



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 17-105

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Hae Jin Liu, Esq.

Gina DeCrescenzo, PC, attorneys for respondent, by Benjamin Brown, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2016-17 and 2017-18 school years was not appropriate and ordered, among other things, the district to provide compensatory education services. The appeal must be sustained in part and the matter remanded to the IHO for further administrative proceedings.

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 student has received diagnoses of autism, impulse control disorder, an attention deficit hyperactivity disorder (ADHD), and a moderate intellectual disability (Parent Ex. C). As a young child, the student received home-based early intervention services based upon an assessment which noted that he manifested symptoms of an autism spectrum disorder (ASD) (Dist. Exs. 7 at p. 2; 9 at p. 1). According to the student's mother, the student's early intervention services included two hours per day of home-based applied behavioral analysis (ABA) from approximately November

2014 through August 2015 (Tr. pp. 247-48).¹ During the 2015-16 school year, the student attended a center-based prekindergarten program in an 8:1+2 special class and received related services of three 30-minute sessions of individual speech-language therapy and two 30-minute sessions of occupational therapy (OT) (see Dist. Exs. 18 at p. 1; 20 at p. 4; 21 at p. 1).

On August 2, 2016, a Committee on Preschool Special Education (CPSE) determined that the student was eligible for special education programs and services as a preschool student with a disability and developed an IEP with a projected beginning date of August 2016 (Dist. Ex. 16). The CPSE recommended that the student receive a 12-month program in an 8:1+2 special class in an approved special education program (id. at pp. 11-12, 14). The CPSE further recommended that the student receive three individual speech-language therapy sessions per week for 30 minutes each and two individual OT sessions per week for 30 minutes each (id. at p. 11). The IEP also identified strategies and supports to address the student's management needs including 1:1 instruction, small group instruction, prompting, redirection, visuals, routine, and a highly structured classroom setting (id. at p. 5). The August 2016 IEP included annual goals and corresponding short-term objectives that addressed the student's needs related to cognitive skills, academics, language skills, fine motor skills, and activities of daily living (ADLs) (id. at pp. 6-10). The August 2016 IEP indicated the student did not need strategies, including positive behavioral interventions, supports and other strategies, to address behaviors that impeded his learning and further indicated the student did not require a BIP (id. at p. 5).

During the 2016-17 school year, the student attended the CPSE's recommended program (Dist. Exs. 7 at p. 1; 9 at p. 120 at p. 4; 21 at p. 1).

A CSE convened on March 9, 2017, to develop an IEP for the student's 2017-18 (kindergarten) school year (Dist. Ex. 5). The CSE determined that the student was eligible for special education and related services as a student with autism (id. at p. 1).² The March 2017 CSE recommended a 12-month program in a 6:1+1 special class in a district specialized school and that related services of speech-language therapy and OT should continue at the same frequency and duration as the previous year (id. at pp. 8-9). The CSE also added one 60-minute session of parent counseling and training for the 2017-18 school year (id.). The March 2017 IEP included 11 annual goals to address the student's needs related to math, ELA, fine motor skills, and receptive and expressive language (id. at pp. 5-7). The IEP identified strategies and supports to address the student's management needs including a small setting based upon his social/emotional/behavioral and sensory needs, extended time to complete tasks as needed, visual cues such as tactile flash cards so he may communicate his needs, a sensory room/center/area, assistance with transitions, clear directions and a rigid time line to promote his adjustment to new settings, adults, providers, and teachers, as well as access to technology (id. at p. 4). The IEP indicated that the student would participate in the same State and district-wide assessments that were administered to regular education students (id. at p. 11). The March 2017 IEP indicated the student did not need strategies,

¹ The parent indicated that between the November 2014 and December 2014 the provision of ABA services was inconsistent (Tr. pp. 47-48).

² The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1][i]; 8 NYCRR 200.1[zz][1]).

including positive behavioral interventions, supports and other strategies, to address behaviors that impeded his learning and further indicated the student did not require a BIP (id. at p. 5).

In a prior written notice, dated March 10, 2017, the district summarized the contents of the March 2017 IEP and noted the evaluative documents the CSE considered as well as other placement options considered by the CSE and the reasons for rejecting the other options (Dist. Ex. 4 at pp. 1-2). In a prior written notice and school location letter, dated May 5, 2017, the district summarized the contents of the March 2017 IEP and identified a particular public school site to which the district assigned the student for the 2017-18 school year (Dist. Ex. 3 at pp. 1-5). As further described below, on May 15, 2017, the parent filed a due process complaint notice (Dist. Ex. 1). On June 15, 2017 the district provided the parent with another prior written notice and second school location letter because the school site had changed and the notice identified the revised public school site to which the district assigned the student for the 2017-18 school (Dist. Ex. 2 at pp. 1-3).

A. Due Process Complaint Notice

In a due process complaint notice dated May 15, 2017, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 and 2017-18 school years (Dist. Ex. 1). With respect to both the 2016-17 and 2017-18 school years, the parent asserted that the IEPs developed for the student at the August 2, 2016 and March 9, 2017 CSE meetings failed to provide the student with instruction in a "1:1, or at the very least, a very small student-to-teacher ratio," failed to provide sufficient ABA therapy, and failed to address the student's behavioral needs via a functional behavioral assessment (FBA) or behavior intervention plan (BIP) (id. at pp. 6-8; see Dist. Exs. 5; 16). The parent alleged that the documentation before the CSE indicated that the student's behaviors "obviously interfere with [his] ability to receive educational services," and that "none of the goals in [his 2017-18] IEP addressed his behaviors in any way" (id. at p. 8).

As relief, the parent sought an independent neuropsychological evaluation, an independent assistive technology evaluation, and an independent speech and language evaluation (Dist. Ex. 1 at p. 9). The parent also requested an independent FBA to be conducted by a board certified behavior analyst (BCBA) of the parent's choosing, as well as independent neuropsychological, assistive technology and speech-language evaluations (id. at p. 9). The parent also requested an order directing the CSE to reconvene after completion of the evaluations and develop a program more appropriate for the student and an order directing the district to immediately refer the student to "the Central Based Support Team ('CBST') for non-public school placement" (id.). Lastly, the parent requested compensatory education in the form of ABA therapy, parent counseling and training, and speech-language therapy (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on June 21, 2017, and concluded on August 11, 2017, after three days of proceedings (Tr. pp. 1-289). By decision dated October 25, 2017, the IHO concluded that the district failed to offer the student a FAPE during the 2016-17 and 2017-18 school years (IHO Decision at pp. 2-9, 11). More specifically, the IHO found that the district's failure to perform an FBA and implement a BIP in light of the student's evident interfering behaviors at

school constituted a serious procedural violation (id. at pp. 4-6). The IHO determined that in addition to failing to conduct an FBA, the CSE failed to evaluate the student's needs regarding assistive technology and neuropsychology (id. at pp. 6-7).³ With respect to the recommended programs, the IHO found that the IEPs should have provided parent counseling and training, should have contained a goal for toilet training, and should have provided a program based upon peer reviewed research, specifically ABA (id. at p. 8).⁴ The IHO concluded that the procedural violations, including the failure to consider ABA, constituted a substantive violation of FAPE (id. at p. 9).

For relief, the IHO ordered the district to fund an FBA and develop a BIP, to fund a neuropsychological evaluation and an assistive technology evaluation, and to reconvene the CSE after the evaluations were complete and develop an IEP with particular provisions (IHO Decision at p. 10). The IHO also ordered the district to "defer the student's placement to the Central Based Support Team ('CBST') for non-public school placement" (id.). The IHO determined that compensatory education was warranted and ordered the district to provide the student with a maximum of 1770 hours of ABA therapy at a rate not to exceed \$290 per hour by a provider chosen by the parent, and ordered the district to provide the parent with a maximum of 100 hours of parent counseling and training at a rate not to exceed \$290 per hour by a provider chosen by the parent (id. at pp. 9-10). No time limit for delivering or receiving these services was imposed (id. at p. 10).

IV. Appeal for State-Level Review

The district appeals, and specifies that their appeal is limited to the compensatory education portion of the IHO Decision (Req. for Rev. ¶¶ 15, 18, 27). With respect to their appeal of the IHO's compensatory education relief, the district brings four challenges. First, the district asserts that the award of 1770 hours of ABA is excessive, represents maximization of services, is merely what the parent requested, and is unsupported by the evidence in the hearing record. In the alternative, the district asserts that a bank of 295 hours of ABA would be appropriate relief. Second, the district asserts that the award of 100 hours of parent counseling and training is also excessive, and that 14 hours, or 1 hour per month of FAPE deprivation, would be appropriate relief. Third, the district asserts that the \$290 per hour rate for both the ABA services and parent counseling and training is excessive. Relying on information from a prior SRO decision that described evidence of service rates (see Application of the Dept. of Educ., Appeal No. 13-078) and an inflation calculator, the district asserts that \$170 per hour is a reasonable rate. Fourth, the district asserts that the IHO erred in failing to specify a "use by" date for the banks of compensatory education services awarded, because the student's needs may change over time and the unbounded award is impractical and may exceed the student's need for services to compensate for the FAPE deprivation. The district asserts that the close of the 2018-19 school year is a reasonable amount of time by which the services would be required to have been obtained. Thus, the district requests

³ The transcript at the impartial hearing reflected the district agreed to the completion of a private neuropsychological evaluation of the student (Tr. p. 2). The district also agreed to provide an FBA and an assistive technology evaluation of the student during the impartial hearing (Tr. p. 7).

⁴ Parent counseling and training was sought as relief the due process complaint notice and once again in the parent's closing brief (Parent Ex. D at p. 14; Dist. Ex. 1 at p. 9).

that the SRO downwardly modify the IHO decision award of compensatory education to 295 hours of ABA, 14 hours of 1:1 parent counseling and training (both at a rate of \$170 per hour), and limit the award to be used prior to the end of the 2018-19 school year.

In an answer, the parent admits and denies the numerous allegations contained in the request for review and argues that the IHO's decision should be upheld. With respect to the district's challenge to the IHO's order for the district to provide the student with 1770 hours of ABA therapy as compensatory education on the ground that it is excessive and not supported by the hearing record, the parent counters that a period of 59 weeks of FAPE deprivation was "put at issue" in the due process complaint notice, and that a witness recommended 30 hours per week of ABA, which supports the IHO's calculation. Relatedly, the parent argues that the district's contentions that the award of 1770 hours of ABA therapy would result in inappropriate maximization, and that the witness at issue was underinformed, were both in error and unpreserved.

With respect to the district's claim that the award of 100 hours of parent counseling and training was excessive and unsupported by the hearing record, the parent contends that the hearing record demonstrated the lack of parent counseling and training in the recommended programs as well as the importance of such services for the student and the parent in this instance, which supports the IHO's order.

With respect to the district's claim that the \$290 per hour rate for both the ABA services and parent counseling and training is excessive, the parent contends that the IHO has the discretion to set an upper limit on the rate, which does not require evidentiary support. In the alternative, the parent suggests that the question should be remanded to the IHO pursuant to 8 NYCRR § 279.10(c) for development of the record and fact findings regarding typical market rates for ABA therapy and parent counseling and training.

Lastly, with respect to the district's claim that the IHO erred in failing to specify a "use by" date for the banks of compensatory education services awarded, the parent asserts that the order was within the IHO's discretion and the district has not stated any factual or legal basis for reversal or modification of the award. In the alternative, the parent suggests that the question should be remanded to the IHO pursuant to 8 NYCRR § 279.10(c) for the IHO to prescribe an expiration date to the award of compensatory education.⁵

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.

⁵ The parent also argued that the district's request for review should be dismissed for improper verification, however, I decline to do so because the district filed a corrected verification that complies with State regulations (see 8 NYCRR § 279.7[b]).

T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v.

Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁶

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).

VI. Discussion

A. Scope of Review

The district does not contest the IHO's FAPE determinations for either school year at issue, and specifically declines to appeal from the IHO's orders to fund an FBA and develop a BIP, fund independent neuropsychological and assistive technology evaluations, reconvene the CSE, develop an IEP that includes appropriate goals and addresses the student's needs in the LRE and

⁶ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

defer the student's placement to the CBST. Accordingly, this decision will be limited to the district's appeal of the IHO's award of compensatory education.

B. Burden of Proof

Initially, I must address a misstatement of law made by the IHO during the impartial hearing. At the close of the impartial hearing, the IHO indicated to the parties that the district had the burden of proof to demonstrate that its recommended programs offered the student a FAPE, and that the parent had the burden of proof to demonstrate the appropriateness of the compensatory education and services she sought in the event the IHO found that the district failed to offer the student a FAPE (Tr. pp. 285-86). 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 as set forth above, 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 bore the burden of proof on the contested issues in the impartial hearing, including the extent to which the student requires compensatory education (see Application of a Student with a Disability, Appeal No. 14-197; see also M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4-5 [S.D.N.Y. Mar. 30, 2017] [upholding the SRO's decision in a review of Application of a Student with a Disability, Appeal No. 14-197]). Nonetheless, it behooves the parent to also provide evidence with respect to what would constitute an appropriate award of compensatory education in order to rebut or supplement the district's evidence with respect to that question in order to assist the fact finder in making his or her determination.

C. Compensatory Education

As noted previously, the district asserts that the IHO's award of compensatory education services for the student and the parent is excessive and not supported by sufficient evidence in the impartial hearing record, and requests that the number of hours awarded and the hourly rate for services be reduced and a "use by" date set for the services awarded. While the district is correct that the specifics of the IHO's award of compensatory education are not sufficiently supported by hearing record evidence, as discussed in detail below, the same can be said for the district's requested alternative compensatory education award. The hearing record does, however, support the IHO's determination that compensatory education in the form of ABA therapy and parent counseling and training is an appropriate remedy for the district's denial of FAPE in this matter. Accordingly, the matter should be remanded to the IHO for additional evidence with respect to the specific parameters of an appropriate compensatory education remedy, and I have provided some guidance with respect to the issues and evidence that may be relevant to determining an appropriate compensatory education award in the continued proceedings.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147, 151 [N.D.N.Y. 1997]).

Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the 10-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation 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 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 [2d Cir. 1990]; Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989], aff'g prior holding in Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [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] [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 at, 2008 WL 9731174 [S.D.N.Y. July 7, 2008]). 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]). Under certain scenarios, a district may not be required to provide compensatory educational services as a remedy if the deficiencies have already been mitigated, however this does not appear to be that case (see Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial

of a FAPE is established]; see generally Application of a Student with a Disability, Appeal No. 17-015).

Rather, 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 Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; 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"]; Student W. v. Puyallup Sch. Dist., No. 3, 31 F.3d 1489, 1497 [9th Cir. 1994]). 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. of Fayette Cty., Ky. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007]; 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). Moreover, the purpose of compensatory education is not to punish the district (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] [noting that "[t]he purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]). In addition, the purpose of any award of compensatory educational services is not to maximize the student's potential or to guarantee that the student achieves a particular grade-level in his areas of need, and it would not serve the needs of the student if the delivery of an award of compensatory educational services only served to overwhelm the student or otherwise adversely impacted the student's current special education program or services.

In this case, the hearing record contained information, as it should have, that related to whether or not the student was offered a FAPE for the 2015-16 and 2016-17 school years. However, with regard to the relief—an appropriate amount of compensatory education—it fell markedly short in terms of record development. Consequently, the matter must be remanded as further described below. A consideration of the student's needs and abilities generally, and existing record information with respect to compensatory education in the form of ABA therapy and parent counseling and training will inform the conduct of additional proceedings upon remand, and I will turn to those topics first.

1. Evidence Regarding the Student's Needs

The hearing record contains program and therapy updates, conducted at the end of the 2015-16 school year, that describe the student's functioning as of June 2016 and the progress he made during the school year. As noted above, for the 2015-16 school year (prekindergarten), the student attended an 8:1+2 special class where classroom instruction was based upon the methods advocated by the Treatment and Education of Autistic and Communication related handicapped Children (TEACCH) and ABA (Dist. Exs. 18 at p. 1; 19 at p. 1).

A June 2016 educational update, conducted when the student was 44 months old, showed that the student's cognitive skills were in the 28 to 31 month range, speech-language skills in the 18 to 20 month range, fine motor abilities in the 24 to 30 month range, gross motor skills in the 36 month range, social/emotional functioning in the 18 to 20 month range, and self-help skills in the 25 to 30 month range (Dist. Ex. 19 at pp. 2-3).⁷ The educational update report indicated the student was active and distractible and performed best when provided with 1:1 support, small group instruction, visual cues, and behavior interventions (*id.* at p. 1). Due to his high distractibility, the student required a structured and predictable setting to assist him to function and transition (*id.*). According to the report, during class time, the student sometimes became very quiet, withdrawn, and refused to participate in class (*id.*). The student attended to table-top activities but required support to initiate play interaction with peers (*id.*). The report stated that the student communicated using prompted one-two words/phrases to get his needs met during 1:1 interaction (*id.*). In addition, the student labeled many objects and pictures when asked, but had minimal spontaneous speech (*id.* at p. 2). Also, the student required adult support and physical prompts to participate in classroom activities and transitions (*id.* at p. 1). The educational update report indicated the student needed 1:1 instruction to decrease his distractibility and assist him with gaining new skills (*id.* at p. 3). According to the education update report, the student required support to assist with verbalization of feelings, social skills with peers, and to expand his play skills (*id.*). The report noted that the student had difficulty remaining on task, expressing himself appropriately, and had poor socialization skills all of which impeded his development and progress (*id.*). In addition to describing the student's then-current functioning, the educational update report indicated that the student's ability to participate in gross motor and playground activities had increased and his gross motor skills continued to expand and improve; the student continued to make steady progress in the area of cognition; the student's eye contact had improved, he was able to maintain fair eye contact when he was engaged in 1:1 interaction and enjoying an activity, and the student had made good progress in his receptive language skills; and the student had made progress in his ability to tolerate familiar sensory activities (Dist. Ex. 19 at pp. 2-3).

An assessment of the student's speech and language development, also conducted in June 2016, showed that the student continued to present with a severe receptive language delay, functioning at the 16-month level with inconsistent scatter to 36 months and a severe expressive language delay functioning at a 24-month level with scatter to 28 months (Dist. Ex. 20 at p. 2). According to the speech and language update, the student's verbal utterances consisted of limited sound/word utterances, communication was primarily through pointing and gestures, and he was

⁷ The student's skills were assessed using the Hawaii Early Learning Profile, The Carolina Curriculum for Preschoolers with Special Needs and informal observation (Dist. Ex. 19 at p. 1).

severely limited in his ability to verbalize concrete, visual stimuli in picture and play contexts (id. at p. 3). The report indicated that the student was unable to respond to one level commands such as "give me" or "show me" involving one or two objects and did not demonstrate knowledge of turn-taking (id.). With respect to expressive language, the student demonstrated limited imitative and responsive behaviors for vocal and verbal tasks (id. at p. 3). The student produced limited consonant-vowel combinations but consistently used the appropriate words for some pictures and objects (id.). The report also indicated verbal and tangible reinforcers were not effective with assisting the student to engage in a nonpreferred task (id. at p. 1). According to the report, the student had made limited progress with respect to his August 2015 IEP (Dist. Ex. 20 at pp. 1, 3).⁸ However, the report indicated that student had mastered a goal related to identifying common objects and animals and was demonstrating progress with respect to increasing verbal utterances (Dist. Ex. 20 at p. 1).

An OT update conducted at the end of the 2015-16 school year indicated that the student enjoyed sensory motor activities and although he preferred movement activities, he transitioned easily to tabletop tasks (Dist. Ex. 21 at p. 1). According to the June 2016 OT update report, the student needed to improve his fine motor and visual motor skills, as well as his sensory processing (id. at p. 2). According to the Peabody Developmental Motor Scales-Second Edition (PDMS-2) and clinical observation, the student presented with at least a 33 percent delay in fine motor and visual motor skills (id.). The OT update indicated the student was demonstrating improved ability to engage in tabletop activities during one-to-one therapy sessions and required verbal and visual cues to complete tasks (id. at pp. 1-2). The OT report indicated the student exhibited a right-hand preference, a quadrupod grasp on writing tools, imitated vertical and horizontal lines, and a circle, required assistance with putting on scissors, stacked blocks, and strung beads but was unable to manipulate buttons (id. at p. 2). Regarding self-care skills, the report noted that the student had a limited repertoire of foods he ate during the school day, was not toilet trained, and required assistance in putting on his jacket and back pack (id.). The report stated that the student had made slow and steady progress in meeting his goals in the areas of fine motor, visual motor, and sensory processing (id.).

Lastly, a June 2016 12-month programing rationale report reiterated much of the information contained in the program and therapy updates (compare Dist. Ex. 18 with Dist. Exs 19-21). Notably, however, the report indicated that the student engaged in tantrums (i.e. throwing his body to the floor, throwing toys, and screaming to avoid demands) (id.). Also, in apparent contrast to the speech-language evaluation, the 12-month programing rationale report indicated the student responded well to one-to-one teaching with edible reinforcers (id.). As part of the rationale for recommending the student for a 12-month program, the student's teachers reported that they observed an increase in the student's noncompliant behavior and self-directedness, along with a loss of previously learned skills after long weekends and school breaks (Dist. Ex. 18 at p. 1).

⁸ The report noted that the student had demonstrated limited quantitative and qualitative progress (Dist. Ex. 20 at p. 3).

The hearing record also includes information relative to the student's functional performance during the 2016-17 school year, along with a review of the student's progress between September and December 2016 (Dist. Exs. 7, 8, 9). In addition, the hearing record contains the results of a psychological evaluation conducted by the district in February 2017 as part of the "Turning Five" process (Dist. Ex. 13).⁹ At the time of these assessments, the student was attending an 8:1+2 special class similar to the special class he attended the previous year (compare Dist. Exs. 7 at p. 1; 8 at p. 1; 9 at p. 1 with Dist. Exs. 18 at p. 1; 19 at p. 1). Overall, the evaluative reports showed that the student demonstrated significant deficits in cognitive skills, speech and language skills, social/behavioral functioning, and attention (Dist. Exs. 7; 8; 9).

As noted above, the December 2016 preschool quarterly progress reports provided a description of the student's speech-language abilities, academic skills, and motor skills from September 2016 through December 2016 (Dist. Ex. 13 at pp. 1-6). The speech-language progress report, completed by the speech-language pathologist, described the student's then-current level of functioning, noting that he was playful, friendly, and enthusiastic and enjoyed playing with animal toys, transportation items, and reading books (id. at p. 1-2). The progress report noted that the student followed one-step directions and labeled objects, food items, and animals while reading and during pretend play, when provided with verbal and visual cues (id. at p. 1). The progress report further noted that the student responded to simple "wh" questions and labeled many common objects when provided with visual and verbal prompts (id.). The progress report stated that the student had "progressed nicely" toward his IEP goals (id.).

The December 2016 education progress report, completed by the student's teacher, indicated the student engaged in various tasks but was easily distracted, would run and wander around the room, and climbed furniture (Dist. Ex. 13 at p. 3-4). The student was verbal but tended to script and repeat the same phrases and songs (id. at p. 3). According to the report, the student was making steady progress and would initiate play with an adult, was improving in his ability to seek and ask for help, initiated simple play with a peer, traced and imitated lines and made some spontaneous requests such as "open door"; however, he would not consistently ask for favorite food items (id.).

With respect to the student's fine motor, visual motor and sensory processing skills, the portion of the December 2016 progress report completed by the occupational therapist indicated that the student enjoyed sensory motor tasks but at times was self-directed and required minimal to moderate verbal and visual cueing to follow directions (Dist. Ex. 13 at pp. 5-6). The occupational therapist noted that the student was making steady progress toward his IEP objectives (Dist. Ex. 13 at p. 5). More specifically she stated that the student held a marker with a quadrupod grasp which was age appropriate, required minimal visual cues to put on scissors correctly, was working on cutting a straight line on piece of paper, opened and closed buttons on a dressing board but refused to try on a button strip, wrote the letters of the alphabet, and wrote numbers but sometimes reversed them (id. at p. 5).

⁹ The March 2017 CSE considered December 2016 preschool quarterly progress reports, the January 2017 observation report, the January 2017 social history update, and the February 2017 psychological evaluation report (Tr. pp. 68-69; Dist. Exs. 7; 8; 9; 13).

The January 2017 observation report, conducted by a district social worker, provided additional information regarding the student's ability to function in an 8:1+2 special class during the 2016-17 school year (Dist. Ex. 8; see Tr. p. 36). The report described the student's participation and behavior in various classroom stations (Dist. Ex. 8).¹⁰ The observation report indicated the student was engaged and happy at the sensory room station where he appeared to have a positive connection with the paraprofessional (id. at p. 1). The observer noted that the room provided "a great deal of unique visual and tactile sensory input" and the student was observed interacting with many different objects in the room (id.). At the next station, which involved stringing beads onto a cord, the student was not interested in the activity and preferred to stack the beads and needed constant redirection throughout the task (id.). The student, with assistance, transitioned to the next activity which involved painting but after a couple of minutes the student became disinterested in the activity and began interacting with the materials inappropriately and would not respond to redirection (id.). The student made several attempts to eat the paint and drink the paint water and the teacher and paraprofessional needed to watch closely through the activity to keep the student safe (id.). According to the observer, throughout the observation, the student made several unintelligible vocalizations and sounds, did not respond to any yes/no questions, and did not express wants or needs to his teachers (id.).¹¹ The student appeared to relate well with his teacher and peers but engaged in parallel rather than cooperative play, and rubbed against peers and adults which likely served a sensory function (id. at p. 2). The report also indicated the student appeared motivated to please and sought positive attention (id.). However, the report also noted the student did not appear engaged or particularly aware of his surroundings (id. at p. 1). Information for a January 2017 social history update, which detailed the student's behavior, social skills, ADLs, and communication skills, was elicited from an interview with the student's mother (Dist. Ex. 9). As memorialized in the social history update report, the student's mother indicated that he had a positive attitude towards school, counted to 30, wrote his name, identified at least four colors, knew a few sight words, and learned and followed routines (id. at p. 2). The student fed himself with a fork and spoon and drank from a cup, but these skills were not fully developed, and he was often fed by his mother (id. at p. 1). Regarding ADLs, the student was working on brushing his own teeth and was not toilet trained (id.). According to the report, the student's mother stated that the student behaved well at home, although he often required redirection, but at school the student tended to disengage and had difficulty with transitions (id. at pp. 2-3).

As noted above, the district conducted a psychological evaluation of the student in February 2017, as part of its Turning Five process (Dist. Ex. 13). The psychological report indicated that according to the student's teacher, her main concerns regarding the student were his delayed speech and inattention (Dist. Ex. 7 at p. 2). The psychological report noted that the student had just begun taking medication and there were notable positive effects, such as the student's increased engagement and decreased hyperactivity (id.). The report indicated that the student had never been aggressive but could become over excited, which necessitated close supervision (id.).

¹⁰According to the observer, the class was broken down into groups of 2-3 students, who rotated through the stations (Dist. Ex. 8 at p. 1).

¹¹ The observer noted that the student was most oral in the sensory room, where he responded to questions with one-word answers (Dist. Ex. 8 at p. 1).

In addition, the student lacked overall awareness of his body in space and safety awareness (*id.*). According to the report, administration of six subtests of the Wechsler Preschool and Primary Scale of Intelligence Fourth Edition (WPPSI-IV) to the student yielded a composite score of 59 in verbal comprehension and a full scale IQ of 44 (*id.* at p. 5).¹² The report indicated the student's general cognitive ability was in the extremely low range of intellectual functioning (*id.*). Administration of two subtests of the Wechsler Individual Achievement Test-Third Edition (WIAT-III) yielded standard scores (percentile ranks) of 89 (23) in early reading skills and 68 (2) in math problem solving (*id.*). The student had his strongest performance on the early reading skills subtest—which measured his ability to identify letters, letter sounds, digraphs, and basic sight words with pictures assistance—because he memorized some letters of the alphabet (*id.*). According to the psychological report, the student was barely able to demonstrate knowledge on rote math tasks on the math problem solving subtest, which measured basic number identification, number identifiers, picture associated addition and subtraction abilities, and word problems (*id.*).

The hearing record includes additional information regarding the student's abilities and needs, as determined by his pediatric neurologist and a private child and adolescent psychiatrist contracted by the parent (Tr. pp. 146-165, 169-215; Parent Exs. A; B). However, this information was not before the August 2016 or March 2017 CSEs and is related to the student's need for ABA instruction, as a compensatory service, which is discussed more fully below.

2. ABA Therapy

The district asserts that the award of 1770 hours of ABA is excessive, merely reflects what the parent requested and is otherwise unsupported by the hearing record. The district argues that an award of 295 hours of ABA would be appropriate. The parent counters that a period of 59 weeks of FAPE deprivation was "put at issue" in the due process complaint notice, and that a witness recommended 30 hours per week of ABA, which supports the IHO's calculation. Relatedly, the parent argues that the district's contentions that the award of 1770 hours of ABA therapy would result in inappropriate maximization, and that the witness at issue was underinformed, were both in error and unpreserved.

With respect to ABA therapy, the district school psychologist testified that ABA services were not considered for the student during the March 2017 CSE meeting (Tr. pp. 80-81; see Tr. pp. 48, 58, 68). The school psychologist testified that he never received the April 2016 and July 2017 progress notes of the pediatric neurologist recommending ABA for the student (Tr. pp. 35-37; *see* Parent Exs. A; B). According to the testimony of the school psychologist, ABA methodology is effective for students with autism (Tr. p. 79). Overall, the testimony of the school

¹² The February 2017 psychological report referenced that the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) having been administered but this may be a clerical error (Dist. Ex. 7 at p. 5).

psychologist, focused on the IEP recommendations made by the district CSE, which did not include a recommendation for ABA services (see Tr. pp. 49-52, 79-81; Dist. Exs. 5; 16).¹³, ¹⁴, ¹⁵

The private psychiatrist engaged by the parent testified that she conducted an initial one-hour evaluation of the student in July 2017 (Tr. p. 152). She observed the student to be "extremely hyperactive" and unfocused and noted that the student engaged in poor behavior, lacked social skills, did not maintain eye contact, lacked reciprocity, had poor communication skills, and exhibited very impaired speech (Tr. pp. 152, 155-56).¹⁶ In addition, the psychiatrist testified that the student climbed on furniture, opened doors, needed constant redirection, and overall engaged in unsafe behaviors (Tr. p. 154). Her impression of the student was that he had autism with a severe intellectual disability, severe ADHD, severely impaired expressive speech and an impulse control disorder (Tr. pp. 153-54). The psychiatrist testified that she was familiar with ABA and had experience working with children who had received ABA therapy (Tr. p. 155). The psychiatrist opined that ABA therapy would be "extremely appropriate" to address the student's impairments in social and communication skills (Tr. pp. 155-56) She further opined that in addition to ABA therapy the student should receive occupational and speech-language therapy (Tr. p. 156). The psychiatrist testified the student would need support and assistance throughout his life (Tr. p. 154). She testified that "ideally" the student should receive ABA every day, if possible, and recommended that he receive one to two hours per day of ABA therapy (Tr. pp. 156-57).¹⁷ According to the psychiatrist, the student's progress would be slow to none without ABA therapy (Tr. p. 158).

The psychiatrist testified that ABA therapy focused on improving skills, routine and structure in a child's life and the student was in "bad need of all of that" (Tr. pp. 157-58). The psychiatrist opined that ABA was "possibly the only therapy that's shown to have any efficacy in improving social skills and communication skills in children with autism" (Tr. pp. 155, 164). The psychiatrist stated the student also needed OT, speech-language services, and a small class, in addition to ABA therapy (Tr. pp. 156, 163-64).

¹³ The school psychologist testified that the CSE mainly looked at district 75 classes including discussions regarding the differences between 8:1+2 and 6:1+1 (Tr. pp. 49- 50).

¹⁴ According to the school psychologist, a 6:1+1 special class, speech-language therapy, OT therapy, small group instruction, and 1:1 support addressed the student's needs related to academics, sensory regulation, and behavior (Tr. pp. 53-54, 57-62, 91-92, 101, 106-07).

¹⁵ The school psychologist testified that some district 75 classes provided ABA as part of the program (Tr. pp. 51-52).

¹⁶ According to the testimony of the psychiatrist, her July 2017 evaluation of the student consisted of a one hour assessment in addition to an intake completed by a social worker (Tr. pp. 151-52).

¹⁷ With respect to the duration of ABA therapy, the psychiatrist testified that the student would need it for many years; however, she noted that the student's IEP could be revised every two years to gauge his progress and see if the frequency could be decreased (Tr. pp. 156-57). The psychiatrist's recommendation was in response to a general question about the student's ABA needs and not a specific question regarding compensatory education (see Tr. pp. 156-57).

In a July 28, 2017 letter entitled "To whom it may concern," the psychiatrist strongly recommended the student receive ABA therapy during or after school to continue to progress with his intellectual and behavioral skills (Parent Ex. C). The letter reflected the student's diagnoses of autism, impulse control disorder, ADHD, and a moderate intellectual disability (id.). The psychiatrist further indicated the student had a major problem with impulse control which could not be fully addressed with psychiatric medication (id.).

The pediatric neurologist engaged by the parent also testified with respect to ABA therapy, stating that ABA therapy would improve the student's behavior (Tr. pp. 181-82).¹⁸ According to the pediatric neurologist, ABA therapy would address the student's needs including those related to communication, working in a group, and understanding the classroom structure (Tr. pp. 184-85). The pediatric neurologist testified that ABA was the only "method for which there is true controlled trial experience," the one treatment for which there was evidence (Tr. pp. 182-83; see Tr. pp. 184-86, 191-92). Moreover, according to the pediatric neurologist, ABA was the most effective intervention with low functioning students with autism whose behaviors interfered with learning (Tr. p. 184, 186-87).

According to the pediatric neurologist, the student had regressed without ABA and 1:1 behavior therapy (Tr. pp. 190-91). The pediatric neurologist testified, that according to the student's mother, the student's ABA therapy was discontinued when he transitioned from early intervention to the CPSE and his behavior regressed as a result of ABA being withdrawn (Tr. pp. 175, 181, 195, 199).¹⁹ The pediatric neurologist reported that the student regressed substantially from April 2016 to July 2017 in the areas of attention and engagement, and had an overall decline in behavior (Tr. pp. 189-90, 201-02; see Parent Exs. A; B). However, the pediatric neurologist also explained that although regression was evident around the time period that ABA was withdrawn "two years later...you may not continue to regress" (Tr. p. 191). He opined that because the student's behavior did not improve, his communication skills did not improve (Tr. p. 191). The pediatric neurologist testified that the student's lack of progress, while not technically regression, left him worse off, relative to his age (Tr. p. 212).

According to the pediatric neurologist autism is a behavior disorder and when "behavior improves, speech catches up" (Tr. p. 179). He explained that it was very common to give a child with autism OT or PT but in his "professional opinion and long experience, it makes no difference in the life of a child with autism, PT and OT" (Tr. pp. 179-81). The pediatric neurologist opined

¹⁸ The hearing record also contains a progress note dated April 26, 2016 completed by the pediatric neurologist that indicated the student was diagnosed with autism and that the student was transitioning from early intervention services to CPSE and was not recommended for ABA therapy from the CPSE (Parent Ex. B at p. 1). The progress note indicated the mother reported that the student received early intervention services of ABA therapy and his behavior had improved (id.). The pediatric neurologist recommended full-time ABA therapy provided by a BCBA to improve the student's behavior (id. at p. 2). The progress note indicated the parent was invited to attend the doctor's monthly parent education group meetings (Parent Ex. B at p. 2; see Tr. pp. 203, 206-07). A second progress note dated July 21, 2017 makes similar recommendations (Parent Ex. A).

¹⁹ The pediatric neurologist confirmed that his knowledge regarding the level of ABA therapy provided to the student in preschool was based solely on information provided to him by the parent (Tr. pp. 199-200).

that money spent on related services such as speech-language therapy, OT and PT should be redirected towards behavior therapy (Tr. pp. 179, 185-86, 205-06).

The pediatric neurologist agreed that the student would have needed 20-30 hours per week of ABA therapy during the last two years (Tr. pp. 197-98). He also opined that the student would have been communicating at a level commensurate with his age if he had received ABA therapy over the previous two years (Tr. p. 195). The pediatric neurologist recommended the student receive 30 hours per week of ABA "going forward" (Tr. pp. 196-197). When asked about how many hours of ABA it would take to "get [the student] to where he would have been had he been receiving it up to this point," the neurologist replied that he usually "tailor[ed] that answer by considering the availability" and that "more recently" he recommended 20 to 30 hours per week of ABA therapy given by "the CPSE agency" and another 10 to 20 hours of privately funded ABA therapy (Tr. pp. 195-96). The pediatric neurologist testified that he would assess the ABA intervention after two or three months to evaluate its effectiveness and then recommend the same rate or higher of ABA therapy (Tr. p. 197).²⁰ The pediatric neurologist recommended that a BCBA initially provide the ABA therapy to the student because BCBA's were licensed to provide such a service and it was their "specialty" (Tr. pp. 193-94).²¹

The pediatric neurologist was not asked questions regarding how much compensatory ABA therapy per week the student should receive in addition to an appropriately designed IEP, or what particular form(s) of ABA therapy would be best in terms of redressing prior deficiencies in the student's programming. Based upon the existing hearing record, I find it necessary to reverse the compensatory education award arrived at by the IHO with respect to ABA services and remand the matter for additional fact finding concerning the appropriate amount of compensatory ABA to be provided to the student based on the denial of FAPE at issue. In the interest of facilitating record development on this issue, I have identified below a number of potential areas of inquiry that are highly relevant to the determination of an appropriate compensatory education award of ABA services for the student.

At present, the record is replete with evidence that the student requires ABA therapy, but is devoid of any documentary or testimonial evidence addressing the issue of ABA therapy as compensatory education. Given that any ABA services awarded as compensatory education will, by necessity, be implemented in tandem with the student's current special education program, the dearth of such evidence renders the current hearing record incomplete on this issue.

Accordingly, as an initial matter, the student's current placement and the nature and amount of the ABA therapy he currently receives in that program, if any, should be established in the record upon remand and, concomitantly, evidence concerning the nature and amount of ABA services to be awarded as compensatory education should be presented and evaluated in light of the student's current special education program and services. In addition, evidence related to the

²⁰ According to the pediatric neurologist, the student did not require ABA beyond the school day because the parent could "be trained in all the things that the ABA instructor wants the child to continue to do" in the evening and on weekends (Tr. p. 196).

²¹ The doctor acknowledged during testimony that the recommendation for a BCBA may be part of the boilerplate language he uses for students with autism; however, he testified that it applied to the student (Tr. p. 209).

following points may also induce further development of the hearing record on the issue of an appropriate compensatory education award of ABA services:

- (1) Testimonial and documentary evidence thus far often refers to "ABA therapy generally;" in the context of compensatory education, however, further clarification is needed that indicates when the ABA therapy refers to 1:1 discrete trial training and when it refers to ABA methods in a small group setting;
- (2) Similarly, "behavioral training" (Tr. pp. 190-91) is mentioned in the hearing record, however, it is unclear if and when such training refers specifically to ABA discrete trial training;
- (3) No opinion was elicited with regard to how the amount/frequency of ABA provided to the student as compensatory education would likely affect his rate of progress in his current programming;
- (4) Given the student's interest in socializing, the hearing record upon remand should indicate the parties' and experts' opinions regarding whether or not a compensatory education award should include opportunities wherein he can interact with peers to support his socialization needs versus a full day 1:1 ABA program (discrete trial or otherwise);
- (5) The IHO directed that a BCBA should conduct the FBA and develop a BIP, however, there is otherwise no indication in the record regarding whether a BCBA needs to deliver the compensatory ABA therapy to the student or whether a teaching assistant or paraprofessional could deliver any of the ABA services under the supervision of a BCBA; and
- (6) An undeveloped area of the record is whether the recommendations for ABA services are in any way linked to or took into consideration the student's diagnosis of a moderate intellectual disability and whether the student's needs related to this diagnosis can or should affect the amount of ABA therapy awarded as compensatory education.

While not exhaustive or definitive, the above areas of inquiry may serve as a useful template for developing the record in order to determine the nature and amount of compensatory education ABA services that will be appropriate to remedy the denial of FAPE at issue and place the student in the position he would be in had he not been denied a FAPE, taking into account the student's current special education programming.

3. Parent Counseling and Training

The district asserts that the award of 100 hours of parent counseling and training was excessive, and that 14 hours, or 1 hour for each month of FAPE deprivation, would be appropriate. The parent contends that the hearing record demonstrated the lack of parent counseling and training in the recommended programs as well as the importance of such services for the student and the parent in this instance, which supports the IHO's order.

However, the hearing record contains very little evidence upon which to determine an appropriate award of compensatory parent counseling and training.

The student's IEP for the 2016-17 school year did not include a recommendation for parent counseling and training and the student's IEP for the 2017-18 school year included a recommendation for one 60-minute session of parent counseling and training for the entirety of the school year (Dist. Exs. 5 at p. 8; 16 at p. 11). According to the school psychologist, the one hour of parent counseling and training recommended for the 2017-18 school year would probably take place on a parent teacher night or a Chancellor's day when teachers, but not students, are in attendance (Tr. p. 95). The school psychologist understood the purpose of the training to be to assist parents in dealing with "the various needs in the home that are associated with children on the spectrum" (Tr. p. 95; Dist. Ex. 5 at p. 8).²² He confirmed that the CSE recommended "group" parent counseling and training, which he interpreted to mean six to eight parents (Tr. pp. 96-97). The school psychologist suggested that in group sessions, parents share a commonality of specific needs and an accumulation of knowledge that applies to multiple individuals and parents' questions get answered within that context (Tr. pp. 98-99).

The pediatric neurologist recommended parent counseling and training for the parent and opined that it was necessary for the student to make meaningful progress (Tr. pp. 187-88, 198). He explained that teaching the parent skills related to managing the student's behavior, so that he arrived at school more prepared for academic work, would be very helpful (Tr. p. 198). He opined that "the more knowledgeable parent contribute[s] the most to enhance[ing] what the therapist is doing in school" (Tr. p. 198).

The hearing record contains insufficient information upon which to craft a remedy in the form of compensatory parent counseling and training. The IHO's decision determining that the district failed to offer parent counseling and training also does not distinguish the nature of the district's violation for the 2015-16 school year when the student was in preschool (i.e. did the IHO believe it was a violation of 8 NYCRR 200.13 as the parent contended in her post hearing brief) from any deficiency for the 2016-17 school year (or, alternatively, if the IHO simply believed that one or both years was a violation of FAPE under the Rowley standard). Such a finding may have significance with regard to relief. Upon remand, the IHO is encouraged to elicit evidence with respect to the amount of parent counseling and training the parent currently receives and will require going forward, the location for the counseling and training (at home or another location) and whether such training is (or will be) provided on an individual or group basis. Information concerning the current status of the parent's receipt of training and counseling services will assist the IHO in determining whether or not a compensatory award of counseling and training will address the lack of these services in the past, and if so, how many hours of training and counseling would be appropriate to address the deprivation.

4. Services Hourly Rate

The district asserts that the \$290 per hour rate for both the ABA services and parent counseling and training is excessive and suggests—using the decision that addressed the evidence

²² The March 2017 IEP shows that the recommended parent counseling and training was scheduled to begin in September 2017 (Dist. Ex. 5 at p. 8).

concerning applicable rates in Application of the Dept. of Educ., Appeal No. 13-078 and an inflation calculator—that \$170 per hour is reasonable. The parent contends that the IHO has the discretion to set an upper limit on the rate, which does not require evidentiary support. In the alternative, the parent suggests that the question should be remanded to the IHO for development of the record and fact findings regarding typical market rates for ABA therapy and parent counseling and training.

Although the parent identified the figure of \$290 as an hourly rate for services in her post-hearing brief, there is no actual evidence with respect to an appropriate hourly rate for services in the hearing record (Parent Ex. D at p. 29). Because there is no evidence regarding appropriate hourly rates, the district's reliance on the decision in Application of the Dept. of Educ., Appeal No. 13-078 is also misplaced.²³

Upon remand the IHO is encouraged to elicit evidence with respect to what the standard or market rates for parent counseling and training and ABA therapy are in the parent's locale.

5. Time Period to Acquire Compensatory Education

The district asserts that the IHO erred in failing to specify a "use by" date for the bank of compensatory education service awarded, because the student's needs may change over time and may exceed need for services to compensate for the period that FAPE was not offered. The district suggests, without any record basis, that the end of the 2018-19 school year is reasonable. The parent asserts that the order was within the IHO's discretion and that the district has not stated any factual or legal basis for reversal or modification of the award. In the alternative, the parent suggests that the question should be remanded to the IHO for the IHO to prescribe an expiration date to the award of compensatory education.

Although the parent requested that the awarded compensatory services be "good until used" in her post-hearing brief, there is no actual evidence with respect to whether there should or should not be a "use by" date attached to the awarded hours in the hearing record (Parent Ex. D at p. 29).

As the student is still at an early age wherein the most benefit may potentially be gained by a well-developed and timely-executed compensatory education award, the parties should be prepared to provide an explanation if they believe a compensatory education award requires years to execute. This is also an area in which the intensity of the student's current programming and services may be a significant factor. In the absence of a record it is difficult to know. Upon remand, the IHO should elicit evidence from the parties and their experts with respect to an appropriate time parameter for delivery of any compensatory education award, if a time limit is needed, and what impact the student's changing needs over time may have in relation to the delivery of the services of ABA therapy and parent counseling and training.

²³ Even if I were to take notice of market rates from a prior decision—which in my view is ill-advised—I would not rely on the evidence from Application of the Dept. of Educ., Appeal No. 13-078 which involved rates from the McCarton Center for Children that are now well over five years old.

VII. Conclusion

State regulations explicitly authorize an SRO to remand a matter to an IHO to take additional evidence or make additional findings (8 NYCRR 279.10[c]; see F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that an SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). For the reasons stated above, the portion of the IHO's order directing compensatory education for the student in the form of a maximum of 1770 of ABA therapy and a maximum of 100 hours of parent counseling and training at a rate of \$290 per hour must be reversed and the matter remanded to the IHO to develop the hearing record on the issue of an appropriate compensatory education award in accordance with the directives outlined in this decision. I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that portion of the IHO's decision dated October 25, 2017, is modified, by reversing, in part, so much thereof which ordered 1770 hours of ABA therapy and 100 hours of parent counseling and training as compensatory education for the student and the parent; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO who issued the October 25, 2017 decision for further proceedings in accordance with the body of this decision; and;

IT IS FURTHER ORDERED that if the IHO who issued the October 25, 2017 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: Albany, New York
January 22, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER