The University of the State of New York

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

No. 24-152

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:
Brain Injury Rights Group, Ltd., attorneys for petitioners, by Peter Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Michael Gindi, 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 request to be reimbursed by respondent (the district) for their son's tuition costs at the International Academy for the Brain (iBrain) for the 2023-24 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has been the subject of three prior State-level administrative appeals concerning the student's 2019-20, 2020-21, and 2022-23 school years (Application of a Student with a Disability, Appeal No. 23-041; Application of a Student with a Disability, Appeal No. 21-115; Application of a Student with a Disability, Appeal No. 21-006). Accordingly, the parties' familiarity with the student's educational history preceding those matters is presumed and such

history will not be repeated here except as relevant to the present matter. Briefly, the student attended iBrain since January 2020 (Parent Exs. H ¶ 5; I ¶ 13).[1, 2]

A CSE convened on March 16, 2022, and developed an IEP for student with projected dates of implementation between March 28, 2022 and June 20, 2022 (Parent Ex. K at pp. 1, 67-68, 73).[3] The IEP reflects that the parents were seeking "additional years of service" pursuant to the State's "COVID waiver for extension of school-age based services" (id. at pp. 48, 75).[4] Finding the student remained eligible for special education and related services as a student with a traumatic brain injury, the March 2022 CSE recommended that the student attend a 12-month, 6:1+1 special class in a specialized school with related services (id. at pp. 1, 67-69). The March 2022 CSE additionally recommended that the student receive the support of a 1:1 paraprofessional for health, ambulation, feeding, and safety, the use of a dynamic display speech generating device (SGD) and two 60-minute sessions of assistive technology services (id. at p. 68). The March 2022 CSE also recommended the student receive special transportation with specific accommodations (id. at p. 73).

After the CSE meeting, in an email to the parents' attorney dated March 16, 2022, the district school psychologist stated that she would "request clarity on the specific process with regards to seeking additional years of school-age services under the state authorized COVID extension" (Dist. Ex. 7 at p. 2). In response, the parents' attorney set forth the parents' position that the student should be deemed eligible for special education from the district until he reached age 23 (id. at pp. 1-2).

As of September 1, 2022, the district discharged the student from enrollment in the district based on the student's age (Dist. Ex. 1). The parents unilaterally placed the student at iBrain for the 2022-23 school year, and the parents' request for the district to fund the student's tuition for that school year was the subject of a prior matter (Application of a Student with a Disability, Appeal No. 23-041).

Turning to the school year at issue, by letter dated June 20, 2023, the parents notified the district of their intention to unilaterally place the student at iBrain for the 2023-24 school year (12-month program) and to seek funding from the district for the student's placement (Parent Ex. C at

[1] iBrain has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] During the impartial hearing, the parents offered certain exhibits into evidence to support their position regarding the student's pendency placement but the pendency exhibits were marked and entered into evidence with the same letter designations that were used to identify other parent exhibits entered into evidence in support of the parents' position on the merits (see Tr. pp. 31-32, 51-54, 112-13). For clarity in this decision, the parents' exhibits that were entered during the pendency portion of the hearing will be cited as "Pendency" exhibits (see, e.g., Parent Exs. A-K; Parent Pendency Exs. A-G).

[3] The district also introduced a copy of the March 2022 IEP into evidence (compare Parent Ex. K, with Dist. Ex. 2). For purposes of this decision, only the parents' exhibit will be cited when referencing the March 2022 IEP.

[4] The student turned 21 years old in January 2022, prior to the March 2022 CSE meeting (see Parent Ex. K at p. 1).

p. 1). In the letter, the parents indicated they were rejecting the district's recommended program and placement because they had not been informed of an IEP meeting, nor had the district developed an IEP or notified the parents of a placement/school location for the student for the 2023-24 school year (id. at pp. 1-2). On July 3, 2023, the parents executed a contract with iBrain for the student's attendance for the 2023-24 school year (Parent Ex. E).

A. Due Process Complaint Notice

In a due process complaint notice dated July 5, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). The parents alleged that, during the March 2022 CSE meeting, the district "explicitly confirmed" the student was eligible for two years of extended eligibility for special education and related services (id. at p. 4). The parents also alleged that the CSE failed to meet and create an IEP for the 2023-24 school year, thus denying the student a FAPE (id. at pp. 4-6). As relief, the parents requested an order finding that the district denied the student a FAPE for the 2023-24 school year and directing the district to fund the cost of the student's program at iBrain including the cost of a 1:1 paraprofessional and transportation costs (id. at p. 7). The parents also requested a pendency order based on a prior unappealed SRO decision which found iBrain was an appropriate program for the student (id. at pp. 1-2).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 7, 2023 and concluded on January 26, 2024, after eleven days of proceedings inclusive of three status conferences and a hearing date devoted to addressing the student's pendency placement (Tr. pp. 1-203).[5, 6] In a decision dated March 15, 2024, the IHO found that the student was not entitled to extended eligibility and thus was not eligible for special education services under the IDEA (IHO Decision at p. 15). To form his determination, the IHO noted the evidence he relied upon, specifically the testimony of the district school psychologist who was a member of the March 2022 CSE, the transcript of the March 2022 CSE meeting, and the email between the parties dated March 16, 2022, and found that such evidence supported a finding that the district did not approve or indicate that it was going to approve extended eligibility services for the student through the 2023-24 school year (id. at pp. 8-15). The IHO determined that the student was not entitled to extended eligibility and there was no evidence in the hearing record to support the parents' requested relief (id. at p. 15). Based on the IHO's eligibility determination, the IHO indicated that the district was not required to provide the student a FAPE, and, as a result, the IHO dismissed the parents' due process complaint notice (id. at pp. 15-16).

[5] A representative from the district did not appear for the status conferences held on August 7, 2023, August 17, 2023, or August 24, 2023 (see Tr. pp. 1-26).

[6] In an interim decision, dated September 12, 2023, the IHO found that the student was entitled to a stay put placement during the pendency of the proceedings consisting of the student's attendance at iBrain (IHO Ex. I).

IV. Appeal for State-Level Review

The parents appeal. The parties' familiarity with the particular issues for review on appeal in the parents' request for review, the district's answer, and the parents' reply thereto is presumed and, therefore, the allegations and arguments will not be recited here. The crux of the parties' dispute on appeal is whether the IHO erred in finding the student ineligible for special education services under the IDEA because the student had turned 22 years old prior to the start of the 2023-24 school year, and that, as a result, the district was not required to offer the student a FAPE for the 2023-24 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 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]).[7]

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

[7] 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).

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 F.4th 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" (Educ. Law § 4401[1]; see 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]).

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 and a State appellate court distinguished New York's education law from Connecticut's law (see Katonah-Lewisboro Union Free Sch. Dist. v. New York State Educ. Dep't, 207 N.Y.S.3d 891 [March 8 2024]), this State funds and administers adult education programs similar to those in Connecticut (see, e.g., Educ. Law §§ 3602[11]; 4604; 8 NYCRR 100.7; 157.1; 164.2; see also Office of Counsel's Formal Opinion No. 242 [July 2023], available at https://www.counsel.nysed.gov/sites/counsel/files/242.pdf). However, even assuming arguendo that the student may have been entitled to special education through the day before his 22nd birthday, the student turned 22 during the 2022-23 school year, which is not the subject of the present proceeding. The foregoing authority does not, as the parents argue, extend a student's eligibility past a student's 22nd birthday (Req. for Rev. ¶ 22).

Turning to the 2023-24 school year at issue, upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that

the student was no longer eligible for special education under the IDEA and that the district was not required to offer the student a FAPE for the 2023-24 school year (IHO Decision at pp. 8-15). Initially, the IHO discussed the parties' arguments and relevant statutes and State guidance concerning extended eligibility for special education services (id. at pp. 3-7). Next, the IHO set forth a thorough written summary of the evidence and testimony, including the instances in the hearing record where contradictory or confusing facts and testimony existed (id. at pp. 8-15).

With respect to the parents' allegation that the district made representations to them during the March 2022 CSE meeting that the student would be eligible for two years of extended eligibility for special education and related services, the IHO's decision set forth in detail the facts and reasoning upon which he based his determinations (IHO Decision at pp. 8-15). The IHO determined that the district did not make such representations to the parents at the March 2022 CSE meeting or later in a March 2022 email, and instead the evidence showed that the district acknowledged that the parents were seeking extended eligibility services for the 2023-24 school year but did not state that the additional year of school age services had been approved (id.). The IHO noted that the district school psychologist testified that at the March 2022 CSE meeting the parents requested extended years of eligibility due to the COVID-19 pandemic and resulting school shutdowns and that she responded by stating she would seek additional information and clarity from the district on what the district's response would be to the request, and she would be in touch with the parents about it (id. at p. 8; see Dist. Ex. 9 ¶¶ 8-9).[8] The IHO further noted that the March 2022 CSE transcript supported the district school psychologist's testimony that she was going to get clarity on the district's position regarding extended eligibility services for the student (IHO Decision at p. 8; see Dist. Ex. 6 at pp. 35-37). The IHO also noted that the March 2022 email between the parties did not grant any additional years of school age services (IHO Decision at p. 8; see Dist. Ex. 7 at pp. 1-2). Upon review, I find that the hearing record support the IHO's factual determinations.

The IHO also found that the parents' reliance on Chapter 167 of the Laws of 2021 was misplaced. Chapter 167 of the Laws of 2021 provided:

> Section 1. Notwithstanding any provision of law, rule or regulation to the contrary, a school district may provide educational services in the 2021-22 and 2022-23 school years to a student who turned twenty-one 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 individualized education plan. Such student may continue to receive such educational services until the student completes the services pursuant to the individualized education plan or turns twenty-three years of age, whichever is sooner.
>
> § 2. This act shall take effect immediately and shall expire and be deemed repealed June 30, 2023.

[8] The district school psychologist testified that she was the district representative at the March 2022 CSE meeting (Tr. p. 80).

(L. 2021, Ch. 167).[9] The IHO noted in his decision that Chapter 167 of the Laws of 2021 was repealed on June 30, 2023 and did not apply to the 2023-24 school year (IHO Decision at p. 15; see Parent Ex. F). Moreover, Chapter 167 of the Laws of 2021 did not mandate that districts provide services to students beyond the age of 21 but provided that "a school district may provide educational services in the 2021-22 and 2022-23 school years" (Parent Ex. F [emphasis added]). The IHO also noted that Chapter 167 of the Laws of 2021 applied to students enrolled at a public school (IHO Decision at p. 15). The student was enrolled at iBrain during the 2023-24 school year, a nonpublic school (Parent Exs. B at p. 1; D; I ¶ 15). On appeal, the parents have not alleged any error in the IHO's reasoning in this regard, and review of the hearing record and the applicable law supports the IHO's determination.

The parents also allege that the district failed to provide them with prior written notice that the student was no longer eligible for special education under the IDEA due to his age and also argue that the September 2022 discharge letter "was not an effective discharge" because the district created an IEP for the student for the 2022-23 school year (Req. for Rev. ¶ 20). There is no merit to the parents' position that the actions of the CSE in May 2022 or the lack of a notice thereafter regarding the student's aging-out of IDEA eligibility would support an extension of the student's eligibility for the 2023-24 school year. Prior written notice must be given to the parents of a student with a disability "a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a [FAPE] to the student" (8 NYCRR 200.5[a][1]). Even if the district were required to provide the parents with a prior written notice indicating the student was no longer eligible for special education under the IDEA due to his age, such failure would, at most, amount to a procedural violation. As indicated above, under the IDEA 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]). Here, the district discharged the student in September 2022 and the student was

[9] It should be noted that despite the parents' allegation that the student turned twenty-one years old during the 2020-21 school year (Req. for Rev. ¶¶ 16-17), based on the student's birthday, the student turned twenty-one years old during the 2021-22 school year (see Parent Ex. A at p. 1). Chapter 223 of the Laws of 2022, which became effective on June 13, 2022 and is deemed repealed on June 30, 2024, provides that students may continue to receive educational services up to age twenty-three under certain circumstances as follows:

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

(L. 2022, Ch. 223). However, this law does not mandate that districts provide services to students beyond the age of 21 but provides that a "district may provide educational services in the 2022-23 and 2023-24 school years to a student who turned twenty-one years old during the 2021-22 school year" (L. 2022, Ch. 223 [emphasis added]).

not eligible to receive a FAPE for the 2023-24 school year. Any procedural violation in failing to send a prior written notice after the conclusion of the school year in which the student's eligibility terminated due to his age did not rise to the level of a gross denial of a FAPE, such that the student would be entitled to extended eligibility for the 2023-24 school year as a result.[10]

Overall, the IHO relied upon the law and the evidence in the hearing record to conclude that the student's eligibility for special education terminated due to the student's age prior to the 2023-24 school year and, therefore, the district was not required to offer the student a FAPE for such school year. In light of the totality of circumstances in this matter and a full, independent review of the impartial hearing record, I find no error in the IHO's determination to deny the parents' request for district funding of the student's tuition at iBrain for the 2023-24 school year and to dismiss the parents' due process complaint notice.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that, due to his age, the student was not eligible for special education under the IDEA and that, therefore, the district was not required to offer the student a FAPE for the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether iBrain was an appropriate unilateral placement for the student or whether equitable considerations support an award of tuition funding (Burlington, 471 U.S. at 370).

I have considered the parties' remaining contentions and find I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 24, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[10] With respect to the availability of extended eligibility as a form of relief, there may be circumstances where 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 may be warranted (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]). However, 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]).