



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 22-161

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:

Cuddy Law Firm, PLLC, attorneys for petitioner, by Joseph Sulpizio, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 that portion of the decision of an impartial hearing officer (IHO) which found that her request for the respondent (the district) to hold a new Committee on Special Education (CSE) meeting for the 2022-23 school year to review and consider the results of the student's independent educational evaluation (IEE) and recommend an appropriate educational program was moot. The district cross-appeals from that portion of the IHO's decision which awarded compensatory education and ordered the district to fund a multisensory reading and writing instructional assessment and implement the services recommended as part of that evaluation. The appeal must be granted in part. The cross-appeal must be dismissed. The matter must be remanded to the IHO for further administrative proceedings.

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 (see Parent Ex. A at p. 4; IHO Ex. I at p. 1). One of the prior proceedings included an IHO referral of the student for a neuropsychological evaluation, which was conducted in September and October 2018 (IHO Ex. I at p. 1).

The bulk of the student's educational background and history included in the hearing record in this matter is derived from the 2018 neuropsychological evaluation, in which the student's mother served as the informant for the family interview, family history, and the student's developmental history (IHO Ex. I at pp. 1-4, 6-7).¹ Although the report of the 2018 neuropsychological evaluation recites the student's educational history going back to Early Intervention (id. at pp. 1-4, 6-7), the focus of this proceeding is on the 2021-22 school year. Accordingly, a review of the student's educational history pertinent to this appeal begins with the planning for the 2021-22 school year.

As relevant to the instant case, the student attended a district high school through the 2020-21 school year (11th grade) (Dist. Ex. 1 at p. 2).

A CSE convened on March 1, 2021 and finding the student remained eligible for special education as a student with a learning disability developed an IEP for the student with an implementation date of March 1, 2021 (Parent Ex. B; Dist. Ex. 1).² The March 2021 CSE recommended that, for the remainder of the 2020-21 school year, the student be placed in a 12:1+1 special class for electives, integrated co-teaching for math, English Language Arts (ELA), social studies, and sciences, and that, at the beginning of the 2021-22 school year, the student be placed in an 8:1+1 special class for ELA, sciences, social studies, and math (Dist. Ex. 1 at p. 14). Recommendations for related services included counseling, occupational therapy (OT), and speech-language therapy (id. at pp. 14-15). Additional recommendations included assistive technology, testing accommodations, and a coordinated set of transition activities to facilitate the student's movement from high school to post high school activities (id. at pp. 15-17).

The March 2021 IEP noted that the student was "on track to graduate with a Regents Diploma in 2022" (Dist. Ex. 1 at pp. 2-3). The March 2021 IEP also included a projected date of March 1, 2022 for the student's next annual review (Dist. Ex. 1 at p. 1).³

As a result of an IHO order in a separate proceeding, the student attended a State approved non-public school for the 2021-22 school year (12th grade) (Parent Ex. F at ¶5; Dist. Ex. 1 at p. 8).

¹ According to the 2018 neuropsychological evaluation report, the evaluation was conducted when the student was 14 years old, and while he attended a ninth grade special class (12:1) at a district high school (IHO Ex. I at p. 1). The report noted that the parent perceived the student had been making little or no progress in his academic, linguistic, or social functioning (id.). The parent was seeking information about the student's level of functioning and clarification of his diagnoses, to better understand the reasons underlying the student's academic delays and social/emotional difficulties (id.). The 2018 neuropsychological evaluation report indicated that the evaluation was necessary to help with deciding on appropriate educational and clinical interventions for the student (id.).

² The March 1, 2021 IEP was admitted into the hearing record as Parent Exhibit B and District Exhibit 1. The exhibits are the same except that District Exhibit 1 includes an attendance sheet that Parent Exhibit B does not include; Parent Exhibit B is in landscape orientation (a view that resulted in a longer document) and District Exhibit 1 is in portrait orientation (compare Parent Ex. B and Dist. Ex. 1). When referred to herein, District Exhibit 1 will be cited to because it includes the attendance sheet (see Dist. Ex. 1 at p. 21).

³ The district did not schedule a CSE meeting to develop an IEP for the student for the 2022-23 school year (see Parent Ex. F at ¶¶ 3-4).

In correspondence in April 2022 between the parent and the school counselor at the student's nonpublic school, the school counselor indicated the student met the requirements for graduation and the parent indicated the student was not ready to graduate and requested that the student stay at the nonpublic school for another year (Parent Exs. C; D). In a May 2, 2022 email to the parent, the school counselor informed the parent that the student was passing the two classes he needed to graduate and that the parent would have to speak with the CSE if she wanted to extend the student's stay at the nonpublic school (Dist. Ex. 4 at p. 9).

A. Due Process Complaint Notice

In a due process complaint notice dated May 10, 2022, the parent asserted that the district denied the student a free and appropriate public education (FAPE) for the 2021-22 and 2022-23 school years, both procedurally and substantively (Parent Ex. A). Initially, the parent requested pendency for the student; specifically, that the student continue to receive services under his March 2021 IEP (*id.* at pp. 2, 6). The parent argued that the district failed to comprehensively evaluate the student's needs in all areas and, more specifically, asserted that the student had not received a vocational assessment (*id.* at p. 6). The parent also argued that the district failed to conduct an evaluation of the student since 2016 and that the last time the student was evaluated was in 2019 as a result of an IEE request by the parent (*id.*). The parent contended that the student's needs had changed since then and the district should have conducted a comprehensive vocational assessment to assist in transition planning (*id.*).

Next, the parent contended that the district failed to develop an appropriate transition plan noting that the transition plan included on the March 2021 IEP stated only that the student would have the opportunity to complete a career plan and employability survey (Parent Ex. A at p. 7). The parent also contended that the district failed to provide appropriate assistive technology, stating that despite a recommendation for a specific assistive technology device, such as a Google Pixelbook, as well as an August 2020 IHO ordering the specific assistive technology device, and the March 2021 IEP stating that the student would receive a Pixelbook or its equivalent, the laptop provided to the student frequently disconnected from the internet and did not have the required programs to assist him in the classroom (*id.*).

In addition, the parent asserted that the district failed to implement the student's IEP and ensure receipt of all mandated services, for example, the parent asserted that the student was not receiving speech-language therapy or counseling services at the frequency mandated on the March 2021 IEP (*id.*). Finally, the parent asserted that the district failed to hold a timely CSE meeting, since the last CSE meeting was held over a year ago on March 1, 2021 and the district had not contacted the parent to schedule another meeting (*id.*). According to the parent, the student's nonpublic school planned to graduate the student in June 2022 despite the fact that the student was entitled to remain in school until age 21 (*id.*).

As relief, the parent requested: (1) a finding that the district denied the student a FAPE for the 2021-22 and 2022-23 school years; (2) the district provide the student's related service encounter attendance records for the 2021-22 school year; (3) compensatory education to provide for missed related services sessions for the 2021-22 school year and "for the inappropriateness of [the student's] program and placement" to include 360 hours of speech-language therapy and 20 hours of assistive technology training; (4) an order for the district to hold a CSE meeting, review and include the results of the IEEs, and develop an appropriate IEP; (5) an order for the district to

fund a transition coordinator or coach to assist the student in preparing for life after graduation; (6) an order for the district to provide the student with appropriate assistive technology as recommended by the speech-language evaluator including a Google Pixelbook; and (7) an order for the district's implementation unit to authorize and pay any services or evaluators within 14 days (Parent Ex. A at pp. 8-9).

B. Impartial Hearing Officer Decision

In May 2022, prior to the commencement of the hearing, the district moved to dismiss the parent's claims related to the 2022-23 school year.

The parties appeared for a pendency hearing on June 10, 2022, as well as a prehearing conference on June 13, 2022 (June 10, 2022 Tr. pp. 1-22; June 13, 2022 Tr. pp. 1-27).⁴

On June 17, 2022, the parent responded to the district's motion to dismiss her claims related to the 2022-23 school year.

In an interim Order on Pendency dated June 21, 2022, the IHO denied the parent's request for pendency, finding that the March 1, 2021 IEP, the appropriateness of which the parent was challenging, could not be the basis of pendency (June 21, 2022 IHO Decision on Pendency).

In a June 21, 2022 interim decision, the IHO dismissed the parent's claim for a denial of FAPE for the 2022-23 school year without prejudice, noting that at the time of the filing of the due process complaint notice on May 10, 2022, the 2022-23 school year had not yet commenced (June 21, 2022 IHO Decision on Motion to Dismiss). The IHO found that the parent's claim was speculative in nature as it "rest[ed] upon contingent future events" because—contrary to the parent's argument that 2022-23 was ripe because an annual IEP meeting should have been held in March 2022 and the student was without an operative IEP going into the 2022-23 school year—the CSE could have convened and developed an IEP for the student prior to the start of the school year and could have cured the prospective injury to the student (id.).

The parties proceeded to an impartial hearing on the merits before the Office of Administrative Trials and Hearings beginning on June 22, 2022, which concluded on September 20, 2022 after five days of proceedings (June 22, 2022 Tr. pp. 1-98; July 12, 2022 Tr. pp. 99-139; Aug. 17, 2022 Tr. pp. 1-29; Sept. 8, 2022 Tr. pp. 1-118; Sept. 20, 2022 Tr. pp. 119-194).^{5, 6}

⁴ The numeration of transcript pages is not consecutive from one volume to the next. Therefore, the date of the proceeding is cited.

⁵ The IHO on August 10, 2022 "issued a decision to the [p]arties," on an evidentiary issue briefed by the parties, informing them that the occupational therapy evaluation and vocational assessment which had not been previously disclosed before June 22, 2022 and the 2022 neuropsychological evaluation which had not yet been completed were precluded from admission during the administrative hearing (IHO Decision at p. 2).

⁶ On September 20, 2022, the parent submitted a revised request for proposed relief adding a request for 13 hours of compensatory counseling and 30 hours of compensatory OT, as well as a request for a district evaluation, specifically identifying "a multisensory reading and writing instructional assessment by a reading specialist," and a feeding evaluation (IHO Ex. II).

According to the parent, during the course of the hearing, on June 23, 2022, the student graduated from the nonpublic school with a Regents diploma (July 12, 2022 Tr. pp. 114-15).

In a final decision dated November 6, 2022, the IHO found that the district failed to provide the student with a FAPE for the 2021-22 school year (IHO Decision at pp. 6-11). As an initial matter, the IHO determined that she would not apply the "gross deprivation of FAPE standard" because when the due process complaint notice was filed, the student had not yet graduated (*id.* at p. 6). The IHO then found that, based on the March 2021 IEP, the March 2021 CSE arbitrarily reduced the duration of the student's OT, speech-language and counseling services from 40 to 30 minutes as the last OT and speech-language evaluations of the student were conducted in 2018 and there was nothing in the IEP justifying the change (*id.* at pp. 6-7). The IHO found that the changes were not reasonably calculated to enable the student to make progress and updated evaluations were necessary prior to these changes to the student's program—concluding that "[t]he lack of data to support the IEPs recommendations amount to a procedural denial of FAPE" (*id.* at p. 7).

Next, the IHO found that based on the credible testimony of the speech-language therapist who evaluated the student, due to the student's global delays and significant deficits, the recommendation of a bank of 360 hours of compensatory services "(providing [Student] with approximately 3 hours a week for 40 weeks, for approximately 3 years)" was appropriate (IHO Decision at p. 8).⁷ The IHO also found that the 30 hours of compensatory OT were appropriate to place the student in the position he would have been in had he received an appropriate OT mandate based on the credible testimony of the occupational therapist who evaluated the student (*id.* at p. 10).⁸ However, with respect to the 20 hours of assistive technology training, recommended by the speech-language therapist, the IHO found that the recommendation was not warranted given that the student would not be enrolled in a public school or program because he had recently graduated (*id.* at p. 8). Similarly, the IHO found that the student should not be given compensatory counseling services as the services were offered and the student refused or was absent for them (*id.* at p. 9). The IHO did not credit the parent's testimony that the student did not refuse services and only requested a different time for the services to occur, finding that the parent's testimony was contrary to other evidence showing that the parent did not raise this issue in her correspondence with the district (*id.*).

Further, the IHO disagreed with the recommendation of the psychologist who testified that a behavioral intervention plan (BIP) should have been developed for the student; the IHO found that based on the information in the IEP about the student's behavior in a classroom setting, specifically that he worked well independently and got along with his peers, a BIP was not required (IHO Decision at pp. 10-11). However, the IHO agreed with the psychologist's opinion that the student's grades for the 2021-22 school year were not an accurate indicator of the student's present levels of performance, finding that the student's graduation with a Regents diploma was not

⁷ The speech-language therapist conducted speech-language and assistive technology evaluations of the student in March 2022 (Parent Ex. E at ¶ 7; *see* Parent Exs. G; H).

⁸ The occupational therapist conducted an OT evaluation and vocational assessment of the student in May and June 2022 (Parent Ex. N at ¶ 4).

enough evidence that the student was provided with a FAPE because the student did not take any Regents Exams and was given credit for exams he did not take due to COVID (id. at p. 11).

Turning to relief, the IHO found that the parent's request for a CSE to reconvene to review and consider the results of the IEEs had "become moot by way of the student graduating" and, as such, the award the student was entitled to would be compensatory in nature; "[t]o rule otherwise would circumvent the Chancellor's authority over the matriculation of students" (id. at p. 11).

With respect to the parent's request for a multisensory reading and writing instructional assessment by a reading specialist to determine if specialized reading instruction would address the student's literacy, spelling, and writing skills, the IHO found that given the varying accounts of the student's reading and writing skills, the student's grades were not a true reflection of the student's performance in reading and writing and further, that due to contradictory information within the March 2021 IEP and the use of dated evaluations, the student's providers did not have a clear understanding of the student's needs at the time the March 2021 IEP was developed (IHO Decision at p. 11). The IHO concluded that the testimony of the occupational therapist, with respect to the student's struggles with writing legibility, grammar, and writing fatigue, for example, supported the need for the multisensory reading and writing instructional assessment (id. at p. 12). With respect to the parent's requested feeding evaluation recommended by the speech-language therapist "because of reports of picky eating," the IHO found that based on the hearing record, it appeared that the student was open to a wide variety of food although his parent would prefer the "incorporation of healthier food choices" and therefore a feeding evaluation was not warranted (id.).

Regarding the student's "IEP mandate[] for a Google Pixelbook or equivalent," the IHO found that the Google laptop provided by the school was "equivalent and sufficient" and did not contribute to the district's denial of a FAPE, therefore the parent's request for assistive technology devices could not be granted as the evaluation recommendation was that the devices be "utilized on a 10-month basis or when performing academic tasks" and as the student had graduated there was no basis to grant the relief (IHO Decision at p. 12). With respect to transitional skills and the argument that the IEP did not include sufficient goals related to vocational career exploration, independent living, and community skills, the IHO found that the student was not on the alternate assessment track but "appear[ed] to be college bound" and, therefore, the goals were "satisfactory for this student" and did not contribute to a denial of FAPE and, further, the vocational support provided by the school was satisfactory thereby rendering the parent's request for the district to provide a transition coordinator or coach as unwarranted (id. at p. 13).

Finally, the IHO ordered the district to provide and/or fund: compensatory education by providers of the parent's choosing at the market rate in the amount of 13 hours of counseling, 360 hours of speech-language therapy to expire within four years of the order, and 30 hours of OT to expire within four years of the order; a multisensory reading and writing instructional assessment and additional services if recommended; and authorization and payment of any service provider or evaluators (IHO Decision at pp. 13-14).

IV. Appeal for State-Level Review

The parent appeals and alleges that the IHO erred in failing to order the district to hold a CSE meeting and recommend an educational program for the student. The parent argues that the

IHO erred in finding that the parent's request for a CSE meeting was moot as the parent filed the due process complaint notice on May 10, 2022, "well before" June 23, 2022 when the student graduated. Next, the parent argues that the IHO's treatment of the student's graduation was in error because "graduation for a student with a disability . . . goes beyond . . . simple matriculation of the required course credits" and requires that a student also make progress on or complete the IEP goals and objectives. According to the parent, a district may not properly graduate a student with a disability if the student was not provided with a FAPE. The parent contends that the student's graduation was "based solely on the accumulation of the required credits to graduate" and not on the student's "progress toward his IEP goals and objectives" arguing that the IHO Decision should not be given deference because it only addressed the required credits. As relief, the parent requests an order for the district to hold a new CSE meeting to review and consider the results of IEEs and recommend an appropriate educational program for the student.

The district answers and cross-appeals from the IHO's decision awarding an IEE and compensatory education. The district argues that the IHO properly denied the parent's request for a CSE meeting, as the student's graduation in June 2022 terminated his eligibility for special education as a student with a disability. As for its cross-appeal, the district asserts that the IHO erred in awarding compensatory services as the student's eligibility for special education and related services ended upon his graduation in June 2022, and the record does not support a finding that the district committed a gross violation of the IDEA entitling the student to compensatory education. The district further asserts that the IHO erred in failing to apply the "gross violation" standard in making a FAPE determination for the 2021-22 school year. The district contends that the sole basis for the IHO's determination that the student was denied a FAPE was in finding a "procedural denial of a FAPE" for the district's failure to conduct updated evaluations to support the reductions in the duration of speech-language and OT services. The district asserts that the IHO erred in relying on the testimony of the occupational therapist and speech-language pathologist. According to the district, their testimony was based on evaluations conducted in March 2022, one year after the CSE meeting at issue, and as such, they were not available to the CSE at the time of the March 2021 CSE meeting and reliance on the providers' testimony would be a retrospective assessment of the March 2021 CSE's recommendations. The district further argues that the March 2021 CSE relied on speech-language and OT evaluations from August and July 2018, respectively, which were less than three years old at the time of the March 2021 CSE meeting, and the parent did not request updated evaluations in speech or OT. In any event, the district contends this would not be a procedural violation that resulted in a gross violation as it did not result in a complete deprivation of a FAPE or exclusion from school for a substantial period of time. Next, the district argues that the IHO erred in finding that the fact that the student graduated with a Regents diploma was not evidence enough that the student was provided with a FAPE, as graduation and receipt of a high school diploma are generally considered evidence of educational benefit. Finally, the district argues that compensatory education is not appropriate relief as the student benefitted from instruction during the 2021-22 school year and graduated. The district requests that the IHO's award of relief be vacated, the request for review be dismissed in its entirety and the cross-appeal be sustained.

In a reply and answer to the district's cross-appeal, the parent denies the assertions that the IHO erred in awarding compensatory education and in failing to apply the "gross violation" standard, but contends that even if the IHO applied the wrong standard, here the denial of a FAPE rises to the level of a gross violation as the district "pushed [the student] through the 2021-2022

school year with inappropriate services, inappropriate and misleading information regarding [the student's] true academic skills, a lack of any consideration towards [the student's] IEP goal progress, or lack thereof, and educating [the student] under an inadequate IEP before unilaterally exiting [the student] from special education services in June 2022."

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]).⁹

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

VI. Discussion

A. June 2022 Graduation

The parent appeals from the IHO's decision that the parent's request for a new CSE meeting to review and consider the results of the student's IEEs and recommend an appropriate educational program was rendered moot by the student's graduation. According to the parent the request was not moot because the parent filed the due process complaint notice on May 10, 2022, "well before" the student's June 2022 graduation. The district responds that the IHO properly denied the parent's requested relief of an order directing the district to hold a CSE meeting, as the student's graduation

⁹ 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).

in June 2022 terminated his eligibility for special education programs and services as a student with a disability.

Here, the parent testified that the student graduated from the nonpublic school with a Regents diploma on June 23, 2022 (July 12, 2022 Tr. pp. 114-15).

In New York State, a student who is 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 (Educ. Law §§ 3202[1]; 4402[1][b][5]; 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]).¹⁰

While SROs have, at times, been compelled to address claims before them related to the validity of the graduation of a student with a disability, they must exercise caution with respect to the degree to which their jurisdiction over IDEA matters also allows them to make affirmative findings concerning whether or not a particular student has met the State requirements to obtain either a Regents or local diploma, particularly given that the issuance of a diploma has historically been the province of the Commissioner of Education who has the authority to consider the validity of an award of course credit and the related issuance or revocation of a diploma (see, e.g., Appeal of K.D., 52 Ed Dept Rep, Decision No. 16,460). An impartial hearing is generally not the proper forum for disputes involving a district's decision to award or its failure to award academic course credit to a student with a disability because such hearings are limited to issues concerning the identification, evaluation, and educational placement of the student, or the provision of a FAPE to a student (20 U.S.C. § 1415[b][6]; 34 CFR. 300.507[a][1]; 8 NYCRR 200.5[i]; Application of the Bd. of Educ., Appeal No. 10-124; see Letter to Silber, 213 IDELR 110 [OSEP 1987] [responding to a series of questions posed by a parent on topics including classification and a local agency's rules regarding the accumulation of credits toward graduation and holding that the only issue amenable to an impartial hearing under federal law was whether the student should be classified]). Further, graduation credits and requirements generally fall under the purview of the district's discretionary authority, again subject to the review of the Commissioner (see Educ. Law § 1709[3] [authorizing a board of education "to prescribe the course of study by which pupils of the schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant"]; Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 205-06 [2d Cir. 2007] [opining that students do not have a right under the IDEA "to graduate on a date certain or from a particular educational institution"]; see also Kajoshaj v. New York City Dep't of Educ., 543 Fed. App'x 11, 17 [2d Cir. Oct. 15, 2013], citing Matter of Isquith v. Levitt, 285 App. Div. 833 [2d Dep't 1955] [finding that "[a]fter a child is admitted to a public school, the board of education has the power to provide rules and regulations for promotion from grade to grade, based not on age, but on training, knowledge and ability"]).

¹⁰ Although not applicable in the instant matter, 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. v. Conn. St. Bd. of Educ., 5 F4th 155, 163-67 [2d Cir 2021]). While this holding has yet to be extended to New York, it appears that this State may fund and administer similar adult education programs (see, e.g., Educ. Law §§ 3602[11]; 4604; 8 NYCRR 100.7; 157.1; 164.2).

Accordingly, the well-established authority of the Commissioner to act as the primary if not sole arbiter of the validity of credit accumulation and graduation by a student largely forecloses the ability of SROs to adjudicate such issues, further compounded by the often bright-line rule that a high school diploma is evidence of educational benefit (see Pascoe v. Washington Cent. Sch. Dist., 1998 WL 684583, at *4, *6 [S.D.N.Y. Sept. 29, 1998]; see also Rowley, 458 U.S. at 207 n.28; Walczak, 142 F.3d at 130), the receipt of which terminates a student's entitlement to a FAPE (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; 200.4[i]). Indeed, SROs have consistently found that it is a rare case where a student will graduate with a high school diploma and yet still qualify for an award of further compensatory educational services thereafter (see, e.g., Application of the Dep't of Educ., Appeal No. 21-049; Application of a Student with a Disability, Appeal No. 19-116; Application of the Bd. of Educ., Appeal No. 18-081; Application of the Bd. of Educ., Appeal No. 17-081; Application of a Student with a Disability, Appeal No. 16-079; Application of a Student with a Disability, Appeal No. 13-215; Application of a Student with a Disability, Appeal No. 13-110; Application of a Student with a Disability, Appeal No. 11-159).

Despite the backdrop discussed above and notwithstanding the caution that must be taken by an SRO in reviewing the issuance of a diploma, upon my independent review of the hearing record, and the arguments presented by the parties, I find that there are so many gaps within the evidentiary record concerning what occurred leading up to the student's June 2022 graduation that it is not possible to make an informed decision as to whether the student should have graduated or whether he should have remained eligible to return to school to continue his education for the 2022-23 school year. My reasoning in this regard is informed by the unique circumstances arising from the COVID-19 emergency, including its impact on Regents diploma requirements at the time the student graduated in June 2022, which shall be discussed further below.

The March 2021 IEP indicated that the student "[wa]s on track to graduate with a Regents Diploma in 2022" (Dist. Ex. 1 at pp. 2-3). The IEP noted that in addition to passing all of his courses, the student needed to obtain a passing grade on five Regents exams in order to graduate (id. at p. 2). However, the IEP noted that the student received credit for five Regents exams while school buildings were closed due to the COVID-19 pandemic, indicating that "students were granted credit for the Regents as long as they could ascertain a passing score in the course" (id.).

Consistent with what was included in the March 2021 IEP, an exemption from Regents exam requirements was provided for the June 2020, August 2020, January 2021, June 2021, and August 2021 Regents exams "due to the State of emergency declared by the Governor pursuant to an Executive Order for the COVID-19 crisis" (8 NYCRR 100.5[f][vi][a]). However, parents were given the option of declining the exemption (see "Parental Right to Decline Examination Waivers," NYSED Memo [May 27, 2020], available at <http://www.nysed.gov/common/nysed/files/programs/coronavirus/nysed-covid-19-parental-right-to-decline-examination-waivers-5-27-20.pdf>). Subsequent guidance clarified that "parents or persons in parental relation of students who are eligible to graduate in the 2020-21 school year and beyond as a result of having met an assessment requirement through an exemption at any time may decline such exemptions" ("Parental Right to Decline Examination Waivers," NYSED Memo [December 8, 2020], available at <http://www.nysed.gov/common/nysed/files/programs/coronavirus/parental-right-to-decline-examination-waivers-december-2020.pdf>). State regulation provided instructions for notifying parents of students who were eligible for an exemption of their right to decline the exemption (8

NYCRR 100.5[f][viii][b]-[d]). Of particular import to this proceeding, the notice was required to explain to parents that "the child will remain eligible to receive a free public education until the end of the school year in which the child attains the age of 21 or earns a diploma, whichever shall occur first" (8 NYCRR 100.5[f][viii][c]). Additionally, "where a student with a disability has an [IEP] . . . indicating that the plan[] for the student was to return to school to continue his or her education, a school may not confer a diploma for such student until a parent or person in parental relation confirms in writing that such student should receive a diploma" (8 NYCRR 100.5[f][viii][f]).

Turning back to the events leading up to the student's graduation, in a letter dated April 7, 2022, the school counselor at the student's nonpublic school informed the parent that graduation was scheduled for June 23, 2022 (Parent Ex. C). The letter stated that for the student to meet State graduation requirements of 22 credits, the student needed to complete ELA 12 and physical education (id.).

In response to the nonpublic school's letter, the parent contacted the counselor on April 26, 2022 via email and indicated that she was not sure if the student was ready to graduate "as he still ha[d] many skills he need[ed] to work on" (Parent Ex. D). The parent indicated she was in the process of obtaining independent evaluations for the student and would forward them as soon as she received completed reports (id.). In addition, the parent asked if the student could stay at the nonpublic school for "another year or so" (id.).

The school counselor responded to the parent in a May 2, 2022 email advising the parent that the student was passing the two classes he needed to graduate and that the parent would have to speak with the CSE if she wanted to extend the student's stay at the nonpublic school (Dist. Ex. 4 at p. 9).

Nothing in the hearing record indicates if the parent was advised of her right to decline the exemption for taking the Regents exams or if it was explained to her that the student would have remained eligible to receive a free public education until the age of 21 or the receipt of a diploma—essentially notification of the impact of the decision to decline the exemption.

For example, rather than explaining the impact of the exemption, the notification process, or the parent's right to decline the exemption, the school counselor testified that the "number one thing is when [students] fulfill their graduation requirements—classes and Regents exams—there's really nothing else that holds them from graduating" (June 22, 2022 Tr. pp. 75-76). The student's school counselor at the nonpublic school indicated that she dealt mainly with the academic part of students' programs including transcripts, registering for the SATs, and report cards (June 22, 2022 Tr. p. 64). She explained that the school was an "out-of-district placement" and that when a new student came to the school, she "call[ed] the [student's] previous school, g[ot] the[ir] transcript, s[aw] how many credits they h[ad], how old they [we]re, and set up an academic plan for them to graduate before the age of 21, or by the age of 21, with the 22" graduation credits needed to do so (June 22, 2022 Tr. pp. 64-65). The school counselor reported she did those things for the student when he arrived at the nonpublic school in September 2021, at which time he was in 12th grade (June 22, 2022 Tr. pp. 65, 72-73). She recalled that the student entered the nonpublic school needing two credits, one in English 12 and one in physical education, to fulfill the required 22 credits for graduation (June 22, 2022 Tr. p. 65). By the time of the school counselor's testimony, the student had been cleared to graduate the next day and was anticipated to receive a Regents

diploma (June 22, 2022 Tr. pp. 65-66). The school counselor testified that required credits for a Regents diploma consisted of 22 specific class credits and passing grades of 65 or more on five Regents examinations, or in the case of the last two school years, exemptions (from taking Regents exams) because of COVID (June 22, 2022 Tr. p. 67).

Nevertheless, there is also a lack of clarity in the parent's request for the district to develop an IEP for the student for the 2022-23 school year. In April 2022, the parent indicated that she was not sure if the student was ready to graduate and requested that the student continue at the nonpublic school for an additional year (Parent Ex. D). In the parent's due process complaint notice, the parent asserted that the district failed to hold a CSE meeting within one year from the March 1, 2021 CSE meeting and that, as a result, the nonpublic school was "planning to graduate [the student] in June 2022 despite the fact that [the student] [wa]s entitled to remain in school until the age [of] 21" (Parent Ex. A at p. 7). Although the IHO dismissed the parent's claims related to the 2022-23 school year in an interim decision as being premature, at the conclusion of the hearing the parent continued to seek a new set of evaluations and a new CSE meeting to develop an educational program for the student (IHO Ex. II at p. 1).¹¹

However, further confusing matters, during the hearing the IHO asked counsel for the parent if the parent was asking the IHO "to make a determination on the appropriateness of the student's requirements for graduation" to which counsel for the parent responded that she was asking for a new CSE meeting, but she was seeking "no specific relief as to looking at the graduation" (June 22, 2023 Tr. p. 32). Yet, on appeal, the parent argues that "graduation for a student with a disability under the [IDEA] goes beyond the simple matriculation of the required course credits, but also requires that a student 'make progress on or complete the IEP goals and objectives'" (Req. for Rev. ¶17).

While there is little merit to the parent's primary argument as raised on appeal,¹² the parent's contention is nonetheless an indication that she intended to challenge the validity of the student's graduation as a part of this proceeding. This combined with the parent's initial requests for the student to continue his education at the nonpublic school for another school year and for the district to convene a CSE to develop an IEP for the student are sufficient challenges to the June 2022 graduation so that it would not be prudent to find the student no longer eligible for special education without first addressing the gaps in information regarding the exemption for the Regents

¹¹ In the event that, after remand, the IHO determines that the student should have returned to school for the 2022-23 school year, the IHO may also consider revisiting her interim decision dismissing the parent's claims related to the 2022-23 school year because they were speculative in nature, or, rather than having duplicative litigation, the parties may discuss amending the parent's due process complaint notice to add the parent's claims regarding the 2022-23 school year as the 2022-23 school year is now half-way over.

¹² Although at least one court has found that a student with a disability should not be graduated without the student meeting the general graduation requirements and making progress on or completing the student's IEP goals and objectives (Kevin T., 2002 WL 433061, at *14, citing Chuhuran v. Walled Lake Consol. Sch., 839 F. Supp. 465, 474 [E.D.Mich.1993], aff'd, 51 F.3d 271 [6th Cir.1995], the IDEA does not impose the additional requirement of progress on IEP goals and objectives on disabled students that is not imposed on non-disabled students in order to graduate with a regular high school diploma (Sammons v. Polk County Sch. Bd., 2005 WL 2484640, at *15 [M.D. Fla. Oct. 7, 2005], opinion clarified, 2005 WL 2850076 [M.D. Fla. Oct. 28, 2005]).

exams, the notification requirement, and the possibility that the parent intended to decline the exemption.

Accordingly, this matter must be remanded to the IHO for clarification of the parties' positions regarding the student's June 2022 graduation and a factual determination as to whether the exemption for Regents exams was properly applied to the student or whether the student should have returned to school to continue his education for the 2022-23 school year (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).¹³

VII. Conclusion

Having determined that the evidence in the hearing record is insufficient to make an informed determination as to the student's potential continuing eligibility for special education, this matter must be remanded for further administrative proceedings.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

¹³ The district cross-appeals from the IHO's decision to award compensatory education without applying the "gross violation" standard. Upon remand, in the event that the IHO finds that the student was properly graduated, the IHO may revisit her opinion as to compensatory education as the Second Circuit has held that compensatory educational services may only be awarded to a student who is no longer eligible for special education by reason of age or graduation where the district has 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, 476 Fed. App'x at 471; Somoza, 538 F.3d at 109 n.2, 113 n.6; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; Garro v. State of Conn., 23 F.3d 734, 737 [2d Cir. 1994], citing Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989], aff'g prior holding in Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]). However, as an analysis of an award of compensatory education may continue to be necessary upon remand; it would not be proper to address the compensatory education award until a full review of the parent's claims is undertaken and a final determination by the IHO is reached regarding what award of compensatory education, if any, would make the student whole (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also 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]).

IT IS ORDERED that this matter is remanded to the IHO to issue a determination regarding whether the exemption for Regents exams was properly applied to the student or whether the student should have returned to school to continue his education for the 2022-23 school year.

Dated: **Albany, New York**
 February 6, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER