The University of the State of New York

The State Education Department
State Review Officer
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No. 24-380

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:
The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Elisa Hyman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Hanna Giuntini, 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 her request that respondent (the district) fund compensatory education, as well as other relief, for her son related to the 2023-24 school year. 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 parties' familiarity with this matter is presumed and, therefore, the facts, procedural history of this case, and the IHO's decision will not be recited in detail.

Briefly, the student has received diagnoses of autism and intellectual disability, and he attended the Manhattan Childrens Center (MCC) from 2008 until June 2023 (Parent Exs. MM at p. 7; NN ¶ 16). During the 12-month 2022-23 school year at MCC, the student received 5 hours per day of individualized applied behavior analysis (ABA) instruction, provided in both 1:1 and 2:1 settings, and one hour of instruction in a 4:1 group during lunch and leisure skills for a total of six hours of instruction per day (Parent Exs. AA at p. 1; NN ¶ 24). As for related services, the student received two 45-minute sessions of individual occupational therapy (OT) per week, one

30-minute consultation by an occupational therapist per week during lunch period, and one 60-minute session of group transdisciplinary community-based instruction per week, supported though 2:1 instruction by classroom staff (Parent Exs. BB at p. 1; NN ¶ 28). MCC also delivered to the student two 45-minute sessions per week of individual speech-language therapy, one 30-minute consultation per week by a speech therapist during lunch, and one 60-minute session of group transdisciplinary community-based instruction per week, also supported through 2:1 instruction by classroom staff (Parent Exs. CC at p. 1; NN ¶ 30). The student also received transportation to and from MCC in the form of an air-conditioned mini-bus with limited travel time, as well as the use of assistive technology (see Parent Ex. PP ¶ 7). Additionally, Manhattan Behavioral Center (MBC) delivered up to 10 hours per week of extended day ABA services to the student (Parent Ex. NN ¶¶ 15, 17). The student also received speech-language therapy and OT on an extended school day basis from Growing Minds (Parent Ex. PP ¶ 6; see Parent Ex. I).

According to the MCC director of upper school ABA services (director), the student turned 21 years of age prior to June 2023 and therefore he "aged out of the program at MCC" (Parent Ex. NN ¶¶ 1, 20; see Tr. pp. 29-30). The parent alleged that, despite a pendency order from an IHO, for the 2023-24 school year, MCC "could not take [the student] back due to his age," and that Growing Minds would not provide services to the student for the 2023-24 school year because the district did not pay for the student's pendency services the year prior (Parent Ex. PP ¶¶ 9, 10). During the 2023-24 school year, the student received compensatory ABA [services] from MBC "funded by a prior hearing order," and attended a program called "SNACK," a special needs activity center, that was funded by the Office for People with Developmental Disabilities (OPWDD) (Parent Exs. PP ¶ 11; MM at p. 7). The student turned 22 years old in spring 2024 (Parent Ex. PP ¶ 2).

A. Due Process Complaint Notice

In a due process complaint notice dated November 6, 2023, the parent alleged, among other things, that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year, asserting that the district failed to: conduct a timely reevaluation of the student, develop an IEP for the student, and provide an appropriate placement for the student (Parent Ex. A at pp. 1, 4). The parent alleged that she filed a ten-day notice seeking an IEP and continuation of services for the 2023-24 school year, but the district "ignored [the] notice and did not offer [the student] an IEP" or placement (id. at p. 4). The parent contended that the student was "out of school completely" due to the district's refusal to respond, resulting in the loss of the student's placement at MCC (id.). The parent further asserted that she was unable to pay for the services of the student in order to seek reimbursement (id. at p. 5). The parent alleged that the student was entitled to a FAPE for the 2023-24 school year, up to the age of 22 (id. at pp. 5-7). The parent further alleged that the student was entitled to a stay-put placement during the pendency of the proceedings (id. at pp. 6-7). For relief, the parent additionally alleged that the student was entitled to compensatory education to make up for the failure to provide a FAPE from the beginning of the 2023-24 school year through the conclusion of the administrative proceedings (id. at 8). The parent alleged that the student was entitled to "1:1 instruction, ABA, related services of OT, [speech-language therapy] and [physical therapy (PT)], transition services (direct and indirect), [assistive technology], [assistive technology] training, vocational training, training in [activities of daily living (ADLs)], and transportation" (id.). The parent also contended that the student should have been entitled to an extended year of eligibility (id.).

B. Impartial Hearing and Impartial Hearing Officer Decisions

Prior to proceeding to the merits portion of the impartial hearing, a hearing date devoted to addressing the student's pendency placement took place on January 3, 2024 (Tr. pp. 9-23). The parties agreed the student's pendency should be based on an IHO decision dated October 19, 2023 (Tr. pp. 14-15; see Parent Ex. B). Additionally, an issue was raised regarding whether the student would be entitled to a FAPE until his 22nd birthday, and the parties submitted memorandums of law on the issues of pendency and age eligibility at the close of the hearing date (Tr. p. 13; see IHO Exs. I-II). The parent contended, among other things, that the student was entitled to a FAPE until his 22nd birthday in light of the decision issued by the Second Circuit in A.R. v. Connecticut State Board of Education, 5 F4th 155 (2d Cir. 2021), and the New York State Education Department's (NYSED's) Office of Counsel's Formal Opinion No. 242 (July 2023), available at https://www.counsel.nysed.gov/sites/counsel/files/242.pdf (IHO Ex. I at pp. 6-7). The district argued that the student was not entitled to a FAPE beyond the 10-month school year in which the student turned 21, i.e., the 2022-23 school year (IHO Ex. II at pp. 2-5).

The IHO issued an interim decision regarding pendency on January 19, 2024 (Interim IHO Decision). Relying on A.R., 5 F4th 155, and NYSED Office Counsel's Formal Opinion No. 242, the IHO found that it was "clear that the [s]tudent [was] entitled to pendency services up until his 22nd birthday . . . and that this would be during the 2023/2024 academic school year" (id. at p. 7).[1] The IHO noted that it was undisputed that the previous IHO decision dated October 19, 2023 was the basis for pendency, which provided for:

> placement at the Manhattan Children's Center, ten hours of afterschool ABA, either at home or at a provider's location, after-school speech and language therapy 2 x 40 minutes and occupational therapy once per week for 60 minutes, as well as special education transportation, in the form of an air-conditioned min-bus [sic] with limited time travel

(id.). The IHO ordered that, pending the outcome of the proceeding, and retroactive to October 19, 2023, the district was to fund the program and services in the IHO decision dated October 19, 2023 (id. at p. 8).

On February 14, 2024, the district filed a motion to dismiss the due process complaint notice because the student was no longer eligible to receive a FAPE due to the student's age, and because a request for continued relief for a student until he or she turns 22 years of age was not available under State Education Law (IHO Ex. IV; see also Tr. pp. 48-59). The district argued, in the alternative, that, if the student was entitled to a FAPE until his 22nd birthday, then the IHO should find that the district would not be obligated to provide a FAPE beyond that (IHO Ex. IV at p. 3). The parent filed a response to this motion, dated February 27, 2024 (IHO Ex. V).

The parties appeared before the IHO on February 29, 2024 (Tr. pp. 60-82), and the IHO orally denied the motion to dismiss as "[t]he matter was previously litigated in the pendency order,

[1] The IHO also discussed the relevancy of whether the student had received a high school diploma; however, it is not in dispute that the student has not received a diploma.

and under the law of the case doctrine" (Tr. p. 61). The IHO further noted that there had been no new evidence or case law to warrant a decision that was different from the pendency order (Tr. pp. 61-62).

Impartial hearing dates devoted to the merits took place on April 17, 2024, May 16, 2024, and May 31, 2024 (Tr. pp. 83-163, 171-226).[2]

The parties submitted post-hearing briefs (IHO Exs. VI-VII). As part of the parent's brief, she summarized relief sought including, among other things, that the IHO award a bank of 1,550 hours of compensatory 1:1 services for the student, for the period of time from July 1, 2023 until the student's 22nd birthday, which "could be used flexibly, as needed, to implement [a] transition plan" (IHO Ex. VI at p. 19).[3] The parent further requested that the district be ordered to arrange for the student to have an internship position for three days per week for one year, pursuant to recommendations made in a transition assessment (id.). Finally, the parent requested that the district provide or fund transportation or a car service for the student and an escort to and from services or an internship (id.).

In its post-hearing brief, the district noted that, since the filing of its motion to dismiss on February 14, 2024, the Supreme Court of the State of New York, Albany County, released a decision, Katonah-Lewisboro Union Free School District v. New York State Education Department, 83 Misc.3d 529 (Sup. Ct. Albany County 2024), which distinguished Connecticut Law from New York Law; therefore, the district disputed the applicability of the Second Circuit's decision in A.R., 5 F4th 155 (IHO Ex. VII at p. 3). The district further contended that, if the IHO found compensatory education was appropriate for the student, the total relief sought by the parent was not appropriate, as the transition specialist testified that an ABA program in a classroom setting would not have been helpful and that the student would need breaks and relaxation after the 30-hour program recommended by the transition specialist (id. at pp. 6-7). The district requested that the IHO limit any award of compensatory education to what was reasonable and practicable (id.).

The IHO issued a final decision on July 31, 2024 (IHO Decision). The IHO noted the recently issued decision in Katonah-Lewisboro Union Free School District, 83 Misc.3d 529, and

[2] There was an appearance on May 24, 2024, but this largely revolved around discussions about an adjournment (see Tr. pp. 164-71).

[3] The parent indicated that the bank of hours was calculated as follows:

- 1,045 1:1 hours to compensate for the 5.5. hours per day the student would have spent at MCC, which could be used for (i) ABA, (ii) speech-language therapy, or (iii) OT, all of which were provided at MCC;
- 380 hours of 1:1: instruction to compensate for the district's failure to implement the student's "10 hour per day [sic]" pendency mandate (although identified as 10 hours per day, it is presumed, based on the hearing record, that the parent meant 10 hours per week);
- 76 hours of ABA supervision, which would have been included in the MCC program;
- 38 hours of OT;
- 50 hours of 40-minute sessions of speech-language therapy;

(IHO Ex. VI at p. 19).

found that, despite a pending appeal, it was "still binding in New York" (id. at pp. 8-9). The IHO found that, as the student turned 21 years of age prior to the start of the 2023-24 school year, the "[p]arent's due process complaint [was] denied," as the parent's request for extended eligibility for a FAPE until the student's 22nd birthday was not available under New York Law (id. at p. 9, citing 8 NYCRR 200.5[i]). As the IHO found that the district did not deny the student a FAPE, due to the student's ineligibility, the IHO also denied the parent's request for compensatory services (IHO Decision at p. 11).

IV. Appeal for State-Level Review

The parent appeals, and alleges, among other things, that the IHO improperly found that the student was not eligible for a FAPE until his 22nd birthday and erred in failing to award compensatory education. The parent further requests that, if compensatory education is awarded, that the student should be awarded all of the services that were ordered under pendency, as well as the services recommended by the transition specialist. Additionally, the parent contends that any compensatory education award should be allowed to be used flexibly, as needed, and that the student could "push in his 1:1 services for support, consistent with the recommendations in the [t]ransition [e]valuation," in order to also attend an internship position three days per week (see Parent Ex. MM).[4]

In an answer, the district responds to the parent's allegations and requests that the IHO's decision be affirmed in its entirety. The district contends, among other things, that the student was not eligible for a FAPE for the 2023-24 school year by virtue of his age and that it was proper for the IHO to rely upon the decision in Katonah-Lewisboro Union Free School District, 83 Misc.3d 529. The district further contends that the student is not entitled to compensatory education by virtue of the student not being entitled to a FAPE. Finally, the district contends that it was only obligated to fund the student's pendency, not provide it, and, as such, it cannot be held liable for any missed services the parent failed to obtain.

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

[4] Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [finding a plaintiff's "inexplicable failure to submit this evidence during the IHO hearing barred her from taking another bite at the apple"]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the parent has offered three proposed exhibits as additional evidence. The first two, copies of the due process complaint notice and the parent's post-hearing brief, are already part of the hearing record. The final group of documents submitted are filings related to the appeal of the decision in Katonah-Lewisboro Union Free School District, 83 Misc.3d 529. The majority of the documents included could have been offered at the time of the impartial hearing, and, in any event, are not necessary to reach a decision and, therefore, have not been considered.

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]).[5]

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. IDEA Eligibility

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., 5 F.4th 155, 157; 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

[5] 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).

and August program until August 31st or until the end of the summer program, whichever occurs first (Educ. Law § 4402[5]).

Recently, however, in A.R., the Second Circuit 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 (5 F.4th at 163-67). This holding has yet to be extended to New York; however, NYSED's Office of Counsel issued a formal opinion stating that:

> New York, like Connecticut, offers publicly funded adult education programs to non-disabled students in this age group. As such, the holding of A.R. that the interaction between federal law (IDEA) and State law (services for adults) required public schools in Connecticut to provide special education and related services to resident students with disabilities at least until their 22nd birthdays is equally applicable in New York.

Office of Counsel's Formal Opinion No. 242 [July 2023], available at https://www.counsel.nysed.gov/sites/counsel/files/242.pdf

Although the trial level State court in Katonah-Lewisboro Union Free School District distinguished New York's Education Law from Connecticut's law (see 83 Misc.3d at 532-33) and found that students with disabilities were only eligible for special education until they turned 21, this State also funds and administers adult education programs in a manner 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). Accordingly, in addition to its interpretation of the IDEA, the salient facts that compelled the court in A.R. to find that students with disabilities should remain eligible for special education until their 22nd birthday, namely the existence of adult education programs for nondisabled students that were funded and administered by Connecticut, also obtains in New York and provides a strong argument for the applicability of A.R. to its age requirements for eligibility under the IDEA.

Accordingly, I am persuaded that A.R. and the State guidance affirming the applicability of A.R. to the provision of special education in New York State to students until their 22nd birthday apply to the instant matter and the IHO erred by relying on Katonah-Lewisboro Union Free School District to find that the student was only eligible for special education services until his 21st birthday. As the student was entitled to a FAPE until he reached the age of 22 years old, and there is no dispute that the district did not provide a FAPE to the student for the 2023-24 school year based on its erroneous determination that the student was only entitled to services until his 21st birthday, I find that the student was denied a FAPE for the 2023-24 school year.

B. Compensatory Education

On appeal, the parent seeks compensatory education as a remedy for the district's failure to offer the student a FAPE for the 2023-24 school year. 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]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; P. v. Newington Bd. of

Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; 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]). 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"]).

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]). 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]).

Here, it is very clear that the district made no efforts to provide the student with a FAPE for the 2023-24 school year during which the student turned 22 years old. Accordingly, the student was deprived of almost a full year of special education services to which he was entitled. Additionally, the district has not presented any argument as to why this deprivation is not a gross violation of the IDEA. Thus, I find that compensatory education is an appropriate remedy for the denial of a FAPE to the student. Additionally, I note that the district does not offer on appeal any argument as to what would be an appropriate remedy of compensatory education; instead, the district merely contended in its post-hearing brief that any award of compensatory education should be limited to what was reasonable and practicable, given the transition specialist's testimony (IHO Ex. VII at pp. 6-7).

Initially, the parent's request for services representing the equivalent of what would have been the student's pendency placement for the duration of this proceeding are largely appropriate

as substantive relief to remedy the district's denial of FAPE. The pendency order directed the district to fund the student's placement at MCC,[6] 10 hours per week of after-school ABA services, two 40-minute sessions per week of speech-language therapy, one 60-minute session of OT per week, and special education transportation in the form of an air conditioned mini bus with limited time travel (Interim IHO Decision at p. 8). It is undisputed that MCC is not available to the student at this time, so the parent seeks 5.5 hours of compensatory education per day to represent the time the student would have spent at MCC with a request that such hours be available for use to provide ABA, speech-language therapy, or OT services.

As noted, the parent also seeks compensatory education based on a transition assessment and the testimony of the transition specialist (Tr. pp. 186-203; Parent Exs. MM; OO). The transition specialist recommended that the student engage in 18 hours per week of transition services, spread evenly between three days, with half to address exploration of or actual work on a job with supervision and a job coach, and the other half to include the development of life skills, integrated community access skills, and functional academics (Tr. pp. 194-99; Parent Ex. MM at pp. 43-45). According to the transition specialist, an additional 12 hours (spread evenly between two days) could be dedicated to the development of leisure activities, community service, and ongoing related services (such as speech-language therapy, OT, and/or assistive technology) (Parent Ex. MM at p. 45). She recommended that professionals who were credentialed in community-based services that understand transitions would work well as team members (id.). The transition specialist noted that the student would "require ongoing support and/or consultation for direct support from a credentialed behaviorist or ABA specialist while spending more time in his community" (id.; see Tr. p. 201). She further testified that a setting that was not akin to the real world, such as a classroom, would not help the student become oriented and integrate, whereas transitionary programming would (Tr. p. 202). She opined that ABA could be incorporated through indirect consultations and collaboration with "the transition specialists and staff" (Tr. p. 203).

The transition specialist further testified that the student could participate in additional services for potentially no more than 3 additional hours per day, but that would require several breaks in between, and she was unsure if that was even realistic (Tr. p. 199).

After reviewing the parent's requests for compensatory education, to the extent an award would separately comprise the services that the parent claims are owed to the student under pendency and the recommendations from the transition assessment (see Parent Ex. MM), I would have concern that this could amount to more than the student could realistically utilize on a weekly basis, particularly given the transition specialist's testimony that, in addition to the transition services, the student could potentially engage with three additional hours of programming, with several breaks, and her skepticism as to whether even that was realistic (Tr. p. 199). However, to this point, I note the parent's request that any bank of hours awarded for compensatory education be able to be applied "flexibly," with the potential for providers to "push in [the student's] 1:1 services for support, consistent with the recommendations in the [t]ransition [e]valuation," so that the student would still have time to attend an internship position three days per week (see Parent

[6] According to the director, the student's MCC programming constituted five hours per day of individualized instruction, and one hour per day of a 4:1 ratio during instructional lunch and leisure skills (Parent Ex. NN ¶ 24; but see IHO Ex. VI at p.19 [parent alleged that the student had 5.5 hours per day of 1:1 instruction]).

Ex. MM; see also Req. for Rev.; IHO Ex. VI at p. 19 [requesting that any bank of compensatory hours be used flexibly, as needed, to implement the transition plan "if feasible"]).

I agree that flexibility will be to the student's benefit in implementing the compensatory relief ordered and discussed below. Given that the student is 22 years old presently, and per the transition specialist's testimony, the hearing record supports a finding that the transition services recommended n the transition assessment would be a benefit to the student when also combined with other services (see Tr. pp. 195-97, 202-03; Parent Exs. MM at p. 45; OO). However, the transition specialist cautioned that a traditional classroom setting, for services such as ABA programming, would not be helpful and would not assist the student in becoming oriented and integrated as he transitions to his post-education activities and pursuits (Tr. p. 202).

Given the parent's testimony regarding her belief that the student needed continued services in the community using ABA strategies to develop the skills to accomplish the goals in the transition assessment and given her preference that the student work toward the goals outlined in the transition assessment (Parent Ex. PP ¶ 14), I find that these services should be, to the extent practicable, incorporated, flexibly, as part of the holistic and transition-focused approach described by the transition specialist in her testimony, rather than a "siloed" approach, which she said could be of no help to the student (see Tr. pp. 195-197, 202-203). These services should be implemented as part of the transition plan, rather than a separate and additional form of programming, in order to ensure the student is not engaging in programming that is unrealistic or would work at cross purposes with respect to the underlying rationale of a compensatory education remedy, namely that it should serve to place the student in the position he would have been in but for the district's failure to offer him a FAPE for the 2023-24 school year (see Reid, 401 F.3d at 518) and not overload the student with services that could begin to have diminishing returns (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017] ["Common sense and experience teaches 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"]).

Thus, I find that the student is entitled to compensatory education to remedy a denial of a FAPE for the 2023-24 school year until his 22nd birthday.[7] I will award 1045 hours of compensatory 1:1 services that may be used flexibly as either ABA, transition services as recommended in the transition assessment (including during any internship opportunities), speech-language therapy, or OT.[8], [9] In addition to this, I will award 380 additional hours of 1:1 ABA

[7] Any compensatory education that would have been available to the student to remedy a lapse in pendency is, in this matter, subsumed by the substantive compensatory award; therefore, I find it unnecessary to separately consider the parent's claim for compensatory pendency services.

[8] As discussed above, to the extent practicable, the services provided here should strive to be inserted as part of the holistic and transition-focused approach described by the transition specialist in her testimony, rather than a "siloed" approach (see Tr. pp. 195-197, 202-203).

[9] This represents the alleged 5.5 hours per day, over the 38 week period for the applicable portions of the school year, which the parent alleges the student would have received as services through his attendance at MCC.

services,[10] 38 hours of OT,[11] and 50 hours of speech-language therapy.[12] I will also award 38 hours of supervision by a Board Certified Behavior Analyst (BCBA). Finally, the district must provide transportation to and from the student's services.

VII. Conclusion

Having found that the IHO erred by determining that the student was not eligible for special education programming during the 2023-24 school year until his 22nd birthday and was therefore not obligated to provide the student with special education services for the that portion of the school year, I find the parent is entitled to the compensatory education as relief to remedy the district's failure to offer the student a FAPE for the 2023-24 school year.

I have considered the parties' remaining contentions and find that the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated July 31, 2024, is modified by reversing that portion which found that the student was not eligible for special education for the 2023-24 school year and that, therefore, the district did not deny the student a FAPE.

IT IS FURTHER ORDERED that the district shall provide the student with compensatory education services including 1045 hours of 1:1 services to be flexibly available to the student to receive ABA, transition services as recommended in the transition assessment (including during any internship opportunities), speech-language therapy, or OT; 380 additional hours of 1:1 ABA services; 38 hours of OT; 50 hours of speech-language therapy; and 38 hours of BCBA supervision, as well as transportation to and from the student's programming; and

IT IS FURTHER ORDERED that the compensatory education services ordered herein shall be available for the student to use within eighteen months of the date of this decision and after such date they shall be deemed expired.

Dated: **Albany, New York**
October 30, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[10] This represents the 10 hours per week of after-school ABA services the student would have received over the 38-week period.

[11] This represents the one hour per week of OT the student would have received over the 38-week period.

[12] This represents the sum of two 40-minute sessions per week of speech-language therapy the student would have received over the 38-week period.