The University of the State of New York

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

No. 21-049

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:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Kathleen Kelly, Esq.

Littman Krooks, LLP, attorneys for respondent, by Marion Walsh, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to pay for tuition costs at the Fusion Academy (Fusion) for the 2019-20 school year.[1] The parent cross-appeals from the IHO's determination which denied her request for certain educational evaluations as equitable relief. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and

[1] The parent is an individual who falls within the definition of a "parent" under IDEA, accordingly this decision refers to her as such.

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

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

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

III. Facts and Procedural History

The student has been the subject of several prior administrative proceedings including an unappealed IHO decision that is relevant to this matter (Parent Ex. A at p. 1; see Application of a Student with a Disability, Appeal No. 15-061). A prior proceeding concluded with an administrative decision dated November 29, 2017, in which the IHO (IHO I) found the student had been denied a free appropriate public education (FAPE) for the 2015-16, 2016-17, and 2017-18

school years (Parent Ex. E at pp. 6-7). According to IHO I's decision, the parties agreed in that proceeding that the district would fund the student's placement at Fusion for the 2017-18 school year and the district agreed to conduct evaluations and reconvene a CSE (id. at pp. 3-4). The district proposed extended eligibility because the student would not be able to "handle" the number of requested hours of compensatory educational services before turning 21 (id. at p. 5). IHO I found the district had committed a gross violation of the IDEA and awarded compensatory educational services as a remedy for the denial of a FAPE for the 2015-16 and 2016-17 school years (id. at pp. 7, 9). IHO I further found that the student would need extended eligibility to benefit from the award of compensatory educational services (id. at pp. 7, 8). IHO I ordered the district to fund the student's placement at Fusion for the 2017-18 school year and provide special transportation, ordered the CSE to conduct occupational therapy (OT), speech-language, psychoeducational and neuropsychological evaluations, and ordered the CSE to reconvene to consider the results of those evaluations and develop a new IEP (id. at pp. 9, 10). IHO I also ordered the district to "provide and fund" 300 hours of tutoring and 100 hours each of OT, physical therapy (PT), counseling and speech-language therapy at an enhanced rate (totaling 700 hours of compensatory educational services) (id. at pp. 9-10). IHO I then ordered that the student was "awarded extended eligibility for special education services under the IDEA through June 30, 2020 and may receive the above-listed compensatory education and services between the date hereof and June 30, 2020" (id. at p. 10).

According to the parent, the student was thereafter awarded funding for Fusion for the 2018-19 school year pursuant to an unappealed October 2018 IHO decision (Parent Ex. A at p. 7; see Tr. p. 18). The student turned 21 during the 2018-19 school year.

For the 2019-20 school year, the student attended Fusion from July 1, 2019 through September 11, 2019 (Parent Ex. B). The student's attendance records indicate that during this time period, he attended school for 24 days and was absent for nine days (Parent Exs. B; C at pp. 1-4). The hearing record reflects that the parent sent an email on July 30, 2019 requesting a CSE meeting, however there was no indication to whom this message was sent (Parent Ex. G at p. 5). In an email dated August 1, 2019, the parent contacted the CSE and requested a meeting (id. at pp. 4-5).

By letter dated September 11, 2019, the student's psychiatrist wrote to the CSE stating that the student was seen on August 26, 2019 and that he had reported ongoing episodes of insomnia and feelings of depression and hopelessness (Parent Ex. H). Due to concerns about weight gain, the psychiatrist wrote that the student was reluctant to take antidepressants but was actively exploring various resources that provided "counseling therapy" (id.). The student's psychiatrist recommended that the student be provided with as much support as possible "particularly as he transitions to post high school resources" (id.). The student's psychiatrist suggested to the CSE that if the student was unable to "complete his attendance" at Fusion, that he be permitted to receive home instruction and related services (id.).

In an email dated November 25, 2019, the parent wrote to the CSE and stated that the student was currently waiting for approval from "Home Instruction" to receive services (Parent Ex. G at p. 4). The parent further stated that the student required "one more elective in order to graduate and has been unassigned since July" (id.). The parent concluded by saying that her previous requests to convene a CSE meeting had not been acknowledged and the student was

becoming "increasingly troubled from a lack of direction and want[ed] to move forward with post graduation transition plans for obtaining housing, etc." (id.). On November 26, 2019, the district's "Home Instruction Schools" office responded by stating that they hoped to have an answer by the next day (id. at p. 3). On November 26, 2019, the parent replied via email stating that the student had completed one-third of an elective at Fusion "when it was placed on 'pause'" however, the student would have been allowed to complete the course in August 2019 (id. at p. 2). The parent further stated that the student's depression and anxiety had worsened throughout the semester and the student was now in therapy (id.). On November 26, 2019, the "Home Instruction Schools" office responded that they were "trying" (id. at p. 1). The student's transcript from Fusion reflected a "School Leave" date of December 11, 2019 but did not indicate that the student received any grades or earned any credits for the 2019-20 school year (Dist. Ex.).

A. Due Process Complaint Notice

By due process complaint notice dated January 31, 2020, the parent alleged that the district did not respond to her request for the CSE to convene and failed to develop an IEP or provide any services during the 2019-20 school year, thus denying the student a FAPE (Parent Ex. A at pp. 1, 7, 8). The parent also asserted that the district failed to perform the evaluations or provide the compensatory educational services ordered by IHO I (id. at p. 6). The parent requested home instruction due to changes in the student's condition and also asserted that she provided notice of the student's placement at Fusion for the 2019-20 school year (id. at pp. 7, 8). The parent asserted that the student had not been properly evaluated by the district and requested an OT, speech-language, updated neuropsychological, educational, psychoeducational, and psychological evaluations to determine the student's current levels of functioning (id. at p. 8). The parent also requested a functional behavioral assessment (FBA) and a behavioral intervention plan (BIP) (id.). As relief, the parent requested funding for the student's attendance at Fusion for the 2019-20 school year, two hours of home instruction and appropriate home services, for the CSE to reconvene and develop an appropriate IEP that addresses the behavioral, academic, and emotional needs of the student, an additional request for the district to conduct OT, PT, speech-language, psychoeducational and neuropsychological evaluations, and for the district to "immediately begin providing" the 300 hours of compensatory tutoring and 100 hours each of compensatory OT, PT, speech-language therapy and counseling at an enhanced rate as ordered by IHO I (id. at p. 9).

B. Events Post-Dating the Due Process Complaint Notice

In a school assignment letter dated April 27, 2020, the parent was notified that the student had been enrolled in a district public school pursuant to "DOE Legal Council [sic] /Home Instruction Stipulation" (Dist. Ex. 3 at p. 1). By letter dated May 19, 2020, the student's psychiatrist indicated that due to the student's "[d]evelopmental issues," he should be excused from the foreign language requirement "as was noted in his IEP" (Dist. Ex. 4).

According to the parent, the student received remote instruction in physical education in approximately May 2020, "so that [the student] could achieve a diploma" (Parent Ex. F at p. 5). The parent stated that the student received a list of topics to cover on physical activity and described the student's remote home instruction as completing worksheets, reading about hiking and physical activity "when he could not leave the house" further noting that "[t]his was difficult to him but he did the work and earned his Regents Diploma" (id.).

A CSE convened on June 11, 2020 and reported that the student was scheduled to graduate in two weeks (Dist. Ex. 1 at pp. 1, 8). The June 2020 IEP indicated that the student's transcript was being reviewed and updated "but verbal reports from the home instruction office indicate that he has the necessary credits and exams for graduation except for PE credits which he is currently completing" (id. at pp. 1, 2, 3, 4, 9). The June CSE determined that the student was exempt from a foreign language requirement (id. at pp. 2, 7). The June 2020 IEP appeared to contain information and recommendations copied from previous IEPs but also included modifications such as a recommendation for home instruction as well as postsecondary and annual goals developed at the June 2020 meeting (id. at pp. 1-9).

A prior written notice dated June 11, 2020, reflected that the June 2020 CSE recommended individual home instruction, individual counseling, individual OT, individual PT, individual speech-language therapy in unspecified amounts and frequencies and a computer with speak-to-text functionality and word prediction (Dist. Ex. 2 at p. 1). The prior written notice indicated that the June 2020 CSE considered a January 28, 2018 OT evaluation, a January 31, 2018 speech-language evaluation and a December 30, 2013 PT evaluation (id. at p. 2). The prior written notice further indicated that no other programs were considered because the student was graduating in two weeks and would receive home instruction for those two weeks to earn the remaining physical education credit (id.).

On June 15, 2020, a district school psychologist prepared a student exit summary for the student (Dist. Ex. 5 at pp. 1-5; see Tr. p. 68; Dist. Ex. 7 at pp. 1-3). The exit summary reflected that the student would graduate with a Regents Diploma on June 26, 2020 (Dist. Ex. 5 at p. 1). According to IHO I's decision, the student's extended eligibility "for special education services under the IDEA" expired on June 30, 2020 (Parent Ex. E at p. 10).

C. Impartial Hearing Officer Decision

An impartial hearing convened on July 28, 2020 and concluded on November 3, 2020 after five days of proceedings (Tr. pp. 1-314). Prior to giving opening statements at the impartial hearing, the parties stipulated that in spring 2020, the district provided remote instruction in physical education for the student to receive one credit and meet the graduation requirements of a Regents diploma (Tr. pp. 6-7). In its opening statement, the district conceded that an IEP was not in place for the student at the start of the 2019-20 school year and the student was unilaterally enrolled at Fusion (Tr. p. 7). The district argued that Fusion was an inappropriate placement for the student and asserted that the student left Fusion in September 2019 (id.). The district further argued that the parent's requested relief in the due process complaint notice was "non-reimbursable" because the student had graduated (Tr. p. 8). The district also contended that the student should not be provided with further evaluations or compensatory educational services because the student was no longer entitled to a FAPE as a result of his graduation (id.). In her opening statement, the parent noted that the district did not provide services to the student for most of the 2019-20 school year (but that the parent stipulated to the provision of remote physical education in spring 2020), and the parties convened the CSE in mid-June 2020, mere weeks before the expiration of the student's extended eligibility on June 30, 2020 as determined by IHO I (Tr. p. 9-10, 15). As "background," the parent's attorney stated that the district's actions "reflect[ed] a very, very long history of failure" by the district and noted that her firm had been working with the student since approximately 2015 and that the district had not met the needs of the student or

provided an IEP in that time (Tr. p. 10). The parent's attorney also stated that IHO I had awarded the student extended eligibility (id.). The parent's attorney confirmed that the student had left Fusion in September 2019 and clarified the amount of the requested relief in light of the student's graduation (Tr. p. 11). Specifically, at the hearing, the parent sought direct payment of tuition for Fusion for July 1, 2019 through September 11, 2019, and compensatory education for the lack of services provided between September 11, 2019 and June 2020 in the areas of tutoring, physical therapy and counseling (Tr. pp. 11-14, 19-20). The parent also requested a psychoeducational evaluation (or neuropsychological evaluation) for the student's transition planning and a PT evaluation (Tr. p. 17).

In a decision dated January 3, 2021, the IHO (IHO II) found that the district failed to sustain its burden that it offered the student a FAPE (IHO Decision at p. 16). IHO II noted that although the student's eligibility for IDEA services had been extended through the 2019-20 school year by IHO I's decision, the IHO determined that the district had failed to provide services during the 2019-20 school year (with the exception of virtual physical education instruction that included no actual physical education) (id.). The IHO further found that the parent's unilateral placement of the student at Fusion was appropriate and that equitable considerations favored an award of reimbursement (id. at 17-20).

IHO II then addressed the parent's request for additional relief. IHO II reiterated that the parent asserted that the district failed to develop an IEP and failed to provide any services for the 2019-20 school year (IHO Decision at p. 20). IHO II then stated that the parent's request for relief was based on IHO I's order for compensatory educational services and, as a result, the parent improperly sought enforcement of the prior IHO's decision (id.). The district argued that the student was not entitled to compensatory educational services upon graduation from high school (id. at pp. 20-21). IHO II then found that the district's failure to recommend services for the 2019-20 school year constituted a gross violation of the IDEA and found that the student was entitled to an award of compensatory educational services (id. at p. 21). IHO II determined that the parent had not requested any independent educational evaluations (IEEs) in her due process complaint notice and further found that the hearing record did not support evaluations for the purpose of post-secondary planning (id. at pp. 23-24). For relief, IHO II directed the district to fund the student's attendance at Fusion from July 1, 2019 through September 11, 2019 in the amount of $6,870 (id. at p. 24). IHO II further ordered the district to provide a bank of compensatory services upon which the student may draw through December 31, 2022 consisting of 300 hours of tutoring from New Frontiers at a rate not to exceed $163 per hour,[2] 54 hours of counseling at a reasonable market rate and 54 hours of PT at a "reasonable" market rate (id. at pp. 24-25).

IV. Appeal for State-Level Review

The district appeals from IHO II's finding of a gross denial of a FAPE, as well as the award of funding for the cost of the student's attendance at Fusion from July 1, 2019 through September 11, 2019 and the award of compensatory educational services for the 2019-20 school year. The district first alleges that IHO II erred as a matter of law by finding a gross violation of

[2] The IHO also ordered that the parent could alternatively select another provider for tutoring at a "reasonable" market rate.

the IDEA based on a one-year denial of a FAPE. The district further asserts that IHO II erred by awarding compensatory educational services because the student graduated from high school with a Regents diploma. The district also argues that IHO II's award of compensatory tutoring services was unsupported by the hearing record. Next the district alleges that IHO II erred by awarding funding for Fusion because the parent failed to demonstrate that Fusion was an appropriate unilateral placement. The district also asserts that there was no evidence of a tuition contract, the parent did not demonstrate a legal obligation to pay Fusion, and therefore was not entitled to direct payment of tuition. Lastly, the district requests excusal for irregularities in the service of its pleadings on the parent's counsel. For relief, the district requests reversal of IHO II's findings of a gross violation of the IDEA and that Fusion was an appropriate unilateral placement and reversal of the awards of compensatory educational services and direct payment of tuition to Fusion.

In an answer and cross-appeal, the parent asserts that the district's request for review should be dismissed for failure to timely and properly serve a notice of intention to seek review. The parent further alleges that the district failed to file a certified copy of IHO II's decision and a copy of the certified hearing record with the Office of State Review and that such failure has prejudiced the parent. The parent cross-appeals IHO II's denial of a neuropsychological evaluation and a PT evaluation as equitable relief. The parent requests that IHO II's order be affirmed in all other respects.

In an answer to the cross-appeal, the district asserts that good cause exists to excuse any service irregularities and that the parent's allegations that the district both failed to file a certified copy of IHO II's decision and the hearing record are based on speculation, and further that the district made those filings.[3] The district also contends that IHO II correctly denied the parent's requests for IEEs because the parent did not request them in the due process complaint notice. The district also asserts that the parent's request for IEEs is "moot" because the student has graduated from high school. Lastly, the district argues that the parent's requests for any evaluations after the final June 2020 CSE meeting would have been for the purpose of reevaluation, which the district is not obligated to provide to a student before the termination of IDEA eligibility due to graduation or exceeding age eligibility.

V. Applicable Standards

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

[3] Due to what the parent's attorney described as a problem with the private carrier, transmittal of the answer and cross appeal for filing with the Office of State Review was delayed far longer than service upon the district, and I have accepted and considered that filing, but only after explaining to the parties that I would not consider a late filing absent a request for an extension of the timelines. I can sympathize with the difficulties faced by attorneys working under trying circumstances. But my resolve in not accepting filings after lengthy delays is firm because SRO decision deadlines imposed by federal law are unyielding. Simply stated, once the request for review has been received and the 30-day timeline to issue a final decision has begun to run, whatever the cause, papers of a party that are received by the Office of State Review after a lengthy delay cannot be given due consideration absent a request for extension of time by a party.

T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Service by the District

As an initial matter in its request for review, the district requested that it be excused for filing a notice of intention to seek review, a notice of request for review, and a request for review via certified mail on the last known business address of the parent's counsel (Req. for Rev. ¶19). Noting that the parent's counsel had previously agreed to accept service, the district attempted service of a notice of intention to seek review via e-mail in this proceeding on January 22, 2021.

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

When the parent's attorney did not respond definitively after additional email correspondence and a telephone voicemail message regarding service via email, the district served a copy of the notice of intention to seek review, a notice of request for review, and the request for review via certified mail on February 10, 2021 (see SRO Ex. 1 [consisting of emails between counsel for the district and counsel for the parent wherein the district requested acceptance "on behalf of the parent and via email"]). In light of its efforts and citing the undersigned's Revised General Order dated March 22, 2020 which allows for alternate service, the district requests that its service of all its pleadings by certified mail, return receipt requested, on the last known business address of the parent's counsel be deemed sufficient service.

In her answer and cross-appeal, the parent "affirmatively" alleges that she did not agree to waive service by mail and "affirmatively allege[s] that the office never received the Notice of Intent to Seek Review by mail" (Answer and cross-appeal ¶10).[5] The parent further alleges that service via email is not appropriate alternative service under the regulations. The parent also asserts that the district's request for review should be dismissed because "upon information and belief" the district failed to file certified copies of IHO II's decision and the hearing record with the Office of State Review (Answer and cross-appeal ¶21). The parent further contends that "[r]espondents have not received any copies of any correspondence" with the Office of State Review to indicate that such filings occurred or were requested, or "that the record is complete" and that the parent has been prejudiced as a result.

As argued by the district, counsel for the parent agreed to accept service on behalf of the parent, and the current disaster emergency declared by the Governor of the State of New York in response to the COVID-19 pandemic was deemed good cause to suspend the personal service requirements in 8 NYCRR 297.4 for all parties appearing before the Office of State Review and authorizes that alternate service methods be utilized. Accordingly, pursuant to the Thirteenth Revised General Order in effect at the time, the district's service of the request for review upon the parent's counsel on February 10, 2021 by certified mail, return receipt requested, is deemed sufficient ("Thirteenth Revised General Order Regarding Coronavirus Disease 2019 and Recommencement of Timelines under 8 NYCRR Part 279," at p. 3, Office of State Rev. [Dec. 31, 2020], available at https://www.sro.nysed.gov/common/sro/files/13th-revised-general-order-12.31.20_1.pdf).

With respect to the late service of the notice of intention to seek review, such a defect by itself causes disruptions in the State-level review process, but rarely results in outright dismissal of a party's pleading. Despite the parent's assertion that the notice of intention to seek review was not received by her office until February 16, 2021, I note that she was able to serve her answer with cross-appeal on the district on February 19, 2021. Although the parent asserts that she was unable to timely serve a notice of intention to cross-appeal due to the district's delay, the district noted in its answer to the parent's cross-appeal that it did not object to the parent's late service of that document (Answer to Cross-Appeal ¶2), and the parent has not suffered any prejudice when serving the notice of intention to cross-appeal late, which has been accepted by the undersigned.

[5] In a cover letter to the Office of State Review dated February 19, 2021, the parent's counsel stated that although the district's notice of intention to seek review was dated February 10, 2021, "our office received it via mail on February 16, 2021".

Turning to the parent's counsel's assertions regarding the filing of certified copies of IHO II's decision and the hearing record, the parent's counsel stated that she received the district's notice of intention to seek review on February 16, 2021. Without any evidence, the parent's counsel merely made the bald assertion "upon information and belief" that the district initiated an appeal of IHO II's decision but failed to file the record before IHO II with the Office of State Review in accordance with State regulation (see 8 NYCRR 279.9[c]). Upon review, the hearing record was duly filed with the Office of State Review together with the district's request for review on February 11, 2021 in accordance with the timelines contemplated by State regulation. The parent's counsel argues that she was not provided notice of the filing of the record, but cite to no authority for that proposition because there is none. The parent's contentions lack merit.

B. Extended Eligibility and IDEA Due Process Rights

Turning to the parties' challenges to the decision of the IHO, the facts of this case make clear that the parties are arguing about issues that stem directly from the compensatory education relief granted by IHO I several years ago. 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, 175 F. Supp. 2d at 387).[6]

The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so

[6] 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]).

as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

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]).

Upon reviewing the relevant authority, a distinction emerges between an equitable award of compensatory education in the form of educational programs or services, which a student may receive after his or her eligibility for special education has expired at a district's expense, and an award of extended eligibility, which extends the district's statutory obligations to a student, including the obligation to conduct a CSE meeting and develop an IEP for the student on an annual basis (Ferren C. v. Sch. Dist. of Phila., 595 F. Supp. 2d 566, 576 [E.D. Pa. 2009] [acknowledging the distinction between the expiration of the statutory right, including the right to an IEP, and the access to equitable relief], affd, 612 F.3d 712 [3d Cir. 2010]; Burr, 863 F.2d at 1078 [same], cert granted, judgment vacated sub nom. Sobol v. Burr, 492 U.S. 902 [1989], and on reconsideration sub nom. Burr, 888 F.2d 258; Letter to Riffel, 34 IDELR 292 [OSEP 2000] [noting that a right to compensatory education as an equitable remedy to address a denial of FAPE is independent from the right to FAPE generally, which latter right terminates upon certain occurrences]). Courts have interpreted this distinction differently, either concluding that equitable relief may include the continued requirement for a district to follow the procedures of the IDEA and develop IEPs for a student (see Ferren C., 595 F. Supp. 2d at 581 [ordering the district to reevaluate the student and develop her IEPs for three years beyond the expiration of her eligibility for special education]; M.W. v. New York City Department of Education, 2015 WL 5025368, at *7 [S.D.N.Y. Aug. 25, 2015] [ordering the district to provide credit-bearing instruction to a 21-year-old student while her appeal was pending]), or questioning the notion that compensatory education may include extended eligibility (see Dracut Sch. Comm. V. Bur. of Special Educ. Appeals, 737 F. Supp. 2d 35, 55 [D. Mass. 2010] [finding that, because an IHO had ordered a district to award a diploma to a high schooler with Asperger's syndrome, he could not order the district to extend the student's IDEA eligibility for another two years]). While the above authorities discuss, to some extent, the appropriateness of an award of extended eligibility, none grapple with the question of how such an award could ultimately result in many years of extended IDEA eligibility beyond the original award—as a consequence of the exercise of process rights, which would also presumably be

extended as a byproduct of the extended statutory entitlements—and the potential for an extension of eligibility well beyond the period of time when programs or services under the IDEA may be appropriate or beneficial to such a student who has reached adulthood.

This type of relief, if interpreted broadly to include an extension of the procedural due process entitlements set forth in the IDEA, including pendency, could result in many more years of eligibility than intended (see Application of a Student with a Disability, Appeal No. 17-021).[7] However, there is a difference between basing relief "on considerations enunciated under a legislated obligation and actually invoking the statutory provision" (Cosgrove, 175 F Supp 2d at 389). Thus, compensatory education is not a full extension of the IDEA itself and does not, for example, continue a student's stay-put rights (id. at 390).[8] This logic would appear to apply further to preclude the parent's access to the due process protections of the IDEA to challenge IEPs developed by a CSE during the extension of eligibility. Otherwise, the extension of eligibility could result in potentially perpetual challenges to IEPs developed during the period of extension and additional awards of compensatory education. In other words, the extension of the student's eligibility must be viewed as an election of remedies by the parent as to the student's educational placement, subject only to further modification in judicial review, and the parent has now assumed the risk that unforeseen future events could render the relief undesirable. As such, the parent cannot return to the due process hearing system to allege new faults by the district during the period of the student's extended eligibility.[9]

An extension of eligibility was awarded to the student in 2017 by IHO I and 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 a CSE at least annually to develop IEPs for the student (Ferren C., 595 F. Supp. 2d at 581; Millay v. Surry Sch. Dep't, 2011 WL 1122132, at *16 [D. Me. Mar. 24, 2011], report and recommendation adopted, 2011 WL 1989923 [D. Me. May 23, 2011]); and/or to provide access to credit-bearing instruction and a chance to earn a diploma (M.W., 2015 WL 5025368, at *5).

However, it is unclear what IHO I intended to confer to the student in her November 29, 2017 decision during the period of extended eligibility. If IHO I ordered any additional services beyond those specifically listed in her decision, she essentially delegated that aspect of the compensatory education relief back to the CSE or the parties, which would not be permissible as

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

[8] 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).

[9] 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, and I begin to question who should really be pursuing the matter now that the child is not only above the age of majority, but an adult beyond the age of the IDEA (see N.Y. Educ. Law § 3202[1] [entitling students aged 5 through 21, who have "not received a high school diploma," to attend public schools]; Mrs. C. v. Wheaton, 916 F.2d 69, 73 (2d Cir. 1990)).

that would be IHO I's responsibility (see Reid, 401 F.3d at 526; Bd. of Educ. of Fayette Cty., Ky. v. L.M., 478 F.3d 307, 317 [6th Cir. 2007]; Application of a Student with a Disability, Appeal No. 14-070). However, IHO I's decision was never appealed and thus the vague terms of that order during the period of the student's extended eligibility were never addressed. The district's obligations to the student during the period of extended eligibility may have included evaluating the student and convening a CSE at least annually to develop IEPs for the student, but it is impossible to say because IHO I's final order failed to provide any parameters for what she envisioned if it went beyond the specific services listed in her order. The basis of the parent's claims for relief in this matter are the district's failure to timely convene a CSE to provide the compensatory services due in extended eligibility and to have an IEP to that effect in place before the start of the 2019-20 school year, but IHO I's Decision does not direct the CSE to do any of that.

This is precisely the path to indefinite IEP challenges cautioned against in the prior State-level review decisions cited above. In this case, the student's right to continuing special education services flow from the terms of his IHO I-creation of extended eligibility and not from the statutory provisions of the IDEA. Because the student's statutory eligibility expired, it is not possible for the parent to proceed with her claims on that front. Crafting any additional terms relief was the responsibility IHO I, however the time to appeal IHO I's decision has long since passed. Going forward, any relief to which the student might be entitled for the district's failure to comply with IHO I's order, including the parent's allegation that the district was obligated to convene a CSE and develop an IEP during the period of the student's extended eligibility that IHO I created, must be determined in a forum with authority to enforce IHO I's order.

In this case, at the time the parent requested an impartial hearing on January 31, 2020, the student was 22 years old to avail herself of relief granted under a prior IHO decision. The student's statutory eligibility for special education and related services ended on June 30, 2019 during the school year in which he turned 21, and it is not clear what IHO I intended to happen at that juncture except it is clear that the student could continue to receive the tutoring, OT, and PT and speech-language therapy services that she specifically ordered.

IHO II recognized that she lacked authority to enforce IHO I's order (IHO Decision at p. 20). With a student such as this in which a denial of a FAPE has been found in multiple prior proceedings, it could be tempting to delve into the matter once again. But because I find that this proceeding is inextricably intertwined with the enforcement of the vague terms of IHO I's order, I am constrained to find that IHO II should have dismissed the parent's due process complaint notice for lack of subject matter jurisdiction.

Even assuming hypothetically that student was younger than 21 during the 2019-20 school year, I would still be reluctant to order further compensatory education services. The district asserted that the student was not entitled to a FAPE because he graduated and further argued that graduation and receipt of a high school diploma was evidence of educational benefit (see 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]). It is a rare case where a student will graduate with a high school diploma and yet still qualify for an award of further compensatory educational services thereafter (see, e.g., Application of a Student with a Disability, Appeal No. 19-116; 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). IHO II's award of further compensatory education for a second year past the period of the student's statutory eligibility was unnecessary in light student's graduation with a Regents diploma. Therefore, IHO II's decision in this matter must be vacated in its entirety.[10]

VII. Conclusion

Having determined that IHO II lacked jurisdiction to conduct an impartial hearing in this matter, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the decision of IHO II dated January 3, 2021 is vacated in its entirety.

Dated: **Albany, New York**
April 1, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER

[10] Having found that the parent was not entitled to an impartial hearing to address the claims set forth in her due process complaint notice, it is not necessary to address the merits of the parent's cross-appeal. Nevertheless, I have conducted an independent and thorough review of the hearing record and agree with IHO II's determinations that the parent was not entitled to IEEs and that the hearing record did not support additional evaluations for the purpose of post-secondary planning (see IHO Decision at pp. 23-24). In addition, the hearing record reflects that the parent's request for additional evaluation was also based at least in part on the assertion that the district had failed to complete evaluations ordered by IHO I, which, once again, is an attempt to enforce an order years after it was issued. As the IHO stated in relation to the parent's request for compensatory educational services, this request for evaluations was also seeking enforcement of IHO I's prior order, which the IHO correctly concluded with respect to compensatory education exceeded her authority (id. at p. 20). I also agree with the district that the IHO erred in finding a gross violation of the IDEA based on a denial of a FAPE for one school year and that State regulation does not require reevaluation of a student prior to termination of eligibility due to graduation or due to exceeding age eligibility (see 8 NYCRR 200.4[c][4]). Under any of the suggested analyses, the parent was not entitled to evaluations as equitable relief.