



The University of the State of New York

The State Education Department
State Review Officer
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No. 20-108

**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 Brian Davenport, Esq.

Cuddy Law Firm, PLLC, attorneys for respondent, by Justin M. Coretti, 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) daughter for the 2018-2019 and 2019-20 school years was not appropriate. 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

According to a September 2018 neuropsychological evaluation report, the student received a diagnosis of autism at two and a half years of age and subsequently attended preschool at which time she received "intervention services" (Parent Ex. D at pp. 1-2). The parent reported that the student attended a special school for students with autism that had "very small classes" where she received speech-language therapy and occupational therapy (OT) services (id. at p. 2). After moving to the district in 2008, the student attended district schools from first grade through ninth grade (2016-17 school year) in either a 6:1+1 or 8:1+1 special class placement and received speech-language therapy and OT services (id. at pp. 1-3; see Parent Ex. E at pp. 1-2).

On March 1, 2017, a CSE convened and developed an IEP with an implementation date of March 10, 2017 (Parent Ex. C at pp. 1, 17). The CSE determined that the student was eligible for special education as a student with autism and, at the time of the CSE meeting, the student's reading and math skills were at a kindergarten level (id. at pp. 1-2, 17). According to the IEP, the student exhibited "limited functional verbal communication," used a communication device, and required maximum prompting to use one to three-word utterances for various communicative functions (id. at p. 2). The March 2017 IEP reflected the parent's report that "a few years back" the student had an incident on the bus that caused posttraumatic stress disorder (PTSD) and "behavioral issues" and that a functional behavioral assessment (FBA) had been conducted to address her self-injurious behaviors (id. at p. 4; see Dist. Ex. 1 at p. 4). The IEP also reflected that the student demonstrated social skill, fine motor, and adaptive functioning delays, and the CSE determined the student was eligible to participate in alternate assessments (Parent Ex. C at pp. 2, 4-5, 18). The March 2017 CSE recommended a 12-month 6:1+1 special class placement in a specialized school for English language arts (ELA), math, social studies, sciences, physical education, and art (id. at pp. 11, 13, 16). The CSE also recommended that the student receive two 30-minute sessions per week of individual OT, one 30-minute session per week of OT in a group, four 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group (id. at pp. 11-12). The IEP further reflected the student was to receive the support of a full time 1:1 health paraprofessional and a 1:1 paraprofessional for transportation as well as the use of a dynamic display speech generating device at school and in the home (id. at p. 12). One "period" per month of group parent counseling and training was also recommended (id.).

The student began attending a district specialized school 6:1+1 special class placement for the 2017-18 school year (tenth grade) (Parent Exs. D at pp. 1, 3; E at p. 1). However, on November 1, 2017, an incident occurred in school that caused the student to subsequently refuse to attend school (Parent Exs. D at p. 1; E at p. 1). As a result, the parent began home schooling the student using a curriculum provided by the district, although according to the parent, she felt it was isolating and felt "strongly that [the student] need[ed] to be in a center-based educational program appropriate for her myriad of needs" (Parent Ex. D at p. 1).¹ At that time, the student received three four-hour independent living service sessions per week at home "to help her adapt," as well as speech-language therapy and OT (id. at p. 2).

The CSE reconvened on December 18, 2017 to develop an individualized education services program (IESP) for the student, with services to begin on December 18, 2017 (Parent Ex. B at pp. 1, 10, 12). The resultant IESP indicated that the student was "[p]arentally [p]laced in a [n]on-[p]ublic [s]chool" and the December 2017 CSE recommended related services for the student consisting of two 30-minute sessions per week of individual OT, one 30-minute session per week of OT in a group, and five 30-minute sessions per week of individual speech-language therapy (id. at pp. 10, 12). The IESP further reflected the student was to receive the support of a full time 1:1 health paraprofessional, special transportation in the form of paraprofessional

¹ The parent testified that she home schooled the student from November 2, 2017 to February 2019 while she looked for another school placement for the student (see Tr. pp. 129-31). However, the December 13, 2018 due process complaint notice indicated that the parent began homeschooling the student in December 2017 (Parent Ex. A at p. 1).

services, as well as the use of a dynamic display speech generating device at school and in the home (id.). The student continued to be home schooled (see Tr. pp. 129-31; Parent Ex. A at p. 1).

The parent obtained a private neuropsychological evaluation of the student that was conducted on April 18, 2018 and August 14, 2018 (Parent Ex. D at p. 1). Following administration of cognitive, academic achievement, adaptive behavior and behavior rating scales, among other assessments, the evaluator concluded, in a report dated September 4, 2018, that the student met the criteria for diagnoses including an autism spectrum disorder, level 3; intellectual disability, mild; and disruptive mood dysregulation disorder (including bizarre and aggressive behavior) (id. at p. 19).² The evaluator opined that, despite these diagnoses, the student had basic skills, was able to recognize letters and numbers, had basic writing skills, and was eager to learn (id.). However, the evaluator also indicated that the student "present[ed] with significant emotional disturbance and behavioral dysregulation which prevent[ed] her from reaching a level of independence in the learning environment, appropriate to her age and grade" (id.). Accordingly, the evaluator included in her report recommendations for the student related to her educational placement and needs (id. at pp. 19-21). The evaluator recommended, among other things, a 12-month 6:1+1 special class in a therapeutic setting in a nonpublic school program that specialized in the education of students with autism and that utilized the applied behavioral analysis (ABA) method of instruction (id. at pp. 19-20). Additionally, the evaluator specifically recommended that the student receive 10 hours of instruction using ABA at home and 30 hours of school-based ABA instruction (id. at p. 20).

On October 23, 2018 a private board certified behavior analyst (BCBA)/licensed behavioral analyst (LBA) prepared a report based on a review of the student's records (Parent Ex. E at pp. 1, 18; see Tr. p. 116).³ Following her review of the student's records and consistent with the private neuropsychologist, the BCBA/LBA indicated, among other things, that the student required a class size of no more than six students in a 12-month school year program that utilized ABA throughout the day for skill acquisition (Parent Ex. E at p. 17; see Parent Ex. D at pp. 19-20). Due to the student's prior "inappropriate and deficient program and placement," the BCBA/LBA further recommended that the student receive 920 hours of "1:1 home empirically based intervention such as ABA" with a trained and experienced ABA provider to focus on teaching the student functional academics, caring for her daily needs, increasing social skills, language skills and pre-vocational skills, while also increasing appropriate behaviors and decreasing maladaptive behaviors (Parent Ex. E at p. 18). The BCBA/LBA also recommended 92 hours of BCBA supervision for the 920 hours of home-based ABA services (id.).

² The September 2018 neuropsychological report reflected that students with a level 3 autism spectrum disorder required "very substantial support," and exhibited "intellectual impairment, including inflexibility of behavior[,] extreme difficulty coping with change, with restricted, repetitive behaviors markedly interfering with functioning in all spheres" (Parent Ex. D at p. 19). According to the report the student also demonstrated "poor social skills, difficulty reading social cues and severe language impairment" (id.).

³ Information reviewed was derived from various documents from 2014 up to the September 2018 neuropsychological evaluation report, most of which are not contained in the hearing record (compare Parent Ex. E at p. 2, with Parent Exs. A-F; Dist. Exs. 1; 4-8). The BCBA/LBA that completed the record review provided ABA therapy to the student at the time of the hearing (Tr. p. 141).

On December 13, 2018, the district's school psychologist conducted an FBA and developed a behavioral intervention plan (BIP) that focused on the student's self-injurious and aggressive behaviors (see Dist. Exs. 4; 5). Also on December 13, 2018, the CSE convened and developed an IEP for the student to be implemented beginning January 11, 2019 (Dist. Ex. 1 at pp. 1, 16, 19). The student's December 2018 IEP reflected the CSE's recommendation for a 12-month 6:1+1 special class placement in a specialized school for ELA, math, social studies, sciences, art, and physical education (id. at pp. 12-14, 16). The CSE recommended related services including one 40-minute session per week of individual counseling services, three 40-minute sessions per week of individual OT services, and four 40-minute individual and one 40-minute group sessions per week of speech-language therapy (id. at p. 13). The IEP also reflected that the student would receive the support of a full time 1:1 health paraprofessional due to the student's PTSD, disruptive mood dysregulation, and diabetes, as well as the support of 1:1 paraprofessional services for transportation (id.). Furthermore, the CSE recommended one 60-minute session per month of group parent counseling and training, and that the student be provided with a dynamic display speech generating device to be integrated into the student's daily program and at home (id.).

The parent stated that she expressed her disagreement with the recommended program during the December 13, 2018 CSE meeting and her belief that the student "had been in that setting" for over eight years and had not been successfully educated (Tr. p. 132).

A. Due Process Complaint Notice and Subsequent Events

By due process complaint notice dated December 13, 2018, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 and 2019-20 school years (Parent Ex. A).⁴ According to the due process complaint notice, the student underwent extensive testing between April and August 2018, which resulted in a September 2018 neuropsychological evaluation report (id. at p. 2). The parent contended that the report indicated that the student needed "a complete revision of her educational placement," which was a 6:1+1 special class in a specialized school, and that it recommended "a therapeutic setting that specialize[d] in the education of children with autism" (id.). According to the parent, the report also indicated the student needed to receive instruction "using a research and evidence-based program, such as ABA," and that the program needed to be provided in "a structured and predictable environment" (id. at pp. 2-3). The parent asserted that this program could only be found in a nonpublic school (id. at p. 2). The parent alleged that, instead of identifying a program that could implement the recommendations contained in the neuropsychological evaluation report, the district sent the student back to her former 6:1+1 special class, from which she had previously been removed "due to school refusal behaviors" (id. at p. 3). With respect to methodology, the parent alleged that the December 2018 IEP was not appropriate because it did not include a recommendation for ABA (id.). The parent contended that this was contrary to the recommendations of evaluation reports provided to the district, including the neuropsychological evaluation report which recommended 30 hours per week of in-school ABA and 10 hours per week of in-home ABA (id.). As relief, the parent requested a determination that the district denied the student a FAPE for the 2018-19 school year, a reconvene of the CSE to recommend a program

⁴ The due process complaint notice also indicated a request for consolidation with another impartial hearing, which was related to the prior school year (Parent Ex. A at p. 1; see Tr. p. 3). The request for consolidation was withdrawn (see Tr. pp. 107-08).

with specified methodologies as recommended in the neuropsychological evaluation report, a referral to the central based support team to find a nonpublic school program for students with autism, and for the district to fund 10 hours per week of in-home ABA "to ensure that behavioral and academic techniques used in-school can be implemented in the home environment" (*id.* at pp. 3-4).

In a prior written notice dated December 28, 2018, the district summarized the December 2018 CSE's recommendations (Dist. Ex. 7 at pp. 1, 2). In addition, in a school location letter dated December 28, 2018, the district notified the parent of the particular school location that it had assigned the student to attend to receive the program and services recommended on the December 2018 IEP (Dist. Ex. 8 at p. 1).

In February 2019, the student began attending a district school (Tr. pp. 86, 135, 140). According to the parent she disagreed with the recommended program and the student regressed academically and behaviorally at the district school and her attendance was poor (Tr. pp. 131-33, 136, 137).

B. Impartial Hearing Officer Decision

The impartial hearing convened on February 20, 2019, and concluded on September 12, 2019, after five days of proceedings (Tr. pp. 1-189).^{5, 6}

In a decision dated May 11, 2020, the IHO determined that the district relied extensively on the September 2018 neuropsychological evaluation report in developing the student's program but did not follow the recommendations included in the report for a 12-month program in a nonpublic school with 40 hours per week of ABA (IHO Decision at p. 8). The IHO also noted that a record review conducted by the private BCBA/LBA, which was relied on by the CSE, recommended the student receive ABA throughout the day (*id.*). The IHO then found that the district recommended basically the same program that the student had experienced difficulty with in the past and had to leave "under traumatic circumstances" (*id.*). The IHO determined that the district did not follow the consensus of the evaluative information, which indicated the student should have been recommended for a 12-month program "with extensive use of ABA" (*id.* at pp. 8-9).

The IHO then assessed what would be an appropriate compensatory award. The IHO reviewed the testimony of the director of EBL Coaching, who recommended the student "would

⁵ On three of the hearing dates, the IHO conducted conferences with the parties to clarify issues, check on the status of proceedings, and schedule additional dates (*see* Tr. pp. 1-11, 74-78). The district submitted a post-hearing brief dated September 27, 2019 (IHO Ex I) and the parent submitted a post-hearing brief dated October 14, 2019 (IHO Ex. II).

⁶ In a letter addressed "To Whom It May Concern," dated August 13, 2019, the director of EBL Coaching documented that the student had been receiving 1:1 tutorial support from EBL Coaching since May 7, 2019 and had been responding well to the multisensory approach they had been using with the student (Parent Ex. F). Testimony from the parent and the director of EBL Coaching indicated that the student received tutoring services at home after school from EBL Coaching, beginning in May 2019 and also received ABA services at home through a private agency (Tr. pp. 104, 140-41, 146-47; *see* Parent Ex. E).

minimally require 400 hours of compensatory services, to make up for a period of time of forty weeks," and noted that the parent was requesting 250 hours of compensatory academic services based on 10 hours per week for 25 weeks that the district did not provide adequate services (IHO Decision at p. 9). The IHO also noted that, while EBL Coaching recommended an Orton-Gillingham approach, it was inconsistent with the testimony of the evaluator who conducted the September 2018 neuropsychological evaluation in that she explained Orton-Gillingham was not appropriate for the student and that the student needed an ABA program (*id.*). However, the IHO noted that the student demonstrated some success with the multisensory approach used by EBL Coaching (*id.* at pp. 9-10). The IHO also noted that the district's program "likely had some positive elements"; however, the IHO found it inappropriate because it was "not in accord with the evaluations" (*id.* at p. 10). The IHO determined that the student's teacher attributed lack of progress to the student's poor attendance, but the IHO found that the student's absences were linked to her behavior—becoming aggressive and refusing to go to school—and the district did not address the cause of the student's lack of attendance (*id.*). The IHO found that, if the student had been placed in an ABA program, she may have been more successful in the past and that if she were placed in an ABA program going forward, she "might well be more successful and demonstrate more progress in the future" (*id.*). Therefore, the IHO ordered the district to "fund a full year at a nonpublic school program for students with autism, which utilizes an ABA approach," as well as 10 hours per week of home ABA (*id.* at pp. 10-11). The IHO further ordered that the district fund 250 hours of compensatory tutoring, using multisensory methods, at \$125 per hour (*id.* at p. 11). Finally, the IHO directed the district to "fund transportation to and from the nonpublic school program as well as to and from the tutoring" (*id.*).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred in finding that the district did not offer the student a FAPE. Initially, the district contends that, although the December 2018 IEP "does not conform in words with the recommendations in the neuropsychological evaluation, it does so in practice." The district alleges that the purpose of the evaluator's recommendation for an ABA program was to address the student's behaviors, and that the district addressed the student's behavioral issues in the classroom by developing a BIP for the student and recommending the support of a full-time paraprofessional. According to the district, the recommendation for a 1:1 paraprofessional was functionally equivalent to a 1:1 ABA program. With respect to the recommendation for placement in a nonpublic school, the district asserts that the evaluator provided no reason for this recommendation other than that the student needed a small supportive therapeutic environment, which the district contends was addressed in the management needs section of the IEP. The district next argues that the IHO erred in awarding 10 hours per week of home-based ABA as the purpose of the home-based ABA was to help the student generalize skills to settings outside of the school environment, which the district asserts was not part of its obligation to provide the student with a FAPE. The district contends that it should not be responsible for the 10 hours of home-based ABA because it is in excess of a FAPE. The district also asserts that the award of 250 hours of compensatory services is not supported by the hearing record because "it bears little to no nexus between the alleged deprivation." More specifically, the district asserts that any denial of FAPE based on a lack of ABA or a nonpublic school placement should not result in compensatory services focused on instruction using Orton-Gillingham, a methodology that was not recommended in the September 2018 neuropsychological evaluation report. The district further contends that it should not have to provide compensatory services for

the student's absences because they were not due to any failure on the part of the district but were due to the parent's decision to keep the student home for health reasons. The district also asserts that the IHO should not have compared the district's recommended program with the program the student attended during the 2017-18 school year, noting that the student did not return to school after that program due to "an incident on the bus" rather than anything regarding the program. Finally, the district alleges that the IHO's award of placement in a nonpublic school circumvents the statutory process because it necessarily involves the student's placement for the 2020-21 school year, a year that is not at issue in this proceeding. The district also asserts that this award is outside the scope of the proceeding as it was not raised in the due process complaint notice.

In an answer, the parent responds to the district's allegations and argues that the IHO correctly found that the district did not offer the student a FAPE, that the IHO's award was not in excess of what the district should have provided as a FAPE as the evidence indicated that the student required ABA services in school and at-home, and that the award of 250 hours of compensatory tutoring services was appropriate to make up for the 25-week denial of FAPE.

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]).⁷

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

⁷ 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 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. December 2018 IEP

Although the present levels of performance in the December 2018 IEP are not directly in dispute, a brief discussion thereof provides context for the discussion of the disputed issue to be resolved—namely, the appropriateness of the December 2018 CSE's recommendation.⁸ Review of the December 2018 IEP shows that it included test results and descriptive information from the September 2018 neuropsychological evaluation report, the October 2018 record review, and the December 2017 IESP (Dist. Ex. 1 at pp. 1-4; see Parent Ex. D).⁹

Specifically, the December 2018 IEP reflected that, following the September 2018 neuropsychological evaluation, the student had received diagnoses including an autism spectrum disorder, intellectual disability, mild, and disruptive mood dysregulation disorder (Dist. Ex. 1 at p. 4; see Parent Ex. D at p. 19).¹⁰ According to the IEP, based on the parent's responses to the Autism Spectrum Rating Scales, Parent Form, as part of the neuropsychological evaluation, the student

⁸ The parent's due process complaint notice alleged a denial of FAPE for the 2018-19 and 2019-20 school years; however, in the relief section, the due process complaint notice only referenced the 2018-19 school year (Parent Ex. A at pp. 1, 3-4). Additionally, at the beginning of the hearing the IHO indicated this proceeding concerned the 2018-19 school year (Tr. p. 3). However, later during the impartial hearing, counsel for the parent clarified that the hearing concerned the December 2018 IEP covering portions of the 2018-19 and 2019-20 school years (Tr. pp. 108-09). As the December 2018 IEP covered portions of two school years, for purposes of clarity, this decision will refer to the date of the challenged IEP rather than the school years in which it was intended to be implemented.

⁹ The December 2018 IEP referred to the October 2018 record review as the teacher progress report (compare Dist. Ex. 1 at pp. 2-4, with Parent Ex. E at pp. 1, 16-17). Additionally, the school psychologist testified that the CSE also relied on discussion with staff from the student's school and the parent (Tr. pp. 32, 36-38).

¹⁰ The December 2018 IEP indicated that the student's autism spectrum disorder was a "Level 3 requiring very substantial support, with intellectual impairment including inflexibility of behavior[,] extreme difficulty coping with change, with restricted, repetitive behaviors markedly interfering with functioning in all spheres" (Dist. Ex. 1 at p. 4; see Parent Ex. D at p. 19). Additionally, according to the IEP, the parent reported and the record review included that the student had also received a diagnosis of PTSD (Dist. Ex. 1 at p. 4; see Parent Ex. E at p. 1).

did not have problems with attention and/or motor and impulse control, related well to adults, did not engage in stereotypical behaviors, and was able to appropriately focus attention (Dist. Ex. 1 at p. 2; see Parent Ex. D at p. 9). However, according to the parent's responses to this scale reflected in the IEP, the student engaged in unusual behaviors, overreacted to sensory stimuli, used language in an atypical manner, and had difficulty using appropriate verbal and nonverbal communication for social contact, relating to children, providing appropriate emotional responses to people in social situations, and tolerating changes in routine (Dist. Ex. 1 at p. 2; see Parent Ex. D at p. 9). Accordingly, the IEP reflected the neuropsychologist's conclusion that the student exhibited many of the associated features characteristic of an autism spectrum disorder (Dist. Ex. 1 at p. 2; see Parent Ex. D at p. 11). Cognitively, the IEP reflected information from the neuropsychological evaluation report that the student spoke in 1-2 word phrases and partial sentences, which at times were "echolalic and recycled," but also that she could speak with communicative intent and demonstrated relative strengths on the verbal knowledge subtest of the cognitive test administered (Dist. Ex. 1 at p. 2; see Parent Ex. D at p. 8). The IEP reflected test results that indicated the student's nonverbal cognitive skills were more advanced than her verbal skills and were at a 6-7 year old age level, although her skills were deficient in the areas of short term memory, working memory, attention, concentration, and executive functions with an age equivalent of four years of age (Dist. Ex. 1 at p. 2; see Parent Ex. D at p. 8). According to the IEP and the evaluation report, the student's reading skills were approximated at a kindergarten level, and although she "ha[d] potential and ha[d] basic skills," the significant symptoms of the autism spectrum disorder prevented her from reaching a level of independence in the learning environment appropriate to her age and grade (Dist. Ex. 1 at p. 2; see Parent Ex. D at p. 8).

Regarding the student's adaptive behavior skills, the December 2018 IEP reflected information from the September 2018 neuropsychological evaluation report, including that results of an administration of the Vineland Adaptive Behavior Scales, Third Edition yielded scores in the elevated range on measures of externalizing (acting out) problem behaviors and within the clinically significant range on measures of internalizing (emotional) problem behaviors (Dist. Ex. 1 at pp. 3, 4; see Parent Ex. D at pp. 16, 18). Additionally, the student's scores were below the first percentile for overall adaptive functioning, the communication domain (receptive, expressive, and written language skills), daily living skills domain (personal, domestic, and community behavior), socialization domain (functioning in social situations), and measures of her interpersonal relationships, play, leisure, and coping skills (Dist. Ex. 1 at pp. 3, 4; see Parent Ex. D at pp. 12, 16-17). According to the IEP, the student occasionally engaged in self-injurious behaviors, found loud noises disturbing, and did not always like to be touched (Dist. Ex. 1 at p. 3; see Parent Ex. D at p. 2).

The December 2018 IEP also reflected information from the October 2018 record review including that the student presented with significant deficits across all academic, social, daily living, self-help, community, and language domains (Dist. Ex. 1 at p. 2; see Parent Ex. E at p. 16). The student's academic deficits placed her functioning between a prekindergarten to kindergarten level (Dist. Ex. 1 at p. 2; see Parent Ex. E at p. 16). Additionally, the IEP reflected information from the record review that the student had very limited self-help, daily living, and prevocational skills; the IEP described that she was as minimally verbal and used a dynamic display communication device with maximum prompting to make 1-3 word utterances (Dist. Ex. 1 at p. 2; see Parent Ex. E at p. 1, 16). Also, the IEP reflected reports that the student required tasks broken down into component parts and repetition in order to acquire skills (Dist. Ex. 1 at p. 3; see Parent

Ex. E at p. 16). Further, according to the record review report as reflected in the IEP, the student exhibited "problem" behaviors including self-injury that interfered with her availability for learning, and also the parent's report that in the "homeschooling setting" the student attempted to stop disturbing stimuli using aggressive behavior, and that in the classroom setting she required one to one assistance (Dist. Ex. 1 at p. 3; see Parent Ex. E at p. 17). The record review report and IEP indicated that the student "require[d] systematic implementation of behavioral interventions in order to diminish or extinguish problem behaviors that interfere with learning" (Dist. Ex. 1 at p. 4; see Parent Ex. E at p. 16).

The December 2018 IEP also included information from the student's December 2017 IESP (see Dist. Ex. 1 at pp. 2-3). Specifically, the December 2018 IEP reflected results of a level 1 vocational assessment, at which time the student and parent provided information about her career interests and strengths (id. at pp. 2, 3). Socially, the IEP indicated that the student had a BIP to address self-injurious behaviors and noted that "in order for her to succeed in the classroom she w[ould] utilize a reinforcement system to increase on task behaviors," that adults would provide the student with "personal space" when she "show[ed] agitation," and that the student would use supports such as time, a communication board, deep breathing exercises, and a timer to show when she needed a break (id. at p. 3).

Management needs included in the December 2018 IEP indicated that the student required instructional supports such as a visual schedule, visual supports, modeling of work, prompting and redirection as needed, small group instruction, structure and a predictable routine, extra time to complete tasks, tasks to be broken down into component skill sets, and instruction that emphasized language (Dist. Ex. 1 at p. 4). The IEP also included behavioral management supports such as sensory breaks, first/then boards, an FBA, a BIP, systematic implementation of behavioral interventions in order to diminish or extinguish problem behaviors that interfered with learning, and a speech generating device (id.).

Turning to the neuropsychologist's recommendations, in the September 2018 report she concluded that a 12-month 6:1+1 therapeutic setting in a nonpublic school that specialized in the education of students with autism was appropriate to meet the student's needs (Parent Ex. D at pp. 19-20). She further indicated that, because the student's "severe symptomology ma[de] her unavailable for learning," she required "1:1 intensive instruction" utilizing "a research-based, structured program of ABA, which has been shown to be effective for children with autism" and which the neuropsychologist recommended to address the student's behavior management and life-skill training needs (id. at p. 20).¹¹ The neuropsychologist indicated that "[t]he frequency and duration of ABA [instruction], based on best clinical practice, is a minimum of 40 hours per week, 12 months a year to treat significant symptoms of autism (poor imitation skills, poor incidental learning, maladaptive behaviors and self-stimulatory behavior) in order to provide an appropriate program for [the student]" (id.). She further indicated that the student should receive 10 hours of ABA instruction at home and 30 hours of ABA instruction in school per week (id.).

Regarding the features of appropriate programming for the student, the neuropsychologist indicated in her report that the student "require[d] direct and individualized instruction for

¹¹ The neuropsychologist indicated that other terminology for the type of program was the Lovaas method or discrete trial learning (Parent Ex. D at p. 20).

academics, friendships and social skills," "[i]ndividual behavior therapy," and "a family component so that consistency [could] be established to ensure success" (Parent Ex. D at p. 20). The neuropsychologist concluded that the student's program must provide "a structured and predictable environment," clear and consistent expectations, "real life opportunities to generalize learning across different settings, and to practice skills with her peer group," and minimal changes in routine (id. at pp. 20-21). Additionally, the student required "a positive program structure where all professionals" consistently enforced rules, developed a clear system of both positive and negative consequences, used effective limit setting and used a much higher rate of positive reinforcement than negative consequences in their interactions with students (id. at p. 20).¹²

Next, according to the October 2018 record review recommendations and consistent with the neuropsychologist, the BCBA/LBA indicated, among other things, that the student required a class size of no more than six students in a 12-month school year program that utilized ABA throughout the day for skill acquisition (Parent Ex. E at p. 17; see Parent Ex. D at pp. 19-20). The BCBA/LBA also stated that the student required tasks to be broken down into component parts and repetition in order to acquire skills (Parent Ex. E at p. 16). Further, the student required "systematic implementation of behavioral interventions" to extinguish self-injurious behaviors, and data collection in order to systematically make changes to her curriculum and interventions (id.). Following a detailed description of the components of the type of program the student required (i.e. repetition, maintenance of learned skills, tests for fluency and retention, instruction in increasing attending and alternative/appropriate replacement behaviors, a variety of prompts applied and faded systematically, etc.), the BCBA/LBA "recommended that empirically based behavioral interventions such as ABA be used" with the student to increase her academic, language, daily living, and social skills as well as behavior, while decreasing problem behaviors that interfered with skill acquisition (id. at pp. 16-17). After listing empirically-based principles that behavior interventions such as ABA use, the BCBA/LBA concluded that it was "crucial that ABA be implemented in both the school and at home" to address the student's needs and develop her skills (id. at p. 17). Due to the student's prior "inappropriate and deficient program and placement," the BCBA/LBA further recommended that the student receive 920 hours of "1:1 home empirically based intervention such as ABA" with a trained and experienced ABA provider to focus on teaching the student functional academics, caring for her daily needs, increasing social, language, and pre-vocational skills while also increasing appropriate behaviors and decreasing maladaptive behaviors (id. at p. 18). The BCBA/LBA also recommended 92 hours of BCBA supervision for the 920 hours of home-based ABA services (id.).

Turning to the IEP in dispute, among other supports and services described below, the December 2018 CSE recommended for the student a 12-month program consisting of a 6:1+1 special class placement for ELA, math, social studies, sciences, art, and physical education in a specialized school, together with one 40-minute session per week of individual counseling services, three 40-minute sessions per week of individual OT services, and four 40-minute individual and one 40-minute group sessions per week of speech-language therapy (Dist. Ex. 1 at pp. 13-14, 16). The IEP also reflected the student would receive the support of a full time 1:1 health paraprofessional due to the student's needs related to PTSD, disruptive mood dysregulation,

¹² According to the neuropsychologist, the student was at risk for a residential placement and she advised that the district should develop a long-term comprehensive plan to address the student's needs at school and at home to avoid having to place the student in a more restrictive residential placement (Parent Ex. D at p. 20).

and diabetes, 1:1 paraprofessional services for transportation, and full time use of a dynamic display speech generating device in school and at home (*id.* at p. 13).¹³ The school psychologist testified that she did not recommend ABA for the student because the CSE did not "usually put a specific kind of a program on the IEP" because "the programs have their own methodology that they use" (Tr. p. 53).

On appeal the district maintains that the IHO erred by failing "to recognize that the substance of the [district's] recommendation adheres to the conclusions, intent, and designs of the neuropsychological evaluation" recommendations (Req. for Rev. at p. 4). Specifically, although the December 2018 CSE did not follow the recommendations for 1:1 ABA instruction, the district asserts that the IEP provided the student with a "functionally equivalent program" consisting of management needs, annual goals, a BIP, and 1:1 paraprofessional services "that would achieve the same results consistent with the ABA methodology, and accordingly would address the [s]tudent's behavior issues" to enable her to access the curriculum (*id.* at pp. 4-6).

The precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94).

However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (*see, e.g.*, R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). If the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the

¹³ The district school psychologist, who also served as the district representative at the December 2018 CSE meeting, testified that she recommended a 6:1+1 special class placement for the student because she believed the student could make progress in a class that size and it was the least restrictive environment (Tr. pp. 39-40, 47-48). She further testified that she recommended a specialized school because that was the program that could best address the student's needs both educationally and behaviorally (Tr. p. 48; *see* Dist. Ex. 1 at p. 16). To address the parent's concerns about the student's writing skills, the school psychologist testified that she recommended an increase in the student's OT services, in conjunction with counseling, parent counseling and training, and both individual and group speech-language therapy (Tr. pp. 50-51; *compare* Dist. Ex. 1 at p. 13, *with* Parent Ex. B at p. 10). Additionally, the school psychologist indicated that she also recommended an assistive technology device because it was on the student's prior IEP (Tr. pp. 52-53; *see* Dist. Ex. 1 at p. 13).

discretion of the teacher implementing the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194).

In the present case, even putting aside the question of methodology, review of the evidence in the hearing record does not support a finding that the December 2018 IEP was sufficient to address the student's needs or consistent with the program recommendations contained in the evaluation reports upon which the CSE relied.

The December 2018 IEP included management needs to support the student's instruction such as: providing a visual schedule and visual supports, prompting and redirection as needed, and small group instruction; modeling work; breaking down tasks into component skill sets; as well as providing instruction that emphasized receptive and expressive language, structure and a predictable routine, and extra time to complete tasks (Dist. Ex. 1 at p. 4). Specifically to support the student's behavior, the IEP management needs included sensory breaks, a first/then board, an FBA, and a speech generating device (id.). The IEP also indicated that the student "require[d] systematic implementation of behavioral interventions in order to diminish or extinguish problem behaviors that interfere[d] with learning" (id.). According to the IEP the student needed a BIP, which addressed one behavior—hitting herself and others—and the CSE developed one counseling annual goal to improve her ability to use strategies to cope with feelings of anxiety and practice strategies to cope with noise sensitivity (id. at pp. 4-5, 11; see Dist. Ex. 5 at p. 1). The hearing record reflected that the CSE recommended 1:1 paraprofessional services in order to address the student's health issues as well as her self-injurious behaviors and aggression (Tr. pp. 52, 59; Dist. Ex. 1 at p. 13).

The district asserts these IEP behavioral interventions and supports in conjunction with 1:1 paraprofessional services would have addressed the student's behaviors and allowed her to be available for learning (see Req. for Rev. at pp. 5-6). While it is true these supports and services may have helped to reduce the student's aggressive behaviors that prevented her from accessing the educational curriculum, the district fails to explain how the IEP addressed her need for "1:1 intensive instruction" throughout the day for "skill acquisition" and to achieve, among others, academic and language skill goals (Parent Exs. D at p. 20; E at p. 17; see Dist. Ex. 1 at pp. 6-8, 10). For example, the BCBA/LBA who prepared the record review recommended the student receive 1:1 intervention from "a provider who is trained and has experience in ABA implementation," noting that the student's "program must focus on teaching functional academics . . ." and increasing pre-vocational skills, "while simultaneously increasing appropriate behaviors and decreasing maladaptive behaviors (Parent Ex. E at p. 18). While the district may argue the 1:1 paraprofessional services would address the behavioral portion of that recommendation, there is no allowance in the IEP for the student to receive 1:1 instruction to improve functional academics and pre-vocational skills (see Dist. Ex. 1 at pp. 13).¹⁴ The December 2018 CSE,

¹⁴ Further, the BCBA/LBA indicated that "[g]iven the significant and severe nature of the behaviors, a [BCBA] is required to oversee the ABA program at home and at school in order to supervise the program, analyze data, make changes to the intervention as needed in order to increase appropriate behavior, coordinate interventions between the home and school, as well as to develop any programs that will be required to increase skill acquisition," a service that was not offered in the December 2018 IEP (compare Dist. Ex. 1 at p. 13, with Parent Ex. E at p. 18).

neuropsychologist, and BCBA/LBA all recommended a 6:1+1 special class placement for the student (Parent Exs. D at p. 19; E at p. 17; Dist. Ex. 1 at p. 13). However, even if the 1:1 paraprofessional successfully reduced the student's behaviors in the 6:1+1 special class, the IEP did not address the recommendations contained in the evaluative reports by either including a recommendation for 1:1 instruction for the student or explaining why she did not require that level of instructional support (compare Parent Ex. D at p. 20 and Parent Ex. E at p. 17, with Dist. Ex. 1 at p. 13).¹⁵ Further, there is nothing in the hearing record to indicate that the 1:1 paraprofessional was intended to provide instruction to the student and moreover, a paraprofessional cannot independently provide that level of service.¹⁶

Moreover, the district did not have an independent source of information to support its position that the student did not require 1:1 instruction using ABA methods. District sources of information used to develop the December 2018 IEP were the student's December 2017 IESP—which provided vocational assessment and social development present levels of performance information—and the December 13, 2018 FBA and BIP which the school psychologist prepared on the day of the CSE meeting (Parent Ex. B; Dist. Exs. 1 at pp. 2-3; 4 at p. 1; 5 at p. 1). The school psychologist testified that she created the FBA herself, and the FBA report indicated that she used the neuropsychological evaluation and record review reports, a "[p]rior FBA," which was not included in the hearing record, and "anecdotal evidence" from "our conversation" (Tr. pp. 47, 64-65; Dist. Ex. 4 at p. 2). The FBA report reflected that the school psychologist did not conduct assessments, such as student/staff/parent interviews, student preferences, behavioral surveys/questionnaires, or gather data about the student's behaviors including information from "ABC," frequency, and duration charts, intensity scales, or latency documentation (Dist. Ex. 4 at p. 2). As a result, the hearing record does not show that the December 2018 CSE had available and reviewed evaluative information to support its recommendations—contrary to the neuropsychologist's and BCBA/LBA's recommendations—that the student's needs would be met without 1:1 instruction using ABA.

Where the evaluative information considered by the CSE and all witnesses familiar with the student testify that 1:1 instruction is required, the failure to consider it may result in the denial

¹⁵ The district's attorney suggested that the student would not be able to generalize skills to her peers while in a 1:1 instructional setting at school (Tr. p. 173). The neuropsychologist explained that the student's level of functioning was such that she would not learn incidentally from or through cooperative learning with peers (*id.*).

¹⁶ State regulations do not define the term "paraprofessional" as the term "paraprofessional" was replaced with the term "supplementary school personnel" (see "'Supplementary School Personnel' Replaces the Term 'Paraprofessional' in Part 200 of the Regulations of the Commissioner of Education," VESID [Aug. 2004], available at <http://www.p12.nysed.gov/specialed/publications/policy/suppschpersonnel.pdf>). Supplementary school personnel "means a teacher aide or a teaching assistant" (8 NYCRR 200.1 [hh]). A teaching assistant may provide "direct instructional services to students" while under the supervision of a certified teacher (8 NYCRR 80-5.6 [b], [c]; see also 34 CFR 200.58 [a][2][i] [defining paraprofessional as "an individual who provides instructional support"]). A "teacher aide" is defined as an individual assigned to "assist teachers" in nonteaching duties, including but not limited to "supervising students and performing such other services as support teaching duties when such services are determined and supervised by [the] teacher" (8 NYCRR 80-5.6 [b]). State guidance further indicates that a teacher aide may perform duties such as assisting students with behavioral/management needs ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 20, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>).

of a FAPE (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 81 [2d Cir. 2014]). Therefore, as the district improperly equated the 1:1 behavioral supports that a paraprofessional (either a teacher aide or a teaching assistant) could provide to a student, with the full-time 1:1 ABA instruction the neuropsychologist and BCBA/LBA recommended, and as the district did not conduct any of its own evaluations that resulted in recommendations for a program that did not include 1:1 instruction using ABA, the evidence in the hearing record supports the IHO's finding that the December 2018 IEP failed to offer the student a FAPE.

B. Compensatory Education

The district alleges that the IHO's award of 250 hours of compensatory services is not an appropriate compensatory award. The district asserts that the only possible denial of FAPE was based on a lack of ABA services or a nonpublic school placement and that this should not result in compensatory services focused on instruction using Orton-Gillingham, a methodology that was not recommended in the September 2018 neuropsychological evaluation report.

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]). 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 E. Lyme, 790 F.3d at 456; 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]). 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 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"]).

The founder and director of EBL Coaching (director) testified that her agency "specialize[d] in providing one on one tutorial support to special education students using the right combination of research based multisensory techniques that [were] most appropriate for that student" (Tr. pp. 100-01). The director testified that she met the student and assessed her in June 2018 and the EBL Coaching staff began providing tutoring services to her in May 2019 (Tr. pp.

103-04; see Parent Ex. F).¹⁷ According to the director, the student exhibited "significant academic weaknesses, along with an intellectual disability and really need[ed] intensive remediation across the board" (Tr. p. 104). Additionally, the student was "lacking foundation across the board academically," although she was "responding very well to the Orton-Gillingham instruction" that EBL Coaching was providing her (Tr. pp. 104-05). However, the director stated that the student still had "a very long way to go, and still ha[d] difficulty with the basic foundation" (Tr. p. 105).

The director testified that the student's compensatory education should be provided to her in a 1:1 setting using a "multisensory Orton-Gillingham approach," which she described as a method that engaged "all the senses simultaneously" (Tr. p. 112). She continued that there was a "great deal of research" supporting the 1:1 multisensory approach as "being the most effective methodology for helping students who [were] struggling academically and who . . . often [had] intellectual disabilities" (Tr. pp. 112-13). To the extent the district's attorney suggested that the Orton-Gillingham methodology was "primarily developed for students with dyslexia," which the student does not have, the director responded that it was "initially" but "there's been a lot of research since then about using [the Orton-Gillingham] method for students who have language challenges and autism, and it's been - - proven very effective" (Tr. p. 120).

According to the director, the student had been "responding exceptionally well to this method" although "she need[ed] a great deal of intensive instruction to build her academics" (Tr. p. 113). In a letter dated August 13, 2019, the director reported that the student had "responded very well" to the Orton-Gillingham approach, which EBL Coaching staff were using with the student to develop her reading and writing skills (Parent Ex. F). Additionally, the student was "progressing nicely" using a multisensory approach to math (*id.*). At the time of her testimony in September 2019, the director stated that the student's reading had progressed from a prekindergarten level in May 2019, to "about a kindergarten level" and she was able to read basic words, she grasped letters and sounds and was starting to blend sounds together to form words (Tr. pp. 114; see Tr. p. 151).

The director testified she recommended "an average of ten hours per week over the one-year school time period;" a recommendation based upon her assessment of the student, review of the student's information and "our overall profile" (Tr. pp. 111-12, 123-24).¹⁸ Although the student had not yet been provided with 10 hours per week of tutoring services, the director "fe[lt] very strongly that it would be beneficial for her" based on her professional opinion (Tr. pp. 124-25).

¹⁷ The student's EBL Coaching evaluation report was not included in the hearing record (see Parent Exs. A-F; Dist. Exs. 1; 4-8). The director testified the student was receiving an average of five hours per week of tutoring services (Tr. p. 115).

¹⁸ The director recommended that the student receive 400 hours of compensatory tutoring, based on 10 hours per week and a 40-week school year (Tr. pp. 111-12). During the hearing, the parent clarified that the compensatory services requested were to remedy the denial of a FAPE from "February 2019 onwards" (Tr. pp. 185-86). In her post-hearing brief, the parent specifically requested a minimum of 250 hours of compensatory academic services to make up for 25 weeks of a denial of FAPE, further explaining the request was for 10 hours per week from February 2019 through the date of the IHO decision (IHO Ex. II at p. 10). The IHO appears to have picked up on the more specific request for 250 hours and awarded 250 hours of 1:1 multisensory tutoring services without further explanation (IHO Decision at p. 9).

The district asserts compensatory services using an Orton-Gillingham approach are not an appropriate form of relief as that methodology was not recommended in the neuropsychological evaluation report. However, except for asserting that the Orton-Gillingham method was not recommended in the neuropsychological report, the district did not offer any information to refute the parent's evidence that the 1:1 multisensory instruction the student was receiving was appropriate to meet her needs and that she demonstrated progress using that method (see Tr. pp. 113-14, 118-19; Parent Ex. F). Additionally, as discussed above, although the CSE's failure to follow the recommendations for ABA instruction was a part of the finding of a denial of FAPE, those recommendations for ABA instruction also incorporated a need for the student to receive 1:1 instruction (see Parent Exs. D at p. 20; E at p. 17). Therefore, the evidence in the hearing record does not provide a basis to depart from the IHO's award of 250 hours of compensatory tutoring using multisensory methods to remedy the denial of a FAPE (see IHO Decision at pp. 9-11).

C. Nonpublic School Placement

Initially, the district asserts that the IHO's award of one year of placement in a nonpublic school as a form of compensatory education was outside the scope of the proceeding as it was not raised in the due process complaint notice. However, the due process complaint notice includes, as compensation for a denial of FAPE for the 2018-19 school year, a request for a reconvene of the CSE to recommend a program with specified methodologies as recommended in the September 2018 neuropsychological evaluation report and a referral to the central based support team to find a nonpublic school program for students with autism as well as 10 hours per week of home-based ABA services (Parent Ex. A at pp. 3-4).¹⁹

The district next alleges that the IHO's award of placement in a nonpublic school circumvents the statutory process because it necessarily involves the student's placement for the 2020-21 school year, a year that is not at issue in this proceeding. The district also objects to the IHO's prospective award of 10 hours per week of at home ABA services. The district contends that because home-based ABA instruction is intended to help the student generalize skills to settings outside of the school environment, it is in excess of what the district would be required to provide in order to offer the student a FAPE.

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

¹⁹ With regard to her recommendation that the student receive ABA instruction "in and out of school" the neuropsychologist indicated that generalizing skills learned in the classroom to other settings was "one of the big problems for individuals with autism" (Tr. pp. 162-63; see Parent Ex. D at p. 20; see also Parent Ex. E at p. 18). She indicated that in order to gain skills, have those skills generalize and to prevent regression, skills should be taught and reinforced in a variety of settings including both home and school (Tr. p. 163).

student during one school year are not necessarily appropriate for the student during a subsequent school year").

Under the unusual procedural circumstances of this matter, the parties completed their post-hearing submissions in September 2019 (see IHO Exs. I; II). At that time the December 2018 IEP was still in effect and the parent was seeking "to ensure [the student was] afforded a free appropriate public education for the remainder of the 2019/20 school year," which the parent asserted consisted of placement in 12-month program in a nonpublic school for children with autism that provided ABA therapy in the classroom (IHO Ex. II at pp. 10-11). The parent also sought 30 hours per week of school-based ABA therapy and 10 hours per week of home-based ABA therapy (*id.* at p. 11). By the time the IHO issued his decision on May 11, 2020, almost eight months had passed, the 2019-20 school year had effectively ended due to the coronavirus (COVID-19) pandemic forcing the closure of schools, and the CSE should have met to develop the student's program for the 2020-21 school year (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]).

Additionally, in an effort to ensure that the hearing record was complete with regard to evidence relevant to a prospective award for the 2020-21 school year, on July 6, 2020 I directed the submission of additional evidence and offered the parties an opportunity to be heard regarding whether the requested evidence should be considered (see 8 NYCRR 279.10[b] [permitting a State Review Officer to seek additional evidence if he or she determines that such additional evidence is necessary]). Specifically, the district was directed to submit evidence as to whether it conducted a CSE meeting for the student for the 2020-21 school year, and if so, to provide a copy of the IEP. The district submitted a copy of a December 2019 IEP (SRO Ex. A). In reviewing the additional evidence, it is apparent that multiple assessments of the student were conducted in 2019 that were not a part of the hearing record in this matter and were not available to the IHO (*id.* at pp. 1-4).

Based on the foregoing, the IEPs challenged in the present matter are no longer in effect and the CSE has already convened to consider new evaluative information. 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 proceeding (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

The evidence in the hearing record supports the IHO's determinations that the program recommended in the December 2018 IEP did not offer the student a FAPE and that 250 hours of compensatory academic services, such as those provided to the student by EBL Coaching, was an appropriate remedy. However, the IHO's award of prospective placement at a nonpublic school along with 10 hours per week of home-based ABA services for the 2020-21 school year must be reversed.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED

IT IS ORDERED that that the IHO decision dated May 11, 2020 is modified by reversing that portions which directed the district to fund a full year at a nonpublic school program for students with autism, which utilizes an ABA approach, as well as 10 hours per week of home-based ABA services.

Dated: **Albany, New York**
 August 10, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER