SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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ELIZABETH KIRK,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

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INDEX NO. 150832/2020

MOTION DATE 01/24/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to Education Law § 4404, of petitioner Elizabeth Kirk on behalf of A.B., a Student with a Disability (motion sequence number 001), is denied, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this proceeding, improperly commenced under CPLR Article 78, petitioner Elizabeth Kirk (Kirk) seeks a judgment on behalf of her child, A.B., a Student with a Disability (AB), to vacate an order of the respondent New York City Department of Education (DOE) as contrary to the evidence (motion sequence number 001). For the following reasons, the petition is denied.

FACTS

In June 2019, Kirk's child, AB, graduated from the New York City private high school which he attended. *See* verified petition, ¶¶ 24-25. Although enrolled in a private school, AB had been classified as "a Student with a Disability" under Education Law § 4401, and as a result was entitled to receive special education services (defined in Education Law § 3602-c) until graduation from high school. *Id.*, ¶ 6.

Pursuant to the federal "Individuals with Disabilities Education Act" (IDEA; 20 USCA § 1400, et seq.), students with disabilities such as AB must be evaluated by their local school boards and presented with an "individual education plan" (IEP) which sets forth the individualized program of special education services to be provided to the student. Kirk avers that the DOE improperly failed to conduct her son's scheduled IEP review meeting in October 2018, which resulted in AB going through the 2018-2019 school year with an expired IEP. *See* verified petition, ¶¶ 25-27. Kirk also avers that, during the 2018-2019 school year, the DOE failed to provide AB with certain of the services that had been authorized in his previous IEP. *Id.*, ¶¶ 28-38. These specifically included certain evaluations, certain assistive technology and "special education teacher support services" (SETSS), consisting of five extra tutoring sessions each week in addition to regular classes. *Id.*, exhibit B.

Kirk served a "due process complaint" on the DOE on March 12, 2019, as required by Education Law § 3602-c. *See* verified petition, ¶ 15; verified answer, exhibit C. A DOE impartial hearing officer (IHO) held a pre-hearing meeting with Kirk, AB and DOE representatives on May 15, 2019, at which they discussed compensating AB for the SETSS services that the DOE had failed to provide during the school year by instead approving payment for certain "transition services" to assist him in preparing for college classes. *Id.*, ¶¶ 35-38. The IHO then conducted five days of hearings on AB's due process complaint between April and June 2019, and issued a "final decision and order" on August 12, 2019 (the IHO's order). *Id.*, ¶¶ 18-19, 39-45; exhibit B. The relevant portions of the IHO's decision found as follows:

> "Remedy: SETSS Services
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> "I find the requested SETSS services to be an appropriate compensatory remedy to be awarded to Petitioner. The service was mandated by the 2017 IESP and should have continued throughout 2018 until a new IESP was developed and should have continued pursuant to the Pendency Order issued in this dispute. Petitioner has evidence showing her efforts to retain such service. It was the DOE's burden to find such a provider and it failed to do so. Its arguments improperly seek to place a burden upon Petitioner.
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> "I find the total failure to provide the SETSS service to have caused a substantive, gross deprivation of educational benefit. The service was included in the last agreed upon IEP and, thus, must have been considered to be necessary in addressing Petitioner's 'unique needs to prepare him for further education, employment, and independent living' and in affording him with an opportunity to make more than 'mere trivial advancement.' Petitioner was to be given this opportunity to develop certain skills before he graduated. He was totally deprived of this opportunity. It would be absurd to assume that the total deprivation a service considered necessary did not have a significant, substantive, negative impact on the skills petitioner was able to accrue before he graduated. That Petitioner managed to graduate and get into college does not support the argument that the failure to provide SETSS did not cause a gross deprivation of educational benefit in violation of FAPE [i.e., a 'free and appropriate pubic education'] (n 23).
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> "N 23. The sole special education and related service mandated was the unimplemented SETSS. Ms./ Tucci testified that the SETSS was supposed to address writing and listening skills. She also testified that the SETSS provider was the person who was to address all the academic goals on the IESP. She considered it 'very important' for AB to receive the SETSS service.
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> "Accordingly, I find Petitioner to be entitled to 165 hours of compensatory academic tutoring, at a rate not to exceed $125 per hour, by a provider of the parent's choosing, to make up for mandated SETSS services not delivered during the 2018/19 school year. I find this to be reasonably calculated to give the student the opportunity to obtain the

educational benefits that likely would have accrued from the special education services the school district should have supplied in the first place. Petitioner was to receive five periods a week of SETSS services and was denied approximately 165 hours of services. (A period is approximately 45 minutes long and a school year approximately 43 weeks.)

"I find the nature of the services and the type of provider to be reasonably calculated to provide petitioner with the benefit he would have received had the services been timely provided.

"Petitioner has a right to receive these services. IDEA did not create a right without a remedy. For these services to provide meaningful relief here, and to fulfil the purpose of IDEA, I find it necessary and appropriate for this remedy to be delivered after Petitioner received his high school diploma. For these same reasons, I find that the level of instruction is to reflect the level of instruction provided in the college classes Petitioner is taking at the time the services are delivered (n 24).

* * *

"Final Order:

"The DOE is Ordered To:

"1) Provide to Petitioner 165 hours of compensatory academic (college-level) tutoring, at a rate not to exceed $125 per hour, by a provider of the parent's choosing. These services will remain available until Petitioner obtains his undergraduate degree.

"a. THE SCHEDULING OF THESE SERVICES is to be within the sole discretion of Petitioner's Parent, EK. Parent control includes, but is not limited to, frequency, spacing, and length of each session.

"b. UPON RECEIPT OF timely notice from Parent, to the DOE of Parent's intent to commence such services, THE DOE IS ORDERED TO rapidly complete all administrative/bookkeeping procedures and issue all documents required (including, but not limited to, related service authorizations) to quickly implement the remedies set forth in Paragraph (1) above.

"2) Reimburse Petitioner for expenses incurred relating to Instructor-led Academic Coaching at Rochester Institute of Technology for one semester, to be provided during the first semester of Petitioner's first year in college, at the rate of $790.00. Reimbursement is to be made at the end of the semester upon receipt of evidence that Petitioner did enroll in, pay for, and attend this program."

Id., exhibit B. The DOE thereafter appealed the IHO's decision to the State Education Department, and a State Review Officer subsequently issued a decision on October 25, 2019 which sustained the DOE's appeal. *Id.*, ¶¶ 20-23, 46-51; exhibit A. The relevant portions of the SRO's decision found as follows:

"VII. Relief

"Turning to the crux of the appeal, the district argues that IHO 2 erred in finding that the district's failure to develop an IESP [i.e., IEP] for the 2018-19 school year-which IHO 2 found deprived the student of receiving five periods per week of SETSS-constituted a gross violation of the IDEA and, therefore, IHO 2 erred by awarding 165 hours of academic (college-level) tutoring and one semester of 'Instructor-led Academic

Coaching' to the student as compensatory educational services. Alternatively, the district argues that even if it committed a gross violation of the IDEA, the student was not entitled to an award of compensatory educational services, in any form, given the student's attainment of graduation. The parent disagrees with the district's contentions, arguing initially that the district committed a gross violation of the IDEA by failing to 'implement [the student's] IESP during 2018/19, fail[ing] to conduct a timely annual review, and fail[ing] to provide any transition services (other than to develop a cursory 'exit summary' shortly before graduation). In addition, the parent contends that IHO 2's award of 'tutoring services' was appropriate and served a purpose similar to SETSS.

A. Compensatory Educational Services

"Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case. Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA. 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 . . ., or until the conclusion of the 10-month school year in which he or she turns age 21. . .. The Second Circuit has held that compensatory education may be awarded to students who are no longer eligible 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.

"The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE. 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.

"In this case, two facts remain undisputed: first, neither party disputes whether the gross violation standard should apply in this case, but only whether the district, in fact, committed a gross violation; and second, the student graduated from high school on June 19, 2019, and neither party disputes that the student met the graduation requirements, and, consequently, was no longer statutorily eligible for special education programs or related services. Given the fact that graduation and receipt of a high school diploma are generally considered to be evidence of educational benefit . . ., when taken together with the Second Circuit's standard requiring a gross violation of the IDEA during the student's period of eligibility . . ., it is a rare case where a student will graduate with a high school diploma and yet still qualify for an award of compensatory educational services . . .. In this instance, although IHO 2 recited and appeared to apply the Second Circuit's gross violation standard to the facts of this case, IHO 2 wholly ignored the fact that the student graduated when determining whether the student was entitled to an award of compensatory educational services to remedy the district's purported violations of the IDEA during the 2018-19 school year.

"Putting aside the gross violation standard, a review of the district's failures during the 2018-19 school year, the services the student actually received during that period-albeit via a previous award of compensatory educational services, to wit, 160 hours of SETSS-and the student's achievements, due in no small part to the student's own efforts, shows that the student benefitted from instruction to the extent that an award of compensatory educational services would not be an appropriate form of relief.

"In summary, notwithstanding the district's failures, the student ultimately received educational benefit during the 2018-19 school year and graduated, thereby achieving one of the major goals and milestones that the IDEA is intended to support-that place being graduation. In other words, no compensatory education is required for the district's denial of a FAPE, since the deficiencies were already mitigated in a substantial way. Consequently, IHO 2's award of 165 hours of academic (college-level) tutoring must be vacated.

"B. Reimbursement for 'Instructor-led Academic Coaching'

"As relief for the district's 'denial of appropriate' transition services during the 2018-19 school year, IHO 2 awarded the parent reimbursement for the costs of one semester of 'Instructor-led Academic Coaching' at college, at a rate not to exceed $790.00. The district contends that the evidence in the hearing record does not support IHO 2's finding that the failure to provide transition planning caused a substantive deprivation of a FAPE. In addition, the district argues that, consistent with State regulation, it provided the student with an exit summary that adequately summarized the student's 'abilities, skills, needs and limitations,' and that provided for 'supports that w[ould] help [the student] succeed in post-secondary life at [college].'

"Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living. Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills. In addition, State regulations require districts to conduct vocational assessments of students age 12 to determine their 'vocational skills, aptitudes and interests.' An IEP must also include the transition services needed to assist the student in reaching those goals. Transition services must be 'based on the individual child's needs, taking into account the child's strengths, preferences, and interests' and must include 'instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.'

"Based upon the evidence in the hearing record, it is undisputed that the district-in failing to develop an IESP for the 2018-19 school year-also failed to have a transition plan with measurable postsecondary goals and a coordinated set of transition activities in place when the student's October 2017 IESP expired in or around October 2018. However, in her due process complaint notice, the parent's concern about the student's transition plan focused solely on the district's alleged failure to conduct evaluations that would allow the student to receive accommodations at college, as well as an unspecified 'disagree[ment]' with the transition plan, which was not otherwise explained during the impartial hearing.

"At the impartial hearing, the parent's attorney clarified that the parent sought these evaluations as 'compensatory [educational] services for [the district's] complete and utter failure to provide any kind of transition planning for this student's senior year in high school.' The parent's attorney reiterated, however, that the purpose of the requested

evaluations was for the student to 'go to college so that he c[ould] get these disability accommodations, and, . . . , then seamlessly transition into college.' When asked at the impartial hearing what other relief the parent sought with respect to transition services, the parent's attorney noted that the parent was also seeking the costs of a 'special transition class . . . specifically for students with ADHD' offered at the college the student planned to attend beginning in fall 2019.

"In reaching the decision to award this particular relief, IHO 2 found that the district failed to address the parent's 'continuing and repeated requests for a review of transition services, particularly the requests for new evaluations and assistive technology.' However, a review of the evidence in the hearing record reveals that, contrary to IHO 2's findings, while the parent may have repeatedly requested an auditory and language processing evaluation of the student, the hearing record fails to include any request by the parent to review the student's transition services-nor does IHO 2 cite to any evidence in the decision to support this conclusion.

"Notwithstanding the fact that the district did not have an updated transition plan in place at the expiration of the October 2017 IESP, the evidence in the hearing record supports a strong inference that the student continued to receive services previously recommended as part of his transition plan, measurable postsecondary goals, and the coordinated set of transition activities by virtue of the student's graduation from high school-and admission to college-by June 19, 2019. For example, based upon the October 2017 IESP, the student was expected to 'continue his college [preparatory] program' as a measurable postsecondary goal and to 'continue to advocate for accommodations to reduce the academic [difficulties] of his auditory processing disorder' as a transition need. In addition, the coordinated set of transition activities listed in the October 2017 IESP reflected that the student's nonpublic school had the responsibility to provide the student with the instruction (i.e., 'College [preparatory] course work'), the community experiences (i.e., 'participate in community service'), and the development of employment and other post-school adult living objectives (i.e., 'Participate in business, chess and coding clubs') identified in the transition plan. The district, under the same set of coordinated transition activities, was responsible to provide the student with the related services listed in the plan (i.e., 'Assistive Technology and FM Unit').

"Additionally, while the district did not develop an updated transition plan, the district did convene a CSE to develop an exit summary, consistent with State regulation, which required that the student receive a 'summary of [his] academic achievement and functional performance' and which included 'recommendations on how to assist [him] in meeting his . . . postsecondary goals.' At the impartial hearing, the district school psychologist who attended the meeting held to develop the exit summary testified that an 'exit summary [was] about transitional services.' A review of the exit summary reveals that the CSE described the student's present levels of performance in reading, mathematics, language, learning characteristics, social and behavioral development, and physical development and medical conditions. In addition, the exit summary provided a lengthy list of accommodations and supports the student required. As previously noted, however, IHO 2 declined to award the parent the requested evaluations (or assistive technology devices) and the parent does not now challenge IHO 2's findings in a cross-appeal. Finally, the exit summary identified the student's postsecondary goals (i.e., attending the college of his choice, noting the student's area of interest for employment,

and that the student would live at college), recommendations to assist the student in reaching his postsecondary goals (i.e., advocating for his 'listening and learning needs'), and organizations or agencies for support.

"Generally, it has been found that 'a deficient transition plan is a procedural flaw' that will only rise to a denial of a FAPE if it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits. Here, the hearing record contains no evidence that the student sustained any harm due to the absence of an updated transition plan or services for the 2018-19 school year. In addition, the parent has not identified how the lack of an updated transition plan was so significant under the facts and circumstances of this case as to deny the student a FAPE or warrant the requested relief. Consequently, IHO 2's order directing the district to reimburse the parent for the costs of one semester of 'Instructor-led Academic Coaching' must be vacated.

"C. Pendency

"Finally, the district does not contest the student's entitlement to compensatory educational services for any missed pendency services (see Req. for Rev. at p. 5 n.1). The parent agrees with this statement, noting the district's failure to implement IHO 2's pendency order and the student's entitlement to compensatory educational services regardless of whether a gross violation occurred (see Answer ¶ 18).

"The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy.

"The IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student. Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships. The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and 'strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school.' A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE. The pendency provision does not require that a student remain in a particular site or location.

"Generally, the stay-put provision does not apply beyond expiration of the student's eligibility for special education due to age. However, courts have found that a student should remain in a stay-put placement in instances where one of the purposes of the pending proceedings is to challenge the factor which terminated the student's eligibility, i.e., to challenge the age limit on special education . . . or to challenge whether the disabled student met the requirements for graduation. Here, the expiration of the student's eligibility due to meeting the requirements for graduation is not challenged in the present matter; accordingly, pendency does not operate to secure the student's continued receipt of pendency services at district expense after June 19, 2019, the date of student's graduation during the 2018-19 school year.

> "While both parties acknowledge the student's entitlement to receive any missed pendency services as compensatory educational services, neither party sets forth the parameters of those services, such as what the services should consist of, how the services should be delivered, or the cost of the services. Using the interim decision as a guide, IHO 2 ordered the district to provide the student with five hours per week of SETSS retroactive to the date the due process complaint notice was filed: March 13, 2019. Had the district implemented the interim order, the student would have received five hours per week of SETSS until the student's graduation date of June 19, 2019 . . ., or approximately 14 weeks-March 13, 2019 through June 19, 2019-for a total of 70 hours (14 weeks x 5 hours per week) of SETSS. Given that the student is now attending college, it is altogether unclear how the district would deliver SETSS to the student; therefore, the district is directed to provide the student with 70 hours of compensatory academic (college-level) tutoring as compensatory educational services for the failure to implement IHO 2's interim order on pendency, at a rate not to exceed $125.00 per hour, by a provider of the parent's choosing
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> "VIII. Conclusion
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> "In summary, a review of the evidence in the hearing record reveals that, notwithstanding the district's failures during the 2018-19 school year, the evidence does not support an award of compensatory educational services, or reimbursement for one semester of 'Instructor-led Academic Coaching' as relief.
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> "The Appeal Is Sustained.
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> "It Is Ordered that: IHO 2's decision, dated August 12, 2019, is modified by reversing IHO 2's order directing the district to provide the student with 165 hours of compensatory academic (college-level) tutoring as compensatory educational services, at a rate not to exceed $125.00 per hour, by a provider of the parent's choosing, and that should remain available until the student obtained his undergraduate degree; and,
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> "It Is Further Ordered that: IHO 2's decision, dated August 12, 2019, is modified by reversing IHO 2's order directing the district to reimburse the parent for the costs incurred relating to 'Instructor-led Academic Coaching' at the student's selected college for one semester during his first year of college, at a rate up to $790.00, upon proof of attendance and payment; and,
>
> "It Is Further Ordered that: the district, unless otherwise agreed to by the parties, shall provide the student with 70 hours of compensatory academic (college-level) tutoring as compensatory educational services for the failure to implement IHO 2's interim order on pendency, at a rate not to exceed $125.00 per hour, by a provider of the parent's choosing."

Id., exhibit A (all citations and footnotes omitted).

Aggrieved, Kirk subsequently commenced this proceeding on January 23, 2020 to challenge the SRO's decision under CPLR Article 78. *See* verified petition. Shortly thereafter, the Covid-19 national pandemic forced the court to suspend most of its operations indefinitely. The parties nevertheless remained in contact and executed several stipulations extending DOE's

time to file responsive pleadings. The DOE eventually submitted an answer on August 18, 2020. *See* verified answer. This matter is now fully submitted (motion sequence number 001).

DISCUSSION

As previously mentioned, Kirk commenced this proceeding pursuant to CPLR Article 78. However, the parties agree that this was an error, since Education Law § 4404 has governed the judicial review of SROs' decisions since 2003. *See* respondent' mem of law at 9; petitioner's reply mem at 1-2. However, Kirk's mistake is not fatal to her petition. Appellate case law interpreting Education Law § 4404 permits the Supreme Court to consider applications improperly denominated as Article 78 petitions to be requests for relief under the Education Law instead, and to utilize the standard of review specified in that law. *See e.g.*, *Matter of Board of Educ. of Hicksville Union Free School Dist. v Schaefer*, 84 AD3d 795 (2d Dept 2011); *Matter of Pawling Cent. School Dist. v New York State Educ. Dept.*, 3 AD3d 821 (3d Dept 2004). This court elects to do so. As a result, the court rejects respondents' argument that the petition should be denied because simply it was incorrectly denominated. *See* respondent' mem of law at 9.

Unlike Article 78 proceedings, in which a reviewing court assesses an agency's decision using the "arbitrary and capricious" standard, Education Law § 4404 (3) specifies that a court's determination regarding an SRO's decision should be based on a "preponderance of the evidence." Here, the petition seeks an order:

> "Reinstating the relief ordered by the IHO, namely 165 hours of academic (college-level) tutoring, at a rate not to exceed $125 per hour, by a provider of the parent's choosing, and that should remain available until the student obtains his undergraduate degree, and reimbursing Petitioner for the costs incurred relating to 'Instructor-led Academic Coaching' at the student's selected college for one semester, in the amount of $790, upon proof of payment and attendance."

See verified petition at 11. Thus, pursuant to Education Law § 4404 (3), the question before the court is whether the SRO's decision to reverse those two grants of compensatory relief to AB

was justified by a preponderance of the evidence. In applying this standard to AB's petition, the court is guided by the precedents established in the United States District Courts, which are the fora that most frequently conduct judicial reviews of SRO decisions. The U.S. District Court for the Southern District of New York (SDNY) recently summarized the parameters of such judicial review as follows:

> "'In considering an IDEA claim, a district court must engage in an independent review of the administrative record and make a determination based on the preponderance of the evidence.' However, '[t]he role of the federal courts in reviewing state educational decisions under the IDEA is circumscribed.' 'This review requires a more critical appraisal of the agency determination than clear-error review but falls well short of complete de novo review.'
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> "In particular, the district court 'must give due weight to the administrative proceedings, mindful that the judiciary generally lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy.' 'The [degree of] deference owed depends on both the quality of the opinion and the court's institutional competence.' '[D]eterminations regarding the substantive adequacy of an IEP should be afforded more weight than determinations concerning whether the IEP was developed according to the proper procedures.'"

E.E. v New York City Dept. of Educ., 2018 WL 4636984, *3, 2018 US Dist LEXIS 166467, *8-9 (SD NY 2018) (internal citations omitted). However, the U. S. District Court for the Eastern District of New York (EDNY) also cautioned that:

> "Factual findings by the administrative decision-makers likewise warrant deference provided they are 'reasoned and supported by the record.' However, this 'due weight' is not implicated with respect to issues of law, such as 'the proper interpretation of the federal statute and its requirements.'"

B.K. v New York City Dept. of Educ., 12 F Supp3d 343, 355-356 (ED NY 2014) (internal citations omitted). With these principles in mind, the court makes the following determinations.

The first disputed portion of the IHO's order awarded AB 165 hours of college-level tutoring sessions to compensate AB for the DOE's "gross violation" of his right to a FAPE during the 2018-19 school year. The SRO determined that the award was improper because the "gross violation" standard was inapplicable. *See* verified petition, exhibit A (SRO's decision) at 15-17. The SRO specifically found that the evidence before the IHO showed that: 1) AB

actually received 160 hours of SETSS tutoring during the 2018-19 school year; and 2) AB graduated at the end of the 2018-19 school year, which is considered "evidence of educational benefit." *Id.* at 17. The SRO concluded from these two factors that "no compensatory education is required for the district's denial of a FAPE, since the deficiencies were already mitigated in a substantial way." *Id.* The SRO relied on a decision by the United States District Court for the District of Columbia as support for the rule that a school district's provision of alternate services to a student instead of the services specified in the student's IEP can mitigate the school district's technical violation of the students right to a FAPE. *Phillips ex rel. T.P. v District of Columbia*, 932 F Supp2d 42 (D DC 2013). The court's research indicates that that rule is observed in the SDNY as well. *See e.g.*, *L.B. v New York City Dept. of Educ.*, 2016 WL 5404654, 2016 US Dist LEXIS 132522 (SD NY 2016); *M.C. v New York City Dept. of Educ.*, 2015 WL 4464102, 2015 US Dist LEXIS 93956 (SD NY 2015). The SRO relied on administrative appeal decisions issued by the State Education Department to support the rule that a student's graduation after not having received the services specified in his/her IEP is "evidence of educational benefit." *See* verified petition, exhibit A at 17. The court's research could not confirm that that rule is observed in New York. The court also notes that the IHO's order cited a decision by the U.S. District Court for the Northern District of New York (*Mason By and Through Mason v Schenectady City School Dist.*, 879 F Supp 215 [ND NY 1993]) for the proposition that a student's graduation does not moot the student's claims for compensatory damages from the school district which violated his/her right to a FAPE. *See* verified petition, exhibit B at 17. However, even if it were to discount the SRO's assertion that AB's 2019 graduation was "evidence of educational benefit" during the 2018-2019 school year, the court must still accord weight to the SRO's observation that the 60 hours of SETSS tutoring which AB actually received during that school year

mitigated the damage caused by the DOE's failure to conduct an IEP evaluation then. As a result, the court concludes that the SRO's decision to reverse the IHO's compensatory award of 165 hours of college-level tutoring sessions was justified by a preponderance of the evidence. Therefore, the court finds that the first request for relief in AB's petition should be denied.

The second disputed portion of the IHO's order awarded AB reimbursement for the cost of one semester of "instructor-led academic coaching" at a rate up to $790.00 to compensate AB for the DOE's denial of "appropriate transition services" during the 2018-19 school year. The SRO determined that the IHO had improperly construed the evidence in the administrative record by relating AB's request for college-level "academic coaching" to his complaint that the DOE had failed to promulgate a 2018-2019 IEP which provided for "transition services." *See* verified petition, exhibit A (SRO's decision) at 18-20. The SRO further noted that, at the May 15, 2019 pre-hearing, the DOE's district school psychologist did develop an "exit summary" of the academic supports AB would require and the academic goals that he should work towards in college. *Id*. at 19-20. The SRO found that this "exit summary" served the same purpose that an IEP's list of recommended "transition services" would have. *Id*. As a result, the SRO concluded that the DOE's failure to promulgate an IEP with "transition services" constituted a mere "procedural flaw that did not rise to the level of a denial of [a] FAPE." *Id*. at 20. The court notes that the SDNY case law which the SRO cited does indeed hold that "the failure to provide a transition plan is a procedural flaw" which does not by itself constitute a violation of a student's right to a FAPE. *J.M. v New York City Dept. of Educ.*, 171 F Supp3d 236, 246-248 (SD NY 2016); *M.Z. v New York City Dept. of Educ.*, 2013 WL 1314992, * 5-6, 2013 US Dist LEXIS 74052 (SD NY 2013). In addition, the student's representative must establish that the alleged procedural inadequacies "(I) impeded the child's right to a [FAPE]; (II) significantly

impeded the parents' opportunity to participate in the decision making process regarding the provision of [a FAPE] to the parents' child; or (III) caused a deprivation of educational benefits." *M.Z. v New York City Dept. of Educ.*, 2013 WL 1314992, * 5, 2013 US Dist LEXIS 47052, *13. Here, the court also notes that AB's reply papers merely argue that the DOE's failure to develop a 2019 IEP that included "transition services" was improper, and assert that the May 15, 2019 "exit summary" was inadequate. *See* petitioner's reply mem at 3. However, AB's counsel does not explain why the "exit summary" was inadequate, or what other DOE conduct (besides failing to promulgate the 2019 IEP) violated AB's right to a FAPE. As a result, the court discounts AB's arguments as insufficient since they do not include any of the three factors discussed above. The court also finds that the SRO's interpretation of the administrative record is entitled to deference, since it appears that AB's request to the IHO for college-level "academic coaching" was to compensate for the DOE's failure to performing academic evaluations and testing in 2019, rather than its failure to develop an IEP with "transition services." Accordingly, the court concludes that the SRO's decision to reverse the IHO's compensatory award reimbursing AB for the cost of one semester of "instructor-led academic coaching" at a rate up to $790.00 was justified by a preponderance of the evidence. Therefore, the court finds that the second request for relief in AB's petition should be denied.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to Education Law § 4404, of petitioner Elizabeth Kirk on behalf of A.B., a Student with a Disability (motion sequence number 001), is denied, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

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12/21/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE