



# The University of the State of New York

The State Education Department

State Review Officer

[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 15-075

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

## **Appearances:**

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

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Theresa Crotty, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied in part the relief they sought relating to the educational program that respondent's (the district's) Committee on Special Education (CSE) recommended for their son for the 2013-14 school year. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

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

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

### **III. Facts and Procedural History**

With respect to the student's educational history, the hearing record reflects that the student received special education as a preschool student with a disability during the 2011-12 school year (see Parent Exs. C at p. 1; I at p. 1). For the 2012-13 school year, a July 2012 CSE found the student eligible for special education as a student with autism and recommended placement in a special class as well as the related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Parent Ex. B at pp. 2, 8-9). The student attended a district public school for the 2012-13 school year (see Parent Exs. X at p. 2; BB at pp. 2-3). In November 2012, the parents commenced an impartial hearing (Hearing I) relating to the 2012-13 school year and, as a result, an IHO determined in January 2013 that the student's pendency (stay-put) placement during the course of that proceeding included, among other things, 10 hours of special education itinerant

teacher (SEIT) services (Parent Ex. BB at pp. 2-4).<sup>1</sup> Hearing I, which involved claims related to the 2012-13 school year, continued throughout the 2012-13, 2013-14 school years and into the 2014-15 school year (Parent Ex. BB at pp. 1-2).

On June 7, 2013 the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (see Dist. Ex. 1 at pp. 1, 15). Finding that the student remained eligible for special education as a student with autism, the June 2013 CSE recommended a that the student attend a 12-month school year program in a 6:1+1 special class placement at a specialized school with the following related services on a weekly basis: two 30-minute sessions of individual OT, two 30-minute sessions of individual PT, two 30-minute sessions of individual speech-language therapy, and one 30-minute session of speech-language therapy in a group of three (see id. at pp. 1, 10-12). The June 2013 IEP made provision for the related service of parent counseling and training once every three months (id. at p. 11).<sup>2</sup> The student attended the placement recommended by the June 2013 CSE at a district public school during the 2013-14 school year (Tr. pp. 389-90, 465-66; Parent Exs. X at p. 2; Y at p. 1; Z at p. 1; AA at p. 1). In addition, the student continued to receive 10 hours of home-based ABA services per week throughout the 2013-14 school year, not under the terms of an IEP, but due to the January 2013 interim decision regarding pendency issued in Hearing I, which hearing concluded on August 12, 2014 (Parent Exs. W at p. 2; X at pp. 1, 2; Y at p. 1; Z at p. 1; AA at p. 1; BB at pp. 2-4).

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

In a due process complaint notice dated October 23, 2013, the parents filed new claims alleging that the district failed to offer the student a FAPE for the 2013-14 school year (Parent Ex. A at pp. 1-14). The due process complaint notice contained approximately 100 numbered allegations; however, due to the limited issues presented on appeal, only those allegations both germane to the findings in the IHO's decision and presented for resolution in this appeal are described below. Accordingly, the parties' familiarity with the remaining claims from the due process complaint is presumed and although I have examined them as part of the administrative record those now-undisputed matters will not be described herein.

Turning to the process by which the June 2013 IEP was developed, the parents asserted that the district failed to conduct a sufficient evaluation of the student (Parent Ex. A at pp. 1, 3, 4, 8, 9). The parents further alleged that that the June 2013 CSE predetermined that it would refuse home-based ABA services on the student's IEP (id. at pp. 8, 9). The parents further contended that the CSE erred by failing to offer parent counseling and training services (id. at p. 9).

As for the June 2013 IEP, the parents asserted that the present levels of performance were inaccurate, the annual goals were vague, incapable of measurement, and the IEP did not address all of the student's areas of need (Parent Ex. A at pp. 8, 9). Particularly, with respect to the student's

---

<sup>1</sup> These SEIT services are elsewhere referred to and described in the hearing record as after school or home-based services using principles of applied behavior analysis (ABA) (hereinafter "home-based ABA services") (see, e.g., Tr. p. 182, Parent Ex. BB at pp. 2-4).

<sup>2</sup> It is unclear from the IEP whether the parent counseling and training services session were intended to be 30 or 45 minutes in duration (see Dist. Ex. 1 at p. 11).

present levels of performance, the parents also asserted that the CSE erred by failing to identify on the IEP the peer group the student required (*id.* at p. 9). The parents further stated that the student required home-based ABA services in order to receive a FAPE and that the CSE erred by failing to recommend such services (*id.* at pp. 2, 9-10, 12-13). The parents also argued that the IEP did not recommend a sufficient quantity of speech-language therapy to meet the student's needs (*id.* at pp. 8, 9). The parents additionally contended that the IEP failed to include positive behavioral supports and that the district failed to conduct a functional behavioral assessment (FBA) (*id.* at p. 9).

With regard to the implementation of the June 2013 IEP, the parent contended that the functional grouping in the student's 6:1+1 classroom was inappropriate to meet his needs (Parent Ex. A at p. 10). The parent further asserted that the district's actions violated Section 504 of the Rehabilitation Act of 1973 (Section 504) (*id.* at pp. 11-12).

For relief, the parents sought the prospective placement of the student at the School for Language and Communication Development (SLCD), a State-approved nonpublic school (Parent Ex. A at p. 13; *see* Tr. pp. 27-28).<sup>3</sup> In the alternative, the parents requested an order directing the district to place the student in a "small, language-based . . . program" with certain identified characteristics (Parent Ex. A at p. 13). The parents additionally sought "an increase" in the amount of home-based 1:1 ABA services received by the student (*id.*). The parents further requested three hours of parent counseling and training "per week" and compensatory services "includ[ing] ABA services, parent training and related services" (*id.* at p. 14). The parents also sought multiple declaratory findings, including a finding that the district violated Section 504 (*id.*). The parents further requested reimbursement for independent educational evaluations, transportation, and "other costs" (*id.*). Finally, the parents invoked their right to have the student remain in his pendency placement throughout the pendency of the administrative proceedings (*id.* at p. 13).

## **B. Facts Post-Dating the Due Process Complaint Notice**

On February 14, 2014, the parties proceeded to an impartial hearing (*see* Tr. pp. 1-10). Subsequently, a CSE convened to develop the student's IEP for the 2014-15 school year and, at that time, recommended that the student attend a placement at a nonpublic school (Tr. pp. 27, 29-30, 160-61). The district approved placing the student in a State-approved nonpublic school, namely SLCD, and the student was enrolled there for the 2014-15 school year (Tr. pp. 27-28, 455-56, 466).

Also as briefly discussed earlier, a final decision was issued on August 12, 2014 resolving the claims in Hearing I related to the 2012-13 school year (*see* generally Parent Ex. BB). The IHO in Hearing I issued an order requiring the district to 1) amend the student's IEP to include 20 hours per week of home-based ABA services (two of which were to be used for parent counseling and training) on a 12-month school year basis; 2) fund an independent assistive technology evaluation and a functional behavioral assessment; 3) reimburse the parent for the costs of a privately-obtained neuropsychological evaluation; and, 4) provide after school compensatory education services consisting of 100 hours of 1:1 speech-language therapy and 750 hours of 1:1 ABA

---

<sup>3</sup> The parents characterized the relief sought as "prospective funding and/or reimbursement in a unilateral placement," however; as of the date of the due process complaint, the parent had not unilaterally placed the student.

services (some of which could be used for parent counseling and training at the parents discretion) by August 30, 2016 (id. at pp. 15-16).

### **C. Impartial Hearing Officer Decision**

After Hearing I concluded in August 2014, the parties continued with the impartial hearing concerning the student's 2013-14 school year, which concluded on February 24, 2015, after nine days of proceedings (see Tr. pp. 1-540). In a decision dated June 3, 2015, the IHO found that the district failed to offer the student a FAPE for the 2013-14 school year (IHO Decision at pp. 11-26). At the outset, the IHO noted that the parents had filed a due process complaint notice challenging the CSE's recommendations for the prior school year (i.e., the 2012-13 school year) and that Hearing I "overlapped" with the instant hearing (id. at p. 2 n.1). The IHO further noted that while impartial hearing was, the CSE had convened and, for the 2014-15 school year, recommended placement at SLCD (id. at p. 4).

Next, with regard to the credibility of witnesses, the IHO applied an "adverse inference" against the testimony of the parent (IHO Decision at p. 13 n.6). The IHO explained that the parent only admitted that he worked as a special education teacher for the district for the past nine years "upon questioning by the IHO" as to the basis of his opinion that the June 2013 IEP's annual goals were inappropriate (id.). The IHO further found that the student's classroom teacher for the 2013-14 school year was a "credible witness" (id. at p. 15 n.7).

Regarding the procedure by which the June 2013 IEP was developed, the IHO found that the district failed to conduct an appropriate evaluation of the student (IHO Decision at pp. 11-12). While the IHO observed that the June 2013 CSE considered a timely March 2012 psychoeducational evaluation report, he found that this evaluation report was insufficient because it "lacked . . . cognitive functioning information" (id. at p. 12). Additionally, the IHO found that the June 2013 CSE "categorically" refused to consider home-based services at the CSE meeting, and that this constituted predetermination (id. at p. 17). Further, the IHO found that the CSE committed a procedural violation of the IDEA by failing to consider parent counseling and training (id. at p. 20).

Turning to the June 2013 IEP, the IHO found that the present levels of performance accurately described the student and that the annual goals addressed the student's areas of need (IHO Decision at p. 13). The IHO also found that the CSE was not required to include annual goals recommended by the student's "home instructor" because these annual goals related to behavior that was not observed in school (id. at p. 14). The IHO further found that the lack of socialization goals did not render the IEP inappropriate and that the parent, who had special education expertise, could have "suggest[ed] additional goals" at the CSE meeting (id. at pp. 13-14). Next, the IHO found that the student's "attention problems, difficulty completing assignments, and [difficulty] working independently" constituted interfering behaviors and that the CSE should have conducted an FBA to address these behaviors (id. at p. 12). The IHO additionally found that the amount and duration of speech-language services recommended by the June 2013 CSE were

appropriate to meet the student's needs (id. at p. 16).<sup>4</sup> The IHO also found that the student did not require instruction during the school day using ABA methodology and, therefore, June 2013 CSE did not err by failing to include such methodology on the IEP (id. at pp. 19-20).

While not recommended by the June 2013 CSE, the IHO found that home-based services provided by the district during the 2013-14 school year were not appropriate because they were largely devoted to completion of the student's homework (IHO Decision at pp. 17-19).<sup>5</sup> The IHO found that there was no evidence in the hearing record that the student received "copious amounts of homework" and that academics, particularly reading and math, were an area of strength for the student (id. at p. 18). The IHO further stated that parents are "primarily responsible for ensuring completion of . . . homework," especially where, as here, one of the parents was a special education teacher (id. at pp. 18-19). Accordingly, the IHO found that home-based ABA services were not required on the student's IEP in order for the student to receive a FAPE for the 2013-14 school year (id. at p. 19).

With respect to the implementation of the June 2013 IEP, the IHO found that the student made progress and that his classroom teacher was able to implement the IEP's annual goals (IHO Decision at pp. 14-15). However, the IHO found that the student was not able to develop proper socialization skills in the 6:1+1 classroom due to the needs and abilities of the other students in the classroom (id. at p. 15). Therefore, the IHO found that the student was denied a FAPE because "he did not receive sufficient . . . opportunities to use and develop communication and social skills" (id.). The IHO also found that the speech-language services on the June 2013 IEP were implemented and that the student made progress (id. at pp. 15-16).

The IHO next considered what relief, if any, was appropriate to remedy the district's failure to offer the student a FAPE for the 2013-14 school year (IHO Decision at pp. 21-24). At the outset, the IHO observed that, as a result of the prior impartial hearing concerning the 2012-13 school year, the student received an award of compensatory services "for the 2013/14 school year" (id. at p. 21 n.9). While the IHO noted that the prior impartial hearing did not concern the 2013-14 school year, he nevertheless indicated that he would "consider" this relief in fashioning a compensatory award so as to avoid awarding "duplicative" relief (id. at pp. 21 & n.9, 24).

The IHO directed two forms of compensatory relief (IHO Decision at pp. 21-26). First, based upon the inappropriate peer grouping in student's 6:1+1 classroom, the IHO ordered two 45-minute sessions of a "social skills program" for each week of the 2013-14 school year to be delivered after school (id. at pp. 21-22, 25). Second, based upon the June 2013 CSE's failure to consider parent counseling and training services, the IHO ordered 20 sessions of parent counseling and training services to be delivered in 60-minute sessions (id. at pp. 23-24, 25). The IHO also ordered the district to complete a "social work assessment" to determine "where, how, and when parent training will be delivered to the family" (id. at pp. 23, 25). The IHO indicated that the

---

<sup>4</sup> The IHO also noted that the district's provision of speech-language therapy services to the student was "consistent" with State regulation regarding educational programs for students with autism and that the amount of services was not predetermined by the CSE (IHO Decision at pp. 16, 17).

<sup>5</sup> As noted above and by the IHO, these home-based services were provided as part of the student's pendency placement arising from the impartial hearing relating to the student's 2012-13 school year (IHO Decision at p. 17; see Parent Exs. W at p. 2; X at p. 1; Y at p. 1Z at p. 1; AA at p. 1; BB at pp. 2-4).

length of the awarded social skills program or parent counseling and training sessions could be altered to reflect the needs of the student, parents, or providers and that the parent would have two years from the date of the decision to use the sessions (id. at pp. 25-26).

The IHO next explained why he did not grant additional relief sought by the parents (see IHO Decision at pp. 12, 22-23, 24). The IHO noted that the student received home-based services for the entirety of the 2013-14 school year as a result of pendency services made available to the student during Hearing I (id. at p. 17). Thus, as to the parents' request for home-based services up to 10 hours, the IHO found such relief "moot" (id. at pp. 17, 23). In addition, the IHO declined to order additional home-based services for the student because, as noted above, the student's home-based services actually delivered during the 2013-14 school year largely focused on homework (id. at p. 22). The IHO further found that, in the alternative, 10 hours of home-based services would have been "sufficient" to meet the student's needs (id.). The IHO additionally noted that a neuropsychological evaluation, an assistive technology evaluation, and an FBA had already been ordered as relief in Hearing I, thus rendering the parents' requests for these forms of relief moot (id. at pp. 12, 24). The IHO further stated that no equitable considerations were present that should preclude or diminish the compensatory services granted to the student (id. at p. 24). Finally, the IHO denied the parties' remaining claims and requests for relief (id. at p. 25).

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

The parents appeal, arguing that the IHO erred by failing to award all of the relief they sought. First, the parents contend that the IHO misapplied the burden of proof and relied upon retrospective evidence to reach certain conclusions. The parents additionally argue that the IHO resolved issues in the district's favor by sua sponte raising and rely upon defenses to claims raised by the parents. The parents also object to the IHO's finding that the issue of whether the student required ABA to receive a FAPE during the 2013-14 school year was moot. The parents additionally contend that the IHO erred by failing to address several claims in their due process complaint notice. The parents further assert that the district was barred from litigating certain issues at the impartial hearing, which were resolved in Hearing I and, thus, had preclusive effect.<sup>6</sup>

Next, the parents argue that the IHO failed to "consider" the outcome of Hearing I insofar as the IHO decision therein "changed" the student's pendency placement. Specifically, the parents aver that the issuance of the final decision in Hearing I gave rise to a new entitlement to the relief ordered by the IHO not only on a prospective basis but on a retroactive basis as well. Based upon this supposition, the parents argue that the student is entitled to additional compensatory education relief as well as the provision of certain services on a prospective basis.

The parents also contend that the IHO erred by finding that the home-based ABA services delivered during the 2013-14 school year were unnecessary because they focused on homework.

---

<sup>6</sup> While the parents describe this preclusion as "res judicata," it is more accurately characterized as collateral estoppel or issue preclusion (see K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at \*5 [S.D.N.Y. Jan. 13, 2012] [noting that "[r]es judicata—also known as claim preclusion—precludes parties from relitigating issues that were or could have been raised in a prior proceeding . . . collateral estoppel—also known as issue preclusion—[holds that] when an issue of ultimate fact has been resolved by a valid and final judgment, that issue cannot be relitigated in a future lawsuit"]).

The parents assert that this amounted to a finding regarding the appropriateness of the student's pendency services and that, assuming that the home-based services improperly focused on homework, the proper course was to award further compensatory education to remediate what amounts to a deficient provision of pendency services, not to reduce or terminate such services. Additionally, the parents argue that the IHO erred in finding no denial of a FAPE based on the June 2013 CSE's failure to include home-based services on the student's IEP. The parents further assert that the IHO erred by failing to find that the student required "additional" ABA and speech-language therapy services to remedy the district's failure to provide the student a FAPE during the 2013-14 school year.

The parents further appeal, in summary fashion, the IHO's findings that certain district witnesses were "more credible" than witnesses called by the parents; that the June 2013 IEP's present levels of performance accurately described the student; that its annual goals addressed the student's areas of need; that the IEP recommended a "sufficient" amount of related services; that the student make progress during the 2013-14 school year; and that the student's 6:1+1 classroom did not address his activities of daily living or behavioral needs.<sup>7</sup> Finally, the parents appeal the IHO's refusal to consider her Section 504 claims to the limited extent that a court would deem such pleading necessary for purposes of administrative exhaustion.

For relief, the parents request amendment of the student's IEP to include certain, specified services; an award of compensatory services to remedy the district's alleged failure to implement the student's pendency placement; an award of compensatory services in the form of ABA and speech-language therapy services; "make-up services" to "compensate" the student for his time in a 6:1+1 classroom during the 2013-14 school year; and a ruling on the merits of the parents' Section 504 claim.<sup>8</sup>

In an answer, the district responds to the parents' petition with admissions and denials and asserts that the IHO properly conducted the impartial hearing and issued a sufficient decision on the merits.

---

<sup>7</sup> The parents also assert that the IHO "should have found" that the June 2013 IEP was predetermined and that the insufficient evaluative information before the CSE resulted in a denial of FAPE (Pet. ¶¶ 57, 60). However, because the IHO resolved these issues in the parents favor, the parents were not aggrieved by these findings and not entitled to appeal them in this instance (IHO Decision at pp. 11-12, 17; see Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination"]).

<sup>8</sup> As the parents appear to recognize in their petition, the State Education Law makes no provision for State-level administrative review by an SRO of IHO decisions with regard to section 504 (Educ. Law § 4404[2] [providing that SROs review IHO determinations "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, an SRO has no jurisdiction to review any portion of the parents' claims regarding section 504 or the IHO's findings, or lack thereof (see Educ. Law § 4404[2]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]).



## 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, 180-83, 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]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be

"reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Additional Evidence**

The parents submit additional evidence with their petition, arguing that the IHO unintentionally neglected to accept this evidence at the impartial hearing. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; 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]).

The testimonial evidence submitted by the parents was available at the time of the impartial hearing and is not necessary to render a decision (see Tr. pp. 444-53; Parent Ex. BB at p. 19). Moreover, the evidence in the hearing record does not support the parents' argument that the IHO intended to admit this evidence but unintentionally failed to do so. At the impartial hearing, the IHO admitted testimony from two witnesses who testified in during Hearing I involving the student's 2012-13 school year into evidence (Tr. p. 450). The IHO directed the parties to "exchange [the testimony], make sure [they] agree[d] as to what the testimony consisted of in the prior proceeding, and then . . . present it [into evidence] at the next hearing [date]" (Tr. p. 453). The parties followed the procedure and reasonable directives of the IHO, and the IHO admitted the testimony of the two witnesses into evidence on the following hearing date (Tr. pp. 453, 462-64; see IHO Ex. 2). However, there is no indication in the hearing record that the IHO mistakenly failed to admit the testimony of a third witness into evidence or that this additional testimony from

Hearing I is necessary in order to render a decision in this case. Accordingly, the parents' additional evidence has not been considered.

## **2. Scope of Review**

Next, the parents aver that the IHO failed to address several of the claims in their due process complaint notice and request that additional grounds exist to supporting the conclusion that the district denied the student a FAPE for the 2013-14 school year. The parents' arguments on these points are flawed in several respects. Initially, the parents' argument is technically incorrect because, to the extent that they allege that the IHO failed to address matters, toward the conclusion of his decision, the IHO explained that he had considered the remainder of the parties' claims that were not specifically discussed and rejected them, albeit in summary fashion (IHO Decision at p. 25). Next, it is unnecessary to address these additional grounds for several reasons. First, as the district did not interpose a cross-appeal challenging the IHO's finding that it denied the student a FAPE for the 2013-14 school year, that determination has become final and binding on the parties and the parents are no longer in any jeopardy of having that finding overturned (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]). Although identifying other possible grounds for finding a denial of a FAPE, the parents do not identify any additional specific relief that should flow from those claims that the IHO rejected, other than the same requests for relief that they identify elsewhere throughout their petition. (see Pet. ¶¶ 51-54, 60), instead leaving the undersigned to search the record and interpret what the parents may be seeking. It is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [indicating that appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 350 Fed. App'x 749, 752 [3d Cir. Nov. 4, 2009] [noting that a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [finding that a generalized assertion of error on appeal is insufficient to preserve a specific challenge]; N.L.R.B. v. McClain of Georgia, Inc., 138 F.3d 1418, 1422 [11th Cir. 1998] [noting that "[i]ssues raised in a perfunctory manner, without supporting arguments and citation to authorities, are generally deemed to be waived"]; see generally Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at \*2 [E.D. Cal. May 6, 2011] [noting that the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at \*4 n.3 [S.D. Ala. Aug. 23, 2007]). Therefore, the additional grounds upon which the parents request findings to support a denial of a FAPE to the student will not be further considered on appeal.

## **3. Collateral Estoppel**

The parents argue that certain issues were resolved in Hearing I and that the IHO in this case erred by refusing to afford them preclusive effect. The parents' argument is unconvincing because Hearing I centered on challenges to the recommendations made by the April 2012 and July 2012 CSEs while the instant hearing involved challenges to the recommendations of the June 2013 CSE (compare Parent Ex. A at pp. 1, 8-14, with IHO Ex. 1 at pp. 4-8). While the parents assert that certain evidence and testimony overlapped between the hearings, the IHO's findings in Hearing I related solely to violations of the student's right to a FAPE from the 2012-13 school year (see Parent Ex. BB at pp. 6-16). Therefore, IHO's findings in Hearing I as to the 2012-13 school

year do not have any preclusive effect on the parents' subsequent claims related to the 2013-14 school year (Tr. pp. 32-34; see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Snyder v. Montgomery County Pub. Schs., 2009 WL 3246579, at \*9-\*10 [D. Md. Sept. 29, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077 at \*21-\*26 [N.D.N.Y. Mar. 31 2009]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*16 [E.D.N.Y. Oct. 30, 2008]).

## **B. Pendency**

Turning to the next issue on appeal, the parents contend that the IHO in this proceeding erred by failing to recognize a purported change to the student's pendency placement effectuated by the IHO's August 2014 final decision in Hearing I on the student's pendency placement. According to the parents, the IHO's decision in Hearing I changed the student's pendency placement including having a retroactive effect, which entitled the student to a further award of compensatory education services. In addition, the parents challenge the IHO's findings relating to the home-based ABA services that the student received pursuant to pendency during the 2013-14 school year.

With regard to stay-put—that is pendency—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 (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Student X, 2008 WL 4890440, at \*20; Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]). Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans v. Bd. of Educ., 921 F. Supp. 1184, 1189 n.3[S.D.N.Y. 1996]; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001], aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

When due process is initiated, an unappealed IHO decision may establish a student's pendency placement under certain circumstances (20 U.S.C. § 1415[j]; see Student X, 2008 WL 4890440, at \*20, 23; Letter to Hampden, 49 IDELR 197). However, in this case the parents misapprehend the effect of the IHO's August 2014 decision in Hearing I, especially given the timing of that decision.

As noted above, a student's "then current placement" is determined at the moment when the due process proceeding is commenced (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 455-56 [2d Cir. 2015]; Murphy, 86 F. Supp. 2d at 359). Here, the parents' due process complaint notice is dated October 23, 2013 (Parent Ex. A at p. 1). The IHO decision in Hearing I was not issued until August 12, 2014 (Parent Ex. BB at p. 16). Therefore, the IHO decision in Hearing I could not have served as a basis for the student's pendency placement as it had not yet been issued at the time of the parents' due process complaint notice in this proceeding.

Once a proceeding commences, a student's pendency placement can be changed in one of two ways pursuant to the IDEA: 1) by agreement between the parties themselves or 2) by a state-level administrative (i.e. SRO) decision that agrees with the child's parents that a change in placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Schutz, 290 F.3d at 484-85; A.W. v Bd. of Educ., 2015 WL 3397936, at \*6 [N.D.N.Y. May 26, 2015]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at \*1 [S.D.N.Y. Mar. 17, 2010]; Murphy, 86 F. Supp. 2d at 366). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during those due process proceedings," S.S., 2010 WL 983719, at \*1 [emphasis in the original]). And upon a pendency changing event, such changes apply "only on a going-forward basis" (S.S., 2010 WL 983719, at \*1).<sup>9</sup> This serves the core purpose of pendency, which is "to provide stability and consistency in the education of a student with a disability," and it would belie this provision to require a district to change a student's educational services in the middle of an impartial hearing (Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 696 [S.D.N.Y. 2006]; see Evans, 921 F. Supp. at 1187, quoting Ambach, 612 F. Supp. at 233; see also E. Lyme Bd. of Educ., 790 F.3d at 452 [noting that the goal of pendency is "to maintain the educational status quo while the parties' dispute is being resolved"]). Therefore, the parents' request for additional relief arising from application of the August 2014 IHO decision in Hearing I and their retroactive pendency argument is denied (see Parent Ex. BB at p. 16).

The governing pendency principles have not been improperly applied IHO in this case as the parents allege. While this proceeding was pending before the IHO, the hearing record shows that the parties reached an agreement among themselves to modify the student's pendency placement on a going forward basis. On or before June 24, 2014, the parents agreed with the district to enroll the student at SLCD for the 2014-15 school year as part of the CSE and IEP annual review process (Tr. pp. 27-28; Parent Ex. BB at pp. 13, 21; see also Tr. pp. 146-47, 251, 466, 520-21). Moreover, the evidence shows that the parties agreed that the district would provide 20 hours of ABA services per week to the student as of September 2014, consistent with the IHO's order in Hearing I (Tr. pp. 253, 525-26; Parent Ex. BB at p. 15; see Ans. at p. 3 n.1). Accordingly, the parties' 2014 agreements as to the student's placement and services now form the basis of the

---

<sup>9</sup> While it has been held that a court may, on equitable grounds, retroactively adjust a student's pendency placement if state administrative decision in a parent's favor was not issued in a timely manner (see Mackey, 386 F.3d at 164-66; O'Shea, 353 F. Supp. 2d at 457-58; see Murphy, 86 F. Supp. 2d at 366-67), that reasoning is inapplicable to the present case. That is, the parents assert that the prior IHO decision should apply to modify the student's pendency placement, as opposed to a decision by an SRO agreeing with a student's parents that a change of placement is appropriate, which federal and State regulations treat as an agreement between the State and the parents (34 CFR 300.518[d]; 8 NYCRR 200.5[m][2]; see 20 U.S.C. § 1415[j]). Moreover, such an equitable exception applies only in cases in which an SRO decides that a unilateral placement, which was not the sort of relief ordered by the IHO in the prior proceeding. Finally, there are not equitable grounds in the present case which would warrant such an exception.

student's pendency placement from that point forward until the proceedings and any appeals are concluded or another subsequent agreement to modify the student's pendency placement takes place between the parties.<sup>10</sup>

On another note related to pendency, the parents argue that the IHO improperly issued findings regarding the appropriateness of ABA services received by the student pursuant to pendency during the 2013-14 school year. The parents also contend that the IHO imposed upon the parents a burden to prove the appropriateness of the student's pendency services. The parents' arguments lack merit. The determination of 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 (Mackey, 386 F.3d at 160). The pendency provision operates as "an automatic preliminary injunction," without regard to the merits of the parent's claims (Zvi D., 694 F.2d at 906; see Mackey, 386 F.3d at 160-61, quoting Susquenita Sch. Dist., 96 F.3d at 83).

The forgoing authorities make clear that parents carry bear no burden whatsoever to establish that a pendency placement or service is appropriate in order for the pendency provision to be effectuated. However, the IHO in no way required the parents in this case to carry such a burden. The IHO accurately noted that the student received home-based ABA services as a pendency placement and took note of what the student actually worked on while receiving those services (see, e.g. IHO Decision at pp. 17-18). The IHO was also required to render a determination on the merits regarding whether the June 2013 CSE improperly failed to include home-based ABA services on the student's June 2013 IEP and he concluded on the merits of the parties dispute over whether the district should or should not include home-based services on the student's IEP that the June 2013 CSE did not err in declining to recommend home-based ABA services as part of the educational plan—which, as noted above, is a finding that need not be reviewed given that the district did not appeal the IHO's ultimate determination that it failed to offer the student a FAPE (see IHO Decision at pp. 17-19).<sup>11</sup> Nowhere in his decision did the IHO state that the student was not entitled to the home-based ABA services by virtue of the pendency provision. The IHO also noted that the student had been receiving home-based ABA services under pendency and that further compensatory equitable relief in the form of yet more home-based ABA services was not necessary in order to remediate the CSE's June 2013 predetermination against providing ABA services (IHO Decision at pp. 17, 22-23; Parent Ex. A at pp. 13-14), and all of these are fairly characterized as determinations on the merits of claims raised by the parents in the due process complaint notice rather than determinations regarding compliance with the IDEA's pendency provision. While the IHO questioned whether working on homework using home-based ABA services that the student was receiving under pendency was an effective educational strategy going forward—evidence of which appeared in the hearing record—the IHO was not required to

---

<sup>10</sup> Other than asserting that the student should have received different pendency services, the parents do not otherwise contend that the district failed to implement the student's pendency services (see E. Lyme Bd. of Educ., 790 F.3d at 456 [awarding compensatory services based on district's failure to implement student's pendency services]).

<sup>11</sup> To the extent the IHO may have relied upon the ABA services received by the student pursuant to pendency during the 2013-14 school year to determine the appropriateness of the June 2013 IEP, such evidence would be impermissibly retrospective if used for this purpose (see R.E., 694 F.3d at 186).

ignore this evidence when he was crafting such an equitable remedy, as discussed below (E. Lyme Bd. of Educ., 790 F.3d at 456; Wenger v. Canastota, 979 F. Supp. 147, 151 [N.D.N.Y. 1997]).

Finally, the parents assert that the IHO improperly issued findings on the student's ABA services because these findings "unilaterally chang[ed]" the student's pendency services (Pet. ¶ 47). This is not a valid basis for contesting the findings on an IHO. Pendency is an incidental effect of filing a due process complaint notice, and courts have not recognized a claim under the IDEA based solely on future pendency harm (see Marcus I. v. Dep't of Educ., 434 Fed. App'x 600, 602 [9th Cir. May 23, 2011] [finding that "the stay-put provision is designed to allow a child to remain in an educational institution pending litigation" but that "the stay-put order will lapse however the litigation concludes."]). Moreover, the parents' view presupposes that the parties will perpetually disagree as to the student's educational programming, that the parents will continue to file due process complaint notices, and that the parties will be unable to agree as to the student's pendency services during these proceedings. This view is neither in keeping with the "cooperative process" envisioned by the IDEA (Schaffer v. Weast, 546 U.S. 49, 53 [2005]), nor consistent with subsequent events: as noted above, a CSE recommended placement in SLCD, a portion of the parents' requested relief in this proceeding, for the 2014-15 school year. Thus, the IHO did not err by issuing findings regarding ABA services.<sup>12</sup>

### **C. Relief**

Before addressing the parties' specific dispute over relief, it is necessary to address the challenges presented by the limited evidence in the hearing record regarding the June 2013 CSE meeting. With the exception of a claim related to the student's functional grouping during the 2013-14 school year, the parents' due process complaint notice is devoted to challenging the procedural process employed by the June 2013 CSE and the recommendations contained in the resultant IEP (see Parent Ex. A at pp. 1, 8-14). However, at the impartial hearing, the district failed to introduce any evidence explaining or justifying the June 2013 CSE's recommendations. The sole exhibit introduced by the district was a copy of the June 2013 IEP (see Dist. Ex. 1) and the two witnesses called by the district—the student's classroom teacher and speech-language pathologist for the 2013-14 school year—neither of whom attended the June 2013 CSE meeting (see Tr. pp. 44-139, 346-80). The only information in the hearing record regarding the June 2013 CSE meeting was solicited from two witnesses called by the parents (see Tr. pp. 262-69, 271-74, 299-300, 302-12, 319-26, 478-80, 483-97, 505).

The IHO recognized this dearth of relevant evidence and encouraged the parties to solicit evidence relevant to determining issues related to the June 2013 CSE meeting (see Tr. pp. 40-41, 225-26, 243-44, 483-84). The IHO's efforts to have the parties assist him were unsuccessful. Thus, the IHO was faced with in the unenviable choice of either attempting securing this information through his own efforts during the hearing without the assistance of the parties, or rendering a decision based upon the very limited evidence introduced by the parents. The IHO elected to do the latter. In doing so, however, the IHO also utilized evidence that post-dated the June 2013 CSE meeting to reach certain findings. This was contrary to the controlling law in this circuit, which requires a prospective analysis of the adequacy of an student's IEP (IHO Decision at pp. 11-12,

---

<sup>12</sup> The parents' argument that the IHO raised and applied defenses in the district's favor appears to be duplicative of this argument and, therefore, is dismissed (see Pet. ¶¶ 67-69).

15-17; R.E., 694 F.3d at 186 [an "IEP must be evaluated prospectively as of the time of its drafting"]; see also C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] ["a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"].

Remand to the IHO was contemplated by the undersigned (see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013]) but ultimately rejected because the parents seek limited relief in this proceeding and there is an adequate record upon which to assess this relief. Additionally, the parties have been embroiled in impartial hearings since at least the filing of the due process complaint notice in Hearing I on November 16, 2012 (see IHO Ex. 1 at p. 1). Remanding this matter to the IHO would only serve to prolong the adversarial process and is unlikely to lead to better development of the hearing record. Therefore, a discussion of the relief sought by the parents follows.

### **1. Prospective Relief; Amendment of IEP**

First, the parents request amendment of the student's IEP to include 20 hours per week of 1:1 ABA services and five, 60-minute sessions per week of speech-language therapy—specifically, three individual sessions and two sessions in a group no larger than three (Pet. at ¶ 83). Prospective relief in the form of modifications of the student's IEP would be inappropriate under the circumstances of this case. In addition to the June 2013 IEP challenged in this proceeding, the hearing record contains references to an IEP developed for the 2014-15 school year and, in accordance with its obligation to review a student's IEP at least annually, the CSE should have already to revise and developed a new IEP for the student for the 2015-16 school year (Tr. pp. 27-28; 146-47, 251, 466, 520-21; Dist. Ex. 1; see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). A CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing a student's needs, and it would be inappropriate to circumvent these statutory processes by unnecessarily by suddenly ordering amendments to the student's IEP, especially in the absence of any material evidence regarding the annual review of the student's current needs or services conducted subsequent to the matters under review in this proceeding (see Student X, 2008 WL 4890440, at \*16 [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). Moreover, the evidence in the hearing record shows that, to the extent that the CSE may recommend a level of related services commensurate with years past, these services, in combination with services ordered by two IHOs and a prospective order directing the district to provide additional ABA and speech-language services, may not be feasible or in the student's educational interests (see generally Dist. Ex. 1; Parent Ex. BB; IHO Decision at pp. 21-26). The appropriate course is to require the parties to come into compliance with the statutory process envisioned under the IDEA and to effectuate equitable relief to remediate past harms that have been explored through the development of an appropriate evidentiary record. Therefore, the parents' request that the undersigned direct amendments to the contents of new IEPs going forward is denied.



## 2. Compensatory Education

Next, the parents seek relief in the form of additional ABA services, speech-language sessions, and unspecified "make-up" services arising from the student's placement in a 6:1+1 special class during the 2013-14 school year. This relief is not warranted for the reasons articulated below.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (E. Lyme Bd. of Educ., 790 F.3d at 456; Wenger, 979 F. Supp. at 151). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such 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., 2008 WL 4890440, at \*23 [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd. of Educ., 2008 WL 9731053, at \*12-\*13 [S.D.N.Y. Mar. 6, 2008], adopted, 2008 WL 9731174 [S.D.N.Y. July 7, 2008]).<sup>13</sup> Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for 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]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E. Lyme Bd. of Educ., 790 F.3d at 456; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at

---

<sup>13</sup> In addition, in the Second Circuit, compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see E. Lyme Bd. of Educ., 790 F.3d at 456 n.15; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; M.W. v New York City Dept. of Educ., 2015 WL 5025368, at \*3 [S.D.N.Y. Aug. 25, 2015]).

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"]; Application of a Student with a Disability, Appeal No. 13-168; Application of the Dep't of Educ., Appeal No. 12-135).

First, the evidence in the hearing record shows that additional ABA services are unnecessary to supplement the ample amount of ABA that the student currently receives. As noted above, the parties agreed to provide 20 hours of ABA services per week to the student as of September 2014 (Tr. pp. 253, 525-26; see Ans. at p. 3 n.1). Additionally, the IHO in Hearing I ordered, among other relief, 750 hours of compensatory 1:1 ABA services to be delivered by August 30, 2016 (Parent Ex. BB at pp. 15-16). When combined, these two forms of relief equate to approximately 27 hours of ABA services per week. This amount exceeds the 20 hours requested by the parents in their closing memorandum submitted at the conclusion of the impartial hearing (see IHO Ex. 6 at p. 30). Moreover, the parents testified at the impartial hearing that the student made progress receiving 20 hours per week of ABA services (see Tr. pp. 525-33; see also Tr. pp. 265-66). Given this evidence, I decline to order additional compensatory services.<sup>14</sup>

Second, as for the student's speech-language needs, the evidence in the hearing record does not support a finding that compensatory speech-language services are warranted. The speech-language pathologist who implemented the June 2013 IEP during the 2013-14 school year testified

---

<sup>14</sup> Similarly, in light of this determination, it is unnecessary to review the IHO's findings regarding the nature of the ABA services actually provided to the student during the 2013-14 school year or the IHO's determination that the parents' claim for ABA services was moot to the extent that the student received 10 hours per week during the entirety of the 2013-14 school year (see IHO Decision at pp. 17, 19, 22, 23).

that, in accordance with the June 2013 IEP, the student received two 30-minute individual speech sessions and one 30-minute session in a group of three each week during the 2013-14 school year (Tr. pp. 347-48, 357; see Dist. Ex. 1 at p. 11).<sup>15</sup> The speech-language pathologist testified that during the 2013-14 school year she worked on the June 2013 IEP's annual goals and short-term objectives including addressing the student's need to use attributes/adjectives; engaging in conversational turns with prompts; taking turns during activities; and interacting with peers by asking "wh" questions (Tr. pp. 353, 355-57, 365-66, 377-79; see Dist. Ex. 1 at pp. 9-10).<sup>16</sup>

The speech-language pathologist further testified that the student made progress during the 2013-14 school year (Tr. p. 357). Specifically, she testified that the student achieved an annual goal to use attributes independently and made progress toward interacting with and taking turns with peers (Tr. pp. 379-80; see Dist. Ex. 1 at pp. 9-10). The speech-language pathologist noted that the student began the 2013-14 school year using only rote phrases and progressed throughout the 2013-14 school year by offering more spontaneous answers to "wh" questions; increasing his use of adjectives; and responding with less dependence on visual prompts, especially in relation to "where" questions (Tr. pp. 348-49). She further noted that the student used attributes of objects to request and respond in 4-5 word verbalizations (Tr. pp. 355, 357-58, 364-66). For example, the student progressed from saying "I want pencil" to "I want the big googly-eyes [pencil]" (Tr. pp. 364-65). Further, the speech-language pathologist stated that the student progressed from answering "wh" question related only to his present environment to being able to respond to questions beyond the immediate present environment (Tr. pp. 350-51). The provider opined that the amount and duration of the student's speech-language services were appropriate and that he did not require additional speech-language sessions (Tr. pp. 357, 374).

The parents do not point to any evidence in the hearing record that contradicts this testimony; instead, they contend that compensatory speech-language therapy services are warranted based upon a recommendation in a July 2013 evaluation report (Parent Ex. W at p. 8; see Tr. pp. 148-51, 154-56, 359). This evaluation report, after assessing the student's needs and abilities, recommended delivery of five sessions of speech-language therapy per week (Parent Ex. W at p. 8).<sup>17</sup> Additionally, this evaluation, which was conducted over the course of a single day at the beginning of the 2013-14 school year, is entitled to relatively little weight when weighed against the testimony of the speech-language pathologist who worked with the student for the entire 2013-14 school year (see Tr. pp. 343-47). Also, I note that, as the result of Hearing I, the student received 100 hours of compensatory speech-language therapy services to be delivered by August 30, 2016, or, an average of an additional 60 minutes of speech-language therapy per week (Parent Ex. BB at pp. 15-16). Even assuming for purposes of argument that three 30-minute

---

<sup>15</sup> In addition to these services, the speech-language pathologist provided the student with a "push in" session, collaboratively with the student's classroom teacher, once a week during a cooking or art activity (Tr. pp. 62-63, 376).

<sup>16</sup> As indicated above, there is no evidence in the hearing record as to how the June 2013 CSE arrived at its recommendation of three sessions of speech-language therapy per week (see Dist. Ex. 1 at p. 11). However, the issue on appeal is whether the student should receive a compensatory award of speech-language services, and not whether the district offered a FAPE in the first instance. For this limited purpose, the testimony of the speech-language provider who implemented the June 2013 IEP is relevant.

<sup>17</sup> The evaluation report does not recommend a particular duration for these services (see Parent Ex. W at p. 8).

sessions were insufficient to meet the student's needs, the student is now receiving an equivalent of two, additional 30-minute sessions per week. Thus, the parents' request for additional speech-language services is denied.

Finally, the parents seek unspecified "make-up" services arising from the student's allegedly inappropriate placement in a 6:1+1 classroom. The only concern the parents articulate on appeal relates to the functional grouping of the student's classroom. The IHO addressed this claim in his decision and awarded compensatory relief which neither party appeals (see IHO Decision at pp. 21-22, 25-26). The parents do not suggest that this award was inadequate or suggest what potential remedies would be appropriate under these circumstances. As noted above, it is not an SRO's role to research and construct the parties' arguments on appeal (see e.g., Gross, 619 F.3d at 704; Fera, 2009 WL 3634098, at \*3; Garrett, 425 F.3d at 841). Moreover, the student attended SLCD for the 2014-15 school year, the very placement sought by the parents in earlier in this proceeding (Parent Ex. A at p. 13). Therefore, a review of the evidence in the hearing record reveals no evidence that relief above and beyond that ordered by the IHO is warranted.

## **VII. Conclusion**

A review of the hearing record supports a finding that no further compensatory relief is warranted.

I have considered the parties' remaining contentions and find them without merit.

**THE APPEAL IS DISMISSED.**

**Dated:**  
**Albany, New York**  
**September 21, 2015**

---

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