the student, she requested an auditory processing evaluation of the student, which the district declined to conduct (see Parent Ex. N at pp. 7-8). As a result of the district's decision, in February 2017, the parent privately obtained an auditory processing evaluation of the student (id. at p. 8 n.4; see generally Parent Ex. H).

After completing the evaluations, a CSE convened on March 16, 2017 to review and consider the information, and at that time, found the student was no longer eligible to receive

[1] In a letter to the parent dated November 23, 2016, NYSED summarized the resolution of the parent's complaint, together with a "Compliance Assurance Plan," which required the district to conduct a mandated three-year reevaluation of the student and to convene a CSE meeting to review the results of those evaluations (Parent Ex. O at pp. 1, 3-6).

[2] The district also conducted another assistive technology evaluation of the student on February 28, 2017, as a follow-up to a trial use period of assistive technology; as a result, an addendum was completed for the assistive technology evaluation (see Parent Ex. G at pp. 7-11).

special education and declassified him (see Parent Ex. E at pp. 1, 3).[3] Following the CSE meeting, the student's father, in a letter to the district dated March 28, 2017, "disagreed with [the district's] psychoeducational evaluation" and requested that the district fund a neuropsychological evaluation of the student as an independent educational evaluation (IEE) (Parent Ex. N at p. 4 n.1; compare Parent Ex. N at p. 4 n.1, with Parent Ex. F at pp. 1, 19). Shortly thereafter in a due process complaint notice dated March 30, 2017, the student's father challenged the CSE's decision to declassify the student and sought an IEE of the student at district expense (see Parent Ex. N at p. 4 n.2; see Parent Ex. M at pp. 4-5). The district filed its own due process complaint notice, dated April 17, 2017, to demonstrate the appropriateness of the psychoeducational evaluation of the student conducted as part of the mandated three-year reevaluation (id. at p. 4 n.1; see generally Parent Ex. N; Dist. Ex. 11).[4]

As the impartial hearings proceeded with respect to the aforementioned due process complaint notices, the parent privately obtained a neuropsychological evaluation of the student, which took place over several dates in June and July 2017 (July 2017 neuropsychological evaluation) (compare Parent Ex. F at p. 1, with Parent Ex. M at p. 1, and Parent Ex. N at p. 1).[5] On October 27, 2017, a CSE convened and reviewed the July 2017 neuropsychological evaluation of the student (see Parent Ex. B at p. 1).[6] At that time, the CSE found the student eligible to receive special education and related services as a student with a learning disability and developed an IESP, which included a recommendation for five periods per week of special education teacher support services (SETSS), assistive technology devices or services (laptop with word processing), and various testing accommodations (id. at pp. 6-7).[7] In addition, the CSE created annual goals targeting the student's needs in writing, writing and listening, and assistive technology and recommended many of the strategies included in the July 2017 neuropsychological evaluation

[3] A prior written notice, dated March 16, 2017, reflected that the CSE considered the following in reaching the decision that the student was no longer eligible for special education: a psychoeducational evaluation, a speech-language evaluation, an OT evaluation, an assistive technology evaluation, a vocational assessment, a March 2017 report card, the privately obtained auditory and language processing evaluation, and teacher reports in the subjects of English and mathematics (see Parent Ex. E at p. 1).

[4] After weighing various concerns, the previous IHO (IHO 1) assigned to these matters declined to consolidate the March 30, 2017 due process complaint notice filed by the student's father and the district's April 17, 2017 due process complaint notice; instead, IHO 1 scheduled impartial hearing dates "together, for the convenience of the parties" (Parent Ex. M at p. 4 n.1; see Parent Ex. N at p. 4 n.2). On or about August 28, 2017, IHO 1 held a "pendency hearing," and in an interim decision dated September 11, 2017, IHO 1 ordered the following as the student's pendency (stay-put) services "during the pendency of all due process proceedings:" "the student shall remain classified and continue to receive Speech/language therapy, counseling and testing accommodations, as provided in the July 9, 2015 IESP" (Parent Ex. M at p. 4).

[5] On or about October 16, 2017, the parent filed an amended due process complaint notice (amending the March 30, 2017 due process complaint notice), which sought reimbursement for the following: the costs of the privately obtained auditory and language processing evaluation of the student completed in February 2017, the costs of hearing aids, and the costs of a "MacBook" (Parent Ex. M at p. 4).

[6] Based upon notations in the October 2017 IESP, it appears that the CSE also had an October 2017 teacher report available to assist in creating the IESP (see, e.g., Parent Ex. B at pp. 2-3).

[7] The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

report to address the student's management needs (id. at pp. 4-6; compare Parent Ex. B at p. 4, with Parent Ex. F at pp. 15-19). The October 2017 IESP also included measurable postsecondary goals and a coordinated set of transition activities (see Parent Ex. B at pp. 5, 7).[8]

On or about February 3, 2018, the parent wrote to the district via email and requested "auditory and language processing evaluations" of the student (Dist. Ex. 3 at p. 1). In a prior written notice dated February 7, 2018, the district declined the parent's requested evaluations (id.; see generally Dist. Ex. 5).

In a due process complaint notice dated February 9, 2018, the parent sought an impartial hearing, in part, to receive "funding" (at the "enhanced rate of $125.00 per hour") for the SETSS recommended in the student's October 2017 IESP (Parent Ex. L at p. 3).[9] The parent also alleged that the student had not received the speech-language therapy services as mandated by IHO 1's pendency decision, dated September 11, 2017; as such, the parent requested "compensatory speech language therapy" (at the "enhanced rate of $125.00 per hour") (id. at pp. 3-4). According to the evidence in the hearing record, after receiving a related services authorization (RSA) from the district following the October 2017 IESP meeting, the parent could not secure a SETSS provider despite her efforts (id. at pp. 4-6). In a decision dated May 21, 2018, IHO 1 ordered the district to fund 160 hours of "one-to-one tutoring with a certified special education teacher at EBL Coaching (or another certified special education teacher, chosen by the parent), at a rate not to exceed $125.00 per hour, to be used by the student within two years" of the decision (Parent Ex. L at pp. 8-9).[10] IHO 1 also ordered the district to provide the student with 53.5 hours of speech-language therapy by issuing an RSA and identifying a provider or, if unable to secure a provider, to otherwise fund the services (id. at p. 9).

[8] In a decision dated January 5, 2018, IHO 1 found that the district's October 2016 psychological evaluation of the student was not sufficient, and ordered the district to reimburse the parent for the costs of the July 2017 neuropsychological evaluation of the student (see Parent Ex. N at pp. 12-13). The district appealed IHO 1's decision to the Office of State Review (see Application of the Dep't of Educ., Appeal No. 18-017 [dated Apr. 9, 2018] [overturning IHO 1's finding that the district's October 2016 psychological evaluation of the student was not sufficient and vacating IHO 1's order directing the district to reimburse the parent for the costs of the July 2017 neuropsychological evaluation]).

[9] Pursuant to State regulation, the parent's February 9, 2018 due process complaint notice was assigned to the same IHO—IHO 1—who was already presiding over the impartial hearing regarding the March 30, 2017 due process complaint notice and who had just completed the impartial hearing related to the district's April 17, 2017 due process complaint notices (see 8 NYCRR 200.5[j][3][ii][a][1]; Parent Exs. L at p. 1; M at p. 1; N at p. 1). In a decision dated March 28, 2018, IHO 1 ordered the district to reimburse the parent for the costs of the privately obtained auditory processing evaluation of the student completed in February 2017, but denied the parent's request to be reimbursed for the costs of the student's hearing aids (see Parent Ex. M at pp. 4, 13). The district otherwise agreed to reimburse the parent for the costs of the "MacBook" (id. at p. 13).

[10] In reaching the decision to award 160 hours of "one-to-one tutoring," IHO 1 calculated the missed services—five hours per week of SETSS (20 hours per month)—for the period of time from October 27, 2017 (the date of the IESP) through the conclusion of the 2017-18 school year in June 2018 (a total of eight months) (Parent Ex. M at pp. 7-8). Essentially, IHO 1's award reflected an hour-for-hour compensation award (but cf. 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"]).

On or about September 28, 2018, the parent, via email, "submitted an additional request for the auditory and language processing evaluations"—which the district had previously denied following the parent's request for the same evaluations in February 2018 (Dist. Ex. 3 at p. 1; see generally Dist. Ex. 5). In response, the district provided the parent with a prior written notice, dated October 1, 2018, denying the parent's request (see Dist. Ex. 4 at p. 1; see also Dist. Ex. 3 at pp. 1-2). Thereafter in a letter dated October 3, 2018, the parent informed the district of her intention to proceed with the auditory and language processing evaluations of the student and of her disagreement with the speech-language evaluation of the student completed in January 2017 (see Dist. Ex. 3 at pp. 1-2).[11]

A. Due Process Complaint Notice

By due process complaint notice dated March 12, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) (see Parent Ex. A at pp. 1-3). Initially, the parent indicated that the district conducted a meeting in October 2017 and, at that time, created an IESP for the student for the remainder of the 2017-18 school year that included recommendations for "five periods per week" of SETSS, "assistive technology, and testing accommodations" (id. at p. 1). The parent also indicated that the October 2017 IESP reflected a "projected annual review" date of October 2018, but to date, the district had failed to conduct an annual review, which denied the parent "meaningful participation in the decision-making process" and deprived the student of "educational opportunity" (id. at pp. 1, 3).

In addition, the parent indicated that she "disagree[d] with the transition planning and implementation of the IESP," noting further that the student planned to attend a "four-year college commencing in the fall of 2019" (Parent Ex. A at p. 1). The parent pointed out that the student, who had been diagnosed as having an attention deficit hyperactivity disorder (ADHD), would "require accommodations to successfully complete a college program" (id.).

With regard to transition planning, the parent noted that under both the "Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973, individuals with disabilities [were] protected from discrimination and assured equal access" (Parent Ex. A at p. 2). The parent also noted that colleges and universities required "documentation to establish that a student's disability substantially limit[ed] some major life activity, including learning, as a prerequisite to providing accommodations" (id.). Thereafter, the parent listed examples of evaluations or testing that at least one four-year-college "deemed acceptable" to establish a student's right to receive such accommodations, and specifically noted that neither an IEP nor a 504 plan itself was sufficient "documentation" to meet this criteria (id.). As a result, the parent alleged that the district's failure to include "such an evaluation," as part of the student's transition planning—i.e., the "coordinated set of transition activities"—and "as required by four-year colleges and universities" to "document necessary accommodations," resulted in a failure to offer the student a FAPE (id.). Furthermore, the parent noted that because the student would require assistive technology at college, an updated assistive technology evaluation was required (id. at p. 3). The parent also noted that, due to the student's "struggles with language," he would need to

[11] In the October 3, 2018 letter to the district, the parent indicated that the student was, at that time, receiving "compensatory speech therapy services" from the district (Dist. Ex. 3 at p. 2).

"apply for a foreign language exemption in college," and therefore, the student would require "evaluative support in the form of an auditory and language processing evaluation" (id.).

With respect to the alleged disagreement with the "implementation" of the IESP, the parent complained that the district's failure to provide the student with the SETSS mandated in the IESP resulted in a failure to offer the student a FAPE (Parent Ex. A at pp. 1, 3).

As a proposed resolution for the alleged violations, the parent sought a finding that the district failed to offer the student a FAPE for the 2018-19 school year (see Parent Ex. A at p. 3). In addition, the parent requested an order directing the district to "authorize an evaluation to document necessary accommodations for [the student's] college," to "authorize an assistive technology evaluation to document necessary [assistive technology] at college," and to "authorize an auditory and language evaluation to support an exemption from the foreign language requirement at college" (id.). The parent also requested an order directing the district to provide "compensatory SETSS services" for the failure to "implement the SETSS service," and to direct the CSE to "convene and develop a new IESP" with an "appropriate transition plan" (id.).

B. Impartial Hearing and Intervening Events

On April 11, 2019, the parties met for the impartial hearing, and on that date, the IHO assigned to this matter—IHO 2—received evidence regarding the student's pendency (stay-put) services and conducted a prehearing conference (see Tr. pp. 1-26; Parent Exs. A-B). In an interim decision dated April 15, 2019, IHO 2 found that, by agreement of the parties, the following constituted the student's pendency services and ordered the district to provide the same to the student retroactive to the date of the due process complaint notice was filed (March 13, 2019): five hours per week of SETSS (see Interim IHO Decision at p. 5).

Before resuming the impartial hearing, a CSE convened on May 15, 2019 and created a "graduation exit summary" (Tr. pp. 159, 184; see generally Dist. Ex. 1).[12] In addition to a district school psychologist (who also acted as the district representative) and a district special education teacher, both the parent and the student attended the May 2019 CSE meeting (see Dist. Ex. 1 at p. 1; see also Tr. pp. 184-86, 214).[13]

Over the next two dates of the impartial hearing, May 10 and May 30, 2019, IHO 2 conducted "status conference[s]" to "provide a clarification of the events at issue; the failures, or the allegations of failure at issue, and the remedies, and to tie the request for remedy to the particular alleged barriers" (Tr. pp. 28, 70). At the conclusion of the second status conference held

[12] State regulation provides that while a district is "not required to conduct a reevaluation of a student before the termination of a student's eligibility due to graduation with a local high school or Regents diploma . . . [a district] is required to provide such student with a summary of the student's academic achievement and functional performance, which shall include recommendations on how to assist the student in meeting his or her postsecondary goals" (8 NYCRR 200.4[c][4]; see 34 CFR 300.305[e][2]-[e][3]).

[13] At the impartial hearing, the district school psychologist who attended the May 2019 CSE meeting testified that the student's nonpublic school was invited to attend the meeting, but no one showed up (see Tr. pp. 184-85; Dist. Ex. 1 at p. 1).

on May 30, 2019, the parties and IHO 2 scheduled future impartial hearing dates for June 24 and June 25, 2019; on the final impartial hearing dates, both parties presented testimonial and documentary evidence (see Tr. pp. 129-35; see generally Tr. pp. 137-420; Parent Exs. A-P; Dist. Exs. 1-11).

Prior to the final impartial hearing dates, the student graduated on June 19, 2019 (see Tr. p. 261).

Following the final impartial hearing date on June 25, 2019, both parties submitted closing briefs—each respectively dated July 15, 2019—to IHO 2 (see generally Admin. Hr'g Exs. 2-3).[14]

C. Impartial Hearing Officer Decision

In a decision dated August 12, 2019, IHO 2 concluded that the district's failure to develop an IESP for the 2018-19 school year constituted a "substantive, gross violation of federal and [S]tate laws," which "significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE" for the 2018-19 school year (IHO Decision at pp. 15-17).[15] Turning to the parent's requested relief, IHO 2 found that the hearing record failed to contain sufficient evidence to support a conclusion that the district was required to fund reevaluations of the student in the areas of assistive technology and auditory and language processing (id. at pp. 4, 17-19, 21-22). IHO 2 also found that the parent was not entitled to the requested reevaluations as part of the district's obligations related to transition services (id. at pp. 18-19). Similarly, IHO 2 denied the parent's request for new assistive technology devices (i.e., Apple iPad, Apple Pencil) (id. at pp. 21-22).

As a remedy for the failure to offer the student a FAPE for the 2018-19 school year, IHO 2 considered the parent's request for compensatory educational services in the form of SETSS (see IHO Decision at pp. 19-20). Here, IHO 2 found that the district should have continued to provide the student with SETSS during the 2018-19 school year—as mandated on the October 2017 IESP—until such time as the district developed a new IESP and pursuant to the pendency decision issued in this proceeding (id. at p. 19). According to IHO 2, the parent produced sufficient

[14] The administrative hearing record submitted to the Office of State Review included documents—notably, the parties' closing briefs to IHO 2, which IHO 2 did not appear to enter into the hearing record as evidence (see IHO Decision at pp. 25-26). For ease of reference, the parties' closing briefs submitted as part of the administrative hearing record that were not formally entered into the hearing record as evidence will be referred to in citations as administrative hearing record exhibits (Admin. Hr'g Ex.) and will thereafter reflect the number assigned to such document in the district's certification accompanying the administrative hearing record provided to the Office of State Review. For example, the citation in the body of this decision immediately preceding this footnote—"Admin. Hr'g Exs. 2-3"—refers to the documents identified as numbers 2 and 3 on the certification (titled, respectively, as "[District] Closing Brief" and "Parent Closing Brief"). In contrast, for those documents formally entered into the hearing record as evidence—here, parent exhibits A through P, and district exhibits 1 through 11—citations thereto will reference such exhibits as designated by the parties and IHO 2 (i.e., "Parent Ex. A" or "Dist. Ex. 1").

[15] The IHO also found that the district's failure to address the parent's requests for transition services, evaluations, and assistive technology in the student's exit summary "significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE" (IHO Decision at pp, 16-17).

evidence to support her "efforts to retain such service," and moreover, it was the district's "burden to find such a provider and it failed to do so" (id.).

In addition, IHO 2 opined that because the previous IESP included a recommendation for SETSS, it "must have been considered to be necessary in addressing [the student's] 'unique needs to prepare him for further education, employment, and independent living' and in affording him with an opportunity to make more than 'mere trivial advancement'" (IHO Decision at p. 19). IHO 2 also opined that the student was "to be given this opportunity to develop certain skills before he graduated" and was "totally deprived of this opportunity" (id.). As a result, IHO 2 further opined that "it would be absurd to assume that the total deprivation [of] a service considered necessary did not have a significant, substantive, negative impact on the skills [the student] was able to accrue before he graduated" (id.). According to IHO 2, although the student "managed to graduate and get into college," this did not "support the argument that the failure to provide SETSS did not cause a gross deprivation of educational benefit in violation of FAPE" (id.). Consequently, IHO 2 concluded that the student was "entitled to 165 hours of compensatory academic tutoring, at a rate not to exceed $125 per hour, by a provider of the parent's choosing, to make up for mandated SETSS services not delivered during the 2018/19 school year" (id. at pp. 19-20). IHO 2 noted that the student had a "right to receive these services" and the "IDEA did not create a right without a remedy," and thus, it was "necessary and appropriate for this remedy to be delivered after [the student] received his high school diploma" (id. at p. 20). IHO 2 also noted that the "level of instruction" the student received through these services was to "reflect the level of instruction provided in the college classes [the student was] taking at the time the services [would be] delivered" (id.).

Finally, IHO 2 found that the student was entitled to reimbursement for one semester of "Instructor-led Academic Coaching" at college for the district's failure to provide appropriate transition planning services (IHO Decision at pp. 20-21).

IV. Appeal for State-Level Review

The district appeals, arguing that IHO 2 erred in finding that the district committed a gross violation of the IDEA by failing to develop an IESP for the 2018-19 school year and in failing to provide the student with SETSS. Relatedly, the district contends that IHO 2 erred in awarding compensatory educational services to the student. The district also argues that IHO 2 erred in applying the FAPE standard in this case, and instead, IHO 2 should have determined whether equitable services were provided. Next, the district contends that IHO 2 erred in finding that the district failed to offer the student a FAPE by not including appropriate transition services in an IESP, because the parent did not raise this as an issue in the due process complaint notice. As a final point, the district contends that IHO 2 erred in awarding academic college level tutoring and one semester of "academic coaching" as an award of compensatory educational services. The district seeks to overturn IHO 2's findings and order directing the provision of compensatory educational services.

In an answer, the parent responds to the district's allegations. Overall, the parent seeks to uphold IHO 2's findings contested by the district and to uphold IHO 2's award of compensatory

educational services. The parent argues, however, that the district failed to properly serve the notice of intention to seek review.[16]

In a reply, the district responds to the parent's contention that it failed to properly serve the notice of intention to seek review.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[17] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special

[16] To the extent that the parent was aggrieved by IHO 2's decision denying her requests for assistive technology devices (i.e., Apple iPad, Apple Pencil) and updated reevaluations of the student—auditory and language processing and assistive technology—and the parent has not appealed IHO 2's findings on these issues, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[17] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[18]

VI. Discussion

A. Preliminary Matters—Compliance with Practice Regulations

1. Service of the Notice of Intention to Seek Review

The parent alleges that the district failed to comply with the alternate service instructions as directed by the Office of State Review when serving the notice of intention to seek review. More specifically, the parent contends that while the notice of intention to seek review was delivered via Certified Mail, it was not by Return Receipt Requested because the Return Receipt was "not detached from the envelope and returned to the sender" (Answer ¶ 7; see Answer Ex. A). The district denies this allegation and argues that it not only followed the instructions of the Office of State Review, but also followed the instructions of the United States Postal Service (USPS) with respect to using Certified Mail, Return Receipt Requested. Consistent with the USPS instructions on "PS Form 3811," the district asserts that it provided the mailing addresses of the recipient (the parent) and the sender (the district), the tracking number from the Certified Mail receipt (if applicable), and attached the card to the envelope (Reply ¶¶ 1-2; see Reply Ex. A). Having mailed the notice of intention to seek review to the parent in conformity with the requirements of the USPS, the district argues that its mailing was sufficient and the parent's (or her authorized agent's) failure to "sign" PS Form 3811 and the USPS's failure to "date, detach and mail" the PS Form 3811 back to the "sender"—here, the district—has "no bearing on whether the [district] complied with the [Office of State Review's] directive and is not evidence of improper service" (Reply at ¶ 2; see Reply Ex. A).

State regulation requires that any party "who intends to seek review by [an SRO] of the decision of an [IHO] shall personally serve upon the opposing party, . . . , a notice of intention to seek review" in the form described therein (8 NYCRR 279.2[a]).[19] The notice of intention to seek review must be personally served upon the "opposing party no later than 25 days after the date of the decision of the [IHO] sought to be reviewed" (see 8 NYCRR 279.2[b]).

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[18] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

[19] The "Notice of Intention to Seek Review" is a filing separate and apart from the "Notice of Request for Review" (compare 8 NYCRR 279.2, with 8 NYCRR 279.3). To be clear, the timely and proper service of the request for review initiates an appeal to the Office of State Review, and when applicable, the timely and proper service of any cross-appeal (see 8 NYCRR 279.4[a], [f] [emphasis added]).

In this case, the district sought permission from the Office of State Review—after various, unsuccessful attempts to personally serve the notice of intention to seek review upon the parent—to effectuate service through an alternate method (see 8 NYCRR 279.2[a], 279.4[c]). In granting the district's request, the Office of State Review instructed the district that, in addition to the steps it had already taken to serve the notice of intention to seek review and as described within the affidavit of service submitted with the district's request, the district must mail the notice of intention to seek review to the parent's last known address by Certified Mail, Return Receipt Requested. In addition, the district was instructed to file an affidavit of service reflecting the completion of the alternate service as approved by the Office of State Review. Consistent with these instructions, the Office of State Review received an affidavit of service from the district attesting to mailing the notice of intention to seek review to the parent via Certified Mail, Return Receipt Requested on September 5, 2019 (see Dist. Aff. of Service).

Upon review of PS Form 3811, which the district included as evidence with its reply, it appears that the district complied with the instructions of the USPS with respect to mailing the notice of intention to seek review by Certified Mail, Return Receipt Requested (see Reply Ex. A). For example, this evidence reflects that the district provided both the parent's and the district's mailing addresses, the tracking number from the Certified Mail, and then attached the card to the envelope (id.). However, a review of a copy of the envelope that the parent included as evidence with the answer reveals that the Return Receipt was neither signed nor detached from the envelope (see Answer Ex. A). While it appears that the parent claims that this evidence, alone, establishes that the district did not properly serve the notice of intention to seek review, the parent offers no arguments regarding how her own failure to sign the Return Receipt and/or the USPS's alleged failure to "date, detach and mail" the Return Receipt back to the district leads to this conclusion (see Answer ¶¶ 4-7). In light of the foregoing, the evidence supports a finding that the district followed both the instructions of the Office of State Review for alternate service, as well as the instructions set forth by the USPS for mailing via Certified Mail, Return Receipt Requested, and the parent's argument must be dismissed.

2. Scope of Impartial Hearing

On this point, the district argues that IHO 2 erred in finding that the district failed to offer the student a FAPE because the student's IESP did not include appropriate transition services. More specifically, the district asserts that IHO 2 exceeded her jurisdiction in reaching this finding because the parent did not raise the failure to include appropriate transition services as an issue in the due process complaint notice to be resolved at the impartial hearing; instead, the district claims that the parent raised the failure to conduct evaluations as part of the transition services as a basis upon which to conclude that the district failed to offer the student a FAPE.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b], 300.508[a]; 8 NYCRR 200.5[j][1]; Application of a Student with a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per

permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013], aff'd, 553 Fed. App'x 65 [2d Cir. Jan. 30, 2014]; DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]).

In this instance, the parent—as the party requesting the impartial hearing—had the first opportunity to identify the range of issues to be addressed at the impartial hearing. Upon review, I find that the parent's due process complaint notice can reasonably be read to include a challenge to the appropriateness of the student's transition plan (see Parent Ex. A at pp. 1-3). For example, the parent alleged in the due process complaint notice that she "disagree[d] with the transition planning" (id. at p. 1). More specifically, the parent alleged that the transition planning failed to include evaluations necessary in order for the student to secure accommodations at college as an issue to be resolved at the impartial hearing (id. at pp. 2-3). Therefore, contrary to the district's argument, IHO 2 did not exceed her jurisdiction by making a finding with respect to the transition plan or transition services, and the district's contentions must be dismissed.[20]

3. IHO 2's Standard of Review

The district argues that because the parent requested an IESP, IHO 2 erred in applying a FAPE analysis instead of determining whether equitable services were provided pursuant to

[20] It must be noted, however, that based solely upon the vague language used in the due process complaint notice, it is difficult, if not impossible, to discern whether the parent's allegations pertained to the transition plan and coordinated set of transition activities in the October 2017 IESP—as the only actual transition plan in the hearing record—or to the absence of a transition plan and coordinated set of transition activities as it related to the district's failure to develop an IESP for the 2018-19 school year (see generally Parent Ex. A at pp. 1-3). IHO 2 appeared to address both interpretations by finding, on one hand, that the district was not obligated to fund reevaluations of the student as part of transition planning or transition services so the student could secure accommodations at college (see IHO Decision at pp. 17-19), and on the other hand, that the district failed to provide the student with a transition plan or transition services as it related to the district's failure to develop an IESP for the 2018-19 school year (id. at pp. 20-21).

section 3602-c.[21, 22] In sum, the district asserts that, as a parentally placed nonpublic school student, the district was not obligated to offer the student a FAPE, and thus, IHO 2 erred in finding that the alleged violations of the IESP constituted a "substantive deprivation of a FAPE" (Req. for Rev. ¶ 13).[23]

Initially, it must be noted that the district's arguments on appeal contrast starkly with the arguments made in its closing brief submitted to IHO 2 regarding whether the district was obligated to offer the student a FAPE (compare Req. for Rev. ¶ 13, with Admin. Hr'g Ex. 3 at pp. 9-11). Significantly, the district set forth the requirements related to dually-enrolled students residing in the State—including the parent's obligation to make a written request for IESP services by June 1st in the preceding school year—and specifically noted as part of the relevant legal authority that

[21] Generally, the State's dual enrollment statute requires parents of a New York State resident student with a disability who was placed in a nonpublic school and who sought to obtain educational "services" for his or her child to file a request for such services in the district where the nonpublic school was located on or before the first day of June preceding the school year for which the request for services was made (Educ. Law § 3602-c[2]). Contrary to the district's assertion, the hearing record contains no evidence satisfying this requirement under section 3602-c, namely, that the parent made a written request for IESP services by June 1st preceding either the 2017-18 school year or the 2018-19 school year (see generally Tr. pp. 1-420; Parent Exs. A-P; Dist. Exs. 1-11; Admin. Hr'g Exs. 2-3). If the parent did not make such a request in writing, the district remained obligated to offer the student a FAPE and should have developed an IEP for the student. Nevertheless, it appears that the parties went forward with the common understanding that the student was entitled to an IESP for the 2018-19 school year, as it was not disputed at the impartial hearing or, now, on appeal. However, it is worth reminding the parties and IHO 2 that if the parent's alleged failure to make a written request for IESP services in a manner consistent with State law was an issue in dispute, courts have grappled with the effect of a parent's intention to place a student at a nonpublic school on the district's obligation to provide the student with an IEP. For example, in E.T. v. Board of Education of Pine Bush Central School District, 2012 WL 5936537 (S.D.N.Y. Nov. 26, 2012), after concluding that the district retained an obligation to offer the student a FAPE, the court found that the "issue of the parents' intent [was] a question that inform[ed] the balancing of the equities rather than whether the district had an obligation to the child under the IDEA" (E.T., 2012 WL 5936537, at *16). In contrast to the court's holding in E.T., at least two federal district courts have found an objective manifestation of the parent's intention to place the student in a nonpublic school as a threshold issue regarding whether a district remained obligated to offer the student a FAPE (see Dist. of Columbia v. Vinyard, 971 F. Supp. 2d 103, 108-10 [D.D.C. 2013] [finding the court's explanation in E.T. "illogical"] [emphasis added]; Shane T. v. Carbondale Area Sch. Dist., 2017 WL 4314555, at *15-*20 [M.D. Pa. Sept. 28, 2017]).

[22] The Second Circuit has noted that "[a] local educational agency may not be required to offer an IEP if the parent's expressed intention is to enroll the child in a private school outside the district, without regard to any IEP" (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 451 n.9 [2d Cir. 2015], citing Child Find for Parentally-Placed Private School Children with Disabilities, 71 Fed. Reg. 46,593 [Aug. 14, 2006]; but see J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 665-66 [S.D.N.Y. 2001] [noting that the "district-of- residence's obligations do not simply end because a child has been privately placed elsewhere"]). The Court did not specifically address the situation presented here, where the nonpublic school the student attended was located within the district, and it appears that under that circumstance the district may not be relieved from the obligation to develop an IEP. The Court also did not reach the issue of whether or how the parent's actions might have impacted on equitable considerations.

[23] It is unclear why the district is citing to federal regulations regarding the provision of equitable services to students with disabilities (see Req. for Rev. ¶ 13; see also 34 CFR 300.134, 137, 138). Separate from the services plan envisioned under the IDEA, the Education Law has provided parents of students with disabilities who are residents of New York with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]).

"a board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs" (Admin. Hr'g Ex. 3 at pp. 9-10, citing Educ. Law § 4402[2][a], [b][2]). Moreover, in the remainder of the closing brief, the district argued, in part, to IHO 2 that the evidence did not demonstrate that the October 2017 IESP (transition services) failed to offer the student a FAPE (see Admin. Hr'g Ex. 3 at pp. 11-16), and similarly, that the evidence did not establish that the district's failure to conduct a timely IESP meeting for the 2018-19 school year resulted in a failure to offer the student a FAPE (id. at pp. 19-20). Consequently, it is beyond cavil—and, perhaps, strains credulity—that the district now contends that IHO 2 erred in applying a FAPE analysis in this matter when the FAPE analysis was the only legal authority presented to IHO 2 by the district for consideration (id. at pp. 9-11).

Nonetheless, while the district argues on appeal that IHO 2 erred in applying a FAPE analysis to the facts of this case, the district offers no other analysis that IHO 2 should have applied, other than the bald and conclusory assertion that IHO 2 should have determined whether the district provided the student with equitable services (see Req. for Rev. ¶ 13). Generally, it is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [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] [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] [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] [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]). As a result, since the request for review lacks any guidance from the district and the district opted to not submit a memorandum of law in support of the request for review that may have provided further elaboration on this claim, I will not sift through the due process complaint notice, the hearing record, and IHO 2's decision for the purpose of arguing this claim on the district's behalf (see Application of the Bd. of Educ., Appeal No. 18-081; Application of a Student with a Disability, Appeal No. 12-069; Application of a Student with a Disability, Appeal No. 12-032; Application of the Dep't of Educ., Appeal No. 12-022; Application of the Dep't of Educ., Appeal No. 11-127).

VII. Relief

Turning to the crux of the appeal, the district argues that IHO 2 erred in finding that the district's failure to develop an IESP for the 2018-19 school year—which IHO 2 found deprived the student of receiving five periods per week of SETSS—constituted a gross violation of the IDEA and, therefore, IHO 2 erred by awarding 165 hours of academic (college-level) tutoring and one semester of "Instructor-led Academic Coaching" to the student as compensatory educational services. Alternatively, the district argues that even if it committed a gross violation of the IDEA, the student was not entitled to an award of compensatory educational services, in any form, given the student's attainment of graduation.

The parent disagrees with the district's contentions, arguing initially that the district committed a gross violation of the IDEA by failing to "implement [the student's] IESP during 2018/19, fail[ing] to conduct a timely annual review, and fail[ing] to provide any transition

services (other than to develop a cursory 'exit summary' shortly before graduation)" (Answer ¶¶ 15-22). In addition, the parent contends that IHO 2's award of "tutoring services" was appropriate and served a purpose similar to SETSS.

A. Compensatory Educational Services

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), 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]). The Second Circuit has held that compensatory education may be awarded to students who are no longer eligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA, which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. Nov. 3, 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom., Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove, 175 F. Supp. 2d at 387).[24]

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] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]). 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

[24] 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]).

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"]).

In this case, two facts remain undisputed: first, neither party disputes whether the gross violation standard should apply in this case, but only whether the district, in fact, committed a gross violation; and second, the student graduated from high school on June 19, 2019, and neither party disputes that the student met the graduation requirements, and, consequently, was no longer statutorily eligible for special education programs or related services. 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]), when taken together with the Second Circuit's standard requiring a gross violation of the IDEA during the student's period of eligibility (see Garro v. State of Conn., 23 F.3d 734, 737 [2d Cir. 1994]; Mrs. C., 916 F.2d at 75), it is a rare case where a student will graduate with a high school diploma and yet still qualify for an award of compensatory educational services (see, e.g., Application of the Bd. of Educ., Appeal No. 18-081; Application of the Bd. of Educ., Appeal No. 17-081; Application of a Student with a Disability, Appeal No. 16-079; Application of a Student with a Disability, Appeal No. 13-215; Application of a Student with a Disability, Appeal No. 13-110; Application of a Student with a Disability, Appeal No. 11-159). In this instance, although IHO 2 recited and appeared to apply the Second Circuit's gross violation standard to the facts of this case, IHO 2 wholly ignored the fact that the student graduated when determining whether the student was entitled to an award of compensatory educational services to remedy the district's purported violations of the IDEA during the 2018-19 school year (see IHO Decision at pp. 15-19).

Putting aside the gross violation standard, a review of the district's failures during the 2018-19 school year, the services the student actually received during that period—albeit via a previous award of compensatory educational services, to wit, 160 hours of SETSS—and the student's achievements, due in no small part to the student's own efforts, shows that the student benefitted from instruction to the extent that an award of compensatory educational services would not be an appropriate form of relief.

In summary, notwithstanding the district's failures, the student ultimately received educational benefit during the 2018-19 school year and graduated, thereby achieving one of the major goals and milestones that the IDEA is intended to support—that place being graduation (see Reid, 401 F.3d at 518). In other words, no compensatory education is required for the district's denial of a FAPE, since the deficiencies were already mitigated in a substantial way (see Phillips v. District of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]). Consequently, IHO 2's award of 165 hours of academic (college-level) tutoring must be vacated.

B. Reimbursement for "Instructor-led Academic Coaching"

As relief for the district's "denial of appropriate" transition services during the 2018-19 school year, IHO 2 awarded the parent reimbursement for the costs of one semester of "Instructor-led Academic Coaching" at college, at a rate not to exceed $790.00 (IHO Decision at pp. 20-22). The district contends that the evidence in the hearing record does not support IHO 2's finding that the failure to provide transition planning caused a substantive deprivation of a FAPE. In addition, the district argues that, consistent with State regulation, it provided the student with an exit summary that adequately summarized the student's "abilities, skills, needs and limitations," and that provided for "supports that w[ould] help [the student] succeed in post-secondary life at [college]" (Req. for Rev. ¶¶ 14-15).

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). In addition, State regulations require districts to conduct vocational assessments of students age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]). An IEP must also include the transition services needed to assist the student in reaching those goals (id.). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]).

Based upon the evidence in the hearing record, it is undisputed that the district—in failing to develop an IESP for the 2018-19 school year—also failed to have a transition plan with measurable postsecondary goals and a coordinated set of transition activities in place when the student's October 2017 IESP expired in or around October 2018 (see generally Tr. pp. 137-420; Parent Exs. A-P; Dist. Exs. 1-11). However, in her due process complaint notice, the parent's concern about the student's transition plan focused solely on the district's alleged failure to conduct evaluations that would allow the student to receive accommodations at college, as well as an unspecified "disagree[ment]" with the transition plan, which was not otherwise explained during the impartial hearing (Parent Ex. A at pp. 1-3; see Tr. pp. 38; see generally Tr. pp. 137-420; Parent Exs. A-P; Dist. Exs. 1-11).

At the impartial hearing, the parent's attorney clarified that the parent sought these evaluations as "compensatory [educational] services for [the district's] complete and utter failure to provide any kind of transition planning for this student's senior year in high school" (Tr. pp. 147-49). The parent's attorney reiterated, however, that the purpose of the requested evaluations was for the student to "go to college so that he c[ould] get these disability accommodations, and, . . . , then seamlessly transition into college" (Tr. pp. 149-50). When asked at the impartial hearing

what other relief the parent sought with respect to transition services, the parent's attorney noted that the parent was also seeking the costs of a "special transition class . . . specifically for students with ADHD" offered at the college the student planned to attend beginning in fall 2019 (Tr. p. 42).[25]

In reaching the decision to award this particular relief, IHO 2 found that the district failed to address the parent's "continuing and repeated requests for a review of transition services, particularly the requests for new evaluations and assistive technology" (IHO Decision at p. 16). However, a review of the evidence in the hearing record reveals that, contrary to IHO 2's findings, while the parent may have repeatedly requested an auditory and language processing evaluation of the student, the hearing record fails to include any request by the parent to review the student's transition services—nor does IHO 2 cite to any evidence in the decision to support this conclusion (IHO Decision at pp. 16-17; see generally Tr. pp. 137-420; Parent Exs. A-P; Dist. Exs. 1-11).

Notwithstanding the fact that the district did not have an updated transition plan in place at the expiration of the October 2017 IESP, the evidence in the hearing record supports a strong inference that the student continued to receive services previously recommended as part of his transition plan, measurable postsecondary goals, and the coordinated set of transition activities by virtue of the student's graduation from high school—and admission to college—by June 19, 2019 (see generally Tr. pp. 137-420; Parent Exs. A-P; Dist. Exs. 1-11). For example, based upon the October 2017 IESP, the student was expected to "continue his college [preparatory] program" as a measurable postsecondary goal and to "continue to advocate for accommodations to reduce the academic [difficulties] of his auditory processing disorder" as a transition need (Parent Ex. B at p. 5). In addition, the coordinated set of transition activities listed in the October 2017 IESP reflected that the student's nonpublic school had the responsibility to provide the student with the instruction (i.e., "College [preparatory] course work"), the community experiences (i.e., "participate in community service"), and the development of employment and other post-school adult living objectives (i.e., "Participate in business, chess and coding clubs") identified in the transition plan (id. at p. 7). The district, under the same set of coordinated transition activities, was responsible to provide the student with the related services listed in the plan (i.e., "Assistive Technology and FM Unit") (id.).

Additionally, while the district did not develop an updated transition plan, the district did convene a CSE to develop an exit summary, consistent with State regulation, which required that the student receive a "summary of [his] academic achievement and functional performance" and which included "recommendations on how to assist [him] in meeting his . . . postsecondary goals" (compare Dist. Ex. 1, with 8 NYCRR 200.4[c][4]). At the impartial hearing, the district school psychologist who attended the meeting held to develop the exit summary testified that an "exit summary [was] about transitional services" (Tr. p. 209-10; Dist. Ex. 1 at p. 1). A review of the exit summary reveals that the CSE described the student's present levels of performance in reading, mathematics, language, learning characteristics, social and behavioral development, and physical development and medical conditions (see Dist. Ex. 1 at pp. 2-4). In addition, the exit summary provided a lengthy list of accommodations and supports the student required (id. at pp. 4-5).

[25] As previously noted, however, IHO 2 declined to award the parent the requested evaluations (or assistive technology devices) and the parent does not now challenge IHO 2's findings in a cross-appeal (see IHO Decision at pp. 17-19; see generally Answer).

Finally, the exit summary identified the student's postsecondary goals (i.e., attending the college of his choice, noting the student's area of interest for employment, and that the student would live at college), recommendations to assist the student in reaching his postsecondary goals (i.e., advocating for his "listening and learning needs"), and organizations or agencies for support (id. at pp. 5-6).

Generally, it has been found that "a deficient transition plan is a procedural flaw" that will only rise to a denial of a FAPE if it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. of Tp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]; see F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *8-*9 [S.D.N.Y. June 8, 2016]; C.W. v City Sch. Dist. of the City of New York, 171 F. Supp. 3d 126, 134 [S.D.N.Y. 2016]; J.M. v New York City Dep't of Educ., 171 F. Supp. 3d 236, 247-48 [S.D.N.Y. 2016]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11 [S.D.N.Y. Mar. 19, 2013). Here, the hearing record contains no evidence that the student sustained any harm due to the absence of an updated transition plan or services for the 2018-19 school year (see generally Tr. pp. 137-420; Parent Exs. A-P; Dist. Exs. 1-11). In addition, the parent has not identified how the lack of an updated transition plan was so significant under the facts and circumstances of this case as to deny the student a FAPE or warrant the requested relief (see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 183-84, 195 [2d Cir. 2012]). Consequently, IHO 2's order directing the district to reimburse the parent for the costs of one semester of "Instructor-led Academic Coaching" must be vacated.

C. Pendency

Finally, the district does not contest the student's entitlement to compensatory educational services for any missed pendency services (see Req. for Rev. at p. 5 n.1). The parent agrees with this statement, noting the district's failure to implement IHO 2's pendency order and the student's entitlement to compensatory educational services regardless of whether a gross violation occurred (see Answer ¶ 18).

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 v. New York City Dep't of Educ., 2008 WL 4890440, at *25, *26 [E.D.N.Y. Oct. 30, 2008] [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]).

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).

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 expiration of the student's eligibility due to meeting the requirements for graduation is not challenged in the present matter; accordingly, pendency does not operate to secure the student's continued receipt of pendency services at district expense after June 19, 2019, the date of student's graduation during the 2018-19 school year.

While both parties acknowledge the student's entitlement to receive any missed pendency services as compensatory educational services, neither party sets forth the parameters of those services, such as what the services should consist of, how the services should be delivered, or the cost of the services (see generally Req. for Rev.; Answer; Reply). Using the interim decision as a guide, IHO 2 ordered the district to provide the student with five hours per week of SETSS retroactive to the date the due process complaint notice was filed: March 13, 2019 (see Interim IHO Decision at p. 5). Had the district implemented the interim order, the student would have received five hours per week of SETSS until the student's graduation date of June 19, 2019 (see Tr. p. 261), or approximately 14 weeks—March 13, 2019 through June 19, 2019—for a total of 70 hours (14 weeks x 5 hours per week) of SETSS. Given that the student is now attending college, it is altogether unclear how the district would deliver SETSS to the student; therefore, the district is directed to provide the student with 70 hours of compensatory academic (college-level) tutoring as compensatory educational services for the failure to implement IHO 2's interim order on pendency, at a rate not to exceed $125.00 per hour, by a provider of the parent's choosing.

VIII. Conclusion

In summary, a review of the evidence in the hearing record reveals that, notwithstanding the district's failures during the 2018-19 school year, the evidence does not support an award of compensatory educational services, or reimbursement for one semester of "Instructor-led Academic Coaching" as relief.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that IHO 2's decision, dated August 12, 2019, is modified by reversing IHO 2's order directing the district to provide the student with 165 hours of compensatory academic (college-level) tutoring as compensatory educational services, at a rate not to exceed $125.00 per hour, by a provider of the parent's choosing, and that should remain available until the student obtained his undergraduate degree; and,

IT IS FURTHER ORDERED that IHO 2's decision, dated August 12, 2019, is modified by reversing IHO 2's order directing the district to reimburse the parent for the costs incurred relating to "Instructor-led Academic Coaching" at the student's selected college for one semester during his first year of college, at a rate up to $790.00, upon proof of attendance and payment; and,

IT IS FURTHER ORDERED that the district, unless otherwise agreed to by the parties, shall provide the student with 70 hours of compensatory academic (college-level) tutoring as compensatory educational services for the failure to implement IHO 2's interim order on pendency, at a rate not to exceed $125.00 per hour, by a provider of the parent's choosing.

Dated: **Albany, New York**
October 25 , 2019

CAROL H. HAUGE
STATE REVIEW OFFICER