The University of the State of New York

The State Education Department
State Review Officer
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No. 21-240

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:
Liz Vladeck, General Counsel, attorneys for petitioner, by Thomas W. MacLeod, Esq.

Law Office of Michelle Siegel, attorneys for respondent, by Jared Stein, 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 that portion of the decision of an impartial hearing officer (IHO) which tolled the statute of limitations with regard to future compensatory services claims to be brought by respondent (the parent) associated with the 2019-20 and 2020-21 school years. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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's educational history includes diagnoses of unspecified/major depressive disorder, unspecified anxiety disorder, attention deficit hyperactivity disorder (ADHD), and oppositional defiant disorder for which medications had been prescribed (Tr. p. 43; Parent Exs. B at pp. 1-5; I at p. 1; Dist. Ex. 4 at pp. 1, 4-5).[1] Historically, the student's scores on cognitive testing

[1] The hearing record contains duplicative exhibits, namely a psychological evaluation of the student, dated June 1, 2020 (compare Parent Ex. B, with Dist. Ex. 5). For purposes of this decision, only the parent's exhibit was cited when referencing this document. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

were in the high average to very superior range and he demonstrated above average academic achievement skills; however, he exhibited mental health concerns, a lack of emotional stability and regulation, problematic behaviors, and he was often not engaged in academic instruction (Tr. pp. 42-43, 45, 58, 60; see generally Parent Ex. B at pp. 1-6; Dist. Exs. 1 at pp. 3, 7; 7 at p. 3; 8 at pp. 2-3).

According to the parent, between 2010 and June 2018 the student was eligible for special education and related services, had a disability category of emotional disturbance, and attended an 8:1+1 special class during elementary school (see Parent Ex. A at p. 2; Dist. Ex. 8 at p. 4). For the 2018-19 school year (seventh grade), the CSE changed the student's disability category to other health-impairment, he attended a general education setting in a charter school and received counseling (see Parent Ex. A at p. 2; Dist. Ex. 8 at p. 4).

The CSE convened on June 14, 2019, to formulate the student's IEP for the 2019-20 school year (eighth grade) (Dist. Ex. 1). According to the IEP, the student began the school year in an integrated co-teaching (ICT) class and was moved to honors track classes in early 2019, at which time his teachers reported that the student performed better in that environment (id. at pp. 4-5).[2] The IEP reported the results of psychological and educational testing conducted in April and May 2017, which included administration of the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) to the student yielding a full-scale IQ of 118, falling at the 88th percentile when compared to same aged peers, as well as the Wechsler Individual Achievement Test - Third Edition (WIAT-III) showing the student's scores were in the average range for all math skills assessed, in the 96th percentile in word reading skills, and in the above average range in decoding and reading comprehension (id. at pp. 2, 3). The CSE found those scores consistent with January 2019 iReady "diagnostic exam[s]" administered to the student, which revealed that his vocabulary scores were at a 10th grade level, comprehension of literature was at a ninth-grade level, comprehension of informational texts was at a mid-seventh grade level, and his overall performance in math was at a seventh-grade level (id. at pp. 1, 3).

The June 2019 CSE determined that the student did not require positive behavioral interventions, supports and other strategies to address behaviors that impede his learning or that of others, and also that he did not need a behavioral intervention plan (BIP) (Dist. Ex. 1 at p. 7). However, the IEP indicated that the parent also expressed to the CSE that she "agreed" the student needed a BIP "to support work production in class" (id. at p. 19). The June 2019 CSE found that the student was "capable of performing at or above grade level standards," but that "his struggles with focus/attention and emotional regulation" needed to be addressed (id. at p. 20). Additionally, the CSE determined that the student had very advanced vocabulary, was a strong writer, and utilized higher level reading skills with ease (id. at pp. 2-3). The CSE maintained the student's previous disability category of other health-impairment and recommended that the student receive one 30-minute session per week of individual counseling services (id. at p. 1).

[2] The June IEP indicates that the student was administered medications to address behaviors related to his diagnoses and that after an incident in May 2019 in which the student became unregulated, his medication regime was adjusted (Dist. Ex. 1 at p. 4). Review of the hearing record shows that the student was hospitalized for approximately one week in May 2019 due to suicidal ideation (Dist. Ex. 3 at p. 2).

The student continued attending the charter school during the 2019-20 school year, but the student required multiple hospitalizations related to mental health concerns as the school year progressed (Parent Ex. B at p. 1; Dist. Ex. 3 at pp. 1-2).[3] In March 2020, the charter school and the CSE communicated with regard to the student's escalating behaviors, which included eloping from school, threatening staff members, defying authority, and failing to attend (Dist. Ex. 3 at pp. 1-2). Due to the student's non-adherence with his medication regimen and his behaviors placing himself and others at risk, the student's mother expressed a desire for the student to be placed in a residential school that was highly structured and therapeutic (Parent Ex. B at pp. 1-5; Dist. Ex. 3 at pp. 1).

A March 2020 social history update indicated that the student was placed in the care of the Administration for Children's Services (ACS) due to the student's mother having to attend to her own medical needs which required being hospitalized (Dist. Ex 3 at p. 3). While in the care of ACS, the student eloped for days at a time (Tr. p. 56; Parent Ex. I at p. 1; Dist. Ex. 3 at p. 3). At the end of March 2020, the student was evaluated and admitted to a psychiatric emergency program in a municipal hospital where he remained for approximately three weeks (Parent Exs. B at p. 1; I at p. 1).

On April 13, 2020, the student was admitted to an inpatient program at a State Office of Mental Health facility, the New York City Children's Center (NYCCC) for "continued treatment and stabilization of irritability, impulsivity, and suicidality" (Parent Ex. B at p. 1). At the time of this placement, charter school staff and the parent reported that the student's emotional and behavioral functioning had been declining for nearly one year (id. at p. 5). The student's program at the NYCCC focused on improving his baseline depressive and ADHD symptoms (Parent Ex. B at p. 1).

NYCCC conducted a psychological evaluation of the student May 2020 (Parent Ex. B at pp. 3-4). Administration of the Wechsler Abbreviated Scale of Intelligence – Second Edition to the student yielded a full scale IQ in the very superior range, and the student achieved a reading composite standard score of 139, a math computation subtest standard score of 107 and a spelling subtest standard score of 140 on the Wide Range Achievement Test, Fourth Edition (id. at pp. 3-4). The June 1, 2020 evaluation report included a recommendation that, upon discharge from NYCCC, the student be placed in a residential treatment center because the student required a highly structured and supervised placement to maintain his safety, continue gains made during the hospitalization, and receive appropriate educational services (id. at pp. 5-6). According to the psychological evaluation report, the student's mother agreed with the recommendation and had initiated the process prior to the student's admission (id. at p. 6).

A CSE was convened by the district on June 5, 2020 to develop an IEP for the 2020-21 school year (ninth grade) with an implementation date of September 29, 2020 (Dist. Ex. 8 at pp. 1, 20). The June 2020 CSE found the student eligible for continued special education and related services but the student's disability category was modified to emotional disturbance, as the student's emotional state was deemed to be the predominate factor that adversely affected his

[3] In December 2019, the student spent 17 days hospitalized (Dist. Ex. 3 at p. 2). On March 28, 2020, the student was again hospitalized (Parent Ex. B at p. 1).

educational performance (id. at pp. 1, 4). The CSE noted that the student had numerous strengths which included having incredible artistic talent, being highly intelligent, academically capable, articulate, and able to comprehend new concepts with little difficulty (id. at pp. 3-5). The student was described as "extremely bright and academically capable" of meeting grade level standards but was generally not challenged by grade level material (id.). Additionally, the CSE determined that the student did not "need strategies, including positive behavioral interventions, supports or other strategies to address behaviors that impeded the student's learning or that of others" or a BIP (id. at pp. 6, 19).[4] Beginning September 29, 2020, the CSE recommended a 12-month 10:1+2 special class placement in a nonpublic residential program (id. at pp. 13, 14). The CSE also recommended that the student receive one 45-minute session per week of individual counseling services and one 45-minute session per week of counseling in a group setting (id. at p. 13).

On September 14, 2020, over an objection made by the student's mother, ACS placed the student at Rising Ground, a child care institution consisting of a residential treatment facility with an associated school (the Biondi School) that provides educational programming (Parent Ex. C at p. 1; Dist. Ex. 11 at p. 1).[5] While enrolled at the Bondi School, the student was frequently absent, failed to attend classes, did not complete assignments on time, and often received failing grades (Parent Ex. H at p. 1).[6] According to a social worker at Rising Ground, initially staff thought that "if [the student] bought into the program [at Rising Ground] things would be better for him"; however, he was "not willing to participate" and was "therefore not benefitting from anything being offered" (Parent Ex. D at p. 1).

A dispute ensued between ACS and the district regarding who was responsible for decisions associated with the student's residential and educational placements (see generally Parent Exs. C at p. 1; D at p. 1, E at pp. 1-4). On September 26, 2020, the district indicated that ACS had placed the student at Rising Ground and the parent did not provide notice of this placement to the district (Parent Ex. C at p. 1). According to the district ACS and the district could not both place the student and therefore, ACS became "the placing agency" (id.).

In February 2021, care of the student was transferred back to the parent at which time the district became responsible for the student's educational placement (Parent Ex. E at p. 4; Dist. Ex. 11 at p. 1). On February 11, 2021, the parent emailed the district's school psychologist stating that the student's placement at Rising Ground/the Biondi School by ACS had "proven extremely inadequate and detrimental to him" and requested that she be informed of any future CSE meetings (Parent Ex. F at p. 2). On February 24, 2021, the parent again informed the district school psychologist of Rising Ground's inadequacies and requested that the district "reopen [the student's]

[4] The March 26, 2020 social history update indicated that the student had a BIP involving the completion of schoolwork (Dist. Ex.; 3 at p. 2). However, the hearing record does not include a BIP.

[5] It appears that in September 2020, a CSE convened and recommended a residential placement for the student (see Parent Ex. E at p. 5; Dist. Ex. 11 at p. 1).

[6] The report card provided by the parent was stated to be for "21-22 Quarter 4"; however, it appears that this is a typographical error as the 2021-22 school year has not yet been completed (Parent Ex. H at p. 1).

case so we can begin searching for a more suitable residential treatment center that c[ould] provide the higher level of care he require[d]" (Dist. Ex. 11 at p. 1).

The CSE convened on March 17, 2021, to formulate an IEP for the student with an implementation date of May 25, 2021 (Dist. Ex. 15). Finding the student eligible for special education as a student with an emotional disturbance, the CSE recommended a 12-month 12:1+1 special class program in a New York State-approved nonpublic residential placement with one 30-minute session per week of individual counseling services and one 30-minute session per week of group counseling services (id. at pp. 1, 13-14, 19, 20). During the CSE meeting, the parent expressed that she felt Rising Ground was not meeting the student's needs because he was not completing academic work, was not engaging in the program, was eloping, did not get along with the staff, and was not compliant with his medications (id. at p. 20). The IEP noted that the student required a residential placement to address his social/emotional/behavioral needs; however, it was also noted that the student did not need a BIP or strategies to address behaviors that impeded the student's learning or that of others (id. at pp. 6, 21).

On August 2, 2021, practitioners at NYU Langone's Children's Hospital summarized their efforts to treat and support the student and parent, as well as provide a recommended course of treatment (Parent Ex. I at p. 1).[7] The student's psychiatrist and therapists recommended that the student attend a therapeutic wilderness program before returning to a therapeutic residential center (id. at p. 3). It was the position of these practitioners that no educational or treatment placement had been able to meet the student's academic, emotional, or behavioral needs (id. at p. 1). Additionally, they noted that "[w]ithout decisive intervention" the student "risk[ed] deteriorating in suboptimal treatment settings and falling irrecoverably off his academic and developmental course" (id.). On August 9, 2021, the student's parent notified the district of the therapeutic wilderness program recommendation, expressed disagreement with the student continuing placement at Rising Ground, and requested that the district assist with appropriately placing the student (Parent Ex. J at p. 1).

A. Due Process Complaint Notice

The parent filed a due process complaint notice on September 23, 2021, and, on the same date, filed a corrected due process complaint notice (Parent Ex. A).[8] In the corrected due process complaint notice, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20, 2020-21, and 2021-22 school years (see id. ¶¶ 1, 42).

Generally, the parent alleged that during the 2019-20 school year, when the student was in the eighth grade, he began to have academic and behavioral difficulties (Parent Ex. A ¶ 9). However, despite the student exhibiting behavioral difficulties, the district did not conduct a manifestation determination review, conduct a functional behavioral assessment (FBA), or

[7] According to the NYU practitioners, he had been seen there since sometime in 2015 (Parent Ex. I at p.1).

[8] The parent's initial due process complaint notice was not entered into the hearing record as evidence; any facts or information concerning the contents of the due process complaint notice have been drawn from the corrected due process complaint notice filed on September 23, 2021 (Parent Ex. A).

develop a BIP (id.). The parent alleged that during spring 2020, she requested that the CSE reconvene to consider a residential placement for the student, but ACS and the CSE could not agree as to who was the party responsible for making such placement (id. ¶ 17).

Specific to the June 4, 2020 CSE meeting, the parent alleged that the CSE changed the student's disability category to emotional disturbance and the recommended program remained deficient (Parent Ex. A ¶ 19). The parent argued that the June 2020 IEP did not recommend a BIP or a plan to prevent the student from eloping (id.). Additionally, the parent asserted that the IEP did not include supports to account for the student's superior intellect (id.). Rather, the parent asserted that the IEP confirmed that the student regressed by several years (id.).

The parent argued that the student's placement at Rising Ground during the 2020-21 school year was inappropriate (Parent Ex. A ¶ 20).[9] The parent asserted that on September 25, 2020, the district re-convened the CSE to formalize placement at an approved out-of-State residential school (id.). However, the district erroneously claimed it was no longer responsible for the student's educational placement, as ACS had already placed the student at Rising Ground (id. ¶ 22). The parent argued that the district directed the parent to address all questions and concerns to ACS, despite the parent's parental rights having never been terminated (id.). The parent asserted that the district acted erroneously and against guidance developed by ACS and the district, as the parent was the party who had authorization to accept and reject special education placements for the student (id.). The parent indicated that it was not until February 2021, after physical custody of the student was transferred back to his parent, that the district assumed responsibility for both the student's residential and educational placements (id. ¶ 25).

The parent asserted in her due process complaint notice that upon information and belief, the district had multiple discussions with ACS about the student's placement at Rising Ground, without including the parent (Parent Ex. A ¶ 22). The parent alleged that for some time the CSE refused to honor the parent's request for progress reports and educational records because ACS had physical custody of the student (id.). The parent alleged that the district merely asserted that it would close the student's case because the parent failed to provide relevant information about the student's placement, despite having actual knowledge of the placement made by ACS (id.). The parent argued that the district could have placed the student in a secure setting during the day, despite ACS establishing a placement for overnight care (id.).

The parent argued that the student's placement at Rising Ground and Biondi failed to confer any meaningful educational benefit to the student (Parent Ex. A ¶ 24). Specifically, within a few hours of arriving at Rising Ground, the student eloped from the campus and continued to do so with great frequency (id. ¶ 23). Additionally, the parent indicated that the student failed to attend classes, failed to participate in the school's related services, did not follow any school wide behavioral plans, and only passed music class (id. ¶ 24).

[9] The parent's due process complaint notice states that the student was placed by ACS at Rising Ground on or about September 10, 2021 (Parent Ex. A ¶ 20). However, the remainder of the evidence in the hearing record and the references by the parent, which appear to be in chronological order, demonstrate that the child began attending Rising Ground in September 2020 (Parent Ex. C at p. 1; Dist. Ex. 11 at p. 1).

The parent asserted that she agreed with the CSE's March 2021 recommendation to secure an appropriate placement in a year-round nonpublic residential program (Parent Ex. A ¶ 26). However, the parent asserted that the IEP failed to cure the defects that resulted from the student's educational placement while enrolled at Rising Ground (id.). Specifically, the parent alleged that the IEP improperly indicated that the student's behaviors did not interfere with his learning and did not require development of a BIP (id.). The parent also objected to the IEP not requiring a secure facility to prevent elopement (id.). The parent argued that the CSE failed to include the parent when attempting to develop annual goals and short-term objectives for the student (id.). Additionally, the parent alleged that the CSE offered related services at inadequate levels and frequencies (id.). The parent also asserted that the IEP was facially deficient because there was no specific information presented about which residential program the student would have attended (id.).

The parent asserted that the New Vision Wilderness program accepted the student and was appropriate because it could provide short term therapeutic acute treatment with academic support, that would prepare the student for longer term treatment and placement in a residential educational setting (Parent Ex. A at ¶ 30). Additionally, the parent asserted that the New Vision Wilderness program would provide instruction, supports, methodologies, supervision, and services specifically designed to meet the student's unique needs so that he could make meaningful academic progress (id. ¶ 36).

Therefore, as relief, the parent requested a finding that ordered the district to provide direct funding for the student's enrollment at the New Vision Wilderness program for the 2021-22 school year (id. ¶ 42). Additionally, the parent requested roundtrip transportation to the New Vision Wilderness program for the student, which was to include travel costs for specialized interventionists who could ensure that the student remained safe during his roundtrip travels (id. ¶¶ 40, 42). The parent also requested funding for her own roundtrip transportation to the New Vision Wilderness program for at least three family visits, costs of which would include airfare, carfare to and from the airport, and up to $325.00 per night for lodging and meals (id. ¶¶ 35, 42).

The parent asserted that such relief should be awarded because a balancing of the equities favored direct funding of the student's tuition for enrollment at the New Vision Wilderness program, along with the aforementioned requested relief (id. ¶ 38). Additionally, although the request to fund the student's enrollment at New Vision Wilderness was only for a portion of the 2021-22 school year, the parent requested a finding that the student would continue to need a 12-month program (id. at p. 9).

With regard to compensatory services, the parent requested that the IHO toll the statute of limitations for any compensatory claims associated with the 2019-20 and 2020-21 school years, so that the student could stabilize, his needs could be assessed, and the parent could raise such claims in the future (id.). Lastly, the parent requested additional relief as determined appropriate by the IHO (id.).

B. Events Post-Dating the Due Process Complaint Notice

On October 8, 2021, Rising Ground expressed concern to the parent that she could be reported for educational neglect due to the student's refusal to attend school at Biondi (Parent Ex.

K at p. 1). Subsequently, on October 19, 2021, the student was accepted into New Vision Wilderness, a program located in Wisconsin for students ages 11 to 17 and their families who have experienced trauma (Tr. p. 23; Parent Ex. N at p. 1). According to the director of admissions, New Vision Wilderness staff have experience working with children from New York City and those who have a full scale IQ above 125 (Tr. pp. 22-24, 32). The program has staff available 24 hours per day, seven days per week and takes precautions to address concerns regarding elopement (Tr. pp. 33-35). Additionally, the New Vision Wilderness program provides students with two hours of individual therapy every week, one hour of group therapy every week, and the opportunity to earn academic credit by way of classes taught by certified teachers (Tr. pp. 25, 27, 37; Parent Ex. N at p. 1). With regard to academics, when enrolled in this program the student would have an "alternative education" curriculum that was "experiential," "inquiry based, progressive in nature and student directed" (Parent Ex. N at p. 1). The student was to have the opportunity to gain a half credit in English, health, and physical education, but the credit amount received would be dependent on his effort (id.).

C. Impartial Hearing Officer Decision

An impartial hearing convened on October 26, 2021 and concluded on November 2, 2021 after two days of proceedings (Tr. pp. 1-66). During the hearing, both parties submitted exhibits; however, only the parent presented witness testimony (Tr. pp. 1-66). At the time of the hearing, the student was in the 10th grade and continued to be enrolled at Rising Ground (Tr. at p. 53). In a decision dated November 10, 2021, the IHO determined that because the district failed to challenge the parent's assertions, the hearing record established that the district failed to offer the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years, that the New Vision Wilderness program was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 13, 15-16).

As relief, the IHO ordered the district to reimburse and/or fund the cost of the student's tuition at the New Vision Wilderness program for the 2021-22 school year for a maximum of 100 days at a specified daily rate and enrollment fee (id. at p. 17). The IHO found that after the wilderness program was completed, the district was also required to fund a 12-month residential placement for the student for the remainder of 2021-22 school year (id.). With regard to transportation to and from the New Vision Wilderness program, the IHO granted costs including airfare and carfare, along with travel expenses for specialized interventionists who were to ensure safe roundtrip travel for the student (id.). Additionally, funding for the parent's roundtrip transportation to the New Vision Wilderness program for three parent visits for educational and/or family counseling purposes was granted, which included roundtrip airfare and carfare to and from the airport (id.). Specifically, such funding for the parent's visits was to include lodging and meals for up to four days per visit in an amount not exceeding $325.00 per night (id.). The IHO ordered that such costs and fees be paid within 15 days of submission of each invoice (id. at p. 18).

Lastly, as relief the IHO tolled the statute of limitations for compensatory service claims associated with the 2019-20 and 2020-21 school years (id.).

IV. Appeal for State-Level Review

The district appeals from that portion of the IHO's decision regarding compensatory services. Specifically, the appeal is limited to the issue of whether the IHO was correct to toll the applicable statute of limitations with regard to compensatory services claims so that the parent may bring another due process proceeding in the future associated with the claims related to the 2019-20 and 2020-21 school years.

The district argues that the IHO improperly tolled the two-year statute of limitations. The district alleges that the IHO's ruling constituted reversible legal error because the IHO did not have jurisdiction or a legal basis to issue an order tolling the statute of limitations with respect to possible future claims for compensatory education. The district argues that there are only two generally recognized exceptions to the statute of limitations for IDEA cases, but no facts were presented in this case that could result in a proper application of either. Even further, the district contends that the IHO had no authority to expand on the exceptions to the statute of limitations. The district argues that the parent's attorney only addressed the tolling of the statute of limitations in his closing statement and that a claim for compensatory education was not properly raised in this proceeding. According to the district, the parent could address arguments relating to the applicable statute of limitations at a future impartial hearing that would be scheduled in response to a subsequent due process complaint notice that specifically made a request for compensatory education.

The district alleges that the parent did not specifically raise any compensatory service claims in the due process complaint notice associated with the underlying impartial hearing, apart from requesting the aforementioned prospective tolling of the statute of limitations. The district also asserts that the parent did not amend her due process complaint notice to include such claims and the parent's attorney did not specify the substance of those claims during the impartial hearing. Even further, the district contends that it did not address any claims regarding compensatory services at the hearing and "did not open the door" for these issues to be addressed. Therefore, the district requests that the IHO's order be vacated to the extent that it relates to a claim for compensatory services that was not properly before the IHO.

In an answer, the parent responds with a series of factual admissions and denials, as well as an affirmative statement of facts. The parent asserts that the IHO was within her authority to order a prospective tolling of the statute of limitations. However, the parent asserts that if it is found that the IHO lacked the authority to toll the statute of limitations, the IHO had jurisdiction to order compensatory services because a request for compensatory education was implicit within the request to toll the statute of limitations. The parent further alleges that this request for compensatory relief, was raised timely. Additionally, the parent asserts that because the due process complaint notice also requested all relief which the IHO deemed appropriate, it was permissible for the issue of compensatory services to be ruled on by the IHO. Therefore, the parent alleges that an SRO has two alternatives if inclined to vacate the order tolling the statute of limitations for the prospective claims. Specifically, the parent asserts that an SRO could order compensatory services in the form of extending eligibility for residential programming for two years beyond the year the student turns 21 years of age or remand the matter for the IHO to hear additional evidence and arguments concerning a potential compensatory services award.

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).

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]).[10]

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).

[10] 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).

VI. Discussion

A. Preliminary Matters

1. Scope of Impartial Hearing

As a preliminary matter, it is necessary to determine whether the parent properly raised a request for compensatory education services as a part of the impartial hearing in this case. 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). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice 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]).

However, the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]).

Additionally, it may not always be necessary to raise every aspect of requested relief in detail in a due process complaint notice. With respect to relief (as opposed to alleged violations), State and federal regulations require that the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). Moreover,

an IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]). Describing the relief sought in as much detail as possible in the due process complaint notice helps the opposing party and IHO avoid misapprehension of the nature of the case and makes the IDEA's statutory 30-day resolution process more productive for parties who make meaningful efforts to use that dispute resolution mechanism effectively. While an award of relief not explicitly requested in a due process complaint notice may not be barred under some circumstances,[11] a party also should not delay until after the hearing is complete to articulate the relief sought (see A.K. v. Westhampton Beach Sch. Dist., 2019 WL 4736969, at *12 [E.D.N.Y. Sept. 27, 2019] [declining to address the parent's request for compensatory education that was raised for the first time in a post-hearing brief]). Such tactics significantly increase the likelihood that the IHO will lack an appropriate hearing record upon which to render a decision because of the party's delay in voicing the specific relief sought.

Turning to the arguments raised on appeal, the district asserts that the IHO lacked jurisdiction to address the parent's compensatory services claims because the parent did not raise the request in the due process complaint notice, except by requesting a preemptive tolling of the statute of limitations for future claims (Req. for Rev. ¶ 12). The district asserts that the parent did not amend her due process complaint notice to include any specific request for compensatory services and the district did not agree to address claims for compensatory relief at the hearing (id.). The district also argues that there is no evidence in the hearing record to establish that it opened the door to the issue of compensatory services to be addressed (id.).

To the contrary, the parent argues that she timely raised a request for compensatory relief because she requested that the IHO toll the statute of limitations for compensatory services and because the due process complaint notice included a request for "all relief the IHO deemed appropriate" (Answer ¶¶ 30-31). The parent further explains that the presentation of her claims for compensatory relief occurred without specificity because the appropriate compensatory remedy could not be defined at the time the due process complaint notice was filed as the impact of the denial of FAPE was ongoing (id. ¶ 32).

Although it is true that the parent's due process complaint notice did not specify the compensatory education services she was seeking as relief as part of this proceeding, it did request a tolling of the statute of limitations for future compensatory claims so that the parent could "raise them once [the student was] stabilized and his needs [could] be reassessed" (Parent Ex. A ¶ 42). Under these circumstances, it appears that the issue of compensatory relief was initially raised in the due process complaint notice to the extent known to the parent at that point in time. Accordingly, I find that such issues relating to crafting compensatory education services could have been raised during the impartial hearing and then properly considered by the IHO . However,

[11] If it appears that a party is or should be aware of the details of the relief sought and is merely withholding the information to obtain strategic advantage by surprising the opponent at the last minute, such sandbagging is strongly disfavored and may provide a reason to reduce or deny relief when weighing equitable considerations. There is nothing to indicate that the parent's delay in this case was merely as a litigation tactic and, therefore, I find nothing improper with the lack of specificity in the parent's mention of compensatory education in the due process complaint notice.

the more troubling aspect of the parent's request is that the parent thereafter continued to delay specifying the compensatory education sought for the student until after hearing the hearing process was concluded—to the point of bifurcating this proceeding from a potential future proceeding regarding damages, which is addressed in more detail below.

2. Scope of Review

With regard to this appeal, State regulations governing the practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

It must be noted that on appeal neither party challenges the IHO's findings that the district failed to offer the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years, that the unilateral placement of the student at New Vision Wilderness was appropriate for a portion of the 2021-22 school year, or that equitable factors supported the parent's requested relief. Additionally, neither party asserted any arguments on appeal relating to the specific relief ordered by the IHO regarding the student's placement at New Vision Wilderness for a maximum of 100 days, the travel associated with the student's enrollment, the parent's visits to the school, or the funding of a residential placement and program for the remainder of the 2021-22 school year. As such, those findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

As noted, the parent received relief for the 2021-22 school year, in the form of prospective placement of the student at New Vision Wilderness for a maximum of 100 days and then funding for placement of the student in a residential program for the remainder of the 2021-22 school year (see IHO Decision at p. 17). Accordingly, compensatory relief for the 2021-22 school year would not be an appropriate remedy in this matter (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "compensatory education is at issue only when tuition reimbursement is not"]; 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]).[12]

[12] 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]).

Therefore, the only issues remaining to be addressed relate to a potential compensatory education award for the 2019-20 and 2020-21 school years.

B. Preemptive Tolling of the Statute of Limitations

Having determined that the parent properly raised a request for compensatory education, I must next address the IHO's disposition of that request, in preemptively tolling the statute of limitations for a future proceeding seeking compensatory education as relief for a denial of FAPE for the 2019-20 and 2020-21 school years. The district appeals from the IHO's tolling of the statute of limitations, asserting that in issuing a determination on the statute of limitations for these claims, the IHO usurped the authority of the IHO that will be assigned to these claims in the future and that, in granting tolling, the IHO went outside of the two authorized exceptions to the statute of limitations. The parent counters that "[w]ithout tolling specifically concerning the compensatory relief, [the student] would have to either forfeit compensatory claims despite the conceded FAPE violation. . . or propose an arbitrary remedy in the hopes it proves relevant and useful in the future" (Answer ¶ 35). According to the parent an order tolling the statute of limitations is necessary for the parent to "to present a fact-based request for compensatory relief" (id. ¶ 37).

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2]; 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 Fed. App'x 56, 57 [2d Cir Feb. 11, 2014]; R.B. v. Dept. of Educ. of City of New York, 2011 WL 4375694, at *2, *4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]). New York State has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]). Determining when a parent knew or should have known of an alleged action "is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]; see K.C. v. Chappaqua Cent. Sch. Dist., 2018 WL 4757965, at *14 [S.D.N.Y. Sept. 30, 2018] [collecting cases representing different factual scenarios for when a parent may be found to have known or have had reason to know a student was denied a FAPE]). Exceptions to the timeline to request an impartial hearing apply if a parent was prevented from filing a due process complaint notice due to: 1) a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice, or 2) the district withholding information from the parent that it was required to provide (20 U.S.C.

Accordingly, unlike the Third Circuit, the Second Circuit's approach to compensatory education may leave room in 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). My view, such circumstances are exceedingly rare and certainly not present in this case.

§ 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]; R.B., 2011 WL 4375694, at *6).

Initially, neither party contends that the statute of limitations bars the parent from requesting compensatory education in this proceeding based on the claims the parent raised in the due process complaint notice. More specifically, in a September due process complaint notice, the parent raised allegations regarding the 2019-20, 2020-21, and 2021-22 school years (see Parent Ex. A). For example, for the 2019-20 school year, the parent alleged that the student should have received a manifestation determination review and an FBA and a BIP; however, they did not occur (id. at p. 2). While the date the parent knew or should have known about these claims undoubtedly occurred within two years prior to the filing of the due process complaint notice on September 23, 2021, if the parent is required to file another due process complaint notice, regarding these same claims, the date that the parent knew or should have known of these claims may end up being outside of the two years prior to the parent's future due process complaint notice.

Accordingly, the pre-emptive tolling of the statute of limitations in this case appears to be an attempt to partially bifurcate the impartial hearing to determine liability on the parent's allegations related to a denial of FAPE for the 2019-20 and 2020-21 school years and then separately address compensatory damages, despite the fact that the allegations of a denial of FAPE upon which the compensatory relief would be based were known to the parent at the time of filing.

Turning to the IHO's decision, the IHO's finding that the statute of limitations be tolled for the compensatory services claims for the 2019-20 and 2020-21 school years was made without explanation or analysis (IHO Decision at p. 18). Although the IHO did not provide a reason for preemptively tolling the statute of limitations, this may have been done in response to the request made by the parent's attorney during closing arguments to delay a finding to allow the student to stabilize and to identify the compensatory services he needed (see IHO Decision; Tr. p. 63). Additionally, the IHO may have based her decision upon consideration of the parent's attorney's argument that the student's condition at that time would not have allowed for the implementation of compensatory relief, if it had been ordered (Tr. p. 63). However, the IHO did not elaborate on her reasoning, which is troublesome as the IHO cited no evidence or legal authority to support her directive.

In attempting to bifurcate the due process proceeding addressing parent's allegations of a denial of FAPE for the 2019-20 and 2020-21 school years from a due processes proceeding addressing compensatory relief, the IHO—with the encouragement of the parent—in essence, followed the same course of other IHOs who did the same thing while labeling the compensatory educational services "unripe" for review—a result that has routinely been reversed on appeal and remanded, at times, back to IHOs for further proceedings (see Application of a Student with a Disability, Appeal No 21-228; Application of a Student with a Disability, Appeal No. 21-120; Application of a Student with a Disability, Appeal No. 21-104; Application of a Student with a Disability, Appeal No. 19-038; Application of a Student with a Disability, Appeal No. 18-135). While the analysis of compensatory education claims may, at times, feel like a speculative assessments of future educational needs, it has been held that, since the injury has been done, the issue is ripe for review (see Lester H. v. Gilhool, 916 F.2d 865, 868 [3d Cir. 1990]). Specifically,

under the IDEA, a cause of action accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint (Somoza, 538 F.3d at 114-15 & n.8).

Here, the IHO was apparently reluctant to calculate an award of compensatory services without knowing if and how the student would stabilize within the program outlined in the IHO's final decision. Similar hesitancy has been addressed and acknowledged in prior State level review decisions, when an IHO declined to calculate a compensatory services award without independent educational evaluations (IEEs) or being aware of how the student would fair in a nonpublic school placement (see Application of a Student with a Disability, Appeal No. 21-120; Application of a Student with a Disability, Appeal No. 21-104; Application of a Student with a Disability, Appeal No. 19-038; Application of a Student with a Disability, Appeal No. 18-135). Such reticence in calculating a compensatory education award without the benefit of having recently ordered IEEs has been deemed understandable, as the additional evaluative information may offer insight into what position the student would have been in had the district complied with its obligations under the IDEA and provided the student with the special education services the student should have received (Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005]; see Newington, 546 F.3d at 123). However, as I recently noted in a matter involving a similar situation as the one presented here, a procedural conundrum was created by the issuance of a final decision that failed to resolve all of the disputed issues and instead allowed the parties to return to due process a second time for review of a claim for compensatory education (Application of a Student with a Disability, Appeal No. 21-228).[13] With that in mind, it was even more ill-advised to order the tolling of the statute of limitations for an indeterminate period of time so that the parties in this matter might continue in a similar direction in a future duplicative due process proceeding.

[13] The district's assertion that the parent would not be prohibited from raising compensatory services claims associated with the 2019-20 and 2020-21 school years in the future is concerning because res judicata could very well prevent the parent from bringing such claims. In fact, "[i]t is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6). Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013]). As the prospect for a future due process proceeding for which the tolling of the statute of limitations would apply would essentially just be an assertion of compensatory damages based on the same allegations of a denial of FAPE as were raised in this proceeding, it is entirely possible a fact finder could determine that the principles of issue or claim preclusion could apply. Additionally, to the extent that it may be asserted that the IHO did not issue a "final" decision on the issues presented in this proceeding, it is axiomatic that an IHO's decision is final unless appealed to a State Review Officer (20 U.S.C. §1415[i][1][A]; 34 CFR 300.514 [a]; 8 NYCRR200.5[j][5][v]).

Rather than taking the approach she did, the IHO could have made an attempt to analyze the evidence in the hearing record in order to compute a compensatory education award; although, such an attempt without the benefit of the parties submitting any arguments as to what an appropriate award may have consisted of would have created a foreseeable and avoidable dilemma. In order to avoid such a situation, the IHO is responsible for ensuring that there is an adequate and complete hearing record (see 8 NYCRR 200.5 [j][3][vii]). To that end, the IHO could have directed the parties to brief the issue of compensatory education, she could have required the parties to submit additional evidence to support the request for compensatory education, or she could have ordered IEEs in an interim decision, while explaining that it was up to the parties to request extensions of time of the decision due date, allowing the IHO to reach a conclusion on compensatory education services on the merits in this proceeding (see Butler v. District of Columbia, 275 F. Supp. 3d 1, 5 [D.D.C. 2017] ["A hearing officer who finds that he needs more information to make such an individualized assessment [of needs for compensatory education due to denial of FAPE] has at least two options. He can allow the parties to submit additional evidence to enable him to craft an appropriate compensatory education award …. or he can order the assessments needed to make the compensatory education determination"]).

Additionally, it would have been appropriate for the IHO to take into account the prospective program that she ordered the district to implement when calculating a compensatory education award (see Demarcus L. v. Bd. of Educ. of the City of Chicago, 2014 WL 948883, at *8 [N.D. Ill. Mar. 11, 2014] [denying compensatory education partially due to the prospective revisions to the student's IEP]). Likewise, it is understandable that the IHO would consider the student's tolerance for services and instruction before calculating an award (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [SDNY Mar. 30, 2017] ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). However, rather than supporting the IHO's determination to refrain from making a decision about compensatory education, these considerations could have weighed in the IHO's decision about what compensatory education award would have been appropriate.

Accordingly, the IHO erred in tolling the statute of limitations associated with potential claims relating to compensatory services for the 2019-20 and 2020-21 school years. Rather, the IHO should have evaluated the request by having the parties brief their respective positions and by either allowing the parties to submit additional evidence or by conducting an analysis of the information already in the hearing record to compute an appropriate award given the information presented.

VII. Compensatory Services as Relief

Having determined that the parent's request for compensatory education should have been resolved in this proceeding, a determination must be made as to whether an appropriate award for compensatory education can or should be made at this point in the proceeding with the evidence available in the hearing record or whether this matter should be remanded for further record development.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, the regulatory scheme currently provides that a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are 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. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d at 109 n.2, 113 n.6; 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]).

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]). 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]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). 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"]).

As stated above, neither party presented any position to the IHO as to what an appropriate form of compensatory relief would have been for the denial of FAPE the IHO found for the 2019-20 and 2020-21 school years. Instead of ensuring that the hearing record was properly developed as to the contours of an appropriate compensatory remedy, the IHO avoided making a ruling with regard to compensatory services by simply granting the parent's request to toll the statute of limitations for a future claim for relief based on an already determined denial of FAPE (id. at p. 17).

When an IHO has not addressed claims set forth in the due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10 [c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]). In order to avoid a remand, there needs to be sufficient information in the hearing record to support an appropriate award. Specifically, in order to compute an award of compensatory education, the parties must present evidence regarding the student's specific educational deficits resulting from the denial of FAPE and the parties' positions about what specific compensatory measures are needed to best correct those deficits (see Reid, 401 F.3d at 526). Accordingly, the adjudicator needs to know the following: what services (type, frequency, and duration) the student should have received as part of a FAPE, what services the student actually received, and what proposed remedy might enable the student to make the progress he or she should have made had appropriate services been provided.

It is clear from the record that during the impartial hearing, the only specific reference to compensatory services occurred when the parent's attorney presented a closing statement. At that time, the attorney specifically stated as follows:

> the parent has asked for tolling of the statute of limitations so that [the student] is stabilized, which we all very much hope, if, in fact, he does require any kind of compensatory services, that he can only benefit from and can only be identified once he is stabilized, that the parent is able to raise those, as needed, without having waived those, because he is not currently stable enough to – be able to identify or implement any kind of compensatory relief at the present.
>
> (Tr. p. 63).

While counsel for the parent states understandable concerns about the student's level of well-being and stability in his current placement, the student's current placement is only one factor in a compensatory education determination, which rather than looking forward as is requested by

the parent, requires a more thorough review of the student's prior educational history—what services the student received and what services the student should have received, and what future remedial services can be provided to that would likely make up for the difference in outcome between the two. Counsel for the parent's closing statement provided no details as to the compensatory services that the student may need or be able to utilize. Additionally, according to the parent the "very damage wrought by [p]etitioner's FAPE violations has resulted in such significant harms, some of which are still ongoing, that the appropriate compensatory remedy cannot yet be defined" (Answer ¶ 32). However, the harms at issue in this proceeding, the denial of FAPE for the 2019-20 and the 2020-21 school year are no longer ongoing and, as discussed above, the parent received the relief she requested for the 2021-22 school year. Accordingly, although it may have been difficult to ascertain a specific remedy right at the outset, the denial of FAPE occurred years into the past, and at the time of the IHO's decision enough information could have been gathered to determine the parameters of an appropriate award—especially considering the student's placement for the 2021-22 school year was directed by the IHO and could have been considered in determining a remedy. Therefore, any further delay in determining an appropriate compensatory award would not serve the purpose of a compensatory education remedy, which is to place the student in the position he would have been but for the denial of a FAPE. The parties and IHO must make the fact specific inquiry now and develop their viewpoints regarding a prospective plan of compensatory education to be ordered by the IHO which is based upon the information reasonably available at the time it is created, but the outcome of that compensatory education plan not guaranteed because it too is prospective in nature, similar to the way the CSE planning process is prospective in nature and does not guarantee a specific result (see B.L. v. New Britain Bd. of Educ., 394 F. Supp. 2d 522, 537 [D. Conn. 2005] [explaining that "[n]either the statute nor reason countenance "Monday Morning Quarterbacking" in evaluating the appropriateness of a child's placement]).

Although neither party has offered a proposed solution at this juncture, a review of the hearing record is necessary to determine whether there is sufficient information to craft an appropriate compensatory education award.

With regard to the student's specific educational deficits, the evidence in the hearing record shows that the student's behavioral and emotional needs have prevented him from participating in and receiving educational services (Tr. pp. 42-45, 58, 60; Parent Ex. B at pp. 4-5; Dist. Exs. 1 at pp. 5, 7; 7 at p. 3; 8 at pp. 3-4). Additionally, the parent alleges that the student's IEP for the 2020-21 school year confirms that the student regressed by several years as his instructional and functional levels decreased from 12th grade to 9th grade in both reading and math (Parent Ex. A ¶ 19). She testified at the impartial hearing that in May 2020 when the student was in the 9th grade, test results revealed that he was at a 12th-grade level in math and at a college level for English language arts (Tr. pp. 58-59). However, according to the parent, "in one year, [the student has] regressed. He's not—he was not attending school. He did not attend during the pandemic, because it was remote. He was leaving the program. He was out there doing his thing, wasting time" (Tr. p. 59). The parent testified that "[t]here is nothing [the student] cannot do when he sets his mind to it" (id.). However, she indicated that he needed "to be reengaged," "brought back," and provided with help (id.).

Although the IHO's now-final determination that the district denied the student a FAPE alludes to the student's behavioral needs having been inappropriately managed in the past, the hearing record contains minimal information regarding what additional services (type, frequency, and duration) the student should have received as part of a FAPE.[14] The IEPs submitted into the hearing record provide insight into the educational program that was recommended for the student for the years at issue (see generally Dist. Exs. 1; 8; 15). However, the evidence in the hearing record shows that the student was routinely absent and absconded from his placements for extended periods of time, which interrupted the educational services he would have received (Tr. p. 56; Parent Ex B at p. 1.; G at p. 1; H at p. 1; I at pp. 1-2; K at p. 1; Dist. Ex. 3 at pp. 2-3). Further, at times the student has refused counseling services, stopped his medication regime, and eloped from educational settings (Parent Ex. I at p. 2; Dist. Exs. 3 at p. 3; 4 at pp. 1, 3; 5 at p. 1). Therefore, the hearing record does not necessarily provide a complete picture as to what services the student received during the school years at issue.

Moreover, the specific compensatory remedy needed to place the student in the position he would have been in if appropriate services had been provided is not apparent. The parent asserts that the student attending a wilderness program "has the potential to save his life and it has the potential to get him to reengage in his future and take charge, acknowledge that he has issues that he needs to work on, and reengage in therapy, consider taking his medication, again. And be successful" (Answer ¶ 32). Although extensive recommendations were made with regard to the student's treatment in a therapeutic wilderness program, the hearing record failed to identify specific academic or other services that the student needed to remedy the denial of FAPE (Parent Ex. I at pp. 2-3).

Other than the student being placed in a therapeutic wilderness program and becoming compliant with his therapeutic interventions, there were no specific educational objectives or other services related to his learning that were identified as a remedy for the denial of FAPE. For example, in an August 2, 2021 letter, the student's treatment team described the student's deteriorating condition over the prior 18 months and included a lengthy recommendation for immediate placement in a wilderness program as a prerequisite before returning to an academically challenging residential placement (see Parent Ex. I). One of the psychologists who authored the report testified that "broadly speaking, [the student] needs a school environment that will engage him" and be appropriate for his behavioral, emotional, and academic needs because "when he's under engaged, he really struggle[d]" (Tr. p. 42). Similarly, the psychologist testified that the student did best in school when the curriculum was "more, rather than less challenging" (id.). However, if the student was not placed in a wilderness program, the student would have continued to have low engagement (Tr. p. 49).

[14] As describe above, there was confusion regarding which public agency was responsible to provide for the student's placement or educational services. There has been confusion in similar cases when a social services district has placed a child outside the home due to extenuating circumstances and each situation requires careful consideration of the facts and state law (see, e.g. Application of the Bd. of Educ., Appeal No. 16-055); however, that point has become moot in this case because the district did not challenge the IHO's determination that the district was responsible for all of the student's placements, and I will not address the matter further in light of the district's willingness to accept that result in this instance.

For the first time in the parent's answer on appeal, she identified the specific compensatory education she is seeking as relief. The parent requests that in the event that an SRO vacates the IHO's order to toll the statute of limitations on future claims, the SRO should order compensatory education in the form of the student's extended eligibility for residential programming for two years beyond the year in which the student turns 21 or remand the case to the IHO so that additional evidence and arguments could be heard concerning potential compensatory remedies (Answer ¶ 37).

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]).[15]

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).[16] 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

[15] 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]).

[16] 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]).

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).[17] 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 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 in mind, at this point in the student's education, an award of extended eligibility as a form of compensatory education is premature. The student is still eligible for special education, and provided he does not graduate from high school with a local or Regents diploma, he may continue to be eligible for special education until after the school year in which he turns 21 years of age.[18] The more appropriate course is to limit review in this matter to remediation of past harms that through the further development of a hearing record as to an appropriate compensatory award.

The testimony of the parent's witnesses and the documentation submitted into the hearing record by both parties paint an incomplete picture of how the student was affected by the denial of FAPE, the services the student should have received as part of a FAPE, and the services the student actually received. Not only did the district fail to present any witness testimony, but it also did not question the parent, or provide a closing statement, thereby failing to offer any arguments regarding the student or any explanation of the efforts the district had made. The parent's attorney

[17] 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).

[18] Recent clarifications of the interaction between IDEA and eligibility for a public education under State law may actually result in eligibility until a student's 22nd birthday in some cases (see A.R. v. Connecticut State Bd. of Educ., 5 F.4th 155 [2d Cir. 2021]).

argued during the hearing, that it was desired for the student to be provided with time so that his condition could possibly stabilize before identifying any compensatory services necessary for the student, making it unclear as to what measures were needed to best correct any alleged deficits. Although deferring a ruling regarding compensatory relief was improper, there is insufficient information in the hearing record to correct the error by formulating an award at this level. The hearing record falls markedly short with regard to establishing the type and the appropriate amount of compensatory education the student should have received for the denial of FAPE, so additional evidence is necessary to formulate a compensatory education award, if any, for the period at issue. Accordingly, the matter must be remanded back to the IHO for further proceedings.

Upon remand, the parties must describe their views, based on a fact-specific inquiry set forth in an evidentiary record, as to what form of a compensatory education remedy would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524). Moreover, to ensure a complete development of the hearing record, the IHO may direct the parties to present evidence. In particular, service-delivery records may be useful to demonstrate what services the student received. Although the record is clear that the student received some instruction during the school years at issue, additional fact development regarding what services were delivered to the student would assist in determining an appropriate award.

The IHO may direct the parties to present evidence supporting their respective positions at the hearing. Specifically, the parent should articulate for the IHO how much and what form of compensatory education she seeks, as well as the specific time period the services are being requested to cover. Additionally, the parent should state the period of time she is seeking for the student to be able to use any such compensatory education award. Further, information regarding the student's present ability to use the compensatory education services being sought may be needed based on the student's history of refusing to participate in both therapeutic and educational services, and whether any additional services may be able to help address the student's refusal to participate in therapies and programming.

VIII. Conclusion

As described above and held in prior State level review decisions, the practice of bifurcating a parent's complaint into separate proceedings for liability and for damages, essentially deferring the issue of relief into a future due process proceeding is not proper (see Application of a Student with a Disability, Appeal No. 21-228). Accordingly, the IHO's decision tolling the statute of limitations with the expectation that the parent would seek compensatory education in the future is without legal support and is procedurally incorrect. Based on the foregoing, the IHO's determination to toll the statute of limitations for possible future compensatory services claims associated with the 2019-20 and 2020-21 school years must be reversed. However, the evidence in the current hearing record does not provide an adequate basis to calculate an appropriate award of compensatory education, if any. Therefore, this matter is remanded for reconsideration by the IHO upon further development of the hearing record and in accordance with this decision. Upon remand, the parties should be prepared to present arguments and any factual evidence relevant to the parent's request for compensatory services for the student.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated November 10, 2021, is modified by reversing that portion which tolled the statute of limitations for compensatory service claims for the 2019-20 and 2020-21 school years; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO to reconvene the impartial hearing and issue a determination regarding what, if any, compensatory services are necessary to remediate the denial of FAPE for the 2019-20 and 2020-21 school years**.**

Dated: Albany, New York
February 2, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER