The University of the State of New York

The State Education Department
State Review Officer
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No. 24-167

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

Appearances:
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. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied, in part, her request for compensatory education to remedy respondent's (the district's) failure to offer or provide her son an appropriate educational program for the 2019-20 and 2020-21 school years. The appeal must be sustained in part.

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 district first found the student eligible for special education as student with a disability in preschool (see Dist. Ex. 6).[1] Leading up to the 2019-20 school year (10th grade), a district CSE convened on June 25, 2019 without the parent (see Parent Ex. B at p. 20).[2] The June 2019 CSE recommended that the student be placed in a 6:1+1 special class in a district specialized school, along with adapted physical education, individual paraprofessional support services, occupational

[1] The student was the subject of a prior State-level administrative appeal concerning the 2016-17 school year (see Application of a Student with a Disability, Appeal No. 17-109).

[2] Several pages of the June 2019 IEP entered into evidence are cut off along the right side of the document (Parent Ex. B). Upon request, the district provided a full copy of the document with all content legible; however, the pagination differs and the district's version of the document does not include handwritten notations on the attendance page. For purposes of this decision, the parent's exhibit will be cited.

therapy (OT), speech-language therapy, and parent counseling and training (id. at p. 15). According to the parent, she was not aware the CSE meeting took place and the district did not provide her a copy of the June 2019 IEP until February 2020 (see Parent Exs. H; U ¶¶ 4-6, 11).

Sometime between July and September 2019, the student moved with the parent to a different school district within the State, and the other school district offered the student transfer services and developed an IEP that the parent ultimately rejected (see Parent Exs. DDD at pp. 1, 3; DDDD at pp. 1-2; Dist. Exs. 1 at pp. 5-6; 14 at p. 3).[3, 4]

In an email to the district, dated October 31, 2019, the student's father informed the district that the student had returned to the district and that he would be "handling [the student's] educational services" (Parent Ex. G at p. 1). The father requested that a CSE meeting be convened for the 2019-20 school year (id.).[5] The student's father signed a consent for the district to evaluate the student on November 12, 2019, and, in November and December 2019, the district conducted a social history, a psychological evaluation, and an occupational therapy (OT) evaluation of the student (Dist. Exs. 4; 6-8). In addition, the CSE had a January 2020 private updated psychological evaluation report to consider as well as letters from the student's medical providers (Dist. Exs. 11-12). After moving to the district, the parent arranged for the student to receive private services in the home from a Board Certified Behavior Analyst (BCBA) (see Dist. Ex. 14 at pp. 4-5).

A CSE convened on February 14, 2020, found the student eligible for special education as a student with autism, and developed an IEP with a projected implementation date of April 24, 2020 (Dist. Ex. 14).[6] The CSE recommended that the student attend a 6:1+2 special class placement in a State-approved nonpublic residential school with the full time support of a 1:1 paraprofessional, adapted physical education, and related services of occupational therapy (OT), speech-language therapy, and parent counseling and training (id. at pp. 22-23, 27). In the interim, while awaiting the identification of an appropriate residential placement, the IEP called for the student to attend a 6:1+1 special class in a district specialized school (id. at p. 22). The CSE also recommended that the student receive the services called for in the IEP for a 12-month basis extended school year (id. at p. 24).

In an email dated February 18, 2020 and a letter dated February 28, 2020 (marked received by the district on March 3, 2020), the parent objected to the interim placement recommended in

[3] The hearing record contains multiple duplicative exhibits. For purposes of this decision, only district exhibits are cited in instances where both a parent and district exhibit are identical in content; further, only full versions of documents are cited rather than excerpts separately entered into evidence. The IHO is reminded that it is his responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[4] According to the hearing record, while residing in the other school district, the student received special education services from a private company, including applied behavior analysis (ABA) services in a ratio of 2:1 (see Dist. Ex. 10 at pp. 6-7).

[5] In a letter also dated October 31, 2019, but stamped received by the district on November 12, 2019, the father requested that the district evaluate the student (Dist. Ex. 5).

[6] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

the IEP but agreed "to consider a residential school placement" (Parent Ex. K at p. 1; Dist. Ex. 13). In the letter, the parent also notified the district of her intent to "set[] up a program . . . similar to the last school placement [her] son received" and "seek[] public funding to homeschool [her] son (30 hours weekly) using ABA providers at an enhanced rate" (Dist. Ex. 13).

The district conducted a speech-language evaluation of the student in March 2020 (Dist. Ex. 9). After completion of the speech-language evaluation, in an email dated April 6, 2020, the district provided the parent "a completed IEP" and submitted an application with the central based support team (CBST) to locate an appropriate State-approved nonpublic residential school for the student (Dist. Ex. 15). In an email dated April 8, 2020, the district requested that the parent provide consent for initial delivery of special education services to the student and notified the parent that the district would be sending a "School Location Letter" for the interim placement (Dist. Ex. 17). In May 2020, the parent contacted the district on several occasions to inform the district that she had not received a "placement" or "been contacted by the CBST" regarding the residential placement (Parent Ex. P). The district, in response, informed the parent of the name of the CBST case manager and opined that there could be a delay due to the circumstances surrounding the COVID-19 pandemic (Parent Ex. Q).

A. Due Process Complaint Notice

In a due process complaint notice dated November 18, 2021, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2019-20 and 2020-21 school years (Due Process Compl. Not.). The parent contended that the district improperly held a CSE meeting in June 2019 without the parent's participation and did not provide a copy of the IEP to the parent until halfway into the school year (id. at pp. 2, 4-5, 7). The parent also argued that, after the parent requested an IEP in October 2019, no IEP was finalized until April 2020 (id. at pp. 2, 5-6). Regarding the IEP developed for implementation in April 2020, the parent argued that the interim recommendations by the CSE were inappropriate (id. at pp. 2, 6-7, 8-9). The parent asserted that, for the 2019-20 and 2020-21 school years, the district failed to sufficiently evaluate the student, failed to conduct a functional behavioral assessment (FBA), develop a behavioral intervention plan (BIP), or sufficiently identify and address the student's interfering behaviors, and failed to offer any particular methodology, social skills training, or appropriate related services to address the student's needs (id. at pp. 7-8). Finally, the parent indicated that "no actual school placement or interim educational services were offered" to the student (id. at pp. 2, 7).

For relief, the parent requested, among other things, "[i]mmediate provision of home related and academic services" with supervision by a BCBA and related services; independent educational evaluations (IEEs) at district expense; compensatory education equal to "what a Residential School Placement would have provided"; compensatory related services; "[e]ducational services extended through 2024/2025"; and reimbursement for all out-of-pocket expenses for evaluations and services (Due Process Compl. Not. at p. 10).

B. Impartial Hearing Officer Decision

An impartial hearing convened on May 20, 2022 and concluded on January 4, 2024 after 23 days of proceedings, inclusive of prehearing and status conferences, appearances by one or both of the parties at which procedural matters and scheduling were discussed, and substantive hearing dates (Tr. pp. 1-607). In a decision dated March 20, 2024, the IHO found that the district failed to

meet its burden to prove that it offered the student a FAPE for the 2019-20 and 2020-21 school years (IHO Decision at pp. 20-24, 27). Initially, the IHO found that the parent had removed the student from the district from September 2019 through November 2019 and that the district thereafter "properly held" a CSE meeting in February 2020 (id. at p. 20). As for the February 2020 IEP, the IHO found that the recommendation for a State-approved nonpublic residential school was appropriate but that the recommended interim program of a 6:1+1 special class in a district specialized school was not appropriate, particularly given the student's "behavioral, safety, and medical issues," and that the CSE should have considered an "interim home program" (id. at pp. 20-23). The IHO also noted that the district did not provide the parent a copy of the February 2020 IEP until April 2020, the IEP was not projected to be implemented until April 24, 2020, and the district never provided the parent with prior written notice or identified a school location for the interim program (id. at p. 23). Although the IHO found the recommendation for a residential school placement was appropriate, he also noted that the district did not make the referral to the CBST to identify an appropriate residential school until April 2020 and, overall, there was no evidence that the district "made any effort to identify an appropriate residential [nonpublic school]" (id. at pp. 23-24).

As for relief, the IHO determined that the student was entitled to compensatory education (IHO Decision at pp. 24-27). The IHO determined that, in the absence of a residential program, the student "required a home based interim program" (id. at p. 26). Relying on the recommendations of the private psychologist, the IHO found that compensatory education should consist of an extended school day for 365 days per year consisting of ABA instruction, supervision by a BCBA, and parent counseling and training (id.). The IHO also found the student entitled to compensatory education for related services recommended in the February 2020 IEP (id.). For the 2019-20 school year, the IHO calculated the compensatory award from the date of the February 2020 CSE meeting to the end of the school year totaling 137 days (21 weeks) (id. at pp. 26, 28). For the 2020-21 school year, the IHO calculated the compensatory award based on the entire year from July 1, 2020 through June 30, 2021 totaling 365 days (52 weeks) (id.). The IHO indicated that "[t]he Parent's remaining requests [we]re denied based on the lack of evidence in the record" (id. at p. 27).

Thus, for the 2019-20 school year, the IHO found the student was entitled to compensatory education consisting of 1,096 hours of instruction from an ABA teacher and/or behavior technician; 42 hours of BCBA supervision; 21 hours of parent counseling and training; 42 hours of OT; and 42 hours of speech-language therapy (IHO Decision at pp. 26, 28). For the 2020-21 school year, the IHO found the student was entitled to compensatory education consisting of 2,920 hours for an ABA teacher and/or behavior technician; 104 hours of BCBA supervision; 52 hours of parent counseling and training; 104 hours of OT; and 104 hours of speech-language therapy (id. at pp. 26-29). The IHO ordered the district to "provide/fund" the compensatory education services to be delivered by providers of parent's choosing at "enhanced contract rate[s]" (id. at p. 28). In addition, the IHO indicated that the compensatory award would not expire (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in not awarding additional compensatory education to remedy a denial of a FAPE for the period of October 31, 2019 through February 13, 2020. The parent argues that the district improperly deemed the student discharged in July 2019

and treated the parent's October 2019 request for special education as an initial referral.[7] She argues that, upon transfer into the district, the student was entitled to immediate services. Thus, the parent seeks compensatory education for the 106 days that the IHO did not include in his calculations. The parent also seeks additional compensatory education to make up for regression experienced by the student for periods of time when he received no services due to the district's failure to provide a FAPE. The parent argues that in denying the parent's request for additional relief, the IHO overlooked evidence and/or improperly limited the parent's opportunity to offer additional proof. Based on recommendations from an ABA expert, who testified in a prior impartial hearing involving the student, the parent contends that an appropriate compensatory award to address regression would consist of three times the hours of FAPE denied. In the event the evidence is not sufficient to support the additional compensatory education sought, the parent requests that the matter be remanded to the IHO.

In an answer, the district denies the parent's material allegations and argues that the IHO's decision should be upheld in its entirety.[8]

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

[7] The parent also argues that the June 2019 CSE improperly convened without the parent and that the IEP developed at that meeting included false statements.

[8] The district does not appeal the IHO's determinations that it denied the student a FAPE for the 2019-20 and 2020-21 school years and which ordered it to fund or provide compensatory education services (see IHO Decision at pp. 20-28). Accordingly, these findings have 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]).

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]).[9]

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

VI. Discussion

A. October 2019—February 2020

Initially, although the IHO found that the district failed to meet its burden to prove that it offered the student a FAPE for the 2019-20 and 2020-21 school years (IHO Decision at pp. 20-24, 27), review of the decision reflects that he did not find that the district violated the IDEA for the period of July 2019 through February 2020 and proportionately limited the award of compensatory education as a result (id. at pp. 20, 26, 28). The parent challenges the IHO's determination in this regard. Accordingly, the first issue to be addressed relates to the district's obligations to the student upon the student's transfer back to the district in October 2019.

Consistent with federal law, State regulation provides that "[i]n the case of a student with a disability who had an IEP that was in effect in this State and who transfers from one school district and enrolls in a new school district within the same school year, the new school district shall provide such student with a [FAPE], including services comparable to those described in the previously held IEP, in consultation with the parents, until such time as the school district adopts the previously held IEP or develops, adopts and implements a new IEP that is consistent with Federal and State law and regulations" (8 NYCRR 200.4[e][8]; see 20 U.S.C. § 1414[d][2][C][i][I]; 34 CFR 300.323[e]). The United States Department of Education has stated that "'comparable' services means services that are 'similar' or 'equivalent' to those that were described in the child's IEP" (IEPs for Children Who Transfer Public Agencies in the Same State, 71 Fed. Reg. 46681 [Aug. 14, 2006]).

A review of the events and the timing of the student's return to the district frames the issue to be resolved. Initially, the parent seeks no relief for the period of July through October 2019, so it is unnecessary to consider the issue of when precisely between July and September 2019 the student moved out of the district. During the impartial hearing, the parent indicated that she moved out of the district "for a few weeks in September 2019" and registered the student at a different school district (Parent Ex. DDDD at pp. 1-2). While the hearing record does not include an IEP developed for the student by the other school district, according to the hearing record, the other school district held a "[t]ransfer meeting" and, thereafter, sent "[p]ackets" to identify an appropriate school placement and assigned a tutor to provide "home instruction as of September 5, 2019"; however, the parent rejected the proposed IEP, stating concern about the lack of mandate for

[9] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

behavioral supports and seeking a reconvene CSE meeting after an opportunity to visit "the programs" discussed at the meeting (Parent Ex. EEE; see Parent Ex. DDDD at p. 2).

As noted above, in emails dated October 31, 2019, the student's father notified the district of the student's return to the district, made a request for dates and times to schedule an IEP meeting, and stated that the student was under medical care and had not attended school "this year" (Parent Ex. G at pp. 1-2).[10] In a letter "To Whom It May Concern," dated October 31, 2019 and stamped received by the district on November 12, 2019, the father requested an evaluation of the student, and provided some diagnostic and medical information and noted that the student was being "home schooled" (Dist. Ex. 5 at p. 1).[11] On November 12, 2019, the father consented to the district conducting evaluations of the student, noting on the consent that the original request for evaluation was submitted October 31, 2019 (Dist. Ex. 4 at pp. 1-3).

The district conducted evaluations of the student including a November 12, 2019 social history and psychoeducational evaluation, a December 8, 2019 OT evaluation, and the parents obtained a January 5, 2020 psychological update (Dist. Exs. 6 at pp. 1-2; 7 at pp. 1-8; 8 at pp. 1-5; 11 at pp. 1-9). In addition, the hearing record includes medical reports dated January 29, 2020 and February 11, 2020 that discuss how the student's diagnoses and medical issues impacted the student's ability to attend a classroom and recommended that, due to the severity of his symptoms, the district should consider a residential school placement for students with autism spectrum disorder (Dist. Ex. 12 at pp. 1-2). The CSE convened on February 12, 2020 (Dist. Ex. 14).

It is undisputed that the student did not receive special education from the district between October 2019 and February 2020 (see Dist. Exs. 6 at p. 2; 12 at pp. 1-2). The district argues that it was not obligated to provide the student services during that timeframe before the February 2020 CSE meeting because the October 2019 request for an evaluation was an initial referral, meaning the district had until February 25, 2020, 60 school days from the parent's provision of consent to evaluate, to arrange for special education programs and services and, to the extent it failed to do so, the IHO already addressed the violation with an award of compensatory education for that period of time after the February 2020 CSE meeting.

However, the district failed to follow the applicable State and federal law governing transfers between school districts within the State that required the district to provide comparable services. The provisions of law and regulation governing initial referrals to which the district cites are applicable to students suspected of having a disability (see Educ. Law § 4401-a[1], [3]; 8

[10] Attached to a February 18, 2020 email from the parent to the district was an October 24, 2019 BCBA report, an overview of the student's educational program from September 5, 2019 to October 24, 2019 (Dist. Ex. 10 at pp. 1-2, 6-7). A summary of this report was included in the February 2020 IEP (Dist. Ex. 14 at p. 3).

[11] The hearing record includes various references to both "home instruction" and "home schooling." A student may receive instruction at home or outside of school for a variety of reasons (see 8 NYCRR 100.10, 175.21[a], 200.6[i]). For example, students may be home schooled by their parents (8 NYCRR 100.10); students with disabilities may receive home or hospital instruction as a placement on the continuum of services (8 NYCRR 200.6[i]; see 8 NYCRR 200.1[w]); or students may receive homebound instruction if they are "unable to attend school because of physical, mental, or emotional illness or injury" (8 NYCRR 175.21[a]; see Educ. Law 3602[1][d]). The November 12, 2019 district psychoeducational evaluation stated that the student had "not been approved for home schooling" and the parent stated that the parents were never the student's home school teachers (Parent Ex. U¶ 24; Dist. Ex. 7 at p. 1).

NYCRR 200.4[a][1][i]; [a][2][ii]-[iv]; [b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]),[12] whereas the student in the present matter had already been found eligible for special education as a student with a disability in the district since preschool with the exception of the brief period of time when he resided in another school district (see Dist. Ex. 6 at p. 2).

The district school psychologist testified that, once a student moves out of the district, that student is "discharged" and his or her "case would be closed" (Tr. p. 452). She further indicated that, if a student comes back after having an IEP in another school district, the CSE would create "a comparable services plan" or, if there had been "no program attended" in the other school district, the district would "do initial evaluations to assess the current needs of that student" (Tr. pp. 452, 510). The school psychologist indicated that, when a student transfers to the district, the district "deal[s] with the family" and the parents provide the district any IEP from the prior school district (Tr. pp. 511, 513).

In her affidavit testimony, the district school psychologist acknowledged the correspondence from the student's father requesting a CSE meeting and indicated that the father was informed "via email as well as over the phone that [the student] need[ed] an updated psychoeducational evaluation before an IEP meeting" (Dist. Ex. 16 ¶¶ 10-11; see Parent Ex. I at p. 2). In addition, the district requested that the father "submit[] copies" of any evaluations that the prior school district may have conducted (Dist. Ex. 16 ¶ 10; see Tr. p. 164). The school psychologist indicated that the district did not receive an IEP from the prior school district and stated her understanding that "there was no IESP [sic] from the District that he attended" before returning to the district and so the district treated the student's case as an initial referral (Tr. pp. 453, 510-11).

Initially, the district's position that it was the parent's obligation to produce and provide any evaluations or IEPs from the prior district is contrary to the IDEA, which provides that, upon a student's transfer, the new district in which the student enrolls "must take reasonable steps to promptly obtain" the student's records from the old district, including "the IEP and supporting documents and any other records relating to the provision of special education or related services to the child" (20 U.S.C. § 1414[d][2][C][ii][I]; 34 CFR 300.323[g][1]; 8 NYCRR 200.4[e][8][i]). The district did not take reasonable steps to obtain the records in this matter and its argument that it can pass off that statutory and regulatory obligation to a parent is without merit.[13]

[12] Upon written request by a student's parent, a district must initiate an individual evaluation of a student suspected of having a disability (see Educ. Law § 4401-a[1], [3]; 8 NYCRR 200.4[a][1][i]; [a][2][ii]-[iv]; [b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]). After parental consent has been obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).

[13] As a matter of convenience, a school district would not be precluded from informally seeking copies of student's educational records from parents, especially if it would alleviate delay in starting the work of developing a comparable services plan, but the district should verify that any parent-provided materials are accurate by obtaining the student's educational records from the previous school district.

Moreover, even if the district was not required to offer comparable services to those recommended in the IEP developed by the other school district but rejected by the parent (A.M. v. Monrovia Unified Sch. Dist., 627 F.3d 773, 779 [9th Cir. 2010] [interpreting the phrase "in effect" to mean the last-implemented IEP and thus determining that the district at issue did not have to provide services comparable to those in an IEP recently adopted but not provided by another district]), this does not explain why the district did not, instead, determine what program was last implemented for the student, which, in this instance, would have been a program provided by the district. Indeed, the student had been in the other school district for such a short period of time that, when the father notified the district that the student had returned, it had been only four months since the district's own June 25, 2019 IEP had been developed (see Parent Ex. B).[14] Although the district school psychologist testified that she would not "have known" about or "been aware" of the June 2019 IEP at the time of the father's October 2019 letter as she did not begin working at the district until September 2019 (Tr. p. 152), this was not an adequate explanation given that the district would nevertheless have access to its own records and is not permitted to rely solely on the personal knowledge of its staff. A review of educational records from both school districts would have shown that the student had previously been found eligible for special education by the district, the student had briefly transfer out of and then returned to the district in this case and, critically, whether either district had taken steps to evaluate the student and declassify the him by determining that the student did not meet the criteria for IDEA eligibility.[15]

Based on the foregoing, I find that the parent is correct that the period during which the district denied the student a FAPE also included the time between the father's October 31, 2019 email through the date of the CSE meeting because the district failed to take steps appropriate to obtain the student's records or review its own records and by failing to provide services to the student who had previously been found eligible for special education as a student with a disability.

B. Compensatory Education

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 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]). 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 student is no longer eligible due to his or her age (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students

[14] While the parent raises challenges to the manner in which the June 2019 IEP was developed and shared with the parent, given the relief sought and my determinations herein, it is not necessary to review those claims.

[15] One passing glance at this particular student's educational records such as his prior IEPs developed by the district and his profound deficits described therein would be sufficient for a special education teacher, provider, or school psychologist within the district to realize that the student would not been determined to be ineligible for special education by another school district's CSE within this State. Avoiding the disruption in special education services that would occur with duplicative initial eligibility determinations is precisely what the intra-State transfer provisions in State and federal law were designed to avoid.

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. 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]). Compensatory education relief may also 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 purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

1. October 2019—February 2020

As described above, in addition to the periods of time for which the IHO found a denial of a FAPE, the evidence in the hearing record shows that the district denied the student a FAPE from the period of time following the father's October 31, 2019 email advising the district of the student's return through the date of the February 2020 CSE meeting. Thus, the IHO erred in omitting that time period from his compensatory education award. The date following the father's October 31, 2019 email through the date prior to the February 2020 CSE meeting consists of 105 calendar days (15 weeks). Consistent with the same approach used by the IHO regarding to compute a compensatory award which the district did challenge (see IHO Decision at pp. 24-28), the student is entitled to 840 hours for an ABA teacher and/or behavior technician (105 days x eight hours per day), 30 hours of BCBA supervision (15 weeks x two hours per week), 15 hours of parent

counseling and training (15 weeks x one hour per week), 30 hours of OT (15 weeks x two hours or three 40-minute sessions per week), and 30 hours of speech-language therapy (15 weeks x two hours or three 40-minute sessions per week). Similarly unchallenged and consistent with the terms of the compensatory education awarded by the IHO, the award shall not expire and the district shall "provide/fund" the compensatory education services to be delivered by providers of parent's choosing at "enhanced contract rate[s]" (IHO Decision at p. 28).

2. Regression

In her appeal, the parent requests additional compensatory educational services be awarded due to regression that the student experienced during the 2019-20 and 2020-21 school years due to the district's failure to provide the student with a FAPE.

During the impartial hearing, the parent requested "compensatory services" based on a "quantitative" calculation of hours (Tr. pp. 145-46). Later, she elaborated that the compensatory award should be based on the recommendations set forth in the January 2020 psychological update report, which recommended eight to ten hours per day of educational services from an ABA provider, BCBA supervision, and related services, seven days per week, and should include an "additional year" based on the same hours to address "the regression" (Tr. pp. 347-48; see Dist. Ex. 11; see also Parent Ex. AAAAA at pp. 2-4).

With respect to regression, according to the January 2020 private psychological evaluation update, the student showed concerning signs of regressive autism at the age of four and the report stated that, in June 2018, the student manifested signs of regression in the loss of previously learned skills such as the ability to button his shirt (Dist. Ex. 11 at pp. 1, 6).

In an affidavit, the student's "care-giver" (caregiver) who worked with him from 2017 to 2021, stated that, in November 2019, the student was not in any program, and he became very bored and frustrated being isolated at home, his frequency and severity of self-injury and inappropriate behaviors increased, and his attention span began to decrease (Parent Ex. CCCCC ¶¶ 1, 5). In addition, the caregiver noted that, since January 2020, the student regressed in sustaining attention on academic tasks and refused to do any academic work having been out of a school program and was not used to being structured (id. ¶ 6). The caregiver stated in her affidavit that the student had been able to listen to picture books and answer some "wh" questions, play simple games, and watch story videos, but that the student's attention span for even these leisure activities declined precipitously and the frequency and intensity of the student's aggression increased dramatically (id. ¶¶ 7,8).

Here, while the student may have experienced regression during the 2019-20 and 2020-21 school year, as noted, the student's disability has manifested over time with a loss of previously learned skills, and there is no objective way to parse the extent to which any loss in skills was due to the regressive nature of the student's disability (which does not stem from district's conduct or inaction) from any loss in skills that were the result of district's failure to provide a FAPE. The purpose of compensatory education is not to maximize the student's potential (see Application of a Student with a Disability, Appeal No. 16-033; cf. Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132), which for this student might be bringing regression to a minimum rather than eliminating it. Instead, an award of compensatory education should place the student in the position that he would have been in had the district acted properly (see Parents

of Student W., 31 F.3d at 1497 [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]). Under the circumstances of this case and when fashioning equitable relief, the IHO did not abuse his broad discretion in forgoing a qualitative approach in favor of adopting a quantitative approach as a reasonable way of calculating the amount of compensatory education based on the recommendations in a psychological update.[16]

Further I am not convinced that additional compensatory education using a different computational methodology would be of significantly greater benefit to the student. At least one court has aptly noted that compensatory education services may be the subject to the law of diminishing returns (M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017] [noting that "services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]).

Here, the IHO has already awarded an extensive amount of services calculated based on a week of 60 hours of direct programming per week (consisting of ABA, speech-language therapy, and OT), plus BCBA supervision and parent counseling and training, for a full calendar year from February 2020 through June 2021, including weekends and holidays, exceeding the school days included in a typical 12-month school year (see Educ. Law § 3604[7]; 8 NYCRR 175.5 [a], [c]; 200.1[eee]) and, as discussed above, I find that an additional award is warranted for the period of November 2019 through February 2020. When excluding weekends, the 60 hours envisioned by the IHO (which went unchallenged by the district) approximates 12 hours of services per day before the BCBA supervision and parent counseling and training was factored in, and overall the services would cover the vast majority of the wakeful hours of the day, and I am not convinced, had it complied with the IDEA, that the district would have been required to provide any more in order to achieve education related objectives for the student without crossing deep into the realm of maximization.[17] In total, the award related to the violations during the 2019-20 and 2020-21 school years includes 4,856 hours of instruction from an ABA teacher and/or behavior technician, 176 hours of BCBA supervision, 88 hours of parent counseling and training, 176 hours of OT, and 176 hours of speech-language therapy and will not expire (see IHO Decision at pp. 26-29). Moreover, the student is now 22 years old. While there is no dispute presented by the parties

[16] The parent cites a February 2015 IHO decision from a prior matter involving the student which notes testimony presented in the impartial hearing underlying that matter demonstrating that the student experienced regression during the time period in dispute (summer 2012) when the student received no services and reflecting a recommendation for three to five times the original amount of service to compensate for missed services (see Parent Ex. BBBBB at pp. 11-19). However, this evidence was not presented in this matter and, therefore, carries diminished weight for purposes of determining a compensatory education award. To the extent the parent claims the IHO deprived her of the opportunity to present evidence of regression, review of the hearing record belies such an assertion. Review of the hearing record demonstrates that the IHO exhibited patience in conducting the hearing and interacting with the parties and allowed the parent adequate opportunities to present evidence and exercise her right to due process.

[17] I am sympathetic to the profound deficits of the student and the regressive nature of his condition; however, I am also concerned that to go any further would be to rely on those sympathies to grant punitive damages against the district in the form of maximized services. That would go beyond the educational objectives underlying the purpose of the IDEA.

regarding whether the district committed a gross violation of the IDEA (see E. Lyme, 790 F.3d at 456 n.15; French, 476 Fed. App'x at 471; Somoza, 538 F.3d at 109 n.2, 113 n.6; Mrs. C., 916 F.2d at 75-76), the student's age is still a relevant factor to consider in fashioning an appropriate award of compensatory education in that it appears that an additional year or years of the student's eligibility may be the subject of another impartial hearing, which could possibly result in additional relief (see Tr. pp. 239-40) and, further, the student may be now eligible to receive services as an adult through other State agencies such as the Office for People with Developmental Disabilities (OPWDD), Adult Career and Continuing Education Services (ACCES), or Adult Career and Continuing Education Services—Vocational Rehabilitation (ACCES-VR).

Accordingly, for the reasons described above, I find insufficient basis to increase the compensatory education award even further using a qualitative approach preferred by the parent.

VII. Conclusion

The evidence in the hearing record shows that the district denied the student a FAPE from the period of time following the father's October 31, 2019 email advising the district of the student's return to the district through the date of the February 2020 CSE meeting. Thus, the IHO erred in omitting that time period from his compensatory education award. The parties have not successfully challenged the terms or quantitative method that the IHO's used to compute the amount of compensatory education for the student, therefore, the same approach will be used to increase the compensatory award to account for the additional time period that the student was denied a FAPE.

I have considered the parties' remaining contentions and find them to be without merit or unnecessary to address in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated March 20, 2024, is modified, by reversing that portion which denied the parent's request for compensatory education services for the period of November 1, 2019 through February 13, 2020; and

IT IS FURTHER ORDERED that, in addition to the relief awarded by the IHO, the district shall provide or fund the following services to be delivered by providers of the parent's choosing: 840 hours for an ABA teacher and/or behavior technician, 30 hours of BCBA supervision, 15 hours of parent counseling and training, 30 hours of OT, and 30 hours of speech-language therapy.

Dated: **Albany, New York**
June 18, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER