The University of the State of New York

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

No. 23-031

Application of the BOARD OF EDUCATION OF THE PLEASANTVILLE UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, by Michael K. Lambert, Esq. and Lakshmi Singh Mergeche, Esq.

Littman Krooks, LLP, attorneys for respondent, by Marion M. Walsh, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which ordered the district to set up a bank of funds, up to a defined amount, to allow the student to obtain services to work towards her General Educational Development (GED) test. The parent cross-appeals from that portion of the IHO's decision which failed to address her child-find allegation and denied her request for compensatory educational services.[1] The appeal must be sustained. The cross-appeal must be dismissed.

[11] The use of the term "parent" in this case refers to the individual who became the student's guardian in October 2018 and who, by guardianship order and upon consent of the student, could function as such until the student reached the age of 21 (May 2020) (see Dist. Ex. 1 at pp. 1, 34). In addition, the guardian's husband—while not named as one of the student's guardians—will, for ease of reference, be referred to in this decision as the student's father (id.).

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

In or around October 2016, the student began attending a Test Assessing Secondary Completion (TASC) program within a neighboring public school district when she was 17 years old (see Dist. Ex. 1 at pp. 1, 5).[2] The TASC program was an "adult education program [that] prepare[d] students age[d] 16 and up for the component examinations . . . , to earn a New York State high school equivalency certificate" (id at p. 5).[3] In or around June 2018, the student reportedly began residing full time in the district with her soon-to-be guardian/parent (id. at pp. 9-10). The parent, in this case, became the student's guardian by Family Court Order dated October 15, 2018 (id. at p. 34).[4] At that time, the student was 19 years old, and as such, had "consented to the appointment until he/she reache[d] the age of 21" (id.). The student continued to attend the TASC program in the neighboring school district from October 2016 through June 2020 (id. at p. 10).

While the student attended the TASC program in the neighboring school district during the 2019-20 school year, the parent, by email dated March 30, 2020, forwarded a letter to the district and therein referred the student to the CSE for an evaluation (see Dist. Exs. 3; 16 at pp. 1-2; 17 at p. 1). In response, the district's interim director of special education (interim director) during the 2019-20 school year sent an email to the parent seeking clarification about the contents of the parent's email and letter (see Tr. pp. 269, 271, 274; see also Tr. pp. 545, 547). At the impartial hearing, the interim director testified that, at the time he received the parent's email and letter in March 2020, he had no familiarity with the student and, after contacting the "registrars who would be [the district] guidance assistant," he found "no evidence" that the student was "in fact registered within our school district" (Tr. p. 275). The interim director also testified that he spoke with the parent later in the afternoon on the same day that he had received the email and letter in March 2020 (see Tr. pp. 275-76). During that telephone call, the parent provided the interim director with a "little background" about the student, including that she was attending a neighboring school district and was "not registered" at the district, and the interim director provided the parent with information concerning the "process as far as getting a student registered" (Tr. pp. 276-79). According to the interim director, the process of registering a student at the district started with confirming that "there was an actual resident" of the district (Tr. pp. 278-79). The interim director also inquired about who the parent may have contacted in "2017" at the district—as referenced in

[2] The student's enrollment in the neighboring school district was based on the student's homeless status pursuant to the protections of the McKinney-Vento Homeless Assistance Act (see Dist. Ex. 1 at pp. 1-2).

[3] During the 2017-18 school year while attending the TASC program, the neighboring school district evaluated the student (see Parent Ex. D at p. 1). The evaluator indicated that the parent was "concerned with [the student's] academic progress" (id.). Overall, the student's cognitive ability fell within the extremely low range, and academically, her "scores ranged from the extremely low to average range depending on the task at hand" (id. at pp. 8-9). The evaluator did not, however, recommend special education or related services or refer the student to the CSE (id.). Furthermore, the hearing record does not contain any evidence that the parent—or any individual who worked within the neighboring school district—referred the student to the CSE in the neighboring school district or sought special education programming from the neighboring school district prior to the student moving into the district (see generally Tr. pp. 1- ; Parent Exs. A-O; Q-S; U-V; Dist. Exs. 1-22; IHO Exs. I-IV).

[4] The parent's spouse was not identified as a guardian in the Court's order (Dist. Ex. 1 at p. 34).

the parent's letter—but the parent could not identify the individual (Tr. pp. 277-78; Dist. Exs. 3 at p. 1; 16 at p. 2). The interim director testified that he inquired within the district's "main office, [with] individuals including guidance to see if anyone did have any past history involving any types of conversations with the [parent]" and found "no evidence of that" (Tr. pp. 277-78).

The hearing record reflects that the parent received registration papers from the district in or around the "third week or fourth week of April" (Tr. p. 550; see Tr. pp. 653-57; see generally Dist. Ex. 22). The hearing record also reflects that the parent "started working on them immediately," but due to the COVID-19 pandemic, it took approximately "four or five weeks to arrange" a physical examination of the student, which was required as a part of the registration process (Tr. pp. 549-50).

In a due process complaint notice dated May 15, 2020, the parent alleged that the neighboring school district—where the student had been attending the TASC program—failed to offer the student a free appropriate public education (FAPE) for the 2016-17, 2017-18, 2018-19, and 2019-20 school years (see Dist. Ex. 15 at pp. 1, 11-12; see also Parent Ex. N at p. 1). The parent asserted that the neighboring school district violated its child-find obligations, failed to refer the student to the CSE after evaluating the student, failed to provide the parent with procedural safeguards, and had "sufficient knowledge of [the s]tudent's emotional needs and should have referred her to the CSE" (Dist. Ex. 15 at pp. 9-10). As relief for the alleged violations, the parent sought an order directing the neighboring school district to evaluate the student—including a "full [n]europsychological [e]valuation, speech[-]language evaluation, a reading evaluation and a vocational evaluation"—to convene a CSE meeting to review the evaluations, provide compensatory educational services consisting of two years of extended-age eligibility, reimburse the parent for private psychotherapy, provide 200 hours of counseling services, and provide "at least 1200 hours of compensatory educational services" (id. at p. 11).

Shortly thereafter, in a second due process complaint notice dated May 21, 2020, the parent alleged that the district in this case failed to offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years by violating its child-find obligations (see Parent Ex. M at pp. 1, 11, 13). In addition, the parent alleged that the district failed to "conduct sufficient outreach efforts and failed to act after the [g]uardians notified the [d]istrict of [the student] and never provided the [p]arent with procedural safeguards at any point during her time in the [d]istrict" (id. at p. 11). According to the parent, the student was "scheduled to age out of eligibility for K-12 education with its associated special education supports for eligible students on or about June 30, 2020 and w[ould] be exiting without ever having received appropriate supports or education" (id. at p. 10). As relief, the parent requested an order directing the district to evaluate the student, including a neuropsychological evaluation, a reading evaluation, and a vocational evaluation (id. at p. 12). The parent also requested an order directing the district to convene a CSE meeting to review the evaluative information and to find the student eligible for special education (id.). The parent also requested compensatory educational services, consisting of two years of extended-age eligibility, reimbursement for the costs of privately obtained psychotherapy for the student, 1500 hours of

counseling services, and "at least 1000 hours of compensatory educational services" (id. at pp. 12-13).[5]

On or about June 24, 2020, the student underwent a physical examination as part of the registration process (see Dist. Ex. 22 at pp. 1-3, 8). As reflected by the evidence in the hearing record, the parent sent the completed registration paperwork to the district after the completion of the student's physical examination on June 24, 2020 (see Tr. pp. 657-63; Dist. Ex. 22 at p. 8).[6] As part of the student's registration, the parent filled out a document allowing the district to communicate with the neighboring school district—as well as with a Board of Cooperative Educational Services (BOCES) location—where the student had been attending and to obtain her records therein (see Tr. p. 663; Dist. Ex. 22 at p. 20).

In August and September 2020, the district completed a bilingual neuropsychological evaluation and a bilingual speech-language evaluation of the student (see generally Dist. Exs. 4-5).

On March 2, 2021, the parent executed a "Stipulation of Settlement" (stipulation) with the neighboring school district involved in the due process complaint notice dated May 15, 2020 (Parent Ex. N at pp. 1, 7-8). As reflected in the stipulation, the student entered the "bilingual TASC program"—which, according to the evidence, was described as the "Test Assessing Secondary Completion" program that preexisted the GED test in New York State—offered by the neighboring school district (Tr. pp. 77-78, 435, 464; Parent Ex. N at p. 1).[7] The stipulation also reflected that the student "attended school in the [neighboring d]istrict, beginning in October 2016" and continued to be served by the neighboring school district as a student in the "bilingual TASC program even after she became a resident of the [district] in or about October 2018, as [the neighboring school district] served out-of-district students in the TASC Program and served [this student] as an out-of-district student" (Parent Ex. N at pp. 1-2).

A. Due Process Complaint Notice

Nearly one year after the initiating this proceeding the parent filed an amended due process complaint notice dated May 10, 2021 (Dist. Ex. 1). The parent alleged that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years by violating its child-find obligations (see id. at pp. 1, 12-13, 16). In addition, the parent alleged that, even after evaluating the student, the district failed to hold a CSE meeting to review the evaluative information (id. at p.

[5] In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the 10-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];[5] 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]).

[6] Although the parent signed all of the forms for the student's registration in the district in June 2020, the forms note that the parent was the student's legal guardian until May 31, 2020 (Dist. Ex. 22 at p. 17).

[7] Effective January 2022, the GED test replaced the TASC test "as the primary pathway to a New York State High School Equivalency [HSE] Diploma" (www.acces.nysed.gov/what-hsetasc-test).

13). As relief, the parent sought an order directing the district to evaluate the student, including a neuropsychological evaluation, a reading evaluation, and a mathematics evaluation (id. at p. 14). In addition, the parent requested an order directing the district to convene a CSE meeting to review the evaluative information and to find the student eligible for special education (id.). The parent also requested compensatory educational services, consisting of three years of extended-age eligibility; 100 hours of counseling services; 720 hours of compensatory educational services; and collaborative services from the district to allow the student to obtain her GED, to access adult and online educational services, earn credits, take Regents examinations, and complete the requirements for any graduation options available to the student (id. at pp. 15-16).

B. Impartial Hearing Officer Decision

On August 8, 2021, the parties proceeded to an impartial hearing, which concluded on June 6, 2022, after five total days of proceedings (see Tr. pp. 1-688).[8] Following the conclusion of the impartial hearing, both parties submitted closing briefs to the IHO—both dated July 18, 2022; on August 9, 2022, the IHO issued an interim decision, which ordered the district to conduct a "complete and comprehensive [n]europsychological [e]valuation" of the student by a specific evaluator and at a specific rate in order for the IHO to "properly evaluate and rule on this matter" (IHO Exs. I at p. 21; II at p. 30; III at pp. 1, 3-4; see generally IHO Ex. IV). Thereafter, in a decision dated January 17, 2023, the IHO concluded that the district failed to offer the student a FAPE, and when fashioning relief, focused on equitable considerations (see IHO Decision at pp. 1, 4-5, 9).

In finding that the district failed to offer the student a FAPE, the IHO noted that "[n]either side c[ame] to the table with clean hands as both [parties] made numerous mistakes along the way" (IHO Decision at p. 5). The IHO further determined that "when balancing the equities, it would be unjust to turn the parents and the student away without any remedy to address the denial of FAPE that did occur in the case at bar" (id.). The IHO noted that the district sought to "apply a strict adherence to the student[']s dates of eligibility despite the fact that during the time frame at issue," the COVID-19 pandemic was occurring (id.). Next, the IHO indicated that although the "process of registering this student began on March 30, 2020," the student was not deemed "completely registered in the district" until June 2020—indicating further, however, that given the ongoing pandemic, "taking a few months to register a student when all New York State school districts were closed to all people . . . was not unreasonable"—but that the student "aged out of eligibility on July 1, 2020" (id. at pp. 5-6). Next, the IHO found that, while the compensatory educational services recommended by one of the parent's witnesses was "without merit," an "equitable decision demand[ed] that both the district and the student's family share in the cost of providing this student with the necessary compensatory education services so that [she] may obtain [her] GED" (id. at p. 6).

[8] Initially, another IHO had been assigned to this matter and the previous IHO conducted the first day of the impartial hearing held on August 10, 2021 (compare Tr. p. 1, with Tr. p. 23). As reflected in the final decision, the IHO who completed the impartial hearing and who issued the decision on the merits was appointed to the case in December 2021 (see Tr. p. 23; IHO Decision at p. 1).

The IHO determined that the district should have found the student eligible for special education "in and around May or June of 2020 and then [the student should have] received summer services" during summer 2020; in addition, the IHO concluded that the student "should have been educated by the district" for the "entire 2020-2021 school year" (IHO Decision at p. 7). Following this line of reasoning, the IHO indicated that, had the student been found eligible for special education in June 2020, then the State guidance issued on June 18, 2020 would have applied to this student and she would have been "allowed to remain a special education student for the summer of 2020 and the following 2020-2021 school year" (id. at pp. 7-8). Therefore, the IHO determined that the student was "entitled to eligibility for the six (6) week summer school program for the summer of 2020 as well as the entire school year from September 2020 through June of 2021, which [wa]s twenty-six (26) weeks" (id. at p. 8). As relief, the IHO ordered the district to bear the cost of 32 weeks of extended eligibility for the student—totaling $60,000.00—to allow her to "work towards obtaining [her] GED, with the basic goal to give this student the skills to be functionally literate in reading and math so that [she] may obtain gainful employment" (id.). In addition, the IHO noted that "any amount required to obtain such services in excess of $60,000.00 shall be borne by either the student or their family" (id.).

IV. Appeal for State-Level Review

The district appeals, arguing initially that the district properly responded to the student's referral to the CSE in 2020. The district contends, moreover, that even if the district received consent to evaluate the student on the same date the district received the student's referral to the CSE—March 30, 2020—the student's eligibility for special education would have expired prior to the district's obligation to arrange the provision of special education to the student within 60 school days of that consent. Next, the district contends that the IHO erred by awarding relief without identifying any rationale for concluding that the district failed to offer the student a FAPE and without expressly finding that the district failed to offer the student a FAPE. The district also argues that the IHO improperly speculated that the student should have been found eligible for special education in or around May or June 2020, and the hearing record did not contain sufficient evidence upon which to reach this conclusion. The district further contends that the IHO erred by finding that the State guidance issued on June 18, 2020 applied to this student, and overall, the IHO misinterpreted the import of the guidance memorandum on the district's obligations with respect to this student.[9] Next, the district asserts that the IHO erred in crafting a compensatory educational services award, as the evidence in the hearing record did not support such relief. As a final point, the district asserts that the IHO deprived the district of due process by appointing an evaluator proposed by the parent and by considering the neuropsychological evaluation without providing the district with an opportunity to be heard with respect to the evaluator's qualifications,

[9] State guidance issued in June 2020 "encourage[ed] schools and school districts to allow those students who will age out of school the opportunity–for this year only–to return for summer school and, if necessary, attend school in the 2020-2021 year" ("Providing Over-Age Students the Opportunity to Return to School in the 2020-21 School Year Due to the COVID-19 Pandemic," Office of Educ. Policy [June 18, 2020], available at http://www.nysed.gov/common/nysed/files/programs/coronavirus/nysed-covid-19-memo-over-age-students.pdf).

the selection of the evaluator, and the content and validity of the reported results. As relief, the district seeks to vacate the IHO's decision.[10]

In an answer and cross-appeal, the parent responds to the district's allegations and generally argues to uphold the IHO's decision in its entirety. The parent asserts, however, that the request for review must be dismissed because the district failed to timely and properly serve the student in this case with the request for review. As for the cross-appeal, the parent argues that the IHO erred by failing to address the alleged child-find violations, and failing to address claims that the student's eligibility did not expire on June 30, 2020. In addition, the parent contends that the IHO erred by failing to address her section 504 allegations and by failing to address her arguments that the student's eligibility for special education did not expire until June 30, 2021. As relief, the parent seeks an order granting her request for compensatory educational services, or alternatively, to remand the matter to the IHO for a full review of claims, including alleged child-find violations, whether the student aged-out when she turned 22 years of age, and whether the district violated section 504.

In an answer to the cross-appeal, the district responds to the parent's allegations and asserts that the parent's answer and cross-appeal must be dismissed for the failure to timely serve the pleading.

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]).

[10] In a footnote, the district acknowledges that the IHO failed to address the child-find violations alleged in the parent's amended due process complaint notice (see Req. for Rev. p. 6 n.11). The district asserts that the evidence in the hearing record established that the district had "practices in place in order to comply with its obligation to locate, identify and evaluate any student under the age of 21 residing in the [d]istrict who ha[d] or may have [had] a disability pursuant to 'child find'" (id.).

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. 386, 399 [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., 580 U.S. at 404). 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., 580 U.S. at 403 [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]).[11]

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

VI. Discussion

A. Preliminary Matters—Timeliness of Answer and Cross-Appeal

The parent was the party who initiated the due process proceeding in this case for the 2018-19 and 2019-20 school years and (Dist. Ex. 1), therefore, is the party upon which an administrative appeal from the resulting IHO decision must be served. State regulations provide in relevant part that, "[i]n the event that a parent of a student with a disability is named as a respondent in a request for review, personal service of the request for review shall be made by delivering a copy thereof to the parent" (8 NYCRR 279.4[c]). After several failed attempts to personally serve the parent with the request for review, the district sought to effectuate service via alternate service as directed by an SRO, which the undersigned granted in a letter dated February 24, 2023 (8 NYCRR 279.4[a], [c][2]).[12] A review of the district's affidavits of service establish that, on Monday, February 27, 2023, the district personally served the parent with the request for review by leaving a copy with the parent, herself, at her last known address (see Feb. 27, 2023 Dist. Aff. of Service [emphasis added]). At that point, having personally served the parent with the request for review, the district successfully complied with the regulation requiring personal service and the alternate service became redundant (see 8 NYCRR 279.4[a]).

The district countered that the parent's cross-appeal should be dismissed untimely. State regulations also provide that a "respondent who wishes to seek review of an [IHO]'s decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer served within the time permitted by section 279.5 of this Part" (8 NYCRR 279.4[f]). Under section 279.5, a "respondent may, within 5 business days after the date of service of the request for review, answer the same either by concurring in a statement of facts with the petitioner or by service of an answer" (8 NYCRR 279.5[a]). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). An SRO may, in the SRO's sole discretion, reject an answer that does not comply with the form

[11] 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., 580 U.S. at 402).

[12] As an alternate method of service, the undersigned directed the district to affix the request for review and supporting papers to the door of the parent's last known address and, via certified mail, return receipt requested, mail the same to the parent at the last known address.

requirement set forth in State regulation, or with the requirements for service and filing of an answer (8 NYCRR 279.5, 279.8[a]).

Here, the parent failed to initiate the answer and cross-appeal in accordance with the timelines prescribed in Part 279 of the State regulations.[13] The parent was required to serve the answer and cross-appeal upon the district no later than March 6, 2023, or five business days from the date the district effectuated personal service on the parent on February 27, 2023 (see 8 NYCRR 279.5[a]). However, the parent's affidavit of service indicates that the parent served the district on March 8, 2023 (Mar. 8, 2023 Parent Aff. of Service), which renders the answer and cross-appeal untimely.

Additionally, the parent failed to assert good cause in the answer and cross-appeal for the failure to timely initiate the cross-appeal from the IHO's decision, as required by State regulation (see generally Answer & Cr. App.). Instead, the parent alleged that the district failed to timely and properly serve the student (see Answer & Cr. App. ¶ 19). Notably, while the parent indicated in the answer and cross-appeal that the district served the parent "via SRO directive, by mail on February 27, 2023," the district's affidavit of service contradicts this assertion and reflects that the parent was personally served on February 27, 2023, at her residence, by "delivering to and leaving a true copy of the "Notice of [R]equest for Review, [and] Request for Review" with [the parent, herself]" (Feb. 27, 2023 Dist. Aff. of Service [emphasis added]).[14]

After the parent's cross-appeal was already late, the parent submitted a letter dated March 7, 2023 alleging "service irregularities" and noting that the district had failed to provide the parent with its affidavit(s) of service in this matter. The parent requested that the undersigned issue a confirming ruling regarding the timelines for responding to the district's appeal. In a letter dated March 8, 2023, the undersigned declined to engage in that activity and noted that the parent could follow the procedures in Part 279 and place such defenses in an answer. The undersigned also specifically noted that if the parent had concerns regarding the timeliness of a responsive pleading, the procedure was to request additional time pursuant to Part 279. The parent did not avail herself of the opportunity to seek additional time to file the answer and cross-appeal.

Thus, because the parents failed to properly serve and file her answer and cross-appeal by effectuating timely service upon the district, and there is no good cause asserted in the answer and cross-appeal, in an exercise of my discretion, the answer and cross-appeal—and specifically, the issues raised therein—are dismissed and will not be further addressed in this decision (8 NYCRR 279.13; see New York City Dep't of Educ. v. S.H., 2014 WL 572583, at *5-*7 [S.D.N.Y. Jan. 22, 2014] [upholding SRO's decision to reject petition as untimely for being served one day late]; B.C.

[13] The parent served the district with a notice of intention to cross-appeal and case information statement on February 17, 2023 (see 8 NYCRR 279.2[d]). To be clear, State regulation requires that a respondent who wishes to cross-appeal to seek review of an IHO's decision must serve a notice of intention to cross-appeal "within 30 days after the date of the decision of the [IHO]" (8 NYCRR279.2[d]). In this case, the IHO's decision was dated January 17, 2023; therefore, the parent was required to serve a notice of intention to cross-appeal no later than February 16, 2023. Consequently, the parent also failed to timely serve the notice of intention to cross-appeal.

[14] In addition to the personal service on the parent as described above, the district's affidavits of service also indicates that the district mailed a copy of its pleadings to the parent and the student on February 27, 2023.

v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-67 [S.D.N.Y. 2013]; T.W., 891 F. Supp. 2d at 440-41; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *4-*5 [Sept. 25, 2009] [upholding dismissal of a petition served three days late]; Keramaty v. Arlington Cent. Sch. Dist., 05-CV-0006, at *39-*41 [S.D.N.Y. Jan. 25, 2006] [upholding dismissal of a petition served one day late], adopted [S.D.N.Y. Feb. 28, 2006]; Application of a Student with a Disability, Appeal No. 18-046 [dismissing request for review for being served one day late]).

B. IHO's Decision and Relief

Having dismissed the parent's untimely served answer and cross-appeal, the only remaining issues to resolve are those presented in the district's request for review. Initially, as the district asserts, it is difficult to discern the rationale upon which the IHO predicated her conclusion that the district failed to offer the student a FAPE. Upon review, the IHO's decision, while it included a brief legal standard pertaining to a FAPE, it did not reference or rely on any applicable legal standard to reach the conclusion that that district should have found the student eligible for special education by May or June 2020 (see IHO Decision at pp. 4-7). Nevertheless, as explained below, even if the district failed to offer the student a FAPE, the IHO's award of a bank of funds based on extended-age eligibility pursuant to State guidance was improper and not supported by the evidence. As a result, the IHO's decision must be reversed.

Consistent with the district's contention, even if the district received the parent's consent to evaluate the student on March 30, 2020—the same day the parent referred her to the CSE—State regulations mandate that, "[f]or a student not previously identified as having a disability, the [CSE] shall provide a recommendation to the board of education which shall arrange for the appropriate special education programs and services to be provided to the student with a disability within 60 school days of the receipt of consent to evaluate" (8 NYCRR 200.4[d]; see 8 NYCRR 200.1[n]; 200.4[b][1] [mandating that an initial evaluation must be completed within 60 calendar days from the date the district receives consent to evaluate the student]). Thus, the 2019-20 school year would have ended prior to, or concurrently with, the district's obligation to evaluate the student within 60 calendar days and to implement a recommended special education program within 60 school days from the receipt of consent, the latter of which fell on or about Friday June 26, 2020.[15, 16] Pertinently, the parent, in this proceeding, only asserted a claim for a denial of FAPE for the

[15] While not explicitly stated, it appears that the district's 60-day calculation includes at least one week the district would have been closed for spring recess in April 2020, and one additional day the district would have been closed to observe Memorial Day in May 2020—as the evidence in the hearing record reflects that the district was closed for the same school days during the 2018-19 school year (see Dist. Ex. 13 at pp. 1, 19, 21). It also appears to be predicated upon a presumption that June 26, 2020 was the district's last day of school for students in the 2019-20 school year, as the evidence reflects that June 26, 2019 was the final day of school for students in the district during the 2018-19 school year (id. at pp. 1, 23). While the district was required to follow the referral and evaluation procedures in this case after the parent made the request, it would be difficult to conclude that the district thereafter failed to provide the student a FAPE for the entire 2019-20 school year because it failed to offer the student special education services for the final day of that school year, and even if I did conclude it was a denial of a FAPE, I would not order compensatory education for one day of missed services.

[16] In April 2020, the New York State Office of Special Education issued a guidance document, which reflected, in relevant part, that State regulation "**section 200.4(d)** was amended so that when a Board of Education [wa]s arranging for appropriate special education programs and services to be provided to a student with a disability

2018-19 and 2019-20 school years (see Dist, Ex. 1; Parent Ex. M). In fact, in both the initial May 2020 and the amended May 2021 due process complaint notices, the parent asserted that the student aged out of special education at the end of the 2019-20 school year (Dist, Ex. 1 at p. 10; Parent Ex. M at p. 10).[17] Consequently, the IHO's finding that the district failed to offer the student a FAPE must be vacated.

Additionally, even if the district should have found the student eligible for special education prior to the end of the 2019-20 school year, the IHO erred by considering the State guidance issued in June 2020 as a basis upon which to calculate an award of funds for the student to obtain her GED (see IHO Decision at pp. 7-8).[18] Here, the IHO—relying on State guidance issued in response to the ongoing COVID-19 pandemic—determined that, had the student been found eligible for special education in June 2020, then the State guidance issued in the same month would have entitled the student to six weeks of special education during summer 2020 and one full year of extended-age eligibility, or an additional 26 full weeks of special education (or a total of 32 weeks) (id. at pp. 7-8). While the June 2020 State guidance may have applied to the student's circumstances in this proceeding if she had already been found eligible for special education, and in large part, could have formed the basis for the relief sought, in part, by the parent, the IHO had no authority to enforce the guidance document, which described discretionary actions the State encouraged school districts to take with respect to disabled students aging out during that portion of the ongoing COVID-19 pandemic (see "Providing Over-Age Students the Opportunity to Return to School in the 2020-21 School Year Due to the COVID-19 Pandemic," Office of Educ. Policy Mem. [June 18, 2020], available at http://www.nysed.gov/common/nysed/files/programs/

within 60 school days of the receipt of consent to evaluate or referral for review, the 60 day period w[ould] not include any days that the school [wa]s closed pursuant to an Executive Order of the Governor issued in response to a State of Emergency for COVID-19" ("Emergency Regulations for the Provision of Special Education Programs and Services and Due Process Procedures in Response to the Novel Coronavirus (COVID-19) Outbreak in New York State," Off. of Spec. Educ. [April 2020], p. 2 [emphasis in original], available at https://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-emergency-regulations-covid-19-response-april-2020.pdf). The hearing record does not include information regarding the days that the school may have been fully closed at the onset of the pandemic.

[17] In the event that the parent wants to pursue an allegation that the district denied the student a FAPE for the 2020-21 school year, based on an argument that the student was eligible for special education until age 22—as raised for the first time in her post-hearing brief—the parent may bring a separate due process proceeding to present that argument because the 2020-2021 school year was not the time frame raised in the parents' amended due process complaint notices (Dist. Ex. 1). The Second Circuit recently held during the pendency of this proceeding 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, 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, it is possible that the student may have been entitled to special education through the day before her 22nd birthday, which occurred towards the end of the 2020-21 school year.

[18] Even assuming for the sake of argument that the district failed to provide the student with a FAPE as of June 1, 2020, the student—as a form of compensatory educational services—would have been entitled to approximately four weeks of services, if any, to make up for the violation.

coronavirus/nysed-covid-19-memo-over-age-students.pdf).[19] In addition, nothing within the June 2020 State guidance required a district to offer or provide disabled students with ongoing instruction or extended age-eligibility, or indicated that a failure to do so could result in a finding that a district denied a student a FAPE, for which the student would then be entitled to either tuition reimbursement or compensatory educational services, or as in this case, a bank of funds (id.). As a result, the IHO erred in ordering the district to set up a bank of funds for the student to draw upon to pursue her GED or to gain the literacy skills she required to obtain her GED.

VII. Conclusion

Having determined that the district properly initiated its appeal and prevailed in its arguments that the IHO erred by finding that the district failed to offer the student a FAPE, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated January 17, 2023, is modified by reversing that portion which found that the district failed to offer the student a FAPE; and,

IT IS FURTHER ORDERED that the IHO's decision, dated January 17, 2023, is modified by reversing that portion which ordered the district to fund a bank of $60,000.00 to allow the student to obtain literacy skills and/or to obtain her GED.

Dated: **Albany, New York**
March 29, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER

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