The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 21-022

Application of a STUDENT WITH A DISABILITY, by her 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 Erin O'Connor, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Theresa Crotty, 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, in part, her request for compensatory educational services and other relief. The district cross-appeals from that portion of the IHO's decision which denied the parent's relief. The appeal must be sustained in part, and the cross-appeal must be sustained.

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

In this case, the parties' familiarity with the student's educational history is presumed; as such, this decision will only refer to those facts essential to explain the resolution of the limited issues raised in either the parent's appeal or the district's cross-appeal. Briefly, the student—who turned 21 years old during the 2020-21 school year—began receiving special education services through the Early Intervention program, and thereafter in first grade, resumed her receipt of special education services through the CSE (see Parent Exs. A at pp. 1, 3; C at pp. 1, 3; I at pp. 1-2; Z at p. 2).[1] According to the evidence in the hearing record, after the student fulfilled the requirements

[1] State law does not require school districts to provide students with a free appropriate public education (FAPE) past the age of 21 (Educ. Law § 3202[1]).

of a "Career Development and Occupational Studies" (CDOS) credential by the conclusion of the 2017-18 school year, she was "discharged" (Tr. p. 48; see Parent Exs. I at p. 2; Z at p. 1; see also Parent Ex. T [depicting "Commencement Credential," dated June 23, 2018]).[2] As a result, the student did not attend school after she turned 18 years old during the 2017-18 school year (see Tr. pp. 52-53; Parent Ex. I at p. 2).

A. Due Process Complaint Notice

By due process complaint notice dated September 20, 2018 (September 2018 due process complaint notice), the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year primarily based on the assertion that, on "June 23, 2018, the [district] illegally exited [the student] from continued special education services," in addition to multiple procedural and substantive violations (see Parent Ex. A at pp. 1-2, 16-19). As relief, the parent requested that the IHO issue interim orders for specific relief, as well as a final order with additional relief specified by the parent (id. at pp. 19-22).

B. Impartial Hearing and Subsequent Events

On November 1, 2018, the parties proceeded to an impartial hearing, and on that date, presented their respective positions regarding the student's pendency placement (see Tr. pp. 1-13;

[2] Beginning in the 2013-14 school year, the Board of Regents established the CDOS as a new exiting credential as a more meaningful substitute for the prior credential known as the IEP diploma ("New York State [CDOS] Commencement Credential," Office of Special Educ. Mem. [June 2013], available at http://www.p12.nysed.gov/specialed/publications/CDOScredential-613.pdf; see Notice of Adoption, New York State [CDOS] Commencement Credential, N.Y. Reg. July 3, 2013, at p. 10). During the 2014-15 school year, the Board of Regents began expanding graduation opportunities in New York State though a "multiple pathways" approach (see http://www.nysed.gov/curriculum-instruction/multiple-pathways; CDOS Pathway Memo; http://www.nysed.gov/common/nysed/files/programs/curriculum-instruction/diplomarequirementsfinal011019.pdf; http://www.nysed.gov/common/nysed/files/programs/curriculum-instruction/diploma-and-credentials-summary-requirements.pdf). Initially, the regulations created graduation pathways in the Humanities, STEM, Biliteracy, CTE, and the Arts (http://www.regents.nysed.gov/common/regents/files/meetings/Jan%202015/115p12a2.pdf; N.Y. Reg. Jan. 28, 2015, at p. 10). Thus, a "4+1" option was created that permitted students to take four Regents exams and technical, arts, or other assessment for the fifth examination required for graduation. The 4+1 option was made applicable beginning with students who first entered ninth grade in or after September 2011 and thereafter or who are otherwise eligible to receive a high school diploma in June 2015 and thereafter and have passed four required Regents exams (or Department-approved alternative assessments) in English, mathematics, science, and social studies http://www.regents.nysed.gov/common/regents/files/meetings/Jan%202015/115p12a2.pdf; N.Y. Reg. Jan. 28, 2015 at p. 10). Further amendments were made in March 2015 (http://www.regents.nysed.gov/common/regents/files/meetings/Mar%202015/315p12a1.pdf). In March 2016, the Board thereafter added the CDOS "4+1" as one of the multiple pathways, which established, beginning June 2016 and thereafter, that a student (regardless of whether the student is eligible under the IDEA) may graduate with a high school diploma if the student meets the graduation course and credit requirements; passes four required Regents Exams or Department-approved alternative assessments (one in each of the following subjects: English, mathematics, science, and social studies); and meets the requirements to earn the New York State (NYS) CDOS Commencement Credential (see "[CDOS] Graduation Pathway Option" Office of Special Educ. Mem. [June 2016], available at http://www.nysed.gov/common/nysed/files/ programs/curriculum-instruction/cdos-field-memo-june-2016.pdf; http://www.regents.nysed.gov/common/regents/files /316p12a1.pdf; N.Y. Reg. June 29 2016, at pp. 8-10). Thus, as of June 2016 students may earn a high school diploma though either through the traditional approach, including five state assessments, or through a 4+1 pathway option such as the CDOS.

see generally Parent Exs. A-B). In a "Statement of Agreement & Order—Pendency," dated November 13, 2018, the IHO reduced the parties' agreement reached at the impartial hearing to writing, indicating that the special education program and related services set forth in the student's December 2016 IEP constituted the student's pendency placement (Interim IHO Decision at pp. 1-2; see Tr. pp. 5-7; see generally Parent Ex. B).[3] According to the interim order, the student was to continue to receive the "placement and services approved" in the December 2016 IEP and the district was responsible for the "costs" of those services retroactive to the date of the parent's due process complaint notice and upon proof of services rendered (Interim IHO Decision at p. 2).

The impartial hearing resumed on November 26, 2018 with a prehearing conference (see Tr. pp. 14-15). Shortly thereafter, the parent filed a second due process complaint notice dated December 2, 2018 (December 2018 due process complaint notice), which the IHO consolidated with the pending impartial hearing in an order dated December 19, 2018 (see IHO Order on Consol. at p. 4; see generally Parent Ex. C). In the December 2018 due process complaint notice, the parent alleged that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years based on various procedural and substantive violations (see generally Parent Ex. C). As relief, the parent requested the same final relief in the December 2018 due process complaint notice as was requested in the September 2018 due process complaint notice (compare Parent Ex. C at pp. 19-20, with Parent Ex. A at pp. 19-21). The parties next met on May 1, 2019 to resume the impartial hearing, which then concluded on July 21, 2020, after four total days of proceedings (see Tr. pp. 20, 43-90).[4]

C. Impartial Hearing Officer Decision

In a decision dated December 13, 2020, the IHO found that the district "conceded liability by failing to present a case and meet its burden" under State law, which left the appropriate relief as the only remaining issue to be resolved (IHO Decision at pp. 13, 22).[5] On this point, the IHO turned to a neuropsychological evaluation of the student, "dated March/April of 2020," and the

[3] The IHO did not describe the pendency placement within the order; instead, the IHO attached a copy of the December 2016 IEP to the order (see Interim IHO Decision at pp. 1-2). Additionally, and notwithstanding the parties' agreement at the impartial hearing, the evidence in the hearing record indicated that the student's September 2017 IEP was the last-implemented special education program (see Tr. p. 6; see generally Parent Ex. F).

[4] The district did not present any documentary or testimonial evidence at the impartial hearing (see generally Tr. pp. 1-90); however, the IHO received selected documents from the parent's evidence (exhibits A, B, C, F, I, Q, T, Y, Z, and AA) into the hearing record, but concluded that the parent's remaining documents were not "relevant and material to what need[ed] to be determined," and declined to enter any additional documents from the parent into the hearing record as evidence without a proper foundation (Tr. pp. 79-81). The parent also submitted a closing brief, dated August 20, 2020, specifying the relief she was requesting of the IHO (Parent Ex. BB).

[5] The IHO later indicated in the decision that the district failed to offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years, and further concluded that the "denial of FAPE in this case constitute[d] a gross violation of the IDEA" (see IHO Decision at p. 18). However, according to the due process complaint notices—as well as the discussions at the impartial hearing and the order on consolidation—the parent had alleged the district failed to offer the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years, but not the 2019-20 school year (compare IHO Decision at p. 18, with Tr. pp. 21-22, and IHO Order on Consol., and Parent Ex. A at pp. 1-2, and Parent Ex. C at pp. 1-2).

recommendations for compensatory educational services contained therein (id. at p. 16). As relief, the IHO ordered the district to provide the following as compensatory educational services: speech-language therapy (five 60-minute individual sessions), counseling/social skills (two 60-minute individual sessions, three 60-minute sessions in a small group), and occupational therapy (OT) (five 50-minute individual sessions), "both as part of [a] program and as make-up," literacy instruction (reading, writing) (five 60-minute individual sessions), five hours per week of mathematics instruction, five hours per week "with a 1:1 job coach" (to include an assessment of the student's "vocational abilities and interests"), and five to ten hours per week of "transitional/adaptive coaching" for career planning and navigating the transportation system (id. at p. 16). In addition, the IHO ordered the completion of an "independent transitional evaluation" as well as for the district to conduct "its own evaluations regarding any areas of suspected disabilities that the student may have" and which the parent, could thereafter, express agreement or disagreement (id. at pp. 16-17). Next, the IHO concluded that the district's failure to offer the student a FAPE for three consecutive school years constituted a gross violation of the IDEA, and thereby justified the compensatory educational services recommended within the neuropsychological evaluation report and as already specified in the decision (id. at pp. 17-18). The IHO then turned to the question of specialized transportation, and ordered the district to provide transportation for the student to access the compensatory educational services awarded (id. at pp. 19-21). In summary, the IHO ordered the district to reimburse the parent—or directly pay for—the "cost of the student's receipt of special education services until June of 2021, an independent transitional/vocational evaluation," and clarified that the parent remained "free to make a request, if supported by that evaluation for compensatory services on that basis" (id. at p. 21). The IHO further clarified that if the district did not agree to the compensatory educational services as requested by the parent, then the parent was "not barred from filing a due process complaint because the student [was] still entitled to special education services until June of 2021, . . . , speech-language therapy (five 60-minute individual sessions), counseling/social skills (two 60-minute individual sessions, three 60-minute sessions in a small group), and OT (five 50-minute individual sessions), "both as part of [a] program and as make-up," literacy instruction (reading, writing) (five 60-minute individual sessions), five hours per week of mathematics instruction, five hours per week "with a 1:1 job coach" (to include an assessment of the student's "vocational abilities and interests"), and 7.5 hours per week of "transitional/adaptive coaching" for career planning and navigating the transportation system (id.). The IHO also ordered that "all of these related services [would] be provide[d] up until June of 2021 at a rate not to exceed the reasonable and fair market rate cost for such related services" (id. at pp. 21-22). Next, the IHO ordered the district to conduct "evaluations of the student in all areas of her suspected disabilities, not identified above and not evaluated within the last two years, for [the student's] 2021-2022 school year" and to convene a CSE meeting to "produce a new IEP for the student" based on the newly acquired evaluative information for the "2021-22 school year" (id. at p. 22). Finally, the IHO indicated that any other relief sought by the parent, but not addressed in the decision, was either "resolved by the parties, withdrawn by the [p]arent, outside the scope of the IHO's authority or unsupported by the record" (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by failing to award any compensatory educational services despite concluding that the district committed a "four-year deprivation" of a FAPE. The parent also argues that the IHO erroneously denied her request for an interim order

for IEEs and as part of the final order, failed to issue a ruling concerning the parent's request for payment for the April 2020 neuropsychological evaluation of the student, improperly shifted the burden of proof to the parent to establish the appropriate remedy, misapplied legal authority concerning compensatory educational services as relief, failed to issue a ruling concerning the parent's request for "compensatory pendency services," and failed to issue rulings concerning the parent's requests for extended eligibility and transportation services (related to access to services and evaluations). As relief, the parent seeks an award of compensatory educational services to remedy the district's "three-year FAPE deprivation" and "two-year pendency violations," three years of extended eligibility for the district's "three years of FAPE denial," additional transportation services, evaluations, and payment for the neuropsychological evaluation of the student. With regard to missed pendency services, the parent seeks compensatory educational services based on a district accounting of all related services the student should have received from the date of the due process complaint notice through the date of the IHO's decision, and "credit" the student for "5.5 hours of instruction per day" per State regulation from the date of the due process complaint notice through the date of the "final decision." In addition, the parent specifically seeks additional compensatory educational services for the failure to provide the student with a FAPE consisting of: 630 hours of literacy instruction, 630 hours of mathematics instruction, 630 hours of speech-language therapy, 630 hours of OT, 630 hours of counseling, 630 hours of vocational instruction/job coaching, and 1260 hours of adaptive skills training.[6]

In an answer, the district responds to the parent's allegations, arguing that the IHO properly declined to award the student with three years of extended age-eligibility as compensatory educational services. As a cross-appeal, the district affirmatively asserts that it does not contest the parent's request for compensatory educational services and specifically agrees to provide the student with the following: 630 hours of literacy instruction, 630 hours of mathematics instruction, 630 hours of speech-language therapy , 630 hours of OT, 630 hours of counseling, and 1260 hours of adaptive skills training. The district affirmatively asserts that the student "should be able to use this bank of services for up to five years from the date of the SRO's [d]ecision." With respect to pendency services, the district affirmatively asserts that it does not object to the parent's request for an award of a bank of compensatory educational pendency services from the date of the September 2018 due process complaint notice through the conclusion of the 2019-20 school year—as per the parent's request to remedy a two-year violation—based upon a calculation of 5.5 hours per day of instruction for that two-year period of time. As for transportation services, the district affirmatively asserts that it does not object to the parent's request for the SRO to award additional transportation services by directing the district to issue metrocards for the student and "an adult" to access the compensatory educational services and evaluations. And finally, the district affirmatively asserts that it does not object to the parent's request for IEEs in the areas of speech-language and OT, and specifically agrees to reimburse the parent for the full cost of the neuropsychological evaluation of the student.

[6] The parent also argue that an SRO should deem all of the facts alleged in the due process complaint notice as admitted and admit additional evidence, and address the IHO's bias and denial of due process, the IHO's failure to develop the hearing record and create a full and accurate transcript of the proceedings, the IHO's erroneous burden-shifting, and the IHO's failure to address the parent's section 504 claims (see Req. for Rev. ¶¶ 1-5, 9-13, 18).

The parent, in an answer to the district's cross-appeal, affirmatively asserts that she does not oppose the district's cross-appeal and consents to the district's offer to provide the following: 630 hours of literacy instruction, 630 hours of mathematics instruction, 630 hours of speech-language therapy, 630 hours of OT, 630 hours of counseling, and 1260 hours of adaptive skills training. According to the parent, the only remaining compensatory educational services' issue is her request for 630 hours of job/vocational coaching, which the district did not address in the cross-appeal or otherwise agree to provide to the student. With regard to pendency, the parent affirmatively asserts that she does not contest a compensatory educational services award for "related services (counseling, speech-language therapy, and [OT]) and for instruction (5.5. hours per day as per [State regulation])" as calculated by an SRO—consistent with the district's proposal. The parent also does not contest the district's suggestion to remand the matter to the IHO for the "limited question of an appropriate compensatory award for the [district's] two-year pendency violations." Next, the parent affirmatively asserts that, while she does not object to the district's agreement to provide round-trip transportation to access the compensatory services or evaluations, the parent alternatively proposes transportation via car service, "as necessary," because "many evaluators and providers are located" in a county closer in proximity to the parent compared to other geographical locations. Finally, the parent affirmatively asserts that she does not object to the district's offer to fund IEEs in speech-language and OT or to fully reimburse the parent for the cost of the neuropsychological evaluation of the student.[7]

In a reply to the district's answer to the request for review, the parent asserts that the answer is "infirm," as it fails to comply with practice regulations (Answer to Cr. App. and Reply ¶ 15).[8]

V. Discussion—Relief

As reflected in the pleadings, the district has agreed to provide much, if not all, of the parent's relief requested in her appeal (compare Req. for Rev. ¶¶ 6-8, 14-17, with Answer and Cr. App. ¶¶ 8-20). Thus, those matters will now be considered settled and will not be further reviewed; however, four issues related to the parent's requested relief remain in contention—whether the student is entitled to 630 hours of job/vocational coaching services, whether the student is entitled to extended age-eligibility as a form of compensatory educational services, a calculation of missed pendency services, and the manner in which the student's agreed upon transportation services must be provided.

[7] To the extent that the parent raised additional issues—such as deeming of facts admitted, the admission of additional evidence, the IHO's bias and denial of due process, the IHO's failure to develop the hearing record and create a full and accurate transcript of the proceedings, the IHO's erroneous burden-shifting, and the IHO's failure to address the section 504 claims—the district argues that such issues generally are "of no moment" in light of the district's concessions that the student "should receive all of the requested relief (with the exception of extended eligibility)" (Answer and Cr. App. ¶¶ 15).

[8] More specifically, the parent asserts that the district's one-paragraph, "boilerplate" denial of "all of the allegations raised in [the parent's] eighteen issues" fails to comply with practice regulations (Answer to Cr. App. and Reply at ¶ 15). As relief, the parent argues that the SRO "should rule in favor of [the parent] on any issue that [the district] failed to address in detail, with citation to the record and legal authority" (id.).

A. Job/Vocational Coaching Services

In the decision, the IHO awarded the student five hours per week "with a 1:1 job coach" (to include an assessment of the student's "vocational abilities and interests") (IHO Decision at p. 21). On appeal, the parent seeks additional job/vocational coaching services for the student, totaling 630 hours of compensatory educational services. As noted by the parent in the reply, the district's cross-appeal does not challenge or otherwise address this, either as part of the relief awarded by the IHO or as compensatory services sought now on appeal by the parent (see Answer and Cr. App. ¶¶ 8, n.2; 16-20).

Initially, to the extent that the district does not cross-appeal this adverse award of relief, the IHO's order of this relief is 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]). Additionally, to the extent that the IHO's award of job/vocational coaching services did not reflect a three-year remedy (based on a 12-month school year, i.e., 42 weeks per year)—which the parent's request for 630 hours of job/vocational coaching represents (5 hours per week x 42 weeks = 210 hours; 210 hours per year x 3 years = 630 hours) (see, e.g., Parent Ex. BB at pp. 25-28), the undersigned SRO cannot determine from the district's answer and cross-appeal whether the district intentionally failed to address this issue or mistakenly did so in its cross-appeal, as the district fully addressed the remaining portions of the parent's relief requested in the appeal. Notably, however, the district did affirmatively assert in its pleadings that it conceded that the student was entitled to all of the relief sought by the parent (Answer and Cr. App. ¶¶ 15). Therefore, at this juncture, 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] [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] [holding 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] [indicating 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] [finding 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]). Consequently, unless the parties agree otherwise, the district shall provide the student with 630 hours of job/vocational coaching services as compensatory educational services.

B. Extended Age-Eligibility

The parent argues that the IHO erred by failing to address her request for three years of extended age-eligibility for the student beyond her 21st birthday during the 2020-21 school year. The district asserts that, given the bank of compensatory educational services plus the additional missing pendency services herein agreed upon, an award of extended age-eligibility is not warranted.

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 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 v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

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

Having reviewed some relevant authority on this type of remedy, a distinction exists between an equitable award of compensatory education in the form of educational programs or services, which a student may receive after his or her eligibility for special education has expired at a district's expense, and an award of extended eligibility, which extends the district's statutory obligations to a student, including the obligation to conduct a CSE meeting and develop an IEP for the student on an annual basis (Ferren C. v. Sch. Dist. of Phila., 595 F. Supp. 2d 566, 576 [E.D. Pa. 2009] [acknowledging the distinction between the expiration of the statutory right, including the right to an IEP, and the access to equitable relief], aff'd, 612 F.3d 712 [3d Cir. 2010]; 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]).[9]

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. 19-038; Application of a Student with a Disability, Appeal No. 17-021).[10] However, there is a difference

[9] 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.

[10] The Third Circuit in Ferren C. acknowledged concerns that, by extending the district's obligations to provide

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).[11] 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 must be viewed as having assumed the risk that unforeseen future events could render the relief undesirable. As such, the parent would not be allowed to return to the due process hearing system to allege new faults by the district during the period of the student's extended eligibility.[12]

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 such a remedy should not include, it remains to be examined what aspects of a FAPE may be extended. 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. v. New York City Dep't of Educ., 2015 WL 5025368, at *5 [S.D.N.Y. Aug. 25, 2015]).

In this matter, the parent argues that the IHO ignored her request for three years of extended-age eligibility to remedy the district's "illegal discharge and three-year FAPE deprivation of this now-21-year-old student." The parent seeks an award of extended-age eligibility for the district's "gross and repeated IDEA violations." The district objects, arguing that the student is not entitled to extended-age eligibility as "'default relief'" or based upon a "rote hour-by-hour analysis that is not factually or legally appropriate" under the circumstances presented. More specifically, the district contends that, given the "substantial amount of compensatory education services,

---

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]).

[11] 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).

[12] 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]).

including pendency services"—which, in total, could aggregate to a bank of up to five years of services—already agreed on by the parties, an additional three years of extended age-eligibility is not warranted and would go well beyond the purpose of compensatory educational services as equitable relief.

As already noted, the parent alleged—and the IHO concluded—that the district failed to offer the student a FAPE for three school years: 2016-17, 2017-18, and 2018-19 (see Parent Exs. A at pp. 1-2; C at pp. 1-2; IHO Decision at pp. 5, 18). At this point, the parties have agreed upon relief that amounts to a bank of three school years of compensatory educational services, as well as additional compensatory services for two years of missed pendency services, to remedy the district's failure to offer the student a FAPE for the three school years at issue. Simply stated, an award of extended age-eligibility, under these circumstances, would go beyond the equitable purposes of compensatory educational services, and thus, the parent's request for this type of relief must be dismissed.

C. Compensatory Pendency Services

On appeal, the parties agree that the student is entitled to an award of compensatory educational services for missed pendency services—that is, related services consisting of speech-language therapy, OT, and counseling, as well as 5.5 hours of instruction per day—from the date of the September 2018 due process complaint notice through the conclusion of the 2019-20 school year. While both parties further agree that this calculation can be made by either an SRO on appeal, or upon remand to the IHO, the district acknowledges that the hearing record contains no testimony or other evidence on this issue.

A review of the hearing record supports the district's assertion concerning the lack of evidence on this point. It appears that the parties engaged in an off-the-record discussion with the IHO on the final day of the impartial hearing, July 21, 2020, which, as summarized by the IHO, included the student's pendency placement (see Tr. pp. 43, 45-47). The IHO indicated that an interim decision on pendency had been issued on or about November 13, 2018, granting the parent's pendency placement based on the December 2016 IEP, and consistent with the parties' agreement that the December 2016 IEP formed the basis for the student's pendency placement (see Tr. p. 47; see generally Interim IHO Decision; Parent Ex. B). According to the IHO, the December 2016 IEP "required the student to be placed in an (sic) nonpublic school," but that, based on the off-the-record discussion, a "nonpublic school was either not offered or not accepted" (Tr. p. 47). In light of the interim decision on pendency, the IHO explained that any failure to "implement or to adhere to the pendency agreement" was an enforcement issue that the parent "should have brought up to the attention of Albany" and was not a matter to bring back to the "IHO and ask for compensatory services because [the district] didn't do it" (Tr. pp. 47-48).

In response, the district representative stated that, in terms of the student's pendency placement, the district "assigned a case manager, and was willing to send out packages to different schools" (Tr. p. 51). According to the representative, the case manager had indicated in writing that the parent did not "pursue placing [the student] in a nonpublic school" (id.).[13] The parent's

[13] This portion of the district representative's statement at the impartial hearing was not fully transcribed, but was, in part, reflected as "indiscernible" (Tr. p. 51). The hearing record did not include a copy of any writing as

attorney did not further elaborate on any issues with respect to the implementation of the student's pendency placement, or the failure to do so, at the impartial hearing, but instead addressed the absence of a pendency placement in the closing brief to the IHO (see Tr. pp. 43-90; Parent Ex. BB at pp. 13, n.18, 14, 17-25).

Generally, when an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

In this instance, the parent did not raise any issues concerning an alleged failure to implement the student's pendency placement or for any attendant relief arising therefrom in either the September 2018 or December 2018 due process complaint notices, or at any point prior to the final date of the impartial hearing—nearly two years after the parent's September 2018 due process complaint notice and the IHO's issuance of the November 2018 interim decision on pendency (see Tr. pp. 1-43, 47; see generally Parent Exs. A; C). As argued by the district, it appears that the hearing record contains very little evidence on this issue, and is devoid of evidence regarding why the pendency placement could not be implemented, except for a brief statement from the district representative—which appeared to be an attempt to shift the failure to implement the pendency placement onto the parent by indicating that the parent no longer sought a nonpublic school as the location within which to implement the pendency placement—or what other measures the district may have taken to implement the pendency placement (see Tr. pp. 43, 51; see generally Tr. pp. 1-90; Parent Exs. A-C; F; I; Q; T; Y-Z; AA-BB).

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 Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey, 386 F.3d at 163, 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]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; 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

referenced by the district representative (see generally Tr. pp. 1-90; Parent Exs. Parent Exs. A-C; F; I; Q; T; Y-Z; AA-BB).

Disability, Appeal No. 95-16). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171).

In addition, 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 [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 [services that the district failed to implement under pendency awarded 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]).

At the impartial hearing, the parties agreed that the student's December 2016 IEP formed the basis for the pendency placement as the last agreed-upon IEP, and the IHO's interim decision on pendency reflected that agreement (Interim IHO Decision at pp. 1-2; see Tr. pp. 5-7; see generally Parent Ex. B). Neither the parent, nor the district representative, nor the IHO questioned where the pendency placement would be implemented (see Tr. pp. 1-13; Interim IHO Decision at pp. 1-2).[14] According to the recommendations in the December 2016 IEP, the student was to attend, as a 10-month school year program, a 15:1 special class placement for English language arts (ELA), mathematics, social studies, and science (five times per week for each subject) (see Parent Ex. B at p. 13). In addition, the December 2016 IEP included the following recommended related services: one 40-minute session per week of individual counseling services, one 45-minute session per week of OT in small group, and two 40-minute sessions per week of speech-language therapy in a small group (id. at p. 14). Furthermore, while the December 2016 IEP included a recommendation for a State-approved nonpublic school, the hearing record does not include any information regarding whether the student actually attended a nonpublic school as recommended in the IEP (id. at p. 18; see Parent Ex. B at pp. 19-20 [noting the parent's conflicting desire for the student to attend a nonpublic school and her concern about "placing [the student] in a new school environment"]; see generally Tr. pp. 1-90; Parent Exs. A-C; F; I; Q; T; Y-Z; AA-BB).[15, 16]

[14] In her closing brief, the parent asserted that a 15:1 special class placement in a nonpublic school is not permitted by State regulation and argued that, therefore, the December 2016 IEP can never be implemented (Parent Ex. BB at p. 12 n. 18).

[15] According to the hearing record, a CSE reconvened on September 20, 2017, and the student's IEP was modified to reflect that the parent was "no longer seeking to place [the student] in a Non Public School," but instead, wished to continue the student's services in a district "community school placement" (Parent Ex. C at pp. 6, 18-19).

[16] Generally, the Second Circuit has held that the selection of a location to provide a student special education and related services is an administrative decision within the discretion of the school district (R.E. v. New York City Dep't of Educ., 694 F.3d 167, 191-92 [2d Cir. 2012]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that,

In light of the foregoing, the parent is entitled to a compensatory remedy for missed pendency services. In addition, as set forth above, the parties agreed that the program set forth in the December 2016 IEP constitutes the student's pendency placement. Additionally, the district concedes to the parent's request for 5.5 hours of 1:1 instruction for each day the student did not receive her pendency program (compare Req. for Rev. ¶14, with Answer and Cr. App. ¶18). Accordingly, it is possible to determine the amount of time the student missed from the filing of the due process complaint notice through the end of the 2019-20 school year (as originally requested by the parent in her closing brief) and compute an amount of compensatory education that the student should receive from the district (see Parent Ex. BB at p. 19). Based on two 10-month school year programs (180 days or 36 weeks per school year) the student should receive 5.5 hours per day of 1:1 instruction computed over 360 days, which equals 1980 hours of 1:1 instruction, plus 72 40-minute sessions of individual counseling services, 72 45-minute sessions of OT in a small group, and 144 40-minute sessions of speech-language therapy (see Parent Ex. B at p. 14). In addition, the parent may be entitled to compensatory education for any portion of the student's pendency program that was not provided to the student during the 2020-21 school year through the date of this decision.

D. Transportation Services

On appeal, the parent argues that the IHO either failed to rule on or denied her request for transportation services (see Req. for Rev. ¶ 17). The parent further argues, however, that the IHO—relying on the neuropsychological evaluation report—indicated in the decision that the district "'must provide transportation of the student to her compensatory services'" but failed to order "special education transportation" (id.). In its cross-appeal, the district offered and agreed to issue metrocards for the student and the parent to access her compensatory educational services and evaluations (see Answer and Cr. App. ¶ 21). In response, the parent indicated that she did not object to the district's offer to issue metrocards for the student and an adult, but further specified that because "many evaluators and providers" who are geographically closer to the parent are located outside of the district, the parent now seeks an award of "transportation via car service, as necessary" (Answer to Cr. App. and Reply ¶ 13).

An examination of the evidence in the hearing record reveals that, in both the September 2018 and December 2018 due process complaint notices, the parent requested, as relief, "transportation expenses" as a form of compensatory educational services (Parent Exs. A at p. 21; C at pp. 19-20). In the decision, the IHO found that the district, if it had not already done so, "must provide transportation of the student to her compensatory services" but did not otherwise specify what type of transportation services the district must provide (IHO Decision at p. 21). A further review of the evidence in the hearing record does not demonstrate why the student requires—as the parent now requests—transportation via car service, or for that matter, any other type of special

---

while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). Similarly, in assessing whether a parent's selection of private service providers was reimbursable as part of the student's educational program under pendency, the Second Circuit noted that "[i]t is up to the school district to decide how to provide that educational program, at least as long as the decision is made in good faith" (T.M., 752 F.3d at 171). "Although the stay-put provision prevents a school district from modifying a student's pendency placement without the parents' consent, it does not prohibit the school district from determining how, and where, a student's pendency placement should be provided" (Ventura de Paulino, 959 F.3d at 536).

education transportation services, as the student's IEPs in evidence reveal that the student was not recommended to receive special education transportation (see Parent Exs. B at p. 18; F at p. 18). As a result, the district's offer to issue metrocards for the student and an adult in order for the student to access her compensatory educational services and evaluations is sufficient relief.

VI. Conclusion

In summary, having determined that the student is not entitled to extended-age eligibility or transportation via car service, the necessary inquiry is at an end. I have considered the parties' remaining contentions and find that, given the concessions and relief agreed upon, I need not address them.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated December 13, 2020, is modified and the district is hereby ordered to provide the student with compensatory educational services as agreed upon by the parties in their respective pleadings; and,

IT IS FURTHER ORDERED that, as agreed upon by the parties in their pleadings, that the student is entitled to receive missed pendency services consistent with this decision; and,

IT IS FURTHER ORDERED that the district shall provide the student with 630 hours of job/vocational coaching services as compensatory educational service and must issue metrocards for the student and an adult to access the compensatory educational services and evaluations awarded herein.

Dated: **Albany, New York**
May 5, 2021

STEVEN KROLAK
STATE REVIEW OFFICER