The University of the State of New York

The State Education Department
State Review Officer
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No. 23-242

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which dismissed their claims regarding respondent's (the district's) implementation of their son's pendency services for the 2022-23 school year without prejudice, dismissed the remainder of the parents' claims with prejudice, and ordered that the parents were estopped from raising any further claims regarding the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

This case is set within a complex history in that the parties have been engaged in due process proceedings for many years preceding their current dispute and, according to the IHO presiding in this matter, at least 35 due process complaint notices were filed during 2022 related to the school years and educational issues that continue to be the subject of the instant appeal, of which approximately 28 were voluntarily withdrawn by the parents (IHO Decision at p. 3, fns. 5, 6, 7; see also IHO Exhibit VI). Additionally, there have been six appeals to the Office of State Review regarding the student (see, e.g., Application of a Student with a Disability, Appeal No. 19-080; Application of a Student with a Disability, Appeal No. 18-105; Application of a Student with a Disability, Appeal No. 15-101; Application of a Student with a Disability, Appeal No. 14-168; Application of a Student with a Disability, Appeal No. 12-065; Application of a Student with a Disability, Appeal No. 10-119). The parties do not dispute that the student's last agreed-upon IEP

was the June 19, 2015 IEP developed by a CSE that determined the student was eligible for special education as a student with an other-health impairment and recommended a 12-month special education program consisting of a 12:1 special class placement in an approved nonpublic day school along with two 30-minute sessions per week of counseling in a group, three 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of individual speech-language therapy, and two 30-minute sessions per week of speech-language therapy in a group (IHO Ex. I at pp. 1, 18-19).[1] According to the evidence in the hearing record, the student had previously attended the Westchester Exceptional Children's School (WECS), but "reportedly lost his school placement in 2018 after several absences due to health problems and the school reportedly d[id] not want to enroll [the student] again" (IHO Ex. X at p. 2).[2] The district confirmed the student's "discharge" from WECS effective October 16, 2019; the student has remained out of school since that time and is currently twenty-two years old (Parent Ex. A; IHO Ex. II at p. 1).

In a due process complaint notice, dated October 12, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20, 2020-21, 2021-22 and 2022-23 school years, asserted specific procedural and substantive claims regarding a June 2022 CSE meeting and resultant IEP, alleged that the student's regular CSE region within the district actively violated the student's due process rights,[3] and argued that the student should be granted "extended special education provisions" and related services until he reaches the

[1] During the November 21, 2022 pendency hearing the district stated "that the IEP from 2015 . . . constitutes this last agreed upon placement and the [s]tudent's pendency program" and the parent stated that the last agreed upon IEP "was the 2015" (Nov. 21, 2022 Tr. pp. 5, 8).

[2] The parents assert that the student was "[i]llegitimately discharge[d]" from WECS by due process complaint notices dated August 5, 2022, May 13, 2022, September 26, 2022, October 12, 2022, and April 11, 2023 (IHO Exs. II at p. 1; VI at p. 1; Supp. Doc. 2 at p. 1; SRO Proposed Ex. 1 at p. 1; SRO Proposed Ex. 2 at p. 1).

[3] The district has numerous, different CSEs based in part upon where the student resides and thus these CSEs are divided up and numbered by administrative region within the municipality.

age of 23 (see IHO Ex. II).[4,5] The parents requested that the student's case be transferred to another one of the district's regional CSEs pursuant to a "safety variance" (the alternate CSE) (Nov. 21, 2022 Tr. pp. 24-25; IHO Ex. II at p. 2). The parents further requested that a newly constituted CSE convene to develop a new IEP for the student (IHO Ex. II at pp. 2-4). The parents also sought an order directing the district to fund an independent psychiatric evaluation of the student (id. at p. 4). The October 2022 due process complaint notice was given case number 237881.

On November 3, 2022, the parents filed a due process complaint notice, which was assigned case number 241697 (Nov. 30, 2022 Order on Consolidation at p. 2). On November 21, 2022, the parties appeared before an IHO with the Office of Administrative Trials and Hearings (OATH) for a pre-hearing conference and pendency hearing for case numbers 237881 and 241697 (Nov. 21, 2022 Tr. pp. 1-53). During this meeting the parties agreed to consolidate case numbers 237881 and 241697 (Nov. 21, 2022 Tr. pp. 22-23). An order on consolidation was issued on November 30, 2022 and the cases were consolidated into number 237881 (Nov. 30, 2022 Interim Decision at pp. 1, 3). According to the IHO, "[t]hereafter, [the] parents filed a number of [due process complaint]" notices (Mar. 2, 2023 Order on Consolidation at p. 2).[6]

On December 12, 2022, the IHO issued a pendency order directing the district to "identify a program capable of implementing, or substantially similar to, the June 19, 2015 IEP" with certain

[4] The parents alleged that the district committed systemic violations (i.e., denying the parents the right to participate in the IEP process, using outdated information and improper evaluative materials, refusing to reconvene, refusing to communicate with the parents, harassing the parents by making reports to adult protective services, and refusing to comply with IHO orders) and violations of various State and federal laws (see IHO Exs. II at pp. 2-4; VI at pp. 2-3; VII at p. 2; SRO Exs. 1 at pp. 2-9; 2 at pp. 1-2) which they assert should have been determined by the IHO. However, regardless of whether the IHO addressed any of these allegations, an SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504, section 1983, ADA claims, or claims with respect to alleged systemic violations, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]). Likewise, as compensatory monetary damages are not available in the administrative forum under the IDEA, neither an IHO nor an SRO has jurisdiction to award any remedy for a claim under section 1983 (see Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483 [2d Cir. 2002]; see R.B. v. Bd. of Educ. of the City of New York, 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, even if the IHO had addressed these claims, an SRO would have no jurisdiction to review any portion of a parent's claims regarding section 504, section 1983, ADA claims, or systemic violations or policy claims, and accordingly such claims will not be further addressed.

[5] IHO Ex. II and Supp. Doc. Ex. 1 are both copies of the October 12, 2022 Due Process Complaint Notice (compare IHO Ex. II with Supp. Doc. Ex. 1).

[6] The IHO issued two separate Orders on Consolidation dated March 2, 2023 (Mar. 2, 2023 Order on Consolidation (237881); Mar. 2 2023 Order on Consolidation (245562)).

provisions and ordering that the district provide the student with transportation to and from the program once it was identified (Dec. 12, 2022 Interim Decision at p. 5). On February 1, 2023, the parents filed another due process complaint notice which was assigned case number 245562 (Mar. 2, 2023 Interim Order on Consolidation at p. 2). On March 2, 2023, the IHO consolidated case numbers 237881 and 245562 (id. at 4).

On March 3, 2023, a status conference was held during which the parties discussed the need for evaluations before the student could be placed at a nonpublic school (Mar. 3, 2023 Tr. pp. 63, 72-76). The IHO issued an interim order on evaluations directing the district to conduct the following evaluations of the student: (1) psychoeducational; (2) speech-language; (3) occupational therapy (OT); (4) functional behavioral assessment (FBA); (5) vocational assessment; and (5) assistive technology (Mar. 3, 2023 Interim Decision at p. 3). The IHO further ordered that the evaluations were to be performed at a "neutral site, to be identified by the [district]" and that the "parents shall provide the [district] with copies of their private neuropsychological and psychiatric evaluations" before the next status conference (id.). Via an email dated March 17, 2023, the parents informed the district and the IHO that the student was unable to be evaluated pursuant to the IHO's March 3, 2023 order because the student needed to undergo extensive psychotherapy and psychiatric therapy before he would be able to participate in district evaluations (IHO Ex. XI at p. 1).

On April 3, 2023, the parties convened for a status conference wherein it was discussed that the student was unable to attend new evaluations due to health concerns, but the parents provided the district with their own private evaluation reports related to the student (Apr. 3, 2023 Tr. pp. 6-7). During the status conference, the IHO advised the parents that they had the option of amending their due process complaint as an alternative to filing a new due process complaint (Apr. 3, 2023 Tr. p. 15). The parents submitted an amended due process complaint notice dated April 11, 2023, in which they requested a pendency hearing, extended special education services until the student reached the age of 23, special conditions for the student's evaluations, and an emergency IEP meeting conducted by alternate CSE (see Supp. Doc. Ex. 2).

On April 27, 2023, the parties entered into a resolution agreement that "represent[ed] an agreement made regarding issues raised as part of an Impartial Hearing Request 237881(Amended) for 2019-2020, 2020-2021, 2021-2022 and 2022-2023 school years" (IHO Ex. III at p. 1). The resolution agreement stated that the parties would: (1) participate in an IEP meeting that would review the August 2, 2022 psychological diagnostic evaluation at a date to be determined; (2) that the district would conduct the following evaluations at a date to be determined by the parents: psychoeducational evaluation, speech-language evaluation, OT evaluation, FBA, vocational assessment, assistive technology evaluation; (3) that the parents would bring the student for testing at the alternate CSE at a date to be determined; and (4) that an IEP meeting would be scheduled within 15 school days of the receipt of all finalized evaluations and reports (id. at pp. 1-2).

On May 18, 2023, a prehearing conference was held in which it was discussed that the IHO received the parents' amended due process complaint and that he understood that the parties had reached a partial resolution of the matter (May 18, 2023 Tr. pp. 4-5). The parents explained that there were some issues with a member of the alternate CSE and that they were recently contacted by the district's "mediation office" to schedule a mediation (May 18, 2023 Tr. pp. 5-6). The IHO explained that if the parties were able to resolve some issues through mediation, they should notify

him of any unresolved issues and he would be able to "put it back on the calendar" (May 18, 2023 Tr. pp. 6-7).

On June 13, 2023, the parties executed a special education mediation agreement in which the parties agreed: (1) to schedule an IEP meeting on June 23, 2023 in person at the alternate CSE; (2) the school psychologist was to participate or send a report; (3) the parties agreed to create a new IEP "with information from outside psychological"; (4) the parties agreed "to consider a non-public school program" for the student; (5) the parents agreed "to have a Zoom introduction with [the] Bilingual School Psychologist;" and (6) that evaluations were to "be scheduled starting September 2023" (IHO Ex. IV). On August 14, 2023, the parties executed a second special education mediation agreement in which the parties agreed: (1) "to schedule an IEP meeting following their Impartial Hearing Office conference"; (2) to use "information from the outside psychological" to create a new IEP; (3) to consider a nonpublic school program for the student; (4) for the parents and the school psychologist to meet via Zoom the week of September 11, 2023; (5) for all parties to engage in better communication; (6) for the parents to supply the CSE chairperson with information about extended eligibility; (7) for the CSE chairperson to supply the parents with information about extended eligibility; and (8) for the CSE chairperson to request evaluations be scheduled starting September 2023 (IHO V).

During a prehearing conference held on July 19, 2023, the IHO reviewed the parents' amended due process complaint notice with the parties to see what issues were remaining "[i]n light of the mediation agreement" (July 19, 2023 Tr. p. 7). The IHO identified that "there's an ongoing issue of pendency" (id.). The parents stated that besides pendency, the only issue remaining after the mediation agreement was the extended school year (July 19, 2023 Tr. pp. 7-8). In response to the parents' statement that the extended school year was an issue unresolved by the mediation agreement, the district representative stated "I haven't spoken to the CSE directly about using the terms extended eligibility but based on the fact that they're in the process of creating an IEP for '23/'24, I'm just going to make the assumption, obviously, that they're going to agree to provide services through '23/'24 at least" (July 19, 2023 Tr. p. 8).

On August 22, 2023, the parents filed a due process complaint notice against the district and the alternate CSE alleging continued violations of multiple pendency orders and requesting compensatory services (IHO VII at pp. 1-2). In an email thread on or about August 24, 2023, the parents requested that their due process complaint notice dated October 12, 2022 be withdrawn without prejudice (see IHO Ex. VIII at p. 2). The district objected to the parents' withdrawal without prejudice and sought to have the IHO mark the case as withdrawn "with prejudice" (IHO Ex. VIII).

In a final decision dated September 27, 2023 the IHO described the procedural history of the case including the consolidations and the parents' April 2023 amended due process complaint notice (IHO Decision at pp 1-2).[7] The IHO noted the parents' position that it was illogical to continue to challenge the 2022 IEP due to the impeding expiration of the IEP, and the IHO also recounted facts regarding the partial resolution agreement executed by the parties, partial

[7] The IHO described the amended due process complaint notice as having a date of "4/13/2013" which contains at least one typographical error (IHO Decision at p. 1), but his description of the contents of the amended due process complaint notice is consistent with the April 11, 2023 document from the parents that is contained in the evidentiary record.

mediation agreements executed by the parties, the previous dismissal of due process complaint notices for lack of jurisdiction, and withdrawal of other due process complaint notices (IHO Decision at p. 2; see IHO Exs. III-V).

With regard to the August 24, 2023 withdrawal of the parents' claims in the amended due process complaint notice, the IHO noted that most of the claims had been resolved through resolution or mediation agreements (IHO Decision at p. 3). The IHO found it troubling that the agreements appeared to have a duplicative effect when compared to efforts by previous IHOs to order relief (IHO Decision at p. 4). The IHO found that efforts had been made multiple times to schedule the hearing on the merits, but that the parents kept withdrawing the complaints prior to the impartial hearing and that "three attempts here is enough" with respect to the parents' claims including their attempt to seek extended eligibility (IHO Decision at p. 5). Accordingly, the IHO dismissed the parents' claim "with prejudice" (IHO Decision at p. 5). With regard to the parents' concerns related to the implementation of pendency during the 2022-23 school year, the IHO allowed the parents to withdraw that specific claim "without prejudice," but otherwise found that the parents should be estopped from raising further claims related to the 2022-23 school year (IHO Decision at p. 6).

IV. Appeal for State-Level Review

The parents appeal and the district filed an answer seeking dismissal of the appeal. The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The parents do not appeal that portion of the IHO's decision to dismiss the parents' pendency claims without prejudice. The crux of the parties' dispute on appeal is whether the IHO erred in finding that the parent's withdrawal of the due process complaint notice be deemed "with prejudice" as to all claims other than those related to pendency , and whether the IHO erred in estopping the parents from raising any further claims concerning the 2022-23 school year.

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. 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]).[8]

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

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

VI. Discussion

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

Under New York law, a student with a disability is defined in section 4401(1) of the Education Law as a student "who has not attained the age of 21 prior to September 1st" (8 NYCRR 200.1[zz]). In other words, a student who is otherwise eligible as a student with a disability may continue to obtain services under the IDEA until the conclusion of the ten-month school year in which he or she turns age 21 (see Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e]; 200.1[zz]; see also 34 CFR 300.102[a][1], [a][3][ii]). For a student with a disability otherwise eligible for special education who reaches age 21 during the period commencing July 1st and ending on August 31st, he or she is entitled to continue in a July and August program until August 31st or until the end of the summer program, whichever occurs first (Educ. Law § 4402[5]).

[8] 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).

Recently, the Second Circuit has held that Connecticut's state-administered, publicly funded adult education programs constituted "public education" under the IDEA, and thus, ending an entitlement to a FAPE for individuals who were eligible for special education and between the ages of 21 and 22 violated the IDEA (A.R., 5 F.4th at 163-67). While this holding has yet to be extended to New York, this State funds and administers similar adult education programs (see, e.g., Educ. Law §§ 3602[11]; 4604; 8 NYCRR 100.7; 157.1; 164.2). Accordingly, the student may have been entitled to special education through the day before his 22nd birthday, which occurred during the 2022-23 school year. However, to the extent the parents seek to have the student receive special education services for the 2023-24 school year, the year that the student turns 23 years old, the parents are specifically requesting extended eligibility for the student as a remedy for the district's alleged denial of FAPE.

I now turn to examine the parents' arguments regarding the student's eligibility for the entirety of the 2023-24 school y1ear.

A. Extended Eligibility

The parents assert that the IHO erred by determining that the withdrawal of the due process complaint notice should be deemed "with prejudice" because the parents withdrew their complaint in good faith based on continuing efforts at mediation between the parents and district and therefore the withdrawal should be considered "without prejudice." While the parents seem to agree that most issues between the parties have been resolved through the mediation process and memorialized in resolution agreements, one notable issue as of yet unresolved, though "currently being managed in cooperative efforts" is the student's extended eligibility for special education (Req. for Rev. ¶ 1). The parents appear to argue that given the outstanding substantive issue between the parties concerning the student's extended eligibility, the withdrawal of their due process complaint notice should not be deemed to be "with prejudice."

With respect to the issue of extended eligibility, compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may, under certain circumstances, be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA, which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. Nov. 3, 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom., Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).[9]

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

The Second Circuit has described compensatory education as "prospective equitable relief, requiring a school district to fund education beyond the expiration of a child's eligibility as a remedy for any earlier deprivations in the child's education" (Somoza, 538 F.3d at 109 n.2 [emphasis added]; see French, 476 Fed. App'x at 471 [noting that "[a] disabled student who has attained the age of 21 is generally no longer eligible to receive state educational services under the IDEA"]). The IDEA and State law do not require school districts to provide students with FAPE who have reached the maximum age for eligibility (20 U.S.C. § 1412[a][1][A]; Educ. Law § 3202[1]), yet compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]).

Review of some relevant authority on this type of remedy reveals a distinction between an equitable award of compensatory education in the form of educational programs or services, which a student may receive after his or her eligibility for special education has expired at a district's expense, and an award of extended eligibility, which extends the district's statutory obligations to a student, including the obligation to conduct a CSE meeting and develop an IEP for the student on an annual basis (Ferren C. v. Sch. Dist. of Phila., 595 F. Supp. 2d 566, 576 [E.D. Pa. 2009] [acknowledging the distinction between the expiration of the statutory right, including the right to an IEP, and the access to equitable relief], aff'd, 612 F.3d 712 [3d Cir. 2010]; Burr, 863 F.2d at 1078 [same]; Letter to Riffel, 34 IDELR 292 [OSEP 2000] [noting that a right to compensatory education as an equitable remedy to address a denial of FAPE is independent from the right to FAPE generally, which latter right terminates upon certain occurrences]).[10]

This type of relief, if interpreted broadly to include an extension of the procedural due process entitlements set forth in the IDEA, including pendency, could result in many more years of eligibility than intended (see Application of a Student with a Disability, Appeal No. 19-038; Application of a Student with a Disability, Appeal No. 17-021).[11] However, there is a difference between basing relief "on considerations enunciated under a legislated obligation and actually invoking the statutory provision" (Cosgrove, 175 F Supp 2d at 389). Thus, compensatory education is not a full extension of the IDEA itself and does not, for example, continue a student's stay-put rights (id. at 390).[12] This logic would appear to apply further to preclude the parents' access to the due process protections of the IDEA to challenge IEPs developed by a CSE during the extension of eligibility. Otherwise, the extension of eligibility could result in potentially perpetual challenges to IEPs developed during the period of extension and additional awards of

[10] At least one district court has found it improper to award extended eligibility under the IDEA as a component of compensatory education; however, in that case the IHO had ordered the district to award the student a diploma making an award of extended eligibility redundant (see Dracut Sch. Comm. v. Bur. of Special Educ. Appeals, 737 F. Supp. 2d 35, 53-55 [D. Mass. 2010]).

[11] The Third Circuit acknowledged concerns that, by extending the district's obligations to provide an IEP beyond the student's 21st birthday, the district could be subjected to ongoing litigation "as challenges are made to the adequacy of the[] IEPs" developed after the student's 21st birthday (Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 720 [3d Cir. 2010]).

[12] The Court in Cosgrove also observed that, under the auspices of an extended eligibility award that "extend[ed] the IDEA in toto," a district might have incentive to utilize the CSE procedures to escape liability for nonpublic school tuition by recommending a placement on an IEP other than the nonpublic school preferred by the parent (175 F Supp 2d at 390).

compensatory education. In other words, the extension of the student's eligibility must be viewed as an election of remedies by the parent as to the student's educational placement, subject only to further modification in judicial review, and the parent must be viewed as having assumed the risk that unforeseen future events could render the relief undesirable. As such, the parent would not be allowed to return to the due process hearing system to allege new faults by the district during the period of the student's extended eligibility.[13]

It is undisputed, and a disturbing element of this matter, that the student has not attended an educational program since the 2019-20 school year (Parent Ex. A; IHO Ex. II at p. 5). The student is currently 22 years of age and will be turning 23 during the 2023-24 school year (IHO Ex. II at p. 1). Therefore, while it appears that the student has missed a great deal of special education services that he would have been entitled to receive during the years he has not attended school, the student's eligibility for special education under the IDEA ended due to his current age being 22, soon to turn 23.

Although the district appears to have agreed to schedule an IEP meeting starting in September 2023 in accordance with the parties' August 14, 2023 mediation agreement (August 2023 mediation agreement), it is noteworthy that the August 2023 mediation agreement did not explicitly extend the student's statutory eligibility for any specific period of time and instead the parties agreed to exchange information on the topic (IHO Ex. V). Despite any ambiguity caused by the district's apparent willingness to develop an IEP for the student during the 2023-24 school year, the IDEA is clear: the student is no longer statutorily eligible for special education and the district has so far not agreed to extended the student's eligibility for special education as part of any resolution agreement between the parties but rather has expressed a willingness to explore the parents' concerns further through a mutually cooperative process set forth in the written mediation agreement.

While the parties are encouraged to continue to resolve any outstanding issues between them and the district may ultimately decide to offer the student further educational services as part of a mediation agreement, even compensatory education, which would otherwise not be a viable remedy available through due process, the mere existence of a pending issue between the parties in the context of mediation does not entitle the parents to, in essence, maintain a "failsafe" option of being able to revive a complaint they had voluntarily withdrawn on multiple occasions in the event mediation on a particular issues fails. As the IHO correctly found that the parents' due process complaint notice should be considered withdrawn with prejudice, and the parents have not demonstrated that such determination was an abuse of the IHO's discretion, I decline to reverse the IHO on this issue. The parties are free to pursue their respective rights and liabilities under the agreements they have crafted in another forum that has jurisdiction over such contractual agreements, however at this point, the parties may not continue to return to due process to litigate issues arising out of those written agreements.

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

However, although the student is no longer eligible for special education services because he reached the age of ineligibility, the timeline to pursue claims due to services allegedly not provided by the district under pendency has not yet elapsed, a point which the IHO was no doubt aware. Because neither party appealed the IHO's determination to dismiss the parents' pendency claims for the 2022-23 school year without prejudice, that portion of the IHO's decision has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Thus, for purposes of compensatory education, the student may be eligible for compensatory education under pendency for the time period up until his 22nd birthday, which occurred during the 2022-23 school year. After his 22nd birthday, the student became statutorily ineligible for further services pursuant to pendency.

B. Estoppel of Further Claims—2022-23 School Year

The remaining issue left to be resolved is whether the IHO erred in holding that the parents were estopped from further litigation regarding the 2022-23 school year, but for pendency.

Pursuant to State regulation, a due process complaint notice may be withdrawn by the party requesting a hearing (see 8 NYCRR 200.5[j][6]). Except in cases where a party withdraws the due process complaint notice prior to the first date of an impartial hearing, a party seeking to withdraw a due process complaint notice must immediately notify the IHO and the other party, and the IHO "shall issue an order of termination" (8 NYCRR 200.5[j][6][ii]). In addition, a withdrawal "shall be presumed to be without prejudice except that the [IHO] may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice" (8 NYCRR 200.5[j][6][ii]). The IHO's written decision that such withdrawal shall be "with or without prejudice" is binding upon the parties unless appealed to an SRO (8 NYCRR 200.5[j][6][ii]).[14] Lastly, State regulations provide that nothing in the withdrawal section shall "preclude an impartial hearing officer, in his or her discretion, from issuing a decision in the form of a consent order that resolves matters in dispute in the proceeding" (8 NYCRR 200.5[j][6][iv]).

In his decision, the IHO set forth the following rationale for dismissing the parents' claims, but for pendency, with prejudice:

> I also note that a hearing on the merits, while scheduled multiple times, has not occurred. In each opportunity, the parents' either filed an amended due process complaint (therefore resetting the timelines), or the parties voluntarily returned to mediation, subsequently reaching further agreement (see Mediation Agreement II). Mediation Agreement I appears to contemplate extended eligibility for the student, at least for the 2023-24 school year. The parents have been seeking extended eligibility relief for various alleged violations in a number of [] their [due process complaint notices], including but not limited to Case Nos. 226452, 229621, the

[14] If a party "subsequently files a due process complaint notice within one year of the withdrawal of the complaint that is based on or includes the same or substantially similar claims as made in a prior due process complaint notice that was previously withdrawn by the party," the district shall appoint the same IHO who was appointed to the "prior complaint unless that [IHO] is no longer available to hear the re-filed due process complaint" (8 NYCRR 200.5[j][6][iv]).

> initial filing of 237881 and its subsequent amendment. I am constrained to find that marking this claim withdrawn without prejudice would be unjust in that the parents have attempted to litigate this claim multiple times, each time withdrawing same. Three attempts here is enough.

(IHO Decision at pp. 4-5).

The undersigned already went to the extraordinary length to order the evaluation by the district without the consent of the parents due to their improper behavior, yet further allowed the parents the opportunity to complete IEEs at public expense by a deadline in January 2020 (Application of a Student with a Disability, Appeal No. 19-080). Upon review of the evidence in the hearing record, I see no sincere efforts since then by the parents to correct their behavior and produce the student to district personnel for evaluation. I do not believe the parent's assertions that the student was incapable of attending a district evaluation. Notably, the student participated in a three-hour psychological diagnostic evaluation on August 2, 2022 conducted by a clinician of the parents' choosing (IHO Ex. X at p. 1). But when called upon to produce the student to the district, the parents have a demonstrated history of failing to comply. The parents are not permitted to prevent the district from evaluating the student year after year then continue to charge the district with wrongdoing in due process and then repeatedly withdraw the claims and restart them anew after the student has become statutorily ineligible for services.[15] The IHO and the district are correct to note the parents' history of filing duplicative due process complaint notices. In this matter, considerable public resources have been expended unnecessarily. The parents are charged with the responsibility of being personally aware of the due process proceedings they have brought (see Application of the New York City Dep't of Educ., Appeal No. 23-082). In this instance it would be unfair to the district to allow the parents to proceed on merits-based claims in a due process proceeding based upon new evaluative information obtained at this point, even if the parents were willing to present the student for such evaluations. They have been given those opportunities and failed to avail themselves of them. At this juncture I find it appropriate to allow the parents to make a final attempt to identify the services that they believe the district was required to provide pursuant to pendency up until the student reached age 22. Accordingly, I find the IHO

[15] This excerpt from a decision dated July 18, 2019 in which a prior IHO wrote of the parties highlights the parents' history of denying the district the opportunity to evaluate the student

> Based on the family's inability to identify even a single clinical provider to assess the student, their incapacity to date to implement my orders granting them the right to conduct IEEs and retain a related service provider, their refusal to cooperate with the Guardian ad Litem, their refusal to participate in district-mandated assessments, and the student's ongoing and urgent need for appropriate assessment and development of a new, appropriate, IEP calling for a new, appropriate placement, I now Find: The district has a right to conduct a triennial re-evaluation of the student, at a time and in a location of its reasonable selection…
>
> I do Find that the family's unwillingness to cooperate with the Guardian-ad-Litem appointed solely for the purpose of facilitating scheduling and transportation verges on a refusal to accept special education services for this young adult who plainly is in need of them and could benefit from them. I lack the investigative powers and enforcement powers of the Family Court. Absent those powers, or a change in [the parents'] willingness to cooperate with district staff, I despair of the district defining, or the student receiving, an[] appropriate program and placement (Parent Ex. B at pp. 6, 7).

was correct to dismiss the parents' non-pendency claims with prejudice and to order that the parents are estopped from raising any further claims regarding the 2022-23 school year.

VII. Conclusion

I have determined that the evidence in the hearing record supports the IHO's determinations that the parents' allegations regarding the district's implementation of pendency for the 2022-23 school year relating back to October 12, 2022 are withdrawn without prejudice and the remainder of the parents' claims are withdrawn and that the parents have been provided ample opportunities to pursue their claims through administrative due process and should be estopped from raising any further claims concerning the 2022-23 school year. I have also found that the student is not statutorily eligibility for special education as of his 22nd birthday, which occurred during the 2022-23 school year, and that the parents may not pursue relief in the due process forum related to their contractual settlements and the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 18, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER