The University of the State of New York

The State Education Department
State Review Officer
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No. 22-154

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by John Henry Olthoff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which dismissed her request to be reimbursed by respondent (the district) for her son's tuition costs at the International Academy for the Brain (iBrain) for the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has been the subject of prior administrative proceedings, which resulted in unappealed IHO decisions pertaining to the 2018-19 through 2020-21 school years and the 2021-22 school year (dated July 19, 2021 and February 8, 2022, respectively) (Tr. pp. 31, 59; Parent Exs. C; E).

According to the parent, the student began attending iBrain in February 2021 (Parent Ex. A at p. 3).

In the unappealed IHO decision dated July 19, 2021 (July 19, 2021 IHO decision), the IHO found that the district denied the student a free appropriate public education (FAPE) for the 2018-

19, 2019-20, and 2020-21 school years, that the need for compensatory education was "patently obvious," and that "gross violations" of the IDEA had occurred and the student was "eligible for compensatory services beyond the age of twenty-one" (Parent Ex. E at pp. 5-7). The IHO further determined that the student was "entitled to compensatory services in an amount to be determined by an Independent Educational Evaluation [(IEE)] but not to exceed three (3) years" (id. at p. 8). With respect to the 2020-21 school year, the IHO found that unilateral placement of the student at iBrain was appropriate and equitable factors favored the parent, entitling the parent to district funding of the student's tuition at iBrain for the 2020-21 school year (id. at pp. 8-9). The IHO ordered that the student "shall have an[] [IEE]conducted by a professional of the [p]arent's choosing to determine what if any changes must be made to the [s]tudent's IEP as well as the extent of Compensatory Education he is to receive to be paid for by the [district]"; that the student "receive Compensatory Education in an amount to be determined by an [IEE] but not to exceed three (3) school years and such education is to extend past the age of twenty-one (21) if necessary"; and that the district fund the cost of tuition for the 2020-21 school year at iBrain, as well as the cost of an "Assisted Technology Device and Assisted Communication Devices necessary for the [student] to access the curriculum at [iBrain]," and transportation including a 1:1 paraprofessional (id. at p. 10).

An independent neuropsychological evaluation was conducted in October and December 2021 (Parent Ex. J at p. 2).[1]

The student turned 21 years of age during the 2021-22 school year (see Parent Ex. F at p. 1).

A CSE convened on January 20, 2022 and developed an IEP for the student (Parent Ex. G).[2]

In an unappealed IHO decision dated February 8, 2022 (February 8, 2022 IHO decision), the same IHO who presided over the prior proceeding found that the district denied the student a FAPE for the 2021-22 school year and, finding iBrain appropriate and that equitable considerations favored the parent, ordered the district to fund the cost of the student's tuition for the 2021-22 school year at iBrain, as well as the cost of assistive technology, transportation, and a 1:1 paraprofessional (Parent Ex. C at pp. 4-8).

On June 14, 2022, the parent executed an enrollment contract with iBrain for the 2022-23 school year commencing July 6, 2022 (Parent Ex. H). On June 16, 2022, the parent entered into a school transportation service agreement with Sisters Travel and Transportation Services, LLC, effective from July 1, 2022 through June 30, 2023 (Parent Ex. I).

[1] The hearing record does not include a copy of the evaluation report; however, it is referenced in the student's IEP developed at a June 21, 2022 CSE meeting (see Parent Ex. J at pp. 2-3, 63).

[2] According to a prior written notice dated March 7, 2022, a CSE convened on January 20, 2022, determined the student was eligible for special education services, and developed an IEP for the student (Parent Ex. G). The hearing record does not include the IEP generated as a result of the January 2022 CSE meeting.

In a June 17, 2022 letter, the parent notified the district that she disagreed with the CSE's recommended program and placement for the student for the 2022-23 school year "as outlined in the IEP dated 03/8/22 and school location letter issued on 03/7/2022" in the district's specialized school program as it would "not appropriately address his educational needs for the 2022-2023 extended school year" (Parent Ex. B at p. 1).[3]

A CSE convened on June 21, 2022 to develop an IEP for the student with an implementation date beginning on June 21, 2022 and ending on June 30, 2022 (Parent Ex. J at pp. 1, 53-55, 60). Finding the student eligible for special education as a student with multiple disabilities, the CSE recommended an 8:1+1 special class placement in a specialized school with the related services of individual occupational therapy (OT), physical therapy (PT), speech-language therapy, and vision education services all for 60-minute sessions four times per week, as well as one 60-minute session of group speech-language therapy (group of 2) per week, and four 60-minute sessions of group parent counseling and training per year (id. at pp. 1, 53-54, 60). The CSE also recommended a full-time 1:1 paraprofessional daily for health and ambulation, as well as assistive technology devices and services consisting of adapted paper, a slant board, a tablet with the support of a dynamic display speech generating device and mount and two 60-minute sessions of assistive technology services per week (id. at pp. 54-55). The student's IEP stated, under the "Measurable Postsecondary Goals, Education/Training" section, that "[u]pon completing school-age services, [the student] w[ould] participate in a day habilitation with a vocational component" and "complete school with a Skills and Achievement Commencement Credential (CDOS)" (id. at p. 34). This section of the IEP also included a note that [t]here [wa]s a hearing order extending his services for three additional years past 21" (id.). The CSE also included notes within the student's present levels of performance and under the "Parent Concerns" section of the IEP that the CSE "also discussed a[n] understanding that [the student]'s hearing order mandated services until age 25" but that "there [wa]s a computer issue which autogenerate[d] termination dates in the IEP for 6/30/22"; according to the IEP, the district members of the committee would "request[] clarity on this from CSE leadership and w[ould] inform parent/school once new guidance [wa]s received" (id. at pp. 22, 63).

A. Due Process Complaint Notice

In a due process complaint notice dated July 6, 2022, the parent asserted that the district denied the student a FAPE for the 2022-23 school year (Parent Ex. A). Initially, the parent requested pendency for the student, asserting that the basis for pendency lay in an unappealed IHO determination dated February 8, 2022 that awarded payment of tuition and related services at iBrain, along with special transportation during the 2021-22 school year (id. at pp. 1-2). Turning to the substance of the parent's complaint, the parent argued that the district failed to evaluate the student in all areas of suspected need, failed to conduct appropriate and timely evaluations, failed to mandate sufficient related services to prevent regression and confer meaningful benefit to the student, failed to develop appropriate IEPs, denied the parent meaningful participation in the IEP development process, predetermined the outcomes of the January 20 and June 21, 2022 IEPs, failed

[3] The hearing record does not include an IEP developed in March 2022; however, as noted above, it does include a prior written notice and school location letter dated March 7, 2022, that summarized the recommendations of the January 2022 CSE and identified a public school location for the student to attend to receive the services identified on the January 2022 IEP (Parent Ex. G).

to implement the student's IEPs, and failed to recommend an appropriate public school location for the student (id. at pp. 6-8). As relief, the parent requested an order declaring that the district denied the student a FAPE for the 2022-23 school year and that iBrain was an appropriate placement; directing the district to pay for the student's tuition, related services, and a 1:1 paraprofessional; directing the district to pay for special education transportation including a 1:1 transportation nurse and/or paraprofessional; directing the district to reconvene a new CSE meeting within 60 days; and directing the district to conduct all necessary evaluations within 30 days (id. at p. 9).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing before the Office of Administrative Trials and Hearings and a different IHO than the IHO who presided over the prior impartial hearings was assigned to the matter. The IHO conducted a prehearing conference on August 16, 2022, as well as a hearing date on the issue of pendency on August 23, 2022 (see Tr. pp. 1-42). In an interim order on pendency, dated August 23, 2022, the IHO found pendency lay in the unappealed IHO decision dated February 8, 2022 and ordered the district to fund pendency retroactive to July 6, 2022, the date of the due process complaint notice, including tuition at iBrain, special transportation to and from the student's home, and related services including a 1:1 paraprofessional (Interim Order on Pendency).

Hearing dates devoted to the merits took place on September 19, 2022 and September 23, 2022 (see Tr. pp. 43-208). At the impartial hearing on September 19, 2022, the district raised a "threshold issue" asserting that it was "a condition precedent that the student [wa]s within the statutory age range to attend school in order to be eligible" for tuition reimbursement and that the student had "aged out" of special education eligibility at the end of the school year in which he turned 21, the 2021-22 school year, that the prior IHO decision for the 2021-22 school year did not address extended eligibility because the student was still eligible, and that the IHO decision for the 2020-21 school year which "contemplate[d] compensatory education" beyond age 21 delegated that determination to an IEE and did not order extended eligibility (Tr. pp. 46-49). The IHO paused the hearing to consider the issue of jurisdiction after discussing the issue on the record with the parties and ultimately determined to continue with the hearing, allowing the parent to finish presenting her case and the district to make any arguments regarding extended eligibility on the record, as well as in closing briefs; however, the IHO denied the district's request to submit documentary evidence as the five-day disclosure rule date had already passed (Tr. pp. 49-74).[4]

[4] In the parties closing briefs, the district argued, among other things, that the IHO lacked jurisdiction in the matter, no prior order had extended the student's eligibility for a FAPE, the parent had already litigated and chosen her remedy for all periods beyond the student's age-out date of July 1, 2022, and therefore the matter could not be reopened (IHO Ex. II). The parent argued that the district denied the student a FAPE for the 2022-23 school year, iBrain was appropriate, the student was eligible for services during the 2022-23 school year, the CSE agreed that the student was eligible until age 25 and did not provide written notice of the student's aging out, the issue of the student's extended eligibility was already litigated and subject to the principle of res judicata, the district's motion regarding the IHO's jurisdiction was untimely, the student was eligible for three years of compensatory tuition at iBrain past the age of 21, and equitable considerations weighed in favor of an award of tuition funding (IHO Exs. II-III).

In a final decision dated October 12, 2022, the IHO dismissed the parent's due process complaint notice with prejudice finding that she lacked the authority to hear the case or to grant the relief requested on the basis of extended eligibility, earlier IHO orders, Chapter 223 of the Laws of 2022, or the June 2022 IEP, as the student had no right to a FAPE for the 2022-23 school year (IHO Decision at pp. 3-11). Specifically, the IHO first indicated that she could not find any authority in any jurisdiction that "extended eligibility" included the right to file a due process complaint notice under the IDEA or New York law where the alleged violations of the right to a FAPE related to a school year after the student's right to statutory protections had ended, and further indicated that she agreed with SRO and federal court decisions finding that compensatory education is not an extension of the IDEA itself (id. at p. 5). As the student turned 21 during the 2021-22 school year, which "ended on June 30, 2022," the parent filed the due process complaint notice on July 6, 2022 with respect to the 2022-2023 school year, the parent sought and obtained compensatory education for past denials of FAPE related to the 2018-19, 2019-20, and 2020-21 school years as well as tuition reimbursement for the 200-21 and 2021-22 school years, the IHO found that any obligation of the district to provide educational services to the student during the 2022-23 school year originated from the July 19, 2021 IHO decision and that she had no authority to grant the requested relief based on "extended eligibility" (id. at pp. 6-7).

Next, the IHO considered extension of the student's eligibility under Chapter 223 of the Laws of 2022, which allowed for the continuation of educational services in the 2022-23 and 2023-24 school years for students who turned 21 during the 2021-22 school year until such time as those students completed their IEPs or turned age 23, whichever occurred sooner, finding that the law did not provide a basis for the IHO to order relief because the statute was not mandatory, the student was not enrolled in the school district and was not receiving services under an IEP during the 2021-22 school year, and the student was not seeking compensatory relief for ongoing negative impacts of COVID-19 as contemplated by the law (id. at pp. 7-8).

Finally, with respect to the parent's argument that the CSE "agreed" that the student was eligible for special education services until age 25, the IHO found that the June 2022 IEP could not be interpreted as creating statutory rights such as making the student eligible for a FAPE for the 2022-23 school year (id. at pp. 8-9). In particular, the IHO referenced the language included in the IEP indicating that a hearing order mandated services until the student attained the age of 25 and found that the July 19, 2021 IHO decision delegated the specifics of the compensatory education award to an IEE, that a copy of the evaluation report was not included in the hearing record, and that the CSE did not explain what services they understood the 2020-21 IHO decision mandated (id. at p. 9). In any event, the IHO concluded that the July 19, 2021 IHO decision did not order the district to continue developing IEPs for the student and that if the district did not comply with the evaluator's recommendations for compensatory education, then the parent's remedy would have been to seek enforcement of the July 19, 2021 IHO decision (id. at pp. 9-10).

IV. Appeal for State-Level Review

The parent appeals and alleges that the IHO erred by finding that the student was not eligible for a FAPE during the 2022-23 school year. Specifically, the parent contends that the IHO erred in: crediting the district's claim that the student had "aged out" of eligibility for special education services; finding the student became ineligible for special education services at the end of the 2021-22 school year; finding that an obligation to provide educational services to the student

during the 2022-23 extended school year originated from the July 19, 2021 IHO decision, which found that the student was entitled to compensatory education, "and not the IDEA"; and failing to find the student remained eligible for special education services for the 2022-23 school year. Additionally, the parent asserts that the student qualified for a FAPE until age 23 pursuant to Chapter 223 of the Laws of 2022. The parent notes that, after the student turned 21 years of age, the district convened the January 2022 CSE meeting, sent the parent a March 2022 prior written notice and school location letter, and convened the June 2022 CSE meeting. According to the parent, those actions, along with a failure to respond to the parent's June 17, 2022 letter or notify the parent that the student had aged out of eligibility until after the parent placed the student at iBrain, indicated that the district intended to exercise its discretion to provide the student with a FAPE for the 2022-23 school year. Further, the parent asserts that the IHO erred in finding that the student did not qualify under the plain language of the statute because he was not receiving services under an IEP. The parent asserts that the student was entitled to public funding for his placement at iBrain for the 2022-23 school year because the IEP and location offered by the district were not appropriate, iBrain was appropriate, and equitable considerations weighed in favor of an award of relief.

In an answer, the district requests that the IHO decision be upheld and the parent's appeal be dismissed with prejudice. First, the district asserts that the IHO "carefully analyzed the potential sources of FAPE entitlement for the 2022-23 school year" including extended eligibility, the July 19, 2021 IHO decision, Chapter 223 of the Laws of 2022, and the district's actions, and properly held that none provided the student a right to a FAPE for the 2022-23 school year. In the alternative, the district contends that the parent did not meet her burden to prove that iBrain was an appropriate program and placement and that equitable considerations do not favor relief.[5]

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

[5] The parent prepared, served, and filed a reply to the district's answer in this case. However, State regulation limits the scope of the parent's reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent triggering the parent's right to file a reply. As such, the parent's reply fails to comply with the practice regulations and will not be considered.

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]).[6]

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

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

VI. Discussion

Initially, the IDEA provides that a FAPE is available to all children with disabilities . . . between the ages of 3 and 21, inclusive (20 U.S.C. § 1412[a][1][A]). "Inclusive," in this provision, has been interpreted to indicate that a child remains eligible for a FAPE under the IDEA until his or her 22nd birthday (see A.R. v. Conn. St. Bd. of Educ., 5 F4th 155, 157 [2d Cir 2021]; St. Johnsbury Acad. v. D.H., 240 F.3d 163, 168 [2d Cir. 2001]). The IDEA also provides, however, that "[t]he obligation to make a [FAPE] available to all children with disabilities does not apply with respect to children aged . . . 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice" (20 U.S.C. § 1412[a][1][B][i]).

Under New York law, a student with a disability is defined in section 4401(1) of the Education Law as a student "who has not attained the age of 21 prior to September 1st" (8 NYCRR 200.1[zz]). In other words, a student who is otherwise eligible as a student with a disability may continue to obtain services under the IDEA until the conclusion of the ten-month school year in which he or she turns age 21 (see Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e]; 200.1[zz]; see also 34 CFR 300.102[a][1], [a][3][ii]). For a student with a disability otherwise

[6] 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).

eligible for special education who reaches age 21 during the period commencing July 1st and ending on August 31st, he or she is entitled to continue in a July and August program until August 31st or until the end of the summer program, whichever occurs first (Educ. Law § 4402[5]).

Recently, the Second Circuit has held that Connecticut's state-administered, publicly funded adult education programs constituted "public education" under the IDEA, and thus, ending an entitlement to a FAPE for individuals who were eligible for special education and between the ages of 21 and 22 violated the IDEA (A.R., 5 F.4th at 163-67). While this holding has yet to be extended to New York, this State funds and administers similar adult education programs (see, e.g., Educ. Law §§ 3602[11]; 4604; 8 NYCRR 100.7; 157.1; 164.2). Accordingly, the student may have been entitled to special education through the day before his 22nd birthday, which occurred during the 2022-23 school year. However, as the IHO has ordered that the district pay for the cost of the student's education at iBrain during the pendency of this proceeding, neither party has appealed from that order, and the student has already turned 22 years of age, further analysis of this issue would not result in the student receiving any more than he has already received.

I now turn to examine the parent's arguments regarding the student's eligibility for the entirety of the 2022-23 school year.

A. Extended Eligibility—Prior IHO Decision

I now turn to the parent's allegation that the July 19, 2021 IHO decision entitled the student to extended special education eligibility during the 2022-23 school year, including an extension of statutory rights under the IDEA

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, under certain circumstances, be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA, which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. Nov. 3, 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom., Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).[7]

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

[7] In addition, compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]).

[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"]). The IDEA and State law do not require school districts to provide students with FAPE who have reached the maximum age for eligibility (20 U.S.C. § 1412[a][1][A]; 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]).

Review of some relevant authority on this type of remedy reveals a distinction 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]).[8]

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).[9] However, there is a difference between basing relief "on considerations enunciated under a legislated obligation and actually invoking the statutory provision" (Cosgrove, 175 F Supp 2d at 389). Thus, compensatory education is not a full extension of the IDEA itself and does not, for example, continue a student's stay-put rights (id. at 390).[10] This logic would appear to apply further to preclude the parent's access to the due process protections of the IDEA to challenge IEPs developed by a CSE during the extension of eligibility. Otherwise, the extension of eligibility could result in potentially perpetual challenges to IEPs developed during the period of extension and additional awards of compensatory education. In other words, the extension of the student's eligibility must be viewed as an election of remedies by the parent as to the student's educational placement, subject only to

[8] 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]).

[9] The Third Circuit 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 (Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 720 [3d Cir. 2010]).

[10] 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 (175 F Supp 2d at 390).

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

Here, the July 19, 2021 IHO decision found a three-year FAPE denial by the district—for the 2018-19, 2019-20, and 2020-21 school years, determined that "gross violations" of the IDEA had occurred, indicated the need for compensatory education was "patently obvious," and ordered that the student was "eligible for compensatory services beyond the age of twenty-one" (Parent Ex. E). However, the IHO delegated a calculation of the compensatory education award in stating that the student was "entitled to compensatory services in an amount to be determined by an [IEE] but not to exceed three (3) years and such education is to extend past the age of twenty-one (21) if necessary" (id. at p. 10).

Considering the language used in the July 19, 2021 IHO decision and in light of the above-described differences between an award of compensatory education to be provided to a student after the student is no longer eligible by reason of age and an award of extended eligibility continuing a district's statutory obligations to a student past the student aging out, it appears that the IHO intended to award the student equitable relief in the form of compensatory education programs or services as recommended in an IEE rather than extended eligibility. In particular, the IHO did not order the district to convene a CSE to develop an IEP for the student after the student turned 21 years of age (see Parent Ex. E).

In any event, even if the July 19, 2021 IHO decision awarded the student extended eligibility, as discussed above, an award of extended eligibility does not necessarily carry with it an extension of the procedural due process entitlements set forth in the IDEA. Rather, as noted above, it should be treated as an election of remedies by the parent as to the student's educational placement, subject only to further modification in judicial review. Accordingly, any relief to which the student might be entitled for any failure of the district to comply with July 19, 2021 IHO decision must be determined in a forum with authority to enforce the IHO's decision. It is well settled that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]).

[11] Overall, the continuation of the types of programs and services available under the IDEA to a student over the maximum age of eligibility may become fraught with challenges related to the student's age, not the least of which is that the student will have exceeded the age of compulsory school-age attendance under State law (see N.Y. Educ. Law § 3205[1][a] [requiring students aged 6 through 16 to attend "full time instruction"]; see also N.Y. Educ. Law § 3202[1] [entitling students aged 5 through 21, who have "not received a high school diploma," to attend public schools]).

The IHO correctly recognized that she lacked authority to enforce the prior IHO's decision (IHO Decision at pp. 9-10). Accordingly, there is no basis to disturb the IHO's determination that the parent was not entitled to seek tuition reimbursement as a remedy for an alleged denial of FAPE based on the purported award of extended eligibility in the prior IHO's July 19, 2021 decision.

B. Continuation of Educational Services to Age 23—Chapter 223 of the Laws of 2022

With regard to the issue of whether the student remained eligible under Chapter 223 of the Laws of 2022, I agree with the conclusion reached by the IHO that it does not provide a basis for the parent's requested relief.

Chapter 223 of the Laws of 2022, which became effective on June 13, 2022, provides that students may continue to receive educational services up to age twenty-three under certain circumstances as follows:

> Notwithstanding any provision of law, rule or regulation to the contrary, a school district may provide educational services in the 2022-23 and 2023-24 school years to a student who turned twenty-one years old during the 2021-22 school year and was enrolled in the school district and receiving special education services pursuant to an individualized education program. Such student may continue to receive such educational services until the student completes the services pursuant to the individualized education program or turns twenty-three years old, whichever is sooner.

(L. 2022, Ch. 223).

The student turned 21 during the 2021-22 school year; accordingly, the IHO determined his eligibility for special education services ended on or about June 30, 2022, the end of the 2021-22 school year in which he turned age 21 (see IHO Decision at pp. 6-10). With respect to the parent's arguments related to Chapter 223 of the Laws of 2022, as the IHO determined, this law does not mandate that districts provide services to students beyond the age of 21, but provides that a "district may provide educational services in the 2022-23 and 2023-24 school years to a student who turned twenty-one years old during the 2021-22 school year" (L. 2022, Ch. 223 [emphasis added]).

The parent argues that the district's actions during the 2021-22 school year, including the January 2021 CSE meeting, the March 2022 prior written notice and school location letter, and the June 2022 IEP, along with the district's failure to respond to the parent's June 17, 2022 letter or notify the parent that the student was aging out of eligibility supports finding that the district agreed that the student was eligible for special education under Chapter 233 of the Laws of 2022 (Req. for Rev. ¶¶ 31-36). However, while the district's actions show that it was unsure of how to implement the compensatory education awarded in the July 19, 2021 IHO decision, the hearing record does not indicate that the district made an election to implement educational services—

other than the compensatory education awarded in the prior IHO decision—for the student during the 2022-23 school year (see Parent Exs. E; G; J).[12]

Further, as noted by the IHO, Chapter 233 of the Laws of 2021 explicitly applies to students who were "enrolled in the school district and receiving special education services pursuant to an individualized education program" (L. 2022, Ch. 223). During the 2021-22 school year, the student was enrolled at iBrain and his education was funded by the district pursuant to the February 8, 2022 IHO decision (Parent Ex. C). The parent asserts that the student's placement at iBrain should be equivalent to enrollment in a public school; however, based on the plain language of the law, the parent has not presented a sufficient argument to show that the IHO erred in this finding.[13]

VII. Conclusion

The evidence in the hearing record supports a finding that the student is not entitled to relief for any portion of the 2022-23 school year for which he is not already entitled to tuition funding pursuant to pendency. Therefore, the necessary inquiry is at an end and there is no need to reach the issues of whether iBrain was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parent's request for relief.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 12, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[12] To the extent that the parent asserts that the district could have notified the parent of the date that the student was expected to age out of eligibility, it appears from a review of the student's June 2022 IEP that the district was required to notify the parent of, among other things, "the date upon which the student will no longer be entitled to receive tuition free educational services" (see 8 NYCRR 200.4[i][1]). However, even acknowledging that the district failed in this instance to provide the parent with the required information, it does not follow that this procedural violation would result in extending the student's eligibility for special education.

[13] It is also unclear the extent to which a student would be entitled to all of the procedural protections of the IDEA if a district did elect to continue providing a student with special education services pursuant to Chapter 233 of the Laws of 2022.