



# The University of the State of New York

The State Education Department  
State Review Officer

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No. 14-179

**Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]**

## **Appearances:**

Friedman & Moses, LLP, attorneys for petitioners, Elisa Hyman, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck., Esq., of counsel

## **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 for compensatory educational services for her daughter. 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 hearing record reflects that the student has received a diagnosis of autism and exhibits global delays in the areas of social interaction, attention, communication, academic, and self-care skills (Parent Exs. M at pp. 1-4; V at pp. 3-7).

On June 12, 2013, a CSE convened to develop the student's IEP for the 2013-14 school year (Parent Ex. D). Finding the student eligible for special education and related services as a student with autism, the June 2013 CSE recommended a 12-month school year program in a 12:1+1 special class placement in a community school with a full time 1:1 paraprofessional (id.

at pp. 10-13, 15).<sup>1</sup> The June 2013 CSE also recommended related services consisting of three 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of individual physical therapy (PT), one 30-minute session per week of PT in a group (2:1), and four 30-minute sessions per week of individual speech-language therapy (*id.* at pp. 11-12). During the 2013-14 school year, the student attended a 12:1+1 special class placement in a district public school pursuant to the June 2013 IEP (Tr. pp. 154, 348).

### **A. Due Process Complaint Notice**

The parent filed a due process complaint notice dated July 11, 2013, which contained a number of factual allegations embodied within 100 numbered paragraphs, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (Parent Ex. A). As relevant here, the parent alleged among other things that the June 2013 CSE failed to reevaluate the student, failed to conduct a functional behavioral assessment (FBA) of or develop a behavioral intervention plan (BIP) for the student, failed to recommend parent counseling and training, and failed to consider the student's needs for assistive technology and home-based services using an applied behavioral analysis (ABA) methodology (*id.*). For relief, the parent requested district funding for (1) at least 10 hours per week of 1:1 ABA services; (2) three 30-minute sessions per week of individual OT; (3) four 30-minute sessions per week of individual speech-language therapy; (4) one 30-minute session per week of PT in a group of two; (5) one 30-minute session per week of individual PT; (6) substitution of the student's 1:1 paraprofessional with a 1:1 teacher or licensed teaching assistant, supervised by an experienced provider of ABA services; (7) an ABA consultant teacher to provide training to the student's teachers and staff; and (8) additional home-based 1:1 ABA services (*id.* at pp. 11-12). The parent also requested compensatory education and equitable additional services to remedy the district's alleged failure to offer the student a FAPE for the 2013-14 school year (*id.*). The parent also requested independent educational evaluations (IEEs) at district expense (*id.* at p. 12).

### **B. Impartial Hearing Officer Decision**

A hearing was held on August 15, 2013, to address the student's pendency (stay put) placement during the due process proceedings (Tr. pp. 1-23). On September 27, 2013, an IHO issued an interim order determining that the student's pendency placement consisted of 10 hours per week of ABA/special education itinerant teacher (SEIT) services (Interim IHO Decision). Following a prehearing conference on September 27, 2013, the impartial hearing convened on the merits on November 7, 2013, and concluded on September 8, 2014, after seven days of proceedings (Tr. pp. 24-876).<sup>2</sup> On the first day of the impartial hearing, the district conceded that it had not offered the student a FAPE (Tr. p. 36).<sup>3</sup>

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<sup>1</sup> The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>2</sup> At the conclusion of the first day of the impartial hearing, the then-presiding IHO, who also issued the pendency decision, recused herself upon motion by counsel for the parent (Tr. pp. 71-73). A new IHO (hereinafter the IHO) was appointed on December 2, 2013, who rendered the decision at issue in this appeal (IHO Decision at p. 3).

<sup>3</sup> Although the district conceded that it did not offer the student a FAPE, the hearing thereafter lacks any

In a decision dated November 21, 2014, the IHO found the case had been rendered "moot" by virtue of the parent having "received all of the relief sought pursuant to pendency" (IHO Decision at p. 8). More specifically, the IHO found that there was no longer any "live controversy" as the 2013-14 school year had expired and the exceptions to the mootness doctrine did not apply (id. at pp. 12-13). Additionally, the IHO denied the parent's request for compensatory additional services because the hearing record indicated that the student received an "inordinate" amount of services and progressed in reading and math during the 2013-14 school year (id. at pp. 15-17). With respect to the parent's request for IEEs at public expense, the IHO found that the parent was entitled to reimbursement for the costs of a privately obtained neurodevelopmental/psychological evaluation only (id. at pp. 17-18).<sup>4</sup> Lastly, the IHO ordered the CSE to reconvene to develop a new IEP for the student (id. at p. 18).

#### **IV. Appeal for State-Level Review**

The parent appeals, asserting that the IHO erred in: (1) applying an incorrect legal standard; (2) limiting the scope of the impartial hearing; (3) failing to rule on her claims arising under section 504 of the Rehabilitation Act of 1973 (section 504);<sup>5</sup> (4) finding that a portion of her requested relief was moot; (5) finding that the student was not entitled to compensatory education services; and (6) failing to provide assistive technology as both a service and compensatory remedy for the student. For relief the parent requests, among other things: (1) direct funding for 15 hours per week of 1:1 home-based ABA services, to be provided 52 weeks a year without breaks; (2) direct funding for 20 hours per week of 1:1 in-school ABA services; (3) 1360 hours of compensatory 1:1 ABA services; (4) supervision of the student's program by an experienced ABA provider; (5) ABA-trained consultant teacher services to provide training to the teachers and staff at the student's district public school; (5) two hours per week of parent counseling training, provided by one of the student's ABA providers and 104 hours of compensatory parent counseling and training ; (6) assistive technology and assistive technology consultant training as recommended in a May 2014 evaluation; and (7) "[s]pecial education small bus transportation" with limited travel time

The district submits an answer, denying the claims raised in the petition and asserting that the IHO correctly denied the parent's request for compensatory services. More specifically, the district asserts that the IHO properly determined that the student received an "inordinate" amount

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indication of how the June 2013 IEP was deficient (Tr. pp. 36, 136). In the absence of any clarification of the scope of its concession and for purposes of fashioning relief related to the denial of a FAPE, I will, in this instance, presume that the district intended to admit every deficiency alleged by the parent in the due process complaint notice regarding the June 2013 IEP.

<sup>4</sup> As neither party appeals the IHO's finding that the parent was entitled to reimbursement only for the neurodevelopmental/psychological evaluation, this determination is final and binding on both parties and will not be further addressed (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]).

<sup>5</sup> While the parent asserts that the IHO failed to rule on her claims regarding systemic violations of the IDEA, she raises no particularized arguments and it is not necessary to address them further given the district's concession that it did not offer the student a FAPE.

of services; however, even if compensatory services were warranted, the district argues that the student should not receive in excess of five hours per week. Furthermore, the district asserts that the parent's request for assistive technology services should not be considered.

## 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. 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; 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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at \*15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], *aff'd*, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Scope of Review**

#### **1. Burden of Proof**

Initially, addressing the parent's argument that the IHO misallocated the burden of proof to the parent regarding the appropriateness of an award of compensatory educational services, under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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]). In the instant case, there was no unilateral placement by the parent or request for tuition reimbursement. The parent requested that the district be directed to provide compensatory education services to the student and thus, it is the district, not the parent, which had the burden of proof on the contested issues in the impartial hearing. Although the IHO stated during the impartial hearing that the parent had the burden of proving that the compensatory educational services sought for the student were appropriate (Tr. pp. 137, 139, 214, 248-52, 303), the IHO's decision reflected an appropriate analysis of the factors that go into determining whether an award of compensatory services is warranted, as did other comments he made during the hearing (IHO Decision at pp. 14-17; see Tr. pp. 172-73, 313, 487-88, 550, 613-14). However, assuming for the sake of argument that the IHO misapplied the burden of proof, I have conducted an independent examination of the hearing record and, as more fully described below, reached a conclusion to reverse in part the IHO's denial of compensatory educational services for the student on other grounds.

#### **2. Scope of Impartial Hearing**

The parent also alleges that the IHO improperly limited the scope of the impartial hearing. An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO has the discretion to limit or exclude evidence or testimony of witnesses that he or she deems to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that

there is an adequate record upon which to permit meaningful review. After examining the hearing record and in light of the broad discretion granted to IHOs in conducting an impartial hearing, the IHO did not improperly restrict the scope or content area of questioning by counsel for the parent. Rather, the IHO provided counsel with leeway in discussing matters outside the scope of the due process complaint notice and appropriately exercised his discretion to curtail the lengthy proceedings by reasonably restricting counsel's repeated attempts to impermissibly expand the scope of the impartial hearing, appropriately discussing evidentiary matters regarding the relevance of proposed testimony, and instructing counsel for the parent to question witnesses in a manner that would result in the development of an adequate hearing record (see, e.g., Tr. pp. 187-94, 207-14, 218-24, 317-19, 486-93, 591-93, 600-02, 609-15, 754-60).<sup>6</sup> In any event, to the extent the parent continues to make specific assignments of error regarding certain items proffered into evidence at the impartial hearing, such claims are addressed below.

### **3. Section 504 Claims**

The parent appeals the IHO's failure to hear her claims pursuant to section 504. The New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and an SRO does not review section 504 claims (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012]; see also Educ. Law § 4404[2] [providing that SROs review determinations of IHOs "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, I have no jurisdiction to review any portion of the parent's claims regarding section 504 and, while the IHO was designated to hear IDEA claims, I make no finding as to whether the IHO was also appointed by the district to hear section 504 claims as well.

### **4. Additional Evidence**

Accompanying the parent's petition are a number of supplemental exhibits submitted for consideration as additional evidence (Supplemental Exhibits A-D). A review of the supplemental exhibits reveals that Supplemental Exhibit A includes Parent Exhibits C, E-I, and K-L, and an August 2014 neurodevelopmental evaluation report. Parent Exhibits C and E-I, although erroneously marked as withdrawn in the IHO's decision, were offered but not accepted into evidence at the impartial hearing, as were Parent Exhibits K-L and the August 2014 neurodevelopmental evaluation report (Tr. pp. 79-80, 103-05, 469-72, 848, 863-70).<sup>7</sup> In addition, Parent Exhibits H and I were later offered into evidence as Parent Exhibits W and X and were again rejected by the IHO (Tr. pp. 600-02). Supplemental Exhibit B consists of a due process complaint notice filed by the parent regarding the 2012-13 school year, Supplemental

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<sup>6</sup> Also contrary to the parent's assertions on appeal, the hearing record reflects that the IHO attempted to assist counsel for the parent in permissibly entering evidence regarding the student's need for compensatory services (Tr. pp. 161-78).

<sup>7</sup> Although not fully explained, it appears that the original IHO presiding over this matter admitted Parent Exhibits C and E-I into the hearing record (Tr. p. 52). The version of Parent Exhibit K entered into evidence at the impartial hearing consists of an assistive technology evaluation conducted on May 13, 2014 (Parent Ex. K; see Tr. pp. 463, 586, 589-91).

Exhibit C contains a stipulation of settlement regarding the impartial hearing requested by Supplemental Exhibit B, and Supplemental Exhibit D consists of various documents purporting to reflect district policy. As Supplemental Exhibits B-D were available at the time of the impartial hearing, and further because they are not necessary to render a decision, they do not need to be considered as additional evidence.<sup>8</sup> With regard to Supplemental Exhibit A, the parent does not now assert that the IHO abused his discretion in not admitting its various components into evidence and, to the extent relevant to the issues on appeal, are not necessary to a determination on the issue of compensatory relief, as discussed further below.

## **B. Mootness**

Next, with regard to the parent's argument that the IHO erred in finding that the matter was moot, the dispute between the parties in an appeal from an IHO decision must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin, 583 F. Supp. 2d at 428; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at \*3-\*4 [W.D.N.Y. Sept. 30, 2008]). Administrative decisions rendered in cases that concern issues such as desired changes in IEPs, specific placements, and implementation disputes that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]).

In the instant case, the IHO found that to the extent the parent was requesting modifications to the student's IEP for the 2013-14 school year, the case was moot and there was no live controversy because the parent received her requested relief through pendency. The parent contends that her appeal is not moot because there is still a "live controversy" and she has a personal stake in the outcome of her claims. To the extent the parent requested modifications to the student's IEP in effect for the 2013-14 school year, the IHO correctly determined that her claims are moot and her requests to that effect will not be further addressed (V.M. v. North Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 255 [S.D.N.Y. 2012]). However, because the parent seeks compensatory services to remedy the district's denial of a FAPE to the student, as noted by the IHO (IHO Decision at p. 14), there continues to be an ongoing and live controversy that can be remedied by an award of compensatory services to the student (see Lillbask, 397 F.3d at 89; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at \*3 n.9 [N.D.N.Y. Feb. 28, 2013]).

## **C. Relief**

It is next necessary to determine whether the IHO erred in denying the parent's request for compensatory educational services to remedy the denial of a FAPE for the 2013-14 school year. Compensatory education is an equitable remedy that is tailored to meet the unique

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<sup>8</sup> Generally, documentary evidence not presented at an impartial hearing will 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 (Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also 8 NYCRR 279.10[b]; 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]).

circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Within the Second Circuit, compensatory relief in the form of supplemental special education or related services has been awarded to students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at \*23 [E.D.N.Y. Oct. 30, 2008]; see generally R.C. v. Bd. of Educ., 2008 WL 9731053, at \*12-\*13 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who have been denied appropriate services, if such deprivation can be remedied through the provision of additional services before the student becomes ineligible for special instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; see, e.g., Application of the Dep't of Educ., Appeal No. 13-048; Application of a Student with a Disability, Appeal No. 11-091).

The purpose of an award of additional services 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 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] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]). Accordingly, an award of additional services 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"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at \*7 [E.D.N.Y. Mar. 30, 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; 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. 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"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]). [14-172]<sup>9</sup>

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<sup>9</sup> To the extent the parent requests assistive technology services as a component of any compensatory award, State regulations provide that assistive technology devices and services are generally required to the extent

## 1. Parent Counseling and Training

The parent asserts that the district failed to provide her with parent counseling and training and requests that the district be directed to provide her with compensatory parent counseling and training services in the amount of two hours for each week such services were not provided during the 2013-14 school year. State regulations require that an IEP indicate the extent to which parent training will be provided to parents (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, courts have held that a failure to include parent counseling and training on an IEP will rarely rise to the level of a denial of a FAPE and the Second Circuit has explained that "because school districts are required by 8 NYCRR 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP" (R.E., 694 F.3d at 191; see R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at \*2 [2d Cir. Mar. 19, 2015]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 169-70 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]).

Here, it is undisputed that the June 2013 CSE did not recommend parent counseling and training as a related service in the student's June 2013 IEP as required by State regulation (see generally Parent Ex. D). Accordingly, the district is directed to provide the parent with twenty-four hours of compensatory additional parent counseling and training, to be used by October 31, 2015.<sup>10</sup> Furthermore, the district is directed, when next it convenes a CSE to develop an IEP for

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necessary to permit a student to benefit from instruction (8 NYCRR 200.4[d][2][v][b][6], [d][3][v]). Accordingly, a compensatory award of assistive technology services will be granted only when the services are necessary to assist the student in accessing the instructional portions of her compensatory award (see Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-121). A May 2014 assistive technology evaluation report indicates that the recommendations for assistive technology were intended to support, reinforce, and permit the student to practice, academic skills, rather than constituting services required for the student to access her curriculum (Parent Ex. K at pp. 7-9). A recommendation for a particular assistive technology device or service as an additional support for a student does not necessarily indicate the student's need for that device or service (High v. Exeter Twp. Sch. Dist., 2010 WL 363832, at \*5 [E.D. Pa. Feb. 1, 2010] [holding that "although assistive technology will almost always be beneficial, a school is only required to provide it if the technology is necessary"]). Accordingly, in these circumstances, the hearing record does not indicate that assistive technology devices or services are required to enable the student to receive benefits from the compensatory services awarded herein.

<sup>10</sup> Although the parent requests substantially more hours of compensatory parent counseling and training, the hearing record contains no evidence indicating a need for, and she presents no argument regarding why, such a high level of services provided to the parent is necessary to remediate the harm caused to the student by the district's failure to provide such services, especially considering testimony by one of the student's home-based ABA providers that, consistent with State regulations (8 NYCRR 200.1[kk]; 200.13[d]), she discussed the student's program with the parent "so [she] can follow through" (Tr. pp. 635, 655-56).

the student, to provide for parent counseling and training in accordance with State regulations (8 NYCRR 200.13[d]).

## **2. 1:1 ABA Instructional Services**

On appeal, the parent requests 1360 hours of compensatory 1:1 ABA services.<sup>11</sup> The hearing record reveals that during the 2013-14 school year, the student received 25 hours of ABA services per week, with 10 hours provided at school and 15 hours provided at home (Tr. pp. 155-56, 58-60; Parent Ex. T at p. 1). More specifically, the student received 10 hours of ABA services per week pursuant to the September 2013 pendency order and 15 hours of ABA services per week from a bank of services provided pursuant to an agreement settling the parent's claims regarding a denial of a FAPE from a previous school year (Interim IHO Decision; Tr. pp. 155-60).

In this case, the IHO determined that an additional award of compensatory services was not appropriate because during the 2013-14 school year, the student received an "inordinate amount of services" and made progress. First, the hearing record supports the IHO's determination that the student received a greater level of services than was necessary to provide her with a FAPE; in addition to a 12:1+1 special class with the services of a 1:1 paraprofessional and 25 hours per week of 1:1 ABA services, the student also received speech-language therapy, OT, and PT services (Parent Exs. D at pp. 10-13; T at p. 1). Additionally, a review of the hearing record reveals that the student made progress during the 2013-14 school year. One of the student's ABA providers indicated that at the beginning of the year, the student performed at a "low" kindergarten level in mathematics, reading, writing, and spelling (Tr. pp. 635-37; Parent Ex. V at pp. 1, 6-7). By the end of the 2013-14 school year, the ABA provider indicated that the student made progress in reading fluency and decoding (improving to level B from level A), in mathematics (progressing to a "high" kindergarten or beginning first grade level with minimal prompts), and in writing and spelling (progressing to amid-kindergarten level) (*id.*). Additionally, the supervisor of the student's ABA providers testified that the student began to initiate interactions with adults, required less prompting to participate in turn taking games, showed a decrease in self-stimulatory behaviors which allowed for increased interactions, and demonstrated some spontaneous eye contact and language during movement activities (Tr. pp. 153-56, 224-25, 275). The ABA supervisor also testified that the student demonstrated progress in gym activities by being able to wait in line rather than running off, responding to peers when prompted, holding a peer's hand rather than needing an adult hand, and responding to prompts rather than needing her hand held (Tr. pp. 279-281). Further, the ABA supervisor indicated the student made progress in English language arts, mathematics, and social skills (Tr. p. 393).

As noted above, the purpose of awarding compensatory additional services is to provide an appropriate remedy for a denial of a FAPE (Newington, 546 F.3d at 123). In this case, the district conceded that it did not offer the student a FAPE. Although the hearing record supports a conclusion that the student received an abundance of services and made progress during the 2013-14 school year, the district is not necessarily relieved of its obligation to compensate the student for its failure to offer the student a FAPE for the 2013-14 school year on that basis alone

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<sup>11</sup> The parent requests 35 hours per week for 52 weeks, less the 460 hours received pursuant to pendency.

(Walker v. Dist. of Columbia, 786 F. Supp. 2d 232, 238 [D.D.C. Cir. 2011] [finding that the IHO's determination that the student had progressed physically did not necessarily alleviate the district's responsibility to compensate the student for past failures to provide PT services and remanding for a fact-specific inquiry]; see Wilson v. District of Columbia, 770 F. Supp. 2d 270, 276 [D.D.C. 2011] [finding that although a student had made some academic progress, remand and a fact specific inquiry was required to determine if there were services that would remediate the district's past failure to provide a necessary service]). Thus, the IHO in this case erred in denying the parent's request for compensatory educational services without addressing the effect that the alleged violations or deprivations had upon on the student, and what, if anything, could remediate such deprivations.

In determining appropriate relief, the compensatory services should place the student in the position she would have occupied had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123). In this case, the parent requests 35 hours of ABA services per week for the student. The district argues that the student should receive no more than 5 hours of ABA services per week, over and above the 10 hours per week she is entitled to pursuant to pendency. A problem with the parent's request for compensatory additional services is that the hearing record is unclear as to what portion of the student's progress was attributable to the student receiving 25 hours of ABA services per week during the 2013-14 school year.<sup>12</sup> Under the circumstances, as the hearing record lacks sufficiently quantifiable proof of the student's progress in relation to the number of ABA hours the student received, the district will be directed to provide, as compensatory additional services, one hour of 1:1 ABA services for each day in the 2013-14 12-month school year, for a total of 210 hours, to be used by October 31, 2015.<sup>13</sup> These services will be limited to days that school is in session; however, the location where the services are provided is to be determined by the parties (either at home or at school, in consideration of the services the student is already receiving).<sup>14</sup> To the extent otherwise

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<sup>12</sup> This confusion was acknowledged by counsel for the parent during the impartial hearing, when she noted that application of the approach of a "bank" of compensatory ABA services in addition to the student's then-current program was "muddying the waters" with regard to the extent of benefits the student received from the IEP versus the bank of compensatory education (Tr. p. 645). In this case, a remand for additional fact finding at this juncture is unlikely to clarify the situation further.

<sup>13</sup> This includes 180 days during the standard school year and an additional 30 days during the summer portion of a 12-month school year. The parent has provided no basis other than generalized assertions of unspecified "regression," and none appears in the hearing record, for an award of services during periods when schools are not in session. State regulations provide that a district must provide a student with 12-month services when the student will experience "substantial regression," defined as the "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], [eee]; 200.6[k][1]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more, i.e., a period of review approximately equal to the period of time during which the student did not receive services (see "Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at <http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf>). The hearing record is devoid of evidence that the student experienced such severe regression as to be eligible not only for 12-month services, but for services provided every week of the year (see Tr. p. 536; Parent Ex. T at p. 6).

<sup>14</sup> The compensatory additional services directed herein are structured to be executed within a reasonably condensed time-frame so that the parties and future CSE participants can more easily determine what progress

required, the district shall not be relieved of its obligation to ensure that the student receives transportation to and from these services on a 12-month basis.

Finally, I note that while this decision specifically identifies ABA methodology as equitable relief, it does not constitute an endorsement of the arguments that ABA methodology is the sole permissible methodology to be used in educating this student, and neither does it constitute a finding that the student requires home-based services to receive educational benefit. The district does not challenge either the provision of ABA services or where such services should be provided. Although the parent argues that the student should receive home-based ABA services, several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch Bd., 941 F.2d 1563, 1573 [11th Cir 1991]). In this regard, and while it is understandable that the parent may desire greater educational benefits through the auspices of special education, a district is not obligated to pay for services to maximize a student's educational opportunity (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Additionally, there is no evidence in the hearing record that suggests the student would not make progress or receive educational benefit without home-based ABA services. Thus, the home-based services that I find permissible in this instance as a remedial measure is a consequence of the fact that it is going to become increasingly difficult for the student to make up missed services from past deprivations and maintain a current program at the same time without resorting to use of instructional time outside the normal school day.

Notwithstanding these points, because the district has apparently decided not to address these difficult methodological questions despite their having been placed squarely at issue for successive school years by the parent, when the CSE next convenes to conduct an annual review of the student's program the district will be directed to consider whether home-based educational services, the provision of instruction using ABA methodology, or assistive technology devices and services are required to enable the student to benefit from instruction and, after due consideration thereof, provide the parent with prior written notice on the form prescribed by the Commissioner specifically indicating whether the CSE recommended or refused to recommend such services on the student's IEP and explaining the basis for the CSE's recommendation therein as well as the evaluative information relied upon in reaching these determinations (8 NYCRR 200.5[a]; see 34 CFR 300.503[b]).<sup>15</sup>

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is thereafter made by the student, independent from services that the student receives as a result of a compensatory award or through pendency. Going forward, the parties should make a concerted effort to work cooperatively to "unmuddy" the waters and consider using methods of progress measurement that can distinguish progress achieved as a result pendency and compensatory education services from progress achieved as a result of services recommended by the CSE.

<sup>15</sup> To the extent that the prior written notice directives set forth in this decision may be interpreted as exceeding the requirements of federal and State regulations, I find it is appropriate remedial relief that is designed to address the parties' recurring disagreement evidenced in this case.

## **VII. Conclusion**

For the reasons stated above, the student is entitled to receive compensatory additional ABA services and parent counseling and training. In light of the foregoing, I need not address the parties' remaining contentions.

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision dated November 21, 2014, is modified by reversing those portions which denied the parent's request for compensatory additional services; and

**IT IS FURTHER ORDERED** that the district shall provide the student with additional services in the form of 210 hours of 1:1 ABA therapy, to be used by October 31, 2015;

**IT IS FURTHER ORDERED** that the district shall provide the parent with additional services in the form of twenty-four hours of parent counseling and training, to be used by October 31, 2015; and

**IT IS FURTHER ORDERED** that upon reconvening the CSE for the next annual review of the student's IEP, the parties shall discuss the topics as directed above and the district shall within 10 days thereafter provide prior written notice in conformity with State and federal regulations and the body of this decision.

**Dated:**           **Albany, New York**  
                          **March 26, 2015**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**