



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-079

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

Appearances:

Queens Legal Services, attorneys for petitioner, by Amy Leipziger, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Nathaniel Luken, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied, in part, the parent's request for compensatory education services, as well as an order of placement at a State-approved nonpublic school, to remedy respondent's (the district's) failure to provide the student an appropriate educational program and services for the 2017-18, 2018-19, and 2019-20 school years. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student in this appeal has received a diagnosis of autism spectrum disorder (level 3 with intellectual impairment, requiring very substantial support) and has been classified as a student with autism for the purposes of eligibility for special education services (Parent Exs. B at p. 1; C at p. 1; L at pp. 2, 10; O at p. 1).¹ The student has a history of delayed speech, deficits in social interaction, inconsistent eye contact, and presents with several stereotypical autistic behaviors (Parent Ex. L at p. 10). The student has been noted to have difficulty with transitions and performs best in structured and predictable environments (id.). In addition to an autism

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

spectrum disorder, the student has been found to meet the criteria for a developmental coordination disorder, as he presents with significant delays in motor functioning with impairments in his ability to copy shapes and write letters and numbers (*id.*). The student has a history of deficits with sequencing and with tasks that require motor planning, such as tying his shoes and brushing his teeth (*id.*). The student has also been found to present with a "profound" expressive and receptive language disorder, pragmatic language disorder, speech disorder, and feeding disorder secondary to the diagnosed autism spectrum disorder (Parent Ex. K at p. 6).

The student received services through the Early Intervention Program from an agency that provided applied behavior analysis (ABA) services, speech-language therapy, and occupational therapy (OT) in the home setting (Parent Ex. L at p. 2). The student subsequently attended a specialized, full-day, 12-month preschool program where he received ABA services in school while receiving OT, physical therapy (PT), and speech-language therapy at home (*id.*).

On March 23, 2016, a CSE convened to determine the student's eligibility for special education services for the 2016-17 school year, the student's kindergarten year (Parent Ex. E at p. 1). The CSE found the student eligible for special education services as a student with autism and recommended that he attend a 12-month program in a 6:1+1 special class and receive related services of OT, PT, and speech-language therapy (*id.* at pp. 5-6). In addition, the CSE recommended that the parents receive one group session per week of parent education services for five weeks (*id.*). The IEP recommended Spanish as the language of service for the student's special class instruction and speech-language therapy and English as the language of service for the student's OT and PT (*id.* at p. 5). No language of service was identified for the parent education services (*see id.*). The March 2016 IEP stated that the use of discrete trial instruction coupled with high rates of reinforcement had been beneficial to the student's progress (*id.* at p. 1). In addition, the IEP indicated that the student required a significant degree of specialized instruction on a 1:1 basis throughout the school day in a small, highly therapeutic setting in a "Special School" (*id.* at p. 2). To address the student's management needs, the March 2016 CSE recommended that the student be afforded repeated trials and provided with prompts, moderate to maximum verbal cues, hand over hand assistance, positive reinforcement, and rest breaks to accomplish classroom activities at his developmental level (*id.*). The March 2016 IEP indicated that the student did not require positive behavioral interventions or a behavioral intervention plan (BIP), or the use of assistive technology, but did note that as a student with limited English proficiency he required special education services to address his language needs as they related to the IEP (*id.* at pp. 2-3). The March 2016 IEP recommended seven annual goals to address the student's academic, speech-language, and motor needs (*id.* at pp. 3-4).

On January 24, 2017, a CSE met to conduct the student's annual review and modified the student's program to reflect English as the language of service for the student's 6:1+1 special class and related services (*see* Parent Ex. D at p. 16; *compare* Parent Ex. D at p. 12, *with* Parent Ex. E at p. 5).² In addition, adapted physical education and monthly parent counseling and training were added to the student's IEP (Parent Ex. D at p. 12). The student's goals and the list of resources needed to address his management needs were also updated (*compare* Parent Ex. D at pp. 7-8, 11,

² The January 2017 IEP reflected that the parent's concern that Spanish-language services "should be changed to English" was "addressed and services would be recommended for English as of this IEP" (Parent Ex. D at p. 17).

with Parent Ex. E at pp. 1-4).³ With respect to special factors, the IEP again indicated the student did not require a BIP or assistive technology; however, it noted that he needed a particular device or service to address his communication needs (Parent Ex. D at p. 8). In addition, the IEP indicated that, as a student with limited English proficiency, the student required a special education service to address his language needs as they related to the IEP (id.). The January 2017 IEP indicated that the parent expressed concern regarding the student's behavior and was exploring an ABA therapy recommendation but that the CSE decided to postpone making a decision on the request pending an upcoming report from a doctor who evaluated the student for ABA therapy (id. at p. 17). The CSE also discussed the student's eligibility for participation in alternate assessment, however, that option was rejected due to the student's age (id.).

The CSE convened on January 23, 2018 to conduct the student's annual review (Parent Ex. C at pp. 1, 22). The January 2018 CSE continued to recommend the student for a 12-month program consisting of a 6:1+1 special class with related services of speech-language therapy, OT, PT, and adapted physical education and also recommended parent counseling and training (id. at p. 12).^{4, 5} In terms of special factors, the CSE continued to identify the student's need as a student with limited English proficiency for a special education service to address his language needs as they related to the IEP and a particular device or service to address his communication needs (id. at p. 11). The CSE also indicated that the student did not require positive behavioral interventions or a BIP and that he did not require an assistive technology device or service (id.). The student's goals were updated, and some short-term objectives added; the resources needed to address his management needs were also updated (compare Dist. Ex. C at pp. 10, 12-16, with Dist. Ex. D at pp.7-11). The January 2018 CSE recommended the student for alternate assessment due to his "marked cognitive, communication/language, social/emotional, and adaptive behavior challenges" that resulted in the need for a highly specialized educational program and educational support systems (Parent Ex. C at p. 23). In addition, the CSE recommended testing accommodations of "on task focusing prompts," revised test format, and separate location (id. at p. 19).

On January 17, 2019, a CSE convened for an annual review of the student's program (Parent Ex. B at pp. 1, 20). The CSE recommended that the student attend a 12-month program consisting of a 6:1+1 special class in a district specialized school with related services of three 30-minute sessions of individual OT per week, two 15-minute sessions of individual PT per week, two 30-minute sessions of individual speech-language therapy per week, and, for the parent, one

³ Although the January 2017 IEP did not indicate that the student received ABA, the present levels of performance noted the use of classroom and ABC data, edible reinforcers during 1:1 instruction, reinforcement schedules, a reinforcement inventory, visual schedules, a token economy, and a school-based behavior plan (Parent Ex. D at pp. 3-5).

⁴ The January 2018 IEP identified the student as an English as a new language (ENL) student who was not in a bilingual class but who received ENL services at school and was spoken to in Spanish in the home (Parent Ex. C at pp. 3, 23).

⁵ In the present levels of performance, the January 2018 IEP referenced the use of data, including frequency data, primary reinforcers (edibles), a reinforcement inventory, and a school-based behavior plan that was updated on October 18, 2017 (Parent Ex. C at pp. 4-8).

30 to 60 minute session of group parent counseling and training per month (*id.* at pp. 16-17).⁶ The CSE also recommended that the student receive three periods per week of adapted physical education (*id.* at p. 16). All services and programs were identified as being provided in English (*id.* at pp. 16-17). In addition, the January 2019 CSE identified the student as requiring a classroom paraprofessional, adherence to the school lunch menu, and a door-to-door minibus to address his management needs (*id.* at p. 10). The CSE also recommended teacher strategies and student supports with respect to listening comprehension, receptive and expressive language, pragmatics, reading, rate/speed of work, working independently, and social competence (*id.*). As with previous IEPs, the January 2019 IEP indicated that the student did not require a BIP or the use of an assistive technology device but still identified the student as one with limited English proficiency who needed special education services to address his language needs as they related to the IEP (*id.* at p. 11). The CSE recommended 11 annual goals to address the student's academic, social, speech-language, and motor needs (*id.* at pp. 12-15). The student was no longer recommended for alternate assessment and his testing accommodations were reduced to include only on-task focusing prompts (*id.* at pp. 18-19). The IEP indicated that the student continued to qualify for English as a second language services (*id.* at pp. 18, 21).

A. Due Process Complaint Notice

In a due process complaint notice dated May 10, 2019, the parent requested an impartial hearing, asserting that the student was denied a free appropriate public education (FAPE) for the 2016-17, 2017-18, 2018-19, and 2019-20 school years (Parent Ex. A at p. 1).

Unrelated to a specific IEP or school year, the parent asserted that the district failed to provide her with interpretation or "appropriately translated documents to allow [her] the opportunity to meaningfully participate in and consent to the development of [the student's] IEPs and to effectively oversee his educational progress" (Parent Ex. A at p. 5).

Next, the parent asserted the March 2016 CSE failed to recommend appropriate services to support and address the student's behavioral needs, the district failed to conduct a functional behavioral assessment (FBA) or develop a BIP, and that the March 2016 IEP did not include measurable annual goals to address the student's behavior in the classroom (Parent Ex. A at p. 5). In addition, the parent alleged that "[t]he IEP failed to provide services to help [the student] make meaningful academic progress in school" (*id.*).

The parent asserted the January 2017 CSE failed to recommend appropriate services or support to address the student's significant communicative and cognitive delays; failed to recommend a placement in a Spanish-speaking class or related services in Spanish; failed to create measurable annual goals to address the student's behavior in the classroom; and failed to recommend appropriate services to support and address the student's behavioral needs (Parent Ex. A at p. 4). As with the March 2016 IEP, the parent alleged that the January 2017 IEP "failed to provide services to help [the student] make meaningful academic progress in school" (*id.*).

⁶ In the present levels of performance, the January 2019 IEP referenced the use of data collection, data sheets, and frequency data; reinforcement and a reinforcement inventory; a visual schedule; and an FBA conducted in October 2018 (Parent Ex. B at pp. 2-9).

As for the January 2018 IEP, the parent asserted that the CSE failed to recommend measurable or appropriate annual goals in the areas of speech-language, OT, and behavior (Parent Ex. A at pp. 3, 4). The parent also asserted the January 2018 CSE failed to recommend instruction or related services in Spanish; appropriate services or supports to address the student's behavioral, communicative, and cognitive needs and failed to recommend a change in placement; or additional services to help the student make meaningful progress; and that the district failed to conduct an FBA or develop a new BIP for the student, noting that the student's BIP was last updated in October 2017 (*id.* at pp. 1, 3-4). In addition, the parent alleged that the IEP did not include a recommendation for assistive technology (*id.* at p. 2).

The parent alleged that the January 2019 CSE failed to recommend appropriate annual goals in the areas of speech-language, OT, and behavior; instruction or related services in Spanish; appropriate services or supports to address the student's behavioral, communicative, and cognitive needs; or a change in placement (Parent Ex. A at pp. 1, 3).

Relevant to both the 2018-19 and 2019-20 school years, the parent asserted the district failed to provide the student with his mandated OT services since September 2018 (Parent Ex. A at pp. 1, 3). In addition, the parent emphasized the student's lack of progress in the district program over the years (*id.* at pp. 1-2).

To remedy these asserted failures, the parent requested independent educational evaluations (IEEs) at district expense, including an FBA, a neuropsychological evaluation, and a speech-language assessment (Parent Ex. A at p. 5). The parent requested that, upon completion of the IEEs, the CSE be required to reconvene to recommend a program and services for the 2019-20 school year based upon the recommendations in the evaluations and consider "additional and/or different special education services, a paraprofessional, assistive technology device and/or related services," as well as a nonpublic school placement for the student (*id.* at pp. 5-6). The parent also sought parent counseling and training in Spanish in an amount to be determined by the provider for in-home ABA treatment and management (*id.* at p. 6). As for compensatory education, the parent requested 700 hours of compensatory ABA services and 560 hours of compensatory speech-language therapy, both to be utilized within five years of the IHO's order (*id.*). The parent also requested that the district be directed to translate all of the student's IEPs into Spanish for the parent and to have an interpreter available for the parent at all meetings regarding the student's educational development (*id.*).

B. Impartial Hearing Officer Decision

An impartial hearing convened on June 13, 2019 and concluded on February 26, 2020 after 10 days of proceedings (Tr. pp. 1-159). During the impartial hearing, the district conceded that it did not offer the student a FAPE for the 2017-18 and 2018-19 school years, but indicated an intent to argue that the statute of limitations should bar the parent's claims regarding the 2016-17 school year and that the parent's claims for the 2019-20 school year were not yet ripe for adjudication (Tr. pp. 12-14). The district also conceded to the parent's requests for IEEs, including an FBA, a neuropsychological evaluation, and a speech-language evaluation, and the IHO issued an interim order dated June 21, 2019 directing the district to pay for those evaluations at rates agreed to by the parties (Tr. pp. 16-20; IHO Ex. I). The speech-language evaluation, FBA, and neuropsychological evaluation were conducted in August 2019 (*see* Parent Exs. J; K; L). The

evaluation reports were completed and provided to the district prior to the October 22, 2019 hearing date (see Tr. pp. 49-50). Based on "a cursory review" of those reports, the district conceded FAPE for the 2019-20 school year (Tr. pp. 48, 50).

In a decision dated March 27, 2020, the IHO first found that the parent's claims related to any IEPs developed as of January 24, 2017 or prior thereto, were barred by the statute of limitations (IHO Decision at pp. 5, 7). The IHO noted that the district conceded it failed to offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years and determined that the district "should have provided a program with more individualized instruction" (id. at pp. 2, 8). However, the IHO also determined that the hearing record did not support a finding that the student required an ABA program (id. at p. 8).

As relief, the IHO ordered the district to provide the following compensatory education services: 1,380 hours of special education teacher instruction with a teacher trained and experienced in working with students with autism; 255 hours of parent counseling and training; and 414 30-minute sessions of speech-language therapy (IHO Decision at pp. 8-9, 11).⁷ The IHO also ordered the district to conduct a bilingual speech-language evaluation (id. at pp. 10-11).⁸ The IHO further ordered that, upon completion of the bilingual speech-language evaluation, the CSE should reconvene to make appropriate recommendations, including whether the compensatory speech-language therapy services should be provided in English or Spanish (id.).

IV. Appeal for State-Level Review

The parent appeals from the IHO's denial of the parent's request for an order of deferral to the district's central based support team (CBST) for placement of the student in a State-approved nonpublic school and from the IHO's decision not to require ABA as part of the compensatory education award.

In its answer, the district generally admits and denies the parent's allegations and requests that the IHO's decision be upheld in its entirety. In addition, the district asserts that the parent's request for review should be dismissed for failure to have the request for review verified in accordance with State regulations, and that, since the parent's first attempt at filing a request for review was already rejected for failure to comply with State regulations, the parent should not be afforded further leniency.

⁷ The IHO decision indicated the she calculated the award for 1,380 hours of compensatory instruction based on "two hours per week of instruction" being a reasonable amount, then multiplying that by 46 weeks for each school year the district conceded was a denial of FAPE; however, in making that computation, the IHO appears to have erred in stating "two hours per week of instruction" and instead meant two hours per day as two hours per week would only add up to 276 hours of instruction for the three year denial of FAPE (see IHO Decision at p. 8). The IHO's award of 1,380 hours of compensatory instruction aligns closely with the parent's request for 1,760 hours of compensatory ABA therapy, limited to the three years of a denial of FAPE conceded by the district instead of the four years of a denial of FAPE alleged by the parent (see IHO Ex. II at p. 10).

⁸ The IHO directed that the bilingual speech-language evaluation be conducted within 30 school days; however, the IHO also noted that at that time schools in the district were closed due to the COVID-19 pandemic and clarified that, for the purposes of his decision, school days meant days when the schools were open (IHO Decision at p. 11).

In a reply, the parent apologizes for the failure to have the request for review properly verified, noting the "unusual and unprecedented circumstances surrounding the filing of this action" and requests that the SRO accept a verification of the request for review attached to the reply.

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. 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" (Andrew 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 Andrew 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]).⁹

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. Initial Matters

1. Compliance with Practice Regulations

The district asserts that an SRO should reject the request for review for failing to comply with the regulatory requirement that a request for review be verified by the parent. Specifically,

⁹ 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" (Andrew F., 137 S. Ct. at 1000).

the district notes that the parent's attorney signed the verification accompanying the amended request for review.

State regulations provide that "[a]ll pleadings and papers submitted to a[n] [SRO] in connection with an appeal must be endorsed with the name, mailing address, and telephone number of the party submitting the same or, if a party is represented by counsel, with the name, mailing address, and telephone number of the party's attorney" (8 NYCRR 279.7[a]). All pleadings must be signed by an attorney, or by a party if the party is not represented by an attorney (8 NYCRR 279.8[a][4]). Additionally, all pleadings shall be verified by a party (8 NYCRR 279.7[b]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

As for the attorney's signing of the affidavit of verification, the district is correct that this aspect of the parents' filing is not in conformance with State regulations; however, the parent submitted a proper, albeit late, affidavit of verification of the request for review with her reply to the district's answer. Considering the circumstances surrounding the filing of the amended request for review in this matter during the COVID-19 pandemic and that the parent subsequently provided an affidavit of verification that was properly endorsed by a notary public, as a matter within my discretion I decline to dismiss the parent's amended request for review on this ground (see Application of a Student with a Disability, Appeal No. 20-049; Application of the Dep't of Educ., Appeal No. 20-027; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 17-015; see also J.E., 2015 WL 4934535, at *4-*6).

2. Scope of Review

An IHO's decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Here, the district does not challenge the IHO's finding that it failed to offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years or the awards of compensatory speech-language therapy and a bilingual speech-language evaluation, and the parent does not appeal the IHO's determination that claims regarding the January 24, 2017 IEP and any prior IEPs were barred by the statute of limitations. Further, although the parent appeals the IHO's award of compensatory education services with regard to whether or not the services were to be delivered using ABA methodology, neither party appeals the number of hours of compensatory education (1,380 hours of instruction and 255 hours of parent counseling and training) that the IHO awarded. As such, these determinations have become final and binding upon the parties and will not be further discussed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

B. Compensatory Education

The parent contends that the IHO erred by ordering 1,380 hours of compensatory special education teacher instruction with a teacher trained and experienced in working with students with autism rather than the requested award for the compensatory education to be provided using ABA methodology and further erred in declining to specify that the compensatory parent counseling and training be provided using ABA.¹⁰ The district argues that the IHO's decision should be upheld because there was no evidence in the hearing record "as to how ABA would meet this particular Student's needs or why it is more appropriate for this Student than other forms of therapy." The district also asserts that the IHO correctly found that some of the student's behaviors that were addressed by ABA therapy only occurred at home and accordingly did not represent an area of need for which the district was responsible.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may 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]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; 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]"]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory 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. of City Sch. Dist. of Buffalo 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]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should

¹⁰ Parent counseling and training is intended as a service to support a student's education "by ensuring that the parents are equipped with the skills and knowledge necessary to continue and implement the student's IEP at home" (M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141 [2d Cir. 2013]). State regulation requires that districts provide parents of students with autism and students placed in certain special classes with "parent counseling and training . . . for the purpose of enabling parents to perform appropriate follow-up intervention activities at home" (8 NYCRR 200.6 [h][8]; 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]).

be designed so as to "appropriately address[] the problems with the IEP"; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA").

As discussed above, the district conceded that it failed to provide the student with a FAPE for three consecutive school years, 2017-18, 2018-19 and 2019-20, and in the absence of any clarification of the scope of its concession and for purposes of fashioning relief related to the denials of a FAPE, I will in this instance presume that the district intended to admit every deficiency alleged by the parents in the due process complaint notice to the extent not contradicted by the hearing record (see Application of a Student with a Disability, Appeal No. 19-061; Application of a Student with a Disability, Appeal No. 19-038; Application of a Student with a Disability Appeal No. 15-050; Application of a Student with a Disability, Appeal No. 15-011; Application of a Student with a Disability, Appeal No. 14-079). Moreover, the district did not address its burdens, as required under the due process procedures set forth in New York State law, by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524). Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district, it is not an SRO's responsibility to craft the district's position regarding the appropriate compensatory education remedy. During the impartial hearing and again on appeal, the district has not asserted any arguments or provided evidentiary support on the issue of what, if any, compensatory education award would be appropriate to remedy its denial of FAPE to the student for three years, despite having a full and fair opportunity to be heard at the impartial hearing.

Nonetheless, while the parent is entitled to a presumption as to the truth of the asserted facts underlying her IDEA claims in light of the district's concession, she is not necessarily entitled to "default" relief.¹¹ Indeed, an outright default judgment awarding compensatory education—including any and all of the relief requested by the parent without further inquiry—is a disfavored outcome even in cases where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]). Indeed, an award ordered without considering the nature of the FAPE violation to be remedied and the impact of the award on the child's educational needs could ultimately do more harm than good for a student (see M.M. v. New York

¹¹ Summary disposition procedures akin to those used in judicial proceedings are permissible under the IDEA; however, they should be used with caution and are only appropriate in instances in which the parties have had a meaningful opportunity to present evidence and the nonmoving party is unable to identify any genuine issue of material fact (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 68 [2d Cir. 2000]). Accordingly, any notion of default relief in this matter would be disfavored in light of the authorities requiring fact-specific inquiries when fashioning equitable relief such as compensatory education.

City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017] ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]. Accordingly, in order to decide whether the IHO erred in failing to award the parent's requested ABA services as compensatory education, it is necessary, upon my independent review of the hearing record on appeal, to determine whether the evidence adduced at the impartial hearing supports an award of compensatory ABA services to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first instance.

In the present matter, the hearing record indicates that the student received 30-minutes a day of ABA intervention in his program as of summer 2019, but there is little detail in the hearing record regarding the nature of the ABA therapy (Tr. p. 148; Parent Ex. G at p. 2; J at pp. 1, 14). As discussed above, the IHO ordered the district to fund an FBA, a neuropsychological evaluation, and a speech-language evaluation, which were completed during the hearing (IHO Ex. I at p. 2; Parent Exs. J; K; L). The district conceded that the results of those evaluations should form the basis of the compensatory education award but did not provide any further explanation as to what the district believed the compensatory award should consist of (Tr. pp. 49-51). However, after the CSE met in December 2019 and reviewed the updated evaluative information, the district questioned why the student needed ABA as compensatory education (Tr. p. 117).¹²

The independent FBA was completed by a Board Certified Behavior Analyst (BCBA) in August 2019 (Tr. p. 15; Parent Ex. J at p. 1).¹³ As part of the FBA, the BCBA reviewed a number of documents related to the student's educational history including assessments, progress reports, IEPs, prior written notices, and a classroom observation (Parent Ex. J at p. 1). According to the FBA, the parent obtained a developmental pediatric behavioral evaluation in August 2016 (id. at p. 2).¹⁴ At the time of the developmental pediatric behavioral evaluation, the parent had indicated that the student demonstrated a continued deterioration of skills, specifically an increase in self-stimulatory behaviors characterized by rubbing his body on the floor while faced down, smelling all objects, and spinning, and that such behaviors occurred both at home and in the community (id.). In addition, the parent noted that the student had restricted his diet over the past year, simply drinking milk throughout the day (id.). As cited in the August 2019 FBA report, the developmental

¹² This appears to have been based on the view of the December 2019 CSE, as noted in the IEP, that the student did not require a BIP to target behaviors during the school day (Tr. pp. 116-17; Parent Ex. O at p. 23).

¹³ The August 2019 FBA was entered into the hearing record as an undated document because of inconsistent testing and report dates (Tr. pp. 97-98). Although the FBA is dated August 6, 2019, it indicates that the assessment that formed the basis for the report was conducted on August 11, 2019, five days after the report was written (Parent Ex. J at p. 1). Further confusing the exact date of the FBA are the BCBA's October 15, 2019 and January 9, 2019 affidavits which indicate the FBA was conducted in July 2019 (Parent Exs. G at p. 1; M at p. 1). Although the exact date of the report is unclear it appears that the parties agree that the FBA was conducted during summer 2019; for the purposes of this decision it will be referred to as the August 2019 FBA.

¹⁴ The developmental behavioral pediatric evaluations conducted August 27, 2016, January 18, 2017, and September 27, 2017 are detailed in the August 1, 2019 speech-language assessment report and the August 2019 neuropsychological evaluation report, as well as in the FBA history (Parent Exs. J at p. 2; K at p. 2; L at p. 3).

pediatrician who conducted the August 2016 evaluation recommended that the student receive 20 to 40 hours of ABA therapy per week and stated that due to the severity of the student's self-stimulatory behavior the student required a one-to-one paraprofessional throughout the school day who understood ABA principles and who could prevent or stop the stimulatory behaviors when they occurred and redirect the student to a more appropriate activity (id.). The August 2019 FBA report indicated that in a follow-up evaluation in January 2017 the developmental pediatrician reported the student was making improvement in joint attention but was still behind same-aged peers in all areas of development, noting that he continued to require very substantial supports for social communication and repetitive behaviors (id. at p. 3).¹⁵ The student was again seen for a developmental evaluation in September 2017 at which time the developmental pediatrician observed that the student "made good eye contact and showed joint attention," showed a desire to learn and sought attention, and demonstrated fewer stereotypies that only occurred when the student was idle (id.). However, the student continued to require significant prompting to complete tasks and continued to present with echolalia (id.). Despite the student's progress, the doctor indicated that the student required very substantial supports to improve social communication and to reduce restricted interests and repetitive behaviors and recommended that the parent seek assistance in expanding the student's diet (id.).

The BCBA indicated that for the August 2019 FBA she collected data using direct measures such as direct observation and ABC data and indirect measures such as the Functional Analysis Screening Tool, Positive Environment Checklist, parent interview using questions from the Functional Assessment Open Ended Interview, and teacher interviews (Parent Ex. J at p. 6). The BCBA identified the student's target behaviors as touching his fingers to his face, crying, refusing non-preferred foods, sitting inappropriately in his chair, and sniffing objects or his finger (id. at pp. 5-6). The BCBA reported that she observed the student during gym class, in the classroom during one-to-one instructional time or independent workstations, snack time, physical therapy, lunchtime, and story time (id. at pp. 7-11).¹⁶ Based on the assessments and observations, the BCBA offered three hypothesized functions of the student's behaviors (id. at p. 13). The first hypothesis stated that the student engaged in crying at home because he could not have what he wanted (denied access to reinforcement) (id.). The second hypothesis stated that the student engaged in food refusal at home and in school because it resulted in a reduction or removal of demands (escape/avoidance) (id.). The third hypothesis stated that the student engaged in sitting inappropriately and touching his face because those behaviors made him feel good (sensory) (id.). The BCBA recommended that to address his language, learning, and behavioral deficits the student needed an intensive daily intervention program that made use of the evidence-based principles and procedures of ABA (id. at p. 14). The BCBA suggested that the most immediate priority involved a focus on establishing tacting, listener skills, and social skills, that the evaluator opined could

¹⁵ Although not specified in the August 2019 FBA report, the August 2019 speech-language assessment report indicated that the January 2017 and the September 2017 development pediatric consultations also made a recommendation for ABA intervention along with physical, occupational, and speech-language therapies (compare Parent Ex. J at p. 3, with Parent Ex. K at p. 2).

¹⁶ Although the FBA indicated that the BCBA observed the student for a total of five hours, it also indicated that she interviewed the student's teacher at 9:00 a.m. and observed the student from 10:00 a.m. until 1:00 p.m., reflecting that the observation took place over three hours (Parent Ex. J at pp. 7-10).

only be accomplished through intensive instruction that was presented for the duration of the school day (id.).¹⁷ The evaluator noted that the student was dependent on prompts to complete the vast majority of demands placed throughout the school day (id.). Further, the BCBA indicated that the student's overall adaptive functioning was very low and his profile of scores showed significant generalized deficits in multiple areas (id.). Based on her assessment, the BCBA concluded that the student should be enrolled in a program that provided the following components: a data-driven program that adhered to all of the dimensions of ABA; full-time 1:1 and small group individualized instruction format; ongoing program oversight by a team of trained and experienced behavior analysts; educational programming by a team of trained and supervised instructors; parent training; and regular meetings between the student's mother and the school staff members (id. at pp. 14-15).

With respect to the first recommendation, for a data-driven program that adhered to all the dimensions of ABA, the BCBA indicated the student's the program should promote changes in behavior that were of social significance to him and his family, ensure accurate and reliable measurement of behavior/performance, and document the occurrence and non-occurrence of behavior whenever possible with respect to the presence/absence of the independent variable/intervention (Parent Ex. J at p. 14). The BCBA also recommended that the program use a comprehensive description of all teaching procedure to guarantee proper and consistent implementation, describe teacher procedures and the principles from which they were derived, and ensure that interventions were effective/produce meaningful and reliable behavior change (id.). Additionally, the BCBA indicated that the program should ensure that interventions promoted skill generalization (id.). The BCBA recommended the development of a BIP to address the student's most persistent behaviors including touching his face, food refusal, and sniffing (id.).

According to the August 2019 FBA report, the recommendation for a full-time 1:1 and small group individualized instruction format was deemed necessary in order for the student to acquire basic skills necessary to learn higher-level skills (Parent Ex. J at p. 14). Given the gaps across the student's developmental and adaptive domains, the BCBA opined that the student would require 25 hours a week of 1:1 data-driven instruction and further opined that the student was not ready for large group learning experiences (id.). The BCBA noted that the student's then-current two and half hours per week of 1:1 data driven instruction was not enough for the student to make meaningful progress (id.).

The August 2019 FBA report stated that ongoing oversight by a team of trained and experienced behavior analysts was necessary to supervise and review the student's program and performance on an ongoing basis (Parent Ex. J at pp. 14-15). In addition, educational programming by a team of trained and supervised instructors was required to ensure the student's skills generalized across people (id. at p. 15).

With respect to parent counseling and training, the August 2019 FBA report indicated that an appropriate program for the student would include a minimum of two hours per week of parent training that included a BCBA parent trainer, the parent, and the student (Parent Ex. J at p. 15).

¹⁷ The August 2019 FBA report noted that at the time of the assessment the student only received 30 minutes per day of direct ABA instruction, which the evaluator opined was "simply not enough time to meet [the student's] level of deficit" (Parent Exs. G at p. 2, J at p. 14).

The BCBA indicated that an appropriate educational program for the student was one that targeted behavior change/skill acquisition, maintenance, and generalization across all environments with direct intervention/programming taking place in all settings, not just at school (id.). The BCBA also noted that changes in the student's skills could not be assured unless intervention occurred in each and every setting in which the student was expected to learn, demonstrate skills, and be a full and active participant (id.). The BCBA further specified the need for the student's program to include regular meetings between the parent and school staff members with ongoing collaboration between the parent, program supervisors, and the home programming/classroom trainer which was considered key to ensuring that the student's educational needs were being met on an ongoing basis (id.).

The BCBA opined that the student had not made the educational progress he was capable of due to the absence of the aforementioned fundamental program components (Parent Ex. J at p. 15). The BCBA concluded that it was "essential" that the student receive full-time ABA-based intervention at that critical time and that his educational file be forwarded to those programs that were equipped to provide the student with a full-time ABA program (id. at pp. 15-16).

In addition to providing an assessment of the student's speech, language, feeding, and technology needs, the August 2019 speech-language assessment report provided history and recommendations regarding the student's past and current needs with respect to ABA (Parent Ex. K at pp. 2-8). Similar to the August 2019 FBA, the speech-language assessment cited the recommendations of the developmental pediatrician who evaluated the student in 2016 and 2017 (id. at p. 2).

The speech-language pathologist assessed the student using a standardized test, informal speech samples, an informal augmentative and alternative communication device assessment, an oral-motor peripheral mechanism evaluation, dynamic assessment, clinical judgment, and clinical intake (Parent Ex. K at p. 2). The results of her assessment revealed that the student presented with a profound expressive and receptive language disorder, pragmatic language disorder, speech disorder, and feeding disorder secondary to an autism spectrum disorder (id. at p. 6). The speech-language pathologist recommended an assistive technology evaluation and opined that due to the student's significant language disorder the student needed a more intensive, holistic, and comprehensive intervention program (id. at pp. 6-7).¹⁸ The speech-language pathologist noted that the student's feeding disorder was related to his sensory deregulation that resulted in aversions to specific foods because of their texture, taste, shape, or color (id. at p. 7). She indicated that these needs could be addressed with incremental food chaining therapy along with ABA and OT collaboration to provide the behavioral incentives and reward program and sensory diet needs, respectively (id.; see Parent Ex. H at p. 3). The speech-language pathologist opined that use of a speech generating device could further facilitate choice and improve the student's motivation to expand the variety of his food intake (Parent Ex. K at p. 7).

In an October 15, 2019 affidavit, the BCBA who conducted the August 2019 FBA, reiterated that as a result of her FBA she had found that the student emitted the following problem behaviors: touching his fingers to his face, crying, refusing non-preferred foods, sitting

¹⁸ At the time of the speech-language assessment the student had been receiving two 30-minute sessions of individual speech-language therapy per week (Parent Exs. B at p. 16; K at p. 3).

inappropriately in his chair, and sniffing objects or his finger (Parent Ex. G at pp. 1-2). The BCBA indicated that the student's touching his face, emitting vocalizations, inappropriate sitting and sniffing interfered with his "ability to access instructions and be able to respond, to be corrected in a meaningful way and to acquire skills at school" (id. at p. 2). She opined that the student's crying at home impeded the family's ability to experience the day-to-day in a productive manner, instead relying on practices that work to manage behaviors in the moment but resulted in daily cycles of parent-child conflict and stress in the long term (id.). According to the BCBA, food refusal affected the student's nutrition, and in the school setting, where mealtime was social, would prohibit him from engaging in responses relevant to mealtimes, such as eating independently (id.). The BCBA affirmed her finding regarding the functions of the student's behaviors, including crying (denied access to reinforcement—because the student could not have what he wanted), food refusal (escape to demands—because it resulted in a reduction or removal of demands), and sitting inappropriately, sniffing, and touching his face (sensory—because they made the student feel good) (id.). The BCBA reported that she directly observed that the student demonstrated language, learning, and behavioral deficits that required a daily intervention program, and through examination of the classroom Assessment of Basic Language and Learning Skills-Revised (ABLRS-R), the student had deficits in the areas of labeling, listener skills, mathematics, writing, reading, play, and social skills (id.). The BCBA noted that only 30 minutes per school day were used to present the student with direct 1:1 ABA instruction and that amount was insufficient to meet the student's level of deficit (id.). She noted that the student was dependent on prompts to complete the "vast majority of demands placed throughout the school day" and that his adaptive functioning was very low and, further, her review of the student's records indicated that he had significant generalized deficits in multiple areas (id.).

Based on the student's aforementioned deficits, the BCBA recommended that an "intensive intervention program be established that ma[de] use of the evidence-based principles and procedures of Applied Behavior Analysis for the school day" and recommended the student's enrollment in a full day language-rich ABA program with a low student-to-teacher instructional format (Parent Ex. G at p. 2). The BCBA indicated that the student was "not appropriately equipped to adequately benefit from large learning experience[s], given the gaps he displayed across behavioral, academic and adaptive domains," and as such the student required a nonpublic school setting that provided small group or 1:1 experiences following ABA methodologies for the duration of the day (id. at p. 3). Lastly, the BCBA recommended in her October 2019 affidavit that the student's mother should receive intensive and ongoing training and support in order to implement evidence-based strategies that were known to change behavior in a positive, meaningful and long-lasting way, and that the parent training should be provided two hours per week by a BCBA (id.).

In an updated affidavit dated January 9, 2020, the BCBA indicated more explicitly that, because the student had not received effective ABA instruction in his school setting, he should receive two hours of ABA daily, five days per week (Parent Ex. M at p. 3). Based on a recommendation of two hours per day for 220 school days per year, over a period of four years the BCBA recommended that the student receive a bank of approximately 1,760 hours of ABA to be provided by a BCBA or a Licensed Behavior Analyst (LBA), which should be flexibly deployed by the parent to meet the student's needs throughout the week (id.). Further, to address the lack of such parent training during the 2017-18, 2018-19, and 2019-20 school years, the BCBA recommended a bank of 384 hours of compensatory parent training by a BCBA/LBA calculated

based on two hours per week for 12 months over a period of four years (Tr. p. 146; Parent Ex. M at p. 3).

The BCBA testified with respect to ABA therapy that her hope was for the student "to meet [his] goals in areas that [were] currently deficit areas for him in language learning, as well as behavior, that really should be addressed in an intervention program that occurs daily" (Tr. pp. 147-48). The BCBA stated that her goal for the student was to "develop a plan that's very systematic and provides instruction for him daily to master a skill" (Tr. p. 148). The BCBA opined that a nonpublic school would be "the best fit for the student" and stated that the student would benefit from a data driven program that adhered to the principles of ABA implemented throughout the day (Tr. p. 149). She further explained that a nonpublic school would "provide [the student] with an opportunity for small-group instruction, more one-to-one instruction, [and] people who have expertise in the area of ABA" (Tr. p. 149).

The BCBA testified that she made the recommendation for 1,760 hours of ABA based on what she "saw was a deficit in the instruction that the [student] was getting" and the accumulation of lack of progress for four years (Tr. pp. 144, 154). She explained that she calculated the 1,760 hours based on two hours per day for 220 school days for a period of four years (Tr. pp. 144-45). She stated that the hours were "to make up for the lack of instruction" that the student had experienced in the district programs "for the four years in question" and indicated that "it wouldn't have been the entire program, it had --to make up for part of the program" (Tr. p. 145). The BCBA testified that she considered the two hours per day for four years as "compensatory, not moving forward" (Tr. p. 154). She explained that "if you had a nonpublic placement, we would do a nonpublic placement in an ABA setting with a bank of hours that would meet the deficits that were not met over the last several years" (*id.*). She further explained that going forward an ABA school should be able to meet the student's needs (*id.*).

On or about August 15, 2019 a clinical psychologist conducted an independent neuropsychological evaluation of the student as ordered by the IHO (Parent Ex. L; see IHO Ex. I at p. 2). The neuropsychological evaluation included developmental and academic histories, a record review, a behavioral observation, cognitive functioning assessment, academic functioning assessment including graphomotor and language skills, social/emotional functioning assessment, and assessment using the Childhood Autism Rating Scale-Second Edition (Parent Ex. L at pp. 1-10). According to the clinical psychologist, the student's cognitive abilities were below expected levels even when factoring out language, and his language functioning was underdeveloped with both receptive and expressive vocabulary in the very low range (*id.* at p. 10). With respect to academic ability, the clinical psychologist indicated that the student was able to identify colors and letters and he inconsistently identified numbers and shapes (*id.*). The results of an academic functioning assessment indicated that the student's reading and mathematics skills were below age and grade expected levels (*id.*). The clinical psychologist indicated that the student was unable to complete a visual processing task and exhibited an immature pencil grip (*id.*). In terms of the student's social/emotional functioning the evaluation noted that the student presented symptoms consistent with his diagnosis of an autism spectrum disorder and that his overall adaptive behavior score was in the low range, as were all his sub-domain scores (*id.* at pp. 10, 13). The clinical psychologist indicated that overall the student presented as a happy and friendly student who nonetheless presented with significant cognitive, academic, language, and social/emotional

challenges that required proper remediation to ensure his continued academic and social/emotional development (id. at p. 10).

The clinical psychologist stated that the student's presentation was consistent with a diagnosis of an autism spectrum disorder (level 3 with intellectual impairment, requiring very substantial support), noting the student's history of delayed speech, deficits in social interaction, inconsistent eye contact, stereotypical autistic behaviors, difficulty with transitions, and tendency to perform best when the environment was structured and predictable (Parent Ex. L at p. 10). The clinical psychologist made a number of recommendations regarding the provision of speech-language therapy, OT, PT, social skills training, the use of a sensory diet, and assistive technology (id. at pp. 11-12). The clinical psychologist indicated the student required a highly-structured learning environment with instructors who were trained to teach children with autism and further indicated that placements that would be appropriate included a "specialized Autism program that ideally would include an ABA . . . component" (id. at p. 11). The clinical psychologist also spelled out additional desired components of the student's academic placement including integration of related services, use of a multisensory curriculum with individualized attention, and a 12-month school year (id.). Although the clinical psychologist described the student's program and placement needs going forward, he did not address the student's need for compensatory ABA services (see id.).

By way of clarification the clinical psychologist indicated that the related services should be integrated into the curriculum instead of providing them at designated times and the providers should be familiar with the student's classroom needs and academic expectations working to reinforce topics and concepts being taught during class (Parent Ex. L at p. 11). The clinical psychologist noted that a school with regular team meetings between teachers and related services providers was "essential" (id.). With respect to a multisensory curriculum/individualized attention the clinical psychologist indicated the student required a multisensory curriculum taught by instructors who had experience with individualized instruction, which included individualized attention throughout the day and special help regarding the development of specific academic skills and supportive strategies, such as vocabulary building and working on phonological skills through the use of pictures, videos, and hands-on activities to convey the meaning of unfamiliar words and concepts (id.). A 12-month program was recommended to prevent regression of newly learned skills (id.). The clinical psychologist noted that the parent should apply to Office for People with Developmental Disabilities' (OPWDD's) autism program to receive assistance in managing the student's autism related needs when not in school (id. at p. 12). The clinical psychologist noted that the parent required parent training and home-based related services to support the student's functioning at home and encouraged the implementation of the student's picture exchange communication system (PECS) and other successful strategies used at school into the home environment (id.; see Tr. p. 141). The clinical psychologist neither specified that the parent training should be provided to teach the parent ABA principles and techniques nor recommended the parent training as a compensatory service, but rather presented recommendations regarding parent training going forward (Parent Ex. L at p. 12).

In finding that the hearing record did not support that the student required ABA, the IHO relied on the clinical psychologist's recommendations in the August 2019 neuropsychological report for a structured environment with a multisensory curriculum and found that the BCBA's recommendation for ABA focused on correcting the student's behaviors, as opposed to the

student's more prominent need to focus his attention, increase comprehension, and improve communication (IHO Decision at p. 8). There are a number of similarities between the recommendations from the August 2019 FBA report and the August 2019 neuropsychological evaluation report (compare Parent Ex. J at pp. 14-16, with Parent Ex. L at pp. 11-12). However, while the BCBA who conducted the FBA clearly recommended ABA therapy for the student and stated that the 30 minutes of ABA the student was receiving in his then-current program was not enough, the neuropsychologist who evaluated the student recommended a specialized autism program "that ideally would include ABA" (compare Parent Ex. J at pp. 14-16, with Parent Ex. L at pp. 11-12). As noted above, the BCBA recommended that the student receive "25 weekly hours of 1:1 data-drive instruction" (Parent Ex. J at p. 14). By contrast the neuropsychologist did not specify the amount of ABA services per week the student required moving forward (compare Parent Ex. J at p. 14, with Parent Ex. L at p. 11). Lastly, the BCBA used four years as the length of time the district failed to provide the student with appropriate instruction and based on that timeframe calculated that the student was entitled to 1,760 hours of compensatory ABA services and 384 hours of compensatory ABA parent counseling and training (Tr. pp. 144-46; Parent Ex. M at p. 3).

Overall, review of the August 2019 neuropsychological evaluation report does not reveal any information which undermines the BCBA's recommendation that the compensatory education be delivered using ABA methodology. Moreover, the BCBA's view appears to be supported by recommendations from as early as 2016 that the student would benefit from ABA in the classroom (see Parent Ex. J at p. 2). To the extent that the IHO concluded that some of the student's behaviors that the recommended ABA services aimed to address only occurred in the home (see IHO Decision at p. 8), the due process complaint notice specifically alleged that the district failed to address the student's in-school behaviors (see Parent Ex. A at pp. 3-5)—which the district failed to defend against at the impartial hearing—and the BCBA described and offered hypotheses regarding the functions of the student's behaviors she observed in the school setting (J at pp. 7-13). Accordingly, the IHO's finding in this respect is not supported by the hearing record.

Ultimately, while the student may be able to receive benefit from a compensatory education award that is not specifically delivered using ABA methodology, the district failed to rebut the parent's expert's recommendation that the services should be delivered using ABA. Instead, on appeal, the district alleges that the hearing record is insufficient to demonstrate that the student could not benefit from some methodology other than ABA but fails to acknowledge its own responsibility for such alleged deficiencies in the hearing record. Based on the foregoing, the IHO's award of 1,380 hours of compensatory education to remedy the student's lack of FAPE for the 2017-18, 2018-19, and 2019-20 school years is modified to provide that the hours be delivered, at the parent's option, by a special education teacher trained and experienced in working with students with autism, as ordered by the IHO, or by a BCBA or LBA. Likewise, the IHO's order directing the district to fund 255 hours of parent counseling and training is modified to allow the services to be used to support the student's ABA program.

C. Nonpublic School Placement

The parent asserts that the IHO erred by denying her request for an order directing the district to prospectively place the student in an approved nonpublic school in an ABA setting. More specifically, the parent asserts that the evidence in the hearing record shows the student

required "a highly systematic program in an [nonpublic school] placement that provides the appropriate number of ABA hours in instruction daily" and argues that the IHO ignored evidence that supported the parent's request, including the testimony of the BCBA who conducted the August 2019 FBA and the psychologist that conducted the August 2019 neuropsychological evaluation.

Awarding prospective placement of a student, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [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"]).

As noted above, during the course of the proceedings in the present matter, the IHO ordered that the district fund IEEs of the student, specifically a neuropsychological evaluation, and FBA, and a speech-language evaluation, and those evaluations were completed as of August 2019 (see Parent Exs. J-L; IHO Ex. I). The CSE convened on December 4, 2019 to conduct the student's annual review and develop an IEP with an implementation date of December 16, 2019 (see Parent Ex. O). The December 2019 CSE "discussed" the IEEs and, in particular, the recommendations contained in the speech-language evaluation and the FBA (id. at p. 23). The December 2019 IEP is not the subject of the present matter (see Parent Ex. A; see also Tr. p. 117).¹⁹ Further, the 2019-20 school year has concluded. The evidence in the hearing record is unclear with regard to whether or not the parent agreed with the recommendations of the December 2019 CSE and an order in this matter prospectively determining the student's placement in this matter could go so far as to undermine the parent's accord with the CSE's recommendations for the student.

Moreover, the IHO ordered the district to conduct a bilingual speech-language evaluate of the student, and upon completion of the evaluation, reconvene a CSE meeting to determine if the student needs "English language learner services," whether the speech-language therapy services should be provided "in English or bilingual Spanish," and "what other strategies and considerations should be included on the IEP to address any difficulties with English or switching from English to Spanish and back" (IHO Decision at p. 11). Neither party appealed from the IHO's decision regarding the evaluation of the student, so at this point the district should be moving forward with having it completed. Accordingly, when the CSE reconvenes it will have additional information to consider and should have the first attempt to determine a placement for the student along the continuum of services, assessing the extent to which the student can be educated with nondisabled peers in a public school setting before considering more restrictive nonpublic school options (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined that [the public school setting] was

¹⁹ Although the parent challenged the district's offer of a FAPE for the 2019-20 school year generally, the allegations were specific to the particular IEPs, with the latest being the January 2019 IEP, and the December 2019 CSE meeting post-dated the parent's due process complaint notice (see Parent Ex. A).

the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs").

Based on the foregoing, the IEPs challenged in the present matter are no longer in effect and the CSE has already convened and, in accordance with the IHO's order, should convene again to review the district's bilingual speech-language evaluation of the student. Under the circumstances, rather than awarding prospective relief, the more appropriate course is to limit review in this matter to remediation of past harms that have been explored through the development of the underlying hearing record. If the parent remains displeased with the CSE's recommendations for the student as set forth in the December 2019 IEP or some subsequent IEP(s), she may obtain appropriate relief by challenging the IEP(s) in a separate proceedings (see Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the school year for which such placement is sought has been developed and the parent challenges that IEP]).

VII. Conclusion

Based on the foregoing, the IHO's award of 1,380 hours of compensatory education to remedy the student's lack of FAPE for the 2017-18, 2018-19, and 2019-20 school years is modified to provide that the hours be delivered, at the parent's option, by a special education teacher trained and experienced in working with students with autism, as ordered by the IHO, or by a BCBA or LBA. Likewise, the IHO's order directing the district to fund 255 hours of parent counseling and training is modified to allow the services to be used to support the student's ABA program. The IHO's denial of the parent's request that the CSE place the student in a nonpublic school is upheld.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that portion of the IHO decision dated March 27, 2020 which awarded compensatory education services to remedy the district's denial of FAPE for the 2016-17, 2017-18 and 2018-19 school years, is amended to reflect that the awarded compensatory education instruction hours are to be provided, at the parent's option, by a special education teacher trained and experienced in working with students with autism or by a BCBA or LBA, and that the awarded compensatory hours of parent counseling and training be made available to the parent to support the student's ABA program, if applicable.

Dated: **Albany, New York**
 July 21, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER