The University of the State of New York

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

No. 21-127

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 Daniel Levin, Esq.

Law Offices of Regina Skyer & Associates, LLP, attorneys for respondent, by Sonia Mendez-Castro, Esq., Linda A. Goldman, Esq., and Alexandra Abend, 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) daughter and ordered it to extend the student's age-eligibility from September 2020 through December 2020, to review the student's transition plan, and as needed, to evaluate the student. The 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

The student in this matter began receiving special education programming in 2014 upon relocating to the United States, and has attended The International Academy of Hope (iHope) since January 2017 (see Parent Exs. B at pp. ; D at p. 1; W at p. 1).[1] The evidence in the hearing record reflects that the student, having suffered a post-surgical stroke at 12 years old, presents with "very significant academic, communicative, and social/interpersonal needs" and "requires the intense

[1] The Commissioner of Education has not approved iHope as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7]).

support and continual adult supervision" provided in an 8:1+1 special class placement with 1:1 paraprofessional support (Parent Ex. D at p. 1).

On June 19, 2019, a CSE convened to conduct the student's annual review and to develop an IEP for the 2019-20 school year (see Dist. Ex. 5 at pp. 1, 17). According to the evidence in the hearing record, the student was expected to turn 21 years old in August 2020, following the conclusion of the 2019-20 school year (id.).[2] Finding that the student remained eligible for special education as a student with multiple disabilities, the June 2019 CSE recommended a 12-month school year program in a 12:1+(3:1) special class placement with the following related services: three 40-minute sessions per week of individual occupational therapy (OT); daily "non 1:1 skilled nursing referral" services; three 40-minute sessions per week of individual physical therapy (PT); three 40-minute sessions per week of individual speech-language therapy; one 40-minute session per week of speech-language therapy in a small group; the services of a full-time, individual paraprofessional for health and feeding; the services of full-time, individual paraprofessional for transportation; one 60-minute session per month of parent counseling and training; and assistive technology devices and services (id. at pp. 14-15).[3] In addition, the June 2019 IEP included a coordinated set of transition services and measurable postsecondary goals (id. at pp. 6, 15-16). As documented in the June 2019 IEP, the student's coordinated set of transition activities identified the needed activities to facilitate the student's movement from school to post-school activities, the service or activity, and the school district or agency responsible for those activities as the "School/Family/OPWDD" (id. at pp. 15-16).[4]

According to the evidence in the hearing record, the student attended iHope during the 2019-20 school year (see generally Parent Exs. D; H). From March 16, 2020, through June 26, 2020, iHope provided the student with remote instruction "due to the [Covid-19] pandemic school closure" (Parent Ex. H at p. 1). At the impartial hearing, the parent's attorney confirmed that the parent had challenged the district's recommended program and services for the 2019-20 school year, and the dispute had concluded with the parent securing payment for the student's tuition costs at iHope "pursuant to pendency and agreement," and thereafter, the matter was withdrawn (Tr. pp. 3-4).

---

[2] 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]). If a student with a disability reaches age 21 during the period commencing July 1st and ending on August 31st and otherwise remains eligible, the student is entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever first occurs (Educ. Law § 4402[5][a]). Since the student was expected to turn 21 years old in August 2020, under State law, the student would remain eligible for July and August special education programming through August 31, 2020—or until the termination of the summer program—whichever occurred first (see Dist. Ex. 5 at p. 1; Educ. Law § 4402[5][a]; see also Educ. Law § 3202[1]).

[3] The parent disputes the student's eligibility category in the June 2019 IEP, asserting that the student should be eligible for special education as a student with a traumatic brain injury (see Parent Ex. A at pp. 5-6; 34 CFR 300.8[a][12]; 8 NYCRR 200.1[zz][12]), rather than as a student with multiple disabilities (see 34 CFR 300.8[a][7]; 8 NYCRR 200.1[zz][8]).

[4] "OPWDD" refers to the New York State Office for People with Developmental Disabilities (see generally https://www.opwdd.ny.gov).

In preparation for the student's aging-out of her eligibility and the termination of special education programming, a CSE convened on May 5, 2020, to conduct the student's exit interview (see Dist. Exs. 3 at p. 1; see generally Dist. Exs. 4; 7). During the meeting, the CSE—which included the parents and the student's then-current iHope providers—reviewed and discussed the student's 2019-20 iHope progress reports, a 2020 iHope exit summary report, the student's iHope IEP, the student's 2019-20 CSE IEP, and verbal reports made by the student's teacher and related services providers (see Tr. pp. ; Parent Exs. D- E; V at p. 2; W at p. 2; X at pp. 5-6; Dist. Exs. 5; 7-8; 12).[5] According to the evidence, the CSE informed the parent at the meeting that the student's "program would end August 21, 2020" (Parent Exs. W at p. 3; X at p. 6; see Dist. Ex. 3 at p. 5 [indicating that the student would "graduate on August 21st" and would "continue to receive school-based services until graduation"]).

On June 5, 2020, the parent sent an email to a district CSE chairperson (see Parent Ex. G at p. 2; see also Tr. pp. 114-15).[6] The parent informed the CSE chairperson that at the May 2020 CSE meeting, she was "told that [the student] would be aging out this school year," and questioned whether the student would not, instead, age out "next year" in 2021," as the student turned 21 years of age in August 2020 (Parent Ex. G at p. 2). The parent asked the CSE chairperson to confirm this information and to advise her if a "new IEP meeting" would be conducted and if she would be "receiving an IEP in the mail" (id.). The parent also noted that the student was "preparing to go out into the community all year before the pandemic closing and now [the student] ha[d] lost so much time and ha[d] been unable to fully fulfill her transition with the city shut down" (id.).

The CSE chairperson responded to the parent via email on the same day, and indicated that the student would be "aging out of our program as of June 2020" (Parent Ex. G at p. 1). The CSE chairperson added that as the student had been attending iHope "for the last several years," she was "sure the program ha[d] connected her with the appropriate post-secondary agencies" (id.). Responding later that same day, the parent thanked the CSE chairperson for the information and further indicated that she had contacted an advocacy group, who "informed [her] that [the student was] entitled to another year as she turn[ed] 21 after the school year start[ed]" on July 1, 2020 and the student's birthday was in August 2020 (id.).

As the Covid-19 pandemic persisted, the New York State Education Department issued a guidance document, dated June 18, 2020, which addressed the provision of services to students with disabilities who would "'age out' of the P-12 education system because they ha[d] turned 21 years old by the start of the school year in September 2020" ("Providing Over-Age Students the Opportunity to Return to School in the 2020-21 School Year Due to the COVID-19 Pandemic," Office of Educ. Policy Mem. [June 18, 2020], available at http://www.nysed.gov/common/nysed/files/programs/coronavirus/nysed-covid-19-memo-over-age-students.pdf). In part, the guidance document contemplated that "[m]any plans for the final quarter of school were placed on hold," which left some students "without the high levels of

[5] It appears that both parents attended the May 2020 CSE meeting (see Parent Ex. X at p. 5; Dist. Ex. 3 at p. 1). Generally, however, references made to the "parent" in this decision refer solely to the student's mother.

[6] The CSE chairperson who received the parent's June 5, 2020 email did not attend the May 2020 CSE meeting (compare Parent Ex. G at p. 2, with Dist. Ex. 3 at p. 1). The district school psychologist—who did attend the May 2020 CSE meeting—testified at the impartial hearing that she only reviewed the parent's June 5, 2020 email at the impartial hearing (Tr. pp. 113-15; see Dist. Ex. 3 at p. 1).

support and planning they needed to effectively transition from high school to their postsecondary plans" (id.). As such, some students "risk[ed] losing the opportunity to earn a high school diploma" by the conclusion of the 2019-20 school year (id.). Therefore, to "ensure that 21-year-old students ha[d] the chance to earn their high school diploma and fully prepare for the transition to their previously planned postsecondary experiences," school districts were "strongly encourage[ed] . . . to allow these students who w[ould] age out of school the opportunity—for this year only—to return for summer school and, if necessary, attend school" during the 2020-21 school year to "complete their education and earn a diploma" (id.).

On June 20, 2020, the parent executed an enrollment contract for the student's attendance at iHope for the 2020-21 school year (see Parent Ex. K at pp. 1, 5).

By letter dated June 22, 2020, the parent notified the district of her intentions to place the student at iHope for the 2020-21 school year beginning in July 2020 and to seek funding and transportation for this placement from the district "if the district d[id] not develop an appropriate IEP and program recommendation" (Parent Ex. B at pp. 1-2). The parent indicated that the May 2020 CSE did not recommend a program for the student "despite the fact that no transition program had been identified or services secured"; the parent and iHope "advocated for a continuation of those services given the current pandemic"; and after the meeting, the parent had followed up with a "request for transition services" (id. at p. 1). In response to that request, the parent noted that the district informed her that the student's program and services "would cease June, 2020" (id.). Pointing to State guidance concerning the "provision of compensatory services" for "vulnerable" students, the parent advised that the student had a "history of settlement" with the district for the "failure to develop an IEP and program recommendations" (id. at p. 2). The parent also noted that pendency applied in this case, pursuant to a decision dated February 27, 2018, and moreover, she had "challenged the IEP developed for the 2019-2020 school year and the matter settled on the issue of tuition funding" (id.). According to the parent, the student could not access her "post-secondary and transition services" due to the Covid-19 pandemic, and therefore, "her program should be continued for the current school year" (id.). In light of the foregoing, the parent indicated that the student would attend iHope until the district recommended an appropriate placement and "cure[d] the procedural and substantive defects within the IEP" (id.).

A. Due Process Complaint Notice

By due process complaint notice dated July 1, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (12-month school year program) (see Parent Ex. A pp. 1-2). More specifically, the parent sought continued prospective funding of the student's tuition at iHope for the 2020-21 school year based on the district's failure to recommend "post-secondary and transition services" at the May 2020 CSE meeting (id. at p. 2). In addition, the parent invoked the student's entitlement to a pendency placement at iHope with district funding, based on an unappealed IHO decision, dated February 2018 (id. at pp. 2-3).

According to the due process complaint notice, the parent alleged that the May 2020 CSE—which functioned as the student's exit interview since the student would attain age 21 in August 2020—failed to recommend "any programs or services" for the student, despite the fact that both the parent and iHope staff "advocated for continued services" for the student because "no transition program or services had been secured by the district" (Parent Ex. A at p. 3). Citing guidance issued

by the New York State Department of Education, dated June 18, 2020, concerning the impact of Covid-19 on vulnerable student populations, the parent sought to continue the student's education at iHope (id. at pp. 3-4). The parent alleged that the May 2020 CSE deprived her of the opportunity to meaningfully participate by "refus[ing] to listen to her concerns and look into a similar program for the continuation of [the student's] services" (id. at p. 4). The parent also alleged that the May 2020 CSE failed to discuss any post-secondary education (id.). In addition, the parent asserted that the May 2020 CSE "failed to conduct new evaluations, predetermined the recommendation of the IEP, failed to consider [the student's] significant health, medical, physical, social, and cognitive abilities, and failed to consider a full continuum of services" (id.). The parent also noted that the May 2020 CSE's "recommendation [was] inappropriate," the student's eligibility category of multiple disabilities was inappropriate, the district failed to evaluate the student prior to the CSE meeting, and the May 2020 CSE significantly changed the student's program "by holding her exit interview without the requisite reevaluations or thought [as] to how the current pandemic would harm [the student] and cut short any progress she made if another program for her adult education were not recommended" (id. at pp. 4-5).

As relief for the alleged denial of a FAPE, the parent requested an additional year of funding for the student's program and placement at iHope, consisting of a 12-month school year program for the 2020-21 school year (see Parent Ex. A at p. 7). The parent also proposed the following terms of settlement: for the district to recommend settling the matter for funding the student's iHope program for the 2020-21 school year "as an extension pursuant to the current guidelines"; and, if the district refused to do so, the parent alternatively sought the "implementation of the program as compensatory education based on the district's failure to recommend a post-secondary program" for the student (id.).

B. Facts Post-Dating the Due Process Complaint Notice

Based upon the evidence in the hearing record, the student attended iHope from July 8, 2020, through January 21, 2021 (see SRO Ex. 1).[7] During the student's attendance at iHope for this time period, the student received remote instruction with the assistance of a 1:1 paraprofessional in the student's home; she also received OT, PT, and speech-language therapy remotely (see Parent Ex. V at p. 2).[8] The director of operations at iHope attested to her familiarity with the enrollment contract executed by the parent for the student's attendance from "July 8, 2020 to January 21, 2021," the total cost of that program as $124,250.00, the parent's payment of $100.00 made on July 14, 2020 toward the program's cost, and the remaining balance owed (Parent Ex. N).

In December 2020, the district moved to dismiss the parent's claim to the extent that she sought relief for the September 2020 through December 2020 portion of the 2020-21 school year (see generally Dist. Ex. 10). The parent opposed the district's motion to dismiss (see generally

[7] After the initiation of this appeal, the undersigned SRO sought, and received, additional evidence from the parties concerning the student's educational placement during the 2020-21 school year, which confirmed that the student attended iHope—without district funding—from August 18, 2020 through December 2020.

[8] The evidence reflects that iHope offered a "hybrid program" during the 2020-21 school year that allowed students to attend "both in person and remotely via Zoom"; the parent in this case "opted for the remote only model" (Parent Ex. X at pp. 5-6).

Parent Ex. U). In an interim decision dated January 21, 2021, the IHO denied the district's motion to dismiss (see generally Jan. 21, 2021 Interim IHO Decision). In denying the district's motion, the IHO agreed with the district's arguments made at that time that the State guidance issued in June 2020 was "not binding or authoritative," and moreover, that the IHO lacked "jurisdiction to enforce a State guidance memorandum"; however, the IHO found that "the proposed dismissal relie[d] on facts assumed by the district" (id. at p. 2).

C. Impartial Hearing Officer Decision

On January 25, 2021, the parties proceeded to an impartial hearing, which concluded on May 5, 2021, after four total days of proceedings (see Tr. pp. 1-150).[9] In a decision dated May 8, 2021, the IHO initially indicated that the present matter challenged whether the district offered the student a FAPE "for a portion of the 2019-20 and 2020-21 school years" (IHO Decision at pp. 2, 6). According to the IHO, the parent asserted that the district failed to "provide (or, in the alternative, failed to adequately oversee) transition planning for the student who was scheduled to age out of her entitled to special education as of August 31, 2020" (id. at p. 2). In addition, the IHO noted that the parent also argued that because "the student's presenting medical and educational conditions rendered her incapable of benefiting from remote instruction, notwithstanding the district's willingness and efforts to provide or pay for a continuing academic program during the onset of the Covid crisis, they engaged in self-help by unilaterally continuing the student's 2019-20 placement in a program and placement that had been deemed to be appropriate" (id.). However, in order to "make [the student] whole for this alleged deprivation," the parent now sought compensatory educational services "in the form of continuation of [the student's] pre-existing program" through December 2020 (id.).

Next, the IHO acknowledged the district's concession at the impartial hearing that the student was entitled to a special education program, i.e., a FAPE, through summer 2020 and "that it failed to develop an IEP or offer a placement for [summer 2020]" (see IHO Decision at p. 2). The IHO also acknowledged that, by virtue of pendency, the student received a special education program at iHope—funded by the district—for summer 2020, and as such, no further remedy was required for that period of time (id.). The IHO noted, however, the district's position with regard to the parent's remaining contentions: the district "should not and cannot be held accountable for the failure of a unilateral placement to have provided transition planning and services"; alternatively, if responsible for any oversight, the district met its obligation because it received assurances from the unilateral placement that the transition planning and services were being provided; in order to award extended age-eligibility to the student beyond age 21, the IHO was required to find a "prolonged, extended, and gross violation of the FAPE requirement"; a "defective transition plan" constitutes a "procedural defect and must be reviewed in that light"; the district was not required to conduct any further evaluations of the student; and the parent "may not simultaneously claim a program as pendency while arguing that that program was inappropriate and form[ed] the basis for a demand for further relief" (id. at pp. 2-3).

[9] In an interim decision, dated January 25, 2021, the IHO ordered, per agreement of the parties, that the district continue to fund the student's attendance at iHope as the pendency placement from July 1, 2020 through the conclusion of the summer session on August 17, 2020 (see Jan. 25, 2021 Interim IHO Decision at p. 2).

As a case of first impression, the IHO examined the uniqueness presented by the culmination of two specific factors at the end of the 2019-20 school year: first, the expiration of the student's entitlement to special education; and second, the Covid-19 pandemic and its related lockdown, which, according to the IHO, resulted in an "unpredictable change in [the student's] existing program as of mid-March 2020" (IHO Decision at p. 3). Given these circumstances, the IHO ultimately concluded that the district's arguments were not supportable "under the plain meaning of the law and policy captured by the IDEA within which State law and regulation must be interpreted" (id.).

More specifically, the IHO found that, regardless of the Covid-19 pandemic, the district remained responsible for providing the "transition planning and needed programs and services . . . to effectuate the student's transition into adult programs and services" (IHO Decision at p. 3). The IHO disagreed with the district's assertion that transition services were "procedural obligations," noting that for a student such as this, "in her last months of entitlement, transition [was] her program"—and thus, the "substance of what she must focus on and accomplish" (id. [emphasis in original]). While also noting that a "receiving agency" may bear some responsibility for certain "elements" of that transition, the IHO found that it did "not undercut the district's continuing obligation until the final day of entitlement to provide programmatic elements required by the student to accomplish the move from one status to the other" (id. at pp. 3-4). According to the IHO, even though the student attended a nonpublic school as a unilateral placement, the district remained "responsible for her education in that setting" (id. at p. 4, citing Letter to Hampden, 49 IDELR 197 [OSEP 2007]). As a result, the IHO noted that the district was "no less, and no differently, obligated to undertake its responsibilities towards the student than it would be if she were placed by the district in a State-approved non-public school" (IHO Decision at p. 4).

In this instance, the IHO characterized the "intervention of Covid" as a "uniquely perfect transition storm for this student" and then turned to "persuasive authorities and policy statements from both the State and federal government [that] have consistently called for flexibility and sensitivity in addressing the needs of general and special education students who were in the process of aging out of entitlement to services or graduation" during both the 2019-20 and 2020-21 school years (IHO Decision at pp. 4-5, citing "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak," United States Dept. of Educ.," [Mar. 12, 2020], available at https://www.sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf; "Providing Over-Age Students the Opportunity to Return to School in the 2020-21 School Year Due to the COVID-19 Pandemic," Office of Educ. Policy Mem. [June 18, 2020], available at http://www.nysed.gov/common/nysed/files/programs/coronavirus/nysed-covid-19-memo-over-age-students.pdf; "Providing Over-Age Students the Opportunity to Return to School in the 2021-22 School Year Due to the COVID-19 Pandemic," Office of Educ. Policy Mem. [April 13, 2021], available at http://www.nysed.gov/common/nysed/files/programs/ coronavirus/memo-over-age-students.pdf).

With this as a backdrop, the IHO opined that "existing authority to the contrary must be narrowly construed," and turned next to his determination that although the district and iHope continued to provide the student with services remotely during Covid-19, these efforts "were laudable but not necessarily sufficient" (IHO Decision at p. 5). According to the IHO, the district had a "responsibility to ascertain, for each student with an IEP, whether remote instruction and services would be accessible to the student," and more specifically, "whether the student's disability, as was the case for this student as the record b[ore] out, precluded the student from

benefiting from remote instruction and services" (id.). As a result, the IHO characterized the deprivation in this case as meeting the "standard of 'gross' deprivation . . . , notwithstanding its relative brevity and the district's helplessness to overtake it" (id.). The IHO also found that the student's "capacity to transition into a new program overseen by a new agency was irretrievably disrupted by the impact of the respective shutdown mandated in both agencies by the Governor" (id.).

In light of these determinations, the IHO found that the student was entitled to "[a] compensatory program and services both for the substance of her program that had been interrupted and undermined when it was forced into remote mode, and for the transition process, including the district's obligation to oversee adequate planning and provide adequate services to permit" the student's transition to the "new agencies to which she will be relating" (IHO Decision at p. 6). As relief, the IHO ordered the district to "continue this student's eligibility to December 31, 2020," and to "review the student's transition plan and, as needed, to undertake or pay for any further evaluation called for in that plan and any further services required to permit her to be taken into the catchment of the receiving agencies" (id.).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by ordering the district to fund the student's continued program and placement at iHope from September 1, 2020 through December 31, 2020; extending the student's age-eligibility for the same time period; and ordering the district to evaluate the student. In addition, the district contends that the IHO exceeded his jurisdiction by finding that the district failed to offer the student a FAPE for the 2019-20 school year, as the parent did not challenge the 2019-20 school year in the due process complaint notice. The district also contends that the IHO inequitably awarded tuition at iHope for four additional months as compensatory educational services, and the student was not entitled to compensatory educational services because neither a two-month nor a five-month lack of FAPE constituted a gross violation of the IDEA or a gross deprivation of a FAPE. In addition, the district argues that even if the student's transition plan or services was defective, as a procedural violation, it did not rise to the level of a denial of a FAPE or a gross violation. Finally, the district asserts that the IHO lacked jurisdiction to enforce or consider a non-binding State policy memorandum, and improperly ordered the district to evaluate or fund evaluations of the student. As relief, the district seeks to reverse the IHO's decision awarding tuition at iHope from September through December 2020, extending the student's age-eligibility for the same time period, and ordering the district to evaluate the student.[10]

[10] The district submits additional documentary evidence for consideration on appeal in support of the argument that the IHO exceeded his jurisdiction (see generally Req. for Rev. SRO Ex. 1). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). A review of the additional evidence submitted by the district reflects that it was available at the time of the impartial hearing and moreover, it is not necessary in order to render a decision on this portion of the district's appeal. As such, I decline to exercise my discretion to accept the submitted document as additional evidence.

In an answer, the parent responds to the district's contentions and generally argues to uphold the IHO's determination in its entirety.[11]

V. Applicable Standards

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

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

[11] Although the parent's due process complaint notice sought funding for the student's attendance at iHope for the entire 12-month 2020-21 school year as relief, the IHO limited the relief awarded in the form of the student's extended-age eligibility until December 31, 2020 (compare Parent Ex. A at p. 7, with IHO Decision at p. 6). Since the parent did not challenge the relief awarded by the IHO, which was limited through December 31, 2020, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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]).[12]

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

[12] 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).

F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters—Scope of the Impartial Hearing

Before reaching the merits of the appeal, I must first determine which claims are properly preserved for review. The district contends that the IHO exceeded the scope of the impartial hearing by sua sponte raising and deciding issues related to the 2019-20 school year, issues that were not raised by the parent in the due process complaint notice. The parent disagrees, noting that the IHO properly considered deprivations that occurred during the later portion of the 2019-20 school year as relevant to crafting equitable relief.

With respect to the issues allegedly raised sua sponte by the IHO concerning the 2019-20 school year, generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parent's due process complaint notice cannot be reasonably read to include any allegations or requests for relief related to the 2019-20 school year, contrary to the IHO's statement in the decision indicating that the present matter challenged whether the

district offered the student a FAPE "for a portion of the 2019-20 and 2020-21 school years" (compare Parent Ex. A, with IHO Decision at pp. 2, 6). The IHO's statement of the issues presented in this case directly contradicts a plain reading of the parent's due process complaint notice, which clearly and unambiguously and in bold capitalized font set forth the following caption: "**REQUEST FOR IMPARTIAL HEARING, PENDENCY, DISPUTED ISSUES, AND PROPOSED RESOLUTION—12-MONTH, ACADEMIC YEAR 2020-21"** (Parent Ex. A at p. 1). As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]). The allegations in the parent's due process complaint notice focused on the May 2020 CSE process (for example, predetermination, sufficiency of evaluative information, parent participation, eligibility category), the alleged absence of a transition plan or services moving the student to postsecondary education upon aging out in August 2020, and whether the student was entitled to extended age-eligibility based upon State guidance issued in June 2020 (see Parent Ex. A at pp. 3-6). Significantly, however, the due process complaint notice does not include any allegations pertaining to the 2019-20 school year, nor does it include any relief related to the 2019-20 school year (see generally Parent Ex. A). This is, most likely, because the parent had already informed the district that she had "challenged the IEP developed for the 2019-2020 school year and the matter settled on the issue of tuition funding" (Parent Ex. B at p. 2). On the first impartial hearing date, the parent's attorney confirmed that the parent's challenge to the 2019-20 school year had concluded with the parent securing payment for the student's tuition costs at iHope "pursuant to pendency and agreement," and the matter had been withdrawn (Tr. pp. 3-4). In addition, the hearing record is devoid of evidence that the parent sought to amend her July 2020 due process complaint notice to include any additional issues regarding the 2019-20 school year (see generally Tr. pp. 1-150; Parent Exs. A-X; Dist. Exs. 1-12).

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include any challenges to the 2019-20 school year or seek to include these issues in an amended due process complaint notice, any issue pertaining to the district's offer of a FAPE to the student for the 2019-20 school year is outside the scope of the proceeding. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 2012 WL 33984, at *4-*5 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R., 2011 WL 6307563, at *13). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D., 2011 WL 4914722, at *13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Given the evidence in the hearing record, the IHO improperly considered facts or events that may have taken place during the 2019-20 school year as a basis upon which to either conclude that the district failed to offer the student a FAPE for both the 2019-20 and the 2020-21 school years or as a basis upon which to craft equitable relief related to alleged violations for the 2020-

21 school year—as the parent did not raise any issues related to the 2019-20 school year in the due process complaint notice and she had already secured relief for the 2019-20 school year prior to initiating her claims concerning the 2020-21 school year. As a result, to the extent that the IHO resolved the parent's due process complaint notice concerning the 2020-21 school year by sua sponte raising and considering issues related to the 2019-20 school year, or otherwise considered issues or events related to the 2019-20 school year in fashioning relief for the 2020-21 school year, the IHO's findings must be annulled.

VII. Relief—Extended Age-Eligibility and Compensatory Educational Services

Here, the district contends that the IHO erred by extending the student's age-eligibility from September 2020 through December 2020 based on State guidance issued in June 2020 and further erred by awarding the costs of the student's tuition at iHope as a remedy for what the IHO characterized as a gross violation of the IDEA.[13] The parent contends that the IHO acted within his authority to consider the State guidance and properly awarded the student's tuition costs at iHope as a compensatory remedy for the district's gross violation.

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). A unilateral placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

[13] To be clear, the parent did not allege in the due process complaint notice that the district's failure to offer the student a FAPE for the 2020-21 school year constituted a gross violation of the IDEA, and the parent also did not seek a gross violation finding from the IHO as relief (see generally Parent Ex. A). Furthermore, the relief awarded by the IHO specifically ordered the district to extend the student's eligibility through December 31, 2020, to review the student's transition plan, and to undertake any evaluations needed therein (see IHO Decision at p. 7). Other than finding that the student was entitled to a "compensatory program and services," the IHO did not specifically order the district to fund the student's unilateral placement at iHope through December 31, 2020 (id.).

Another form of relief available is compensatory education, which 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 relief may 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]). 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 & n.12 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Some courts have held that compensatory education is not available as an additional or alternative remedy when reimbursement for the costs of a unilateral placement is also at issue for the same time period (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]; but see I.T. v. Dep't of Educ., State of Hawaii, 2013 WL 6665459, at *7-*8 [D. Haw. Dec. 17, 2013] [finding that the student was entitled to compensatory education for services the student received at the nonpublic school]). The Second Circuit Court of Appeals has not directly addressed this question and, generally, appears to have adopted a broader reading of the purposes of compensatory education than the Third Circuit (compare P.P., 585 F.3d at 739 [finding that "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education"], with E. Lyme, 790 F.3d at 456-57 [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]). Accordingly, unlike the Third Circuit, the Second Circuit's approach to compensatory education may leave room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but the parent's request for tuition reimbursement is denied under a Burlington/Carter

analysis (see Application of a Student with a Disability, Appeal No. 16-050). However, if permitted, it would be the rare case where a unilateral placement is deemed to provide instruction specially designed to meet the student's unique needs, but the student is also deemed entitled to compensatory education to fill gaps in the services provided by such unilateral placement.

In addition, compensatory education may, under certain circumstances, 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]).[14]

[14] 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]).

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).[15] 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).[16] 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, an 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 would then assume 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 a period of a student's extended eligibility.

Taking these limits into account, an award of extended eligibility may be an appropriate form of relief in a case where the district committed a gross violation of the IDEA (see Cosgrove, 175 F Supp 2d at 387). Having examined what aspects of special education eligibility the remedy should not include, it remains to be examined as to what aspects of a FAPE the remedy may extend. Where an extension of eligibility has been awarded, the components of such relief may include: the district's obligations to evaluate the student and convene 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. v. New York City Dep't of Educ., 2015 WL 5025368, at *5 [S.D.N.Y. Aug. 25, 2015]).

With the above framework in mind, as an initial matter, it is necessary to address whether an appropriate remedy for a denial of FAPE should consist of both funding for the student's placement at iHope and compensatory education, in the form of extended eligibility, for the 2020-21 school year.

It is undisputed—and in fact, the district conceded at the impartial hearing—that the district failed to offer the student a FAPE for the final period of the student's eligibility for special education, which, by virtue of the student turning 21 years of age in August 2020, extended through the months of July and August 2020, which constituted a portion of the 2020-21 school year. In

[15] 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]).

[16] 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).

addition, it is also undisputed that the student's eligibility for special education as well as the district's obligation to provide the student with a FAPE terminated in August 2020, upon the student reaching the age of 21 (Educ. Law §§ 3202[1]; 4402[5][a]).

While the IHO did not address the appropriateness of iHope for the student for the 2020-21 school year, the parent requested funding of iHope for the 2020-21 school year and submitted testimonial and documentary evidence intended to support a finding that iHope was an appropriate unilateral placement for the student for the 2020-21 school year (Parent Exs. V at pp. 1, 4; W at pp. 3-5; X at pp. 1, 3-5; see Parent Exs. I; J; L; R-S). Instead of assessing the evidence presented, the IHO found that "[the district] has provided the continuing program sought by the family for that period by virtue of pendency in this case, however, and so asserts that it has no further obligation to the student for that period. The family does not appear to contest that claim, and I concur" (IHO Decision at p. 2). The parties do not argue on appeal that, although there has not been a finding in this proceeding as to the appropriateness of the parent's placement of the student at iHope for the summer portion of the 2020-21 school year, the interim order on pendency funded the student's attendance at iHope for July and August 2020 and also acted as a remedy for the district's failure to recommend a program for the student for the summer. Neither party appeals the district's concession of FAPE for July and August 2020 or that the interim order on pendency provided full relief for this deprivation (see generally Req. for Rev.; Answer). Accordingly, for the district's denial of FAPE for the summer portion of the 2020-21 school year, the pendency placement at iHope for the same period constituted the relief awarded. This does not appear to be the rare case where the student should receive funding for a unilateral placement and where the student should also be deemed entitled to compensatory education to fill gaps in the services provided by the unilateral placement (see Application of the Dep't of Educ., Appeal No. 21-118; Application of a Student with a Disability, Appeal No. 16-050).

However, as noted above, the IHO ordered the district—relying mostly on State guidance issued in response to the ongoing Covid-19 pandemic—to "continue the student's eligibility to December 31, 2020," based on his finding that the student was entitled to a compensatory program and services, which according to the IHO was a remedy "both for the substance of her program that had been interrupted and undermined when it was forced into remote mode, and for the transition process, including the district's obligation to oversee adequate planning and provide adequate services" (IHO Decision at p. 7).

Generally, under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).[17] An IEP must also include the transition services needed to assist the student in reaching those goals

[17] In addition, State regulations require districts to conduct vocational assessments of students age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]).

(id.). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]). It has been found that "a deficient transition plan is a procedural flaw" that will only rise to a denial of a FAPE if it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. of Tp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]; see F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *8-*9 [S.D.N.Y. June 8, 2016]; C.W. v City Sch. Dist. of the City of New York, 171 F. Supp. 3d 126, 134 [S.D.N.Y. 2016]; J.M. v New York City Dep't of Educ., 171 F. Supp. 3d 236, 247-48 [S.D.N.Y. 2016]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11 [S.D.N.Y. Mar. 19, 2013).

In this instance, even assuming for the sake of argument that the district failed to provide the student with an appropriate transition plan or process and failed to oversee adequate planning and to provide adequate services—as the IHO concluded—the appropriate compensatory educational services remedy, if any, should aim to place the student in the position she would have been in had the district complied with its obligations under the IDEA (see, e.g., Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]), which most logically points to additional transition services but not—as the IHO concluded—to extend the student's age-eligibility.[18] In this respect, the IHO ignored prevailing legal authority on compensatory educational services, as well as guidance issued by the district, itself, and as argued by the parent, which authorized the provision of "transition support consultancy services" to disabled students who turned 21 years of age prior to the start of the 2020-21 school year and who needed to be "connected with adult/postsecondary services or instruction" (Parent Ex. U at pp. 3-4, 22-25; see https://www.includenyc.org/images/uploads/content/Extension_of_Services_21%2B.pdf).[19]

Furthermore, while the June 2020 State guidance may have applied to the student's circumstances in this proceeding, and in large part, may have formed the basis for the relief sought by the parent, the IHO had no authority to enforce the guidance document, which described discretionary actions the State encouraged school districts to take with respect to disabled students aging out during that portion of the ongoing Covid-19 pandemic (see "Providing Over-Age Students the Opportunity to Return to School in the 2020-21 School Year Due to the COVID-19 Pandemic," Office of Educ. Policy Mem. [June 18, 2020], available at http://www.nysed.gov/common/nysed/files/programs/coronavirus/nysed-covid-19-memo-over-

[18] Notably, the IHO ordered the district to extend the student's age-eligibility through December 2020 in a decision issued in May 2021.

[19] As a reminder, State regulation sets forth that, "if the purpose of the [CSE] meeting is to consider the postsecondary goals for the student and the transition services needed to assist the student in reaching those goals," the school district—"[t]o the extent appropriate and with parental consent or consent of a student 18 years of age or older"—"must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services" (8 NYCRR 200.4[d][4][i][c]).

age-students.pdf).[20] In addition, nothing within the June 2020 State guidance required a district to offer or provide disabled students with ongoing instruction or extended age-eligibility, or indicated that a failure to do so could result in a finding that a district denied a student a FAPE, for which the student would then be entitled to either tuition reimbursement or compensatory educational services (id.). As a result, the IHO erred in ordering the district to extend the student's age-eligibility through December 31, 2020.

VIII. Conclusion

Having found that the evidence in the hearing record does not support the IHO's award of extended age-eligibility, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated May 8, 2021, is modified by reversing the finding that the district must extend the student's age-eligibility until December 31, 2020 and by extension, fund the student's tuition costs at iHope through December 31, 2020 or through the student's graduation from iHope in January 21, 2021; and,

IT IS FURTHER ORDERED that IHO's decision, dated May 8, 2021, is modified by reversing the finding that the district must evaluate the student and review the student's transition services.

Dated: **Albany, New York**
July 30, 2021

STEVEN KROLAK
STATE REVIEW OFFICER

[20] Recently, the State enacted a new provision into law that mirrors, in part, language from the State guidance document at issue in this proceeding. Under this provision, "a school district may provide educational services in the 2021-22 and 2022-23 school years to a student who turned [21] years old during the 2019-20 or 2020-21 school years and was enrolled in the school district and receiving special education services pursuant to an [IEP]" (L. 2021, ch. 167] [emphasis added]). Given the discretionary language in this new provision, it does not appear that it provides the student in this case with any further entitlements than afforded by the June 2020 State guidance.