The University of the State of New York

The State Education Department
State Review Officer
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No. 21-118

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:
Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Brian J. Reimels, Esq.

The Cuddy Law Firm, PLLC, attorneys for respondents, by Anthoula Vasiliou, 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 the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son for the 2020-21 school year and ordered it to fund compensatory education services. 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 has received diagnoses of autism with language impairment; attention deficit hyperactivity disorder (ADHD), combined type; persistent depressive disorder (dysthymia); receptive-expressive language delay; speech sound disorder; and speech impairment (Parent Exs. A at p. 3; B at p. 1; D at pp. 8-11, 13; E at p. 1).

The CSE convened on April 5, 2019 for an annual review and to develop an IEP for the student's first grade school year (2019-20) (see generally Parent Ex. B).[1] The CSE determined that the student was eligible for special education and services as a student with autism (Parent Ex. B at p. 1).[2] Academically, the student was at the kindergarten instructional level for both reading and math (id. at p. 14). Management needs identified at the time were to model appropriate responses and social interactions through the day, allow extra time to formulate and express responses, inform the student of the schedule and simplify per activity, use visual organizers/story maps, provide opportunities for story retelling, ensure the student's attention before giving directions/instructions, and use of a visual schedule, first/then chart, reward chart, frequent breaks, and manipulatives to assist with self-regulation (id. at p. 4). The CSE determined that the student required a "small classroom setting" to meet "his academic goals" and "social-emotional goals" (id. at p. 5). In addition, due to the student's behaviors, a behavioral intervention plan (BIP) was developed (id.). The CSE recommended a 12:1+1 special class placement (id. at p. 9). In addition, the CSE recommended one 30-minute session per week of counseling in a group of two, two 30-minute sessions per week of individual occupational therapy (OT), one 60-minute session every five weeks of group parent counseling and training, and two 30-minute sessions per week of speech-language therapy in a group of two (id. at p. 10). The CSE also recommended shared behavioral support paraprofessional services (id.).

Next, on May 15, 2020, the CSE met for an annual review and to develop an IEP for the 2020-21 school year (second grade) (see generally Parent Ex. C). The student's instructional levels in both reading and math continued to be at the kindergarten level (id. at p. 16). In addition to some of the management needs identified in the April 2019 IEP, the CSE also recommended additional management needs including frequent breaks, step-by-step instruction, preferential seating, visual aids, directions repeated, use of physical signals to increase and maintain attention to tasks, and first/then board for transitions (compare Parent Ex. B at p. 5, with Parent Ex. C at p. 5). For the 2020-21 school year, the CSE recommended a 12:1+1 special class placement with the following related services: one 30-minute session per week of counseling in a group of two, one 30-minute session per week of OT in a group of two, one 30-minute session per week of individual OT, one 60-minute session every five weeks of group parent counseling and training, one 30-minute session per week of speech-language therapy in a group of two, and one 30-minute session per week of individual speech-language therapy (Parent Ex C. at pp. 11-12). Additionally, the CSE recommended individual behavioral paraprofessional services (id. at p. 12).

The parents disagreed with the recommendations contained in the May 2020 IEP, and on August 18, 2020 sent a 10-day notice letter to the district expressing their disagreement and their intent to enroll the student at Happy Hour 4 Kids (HH4K) for the 2020-21 school year and seek

[1] According to the April 2019 IEP present levels of performance, the student received instruction in a 12:1+1 special class for kindergarten (2018-19 school year), however, the hearing record did not contain the kindergarten IEP (see Parent Ex. B at p. 2).

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

public funding for that placement (Parent Ex. I at pp. 1-2).[3] The student was enrolled in HH4K in September 2020 (Parent Ex. A at p. 3).

A. Prior Due Process Proceedings

The parents filed a due process complaint notice on or about November 21, 2019, alleging that the district failed to provide the student with a free appropriate public education (FAPE) for the 2017-18, 2018-19, and 2019-20 school years (IHO Ex. IV at pp. 2-3). In a decision dated June 2, 2020, the IHO held that the district failed to present any evidence in the case, that the district failed to meet its burden of proof, and therefore, the district denied the student a FAPE for the three years in question (id. at pp. 4, 7). As relief, the IHO ordered the district to fund the following independent educational evaluations (IEE): neuropsychological, OT, speech-language, assistive technology, functional behavioral assessment (FBA), and applied behavioral analysis (ABA) skills assessment (id. at pp. 7-8). Additionally, the IHO awarded compensatory education as follows: 184 hours of speech-language therapy, 92 hours of parent counseling and training, and 920 hours of individual academic tutoring (id. at p. 8).

B. Due Process Complaint Notice

In a due process complaint notice, dated October 29, 2020, the parents alleged that the district failed to offer the student a FAPE for the 2020-21 school year (see generally Parent Ex. A).

The parents alleged that the May 2020 CSE failed to recommend an appropriate program and services for the student (Parent Ex. A at pp. 4-5). More specifically, the parents argued that the May 2020 CSE recommendation for a 12:1+1 special class failed to provide the student with behavior interventions and instruction using ABA methods ("ABA therapy") (id. at p. 4). In addition, the parents argued that the May 2020 CSE failed to recommend a 12-month program to prevent regression and help the student make consistent progress (id.). It was also the parents' contention that the student required "more intensive" speech-language therapy support as he had "significant language deficits" (id.). Additionally, the parents contended that the CSE failed to consider whether the student would benefit from an assistive technology device as he struggled with communication skills, i.e., articulation, utterance length, fluency, and that he "struggled with academic skills" such as identifying letter sounds and spelling (id.). The parents further argued that the student remained at the "kindergarten functional level year after year" and did not make progress (id.).

Next, the parents argued that HH4K was an appropriate placement for the student (Parent Ex. A at p. 5). Specifically, the parents alleged that HH4K had a board-certified behavior analyst (BCBA) who designed the student's therapies and behavior interventions and oversaw the students' progress (id.). According to the parents, HH4K provided individual ABA therapy together with speech-language therapy, OT, physical therapy (PT), adapted physical education and a sensory

[3] The Commissioner of Education has not approved HH4K as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

gym (id.). The parents also contended that they cooperated with the district and therefore, equitable considerations weighed in their favor for an award of tuition at HH4K (id.).

As relief, the parents sought a finding that the student was denied a FAPE for the 2020-21 school year, that HH4K was an appropriate placement for the student, and that the equities favored the parents (Parent Ex. A at p. 5). The parents requested funding for tuition and transportation at HH4K for the 2020-21 school year (id.). Additionally, the parents requested funding for the cost of home-based ABA therapy for 10 hours per week and an "appropriate assistive technology device" (id. at p. 6). The parents also requested compensatory education services of ABA therapy and assistive technology training to remedy the district's failure to provide the student with a FAPE for the 2020-21 school year. Finally, the parents requested an order finding that the district's failure to immediately appoint a hearing officer impeded the parents' access to their due process rights and an order that the district authorize any tuition payments within 14 days (id.).

C. Impartial Hearing Officer Decision

An impartial hearing convened on February 2, 2021, and concluded on March 9, 2021, after two days of proceedings (Tr. pp. 1-70). In a decision dated April 19, 2021, the IHO determined that the district failed to offer the student a FAPE for the 2020-21 school year, that HH4K was an appropriate placement, and that equitable considerations weighed in favor of the parents' request for tuition reimbursement (IHO Decision at pp. 7, 11, 12-14). As relief, the IHO ordered the district to reimburse the parents and directly fund the cost of the student's tuition and transportation at HH4K for the 2020-21 school year together with an order for compensatory education services (id. at pp. 16-17, 20-22).

The IHO held that HH4K was an appropriate placement for the student as the program at HH4K was developed for the student's "individual learning needs" and was "specifically designed to meet his unique special education needs" which allowed the student to "benefit from instruction" (IHO Decision at pp. 12-13). The IHO also noted that the student made "significant progress" academically and behaviorally at HH4K (id. at 13). Further, the IHO found that the parents cooperated with the CSE and therefore, equitable considerations favored the parents' claim for tuition at HH4K for the 2020-21 school year (id. at p. 14).

Next, the IHO addressed the parents' request for compensatory education services (IHO Decision at pp. 16-20). The IHO held that the hearing record supported that the student required a 12-month program (id. at p. 18). Accordingly, the student was "deprived of a FAPE for the [12-] month 2020-21 school year and [wa]s entitled to compensatory services for that deprivation" (id.).

The IHO determined that the parents' request for 10 hours per week of home-based ABA therapy and for compensatory ABA therapy was a duplicative request which she was unwilling to grant (IHO Decision at p. 19). The IHO then clarified that "the total relief granted to remedy the [district's] failure to provide (a) a twelve month program for the 2020-21 school year and (b) ten hours per week of 1:1 ABA therapy in addition to [the] [s]tudent's ten-month program at [HH4K], as a necessary component of [the] [s]tudent's special education program for the 2020-21 school year consists of (a) payment for [the] [s]tudent's enrollment in the ten-month program at HH4K

for the 2020-21 school year and (b) up to 460 hours of 1:1 ABA tutoring, to be delivered to [the] [s]tudent at home and outside of school hours, over a period of one year from the date of this decision" (id.).

The IHO then discussed the parents' request for assistive technology to address the student's deficits in "reading, reading comprehension, writing, and drawing" (IHO Decision at p. 20). The IHO awarded the student those assistive technology devices in accordance with the assistive technology evaluation dated November 21, 2020, together with 15 hours of assistive technology training to ensure access to the assistive technology devices (id.; see Parent Ex. G).

Finally, the IHO awarded transportation expenses in the form of Metrocards for the student to attend HH4K and to attend the compensatory services (IHO Decision at pp. 16, 21-22).

IV. Appeal for State-Level Review

The district appeals from that part of the IHO decision that determined the student required a 12-month program for the 2020-21 school year and was denied a FAPE for failing to receive such services, and the IHO's award of 460 hours of compensatory home-based ABA services. According to the district, it was implementing the other non-appealed portions of the IHO Decision.[4]

First, the district argues that the IHO erred in awarding 460 hours of home-based ABA compensatory education services. The district contends that the student is not entitled to compensatory education services in addition to the award of tuition for HH4K. The district further contends that "it would be the rare case where a unilateral placement is deemed to provide instruction specially designed to meet the student's unique needs but the student is also deemed entitled to compensatory education to fill gaps in the services provided by such unilateral placement," citing Application of a Student with a Disability, Appeal No. 20-151 (Req. for Rev. at p. 5). Based upon this holding, the district argues that since HH4K was found to be appropriate and the student was awarded tuition for HH4K, this is not a "rare" or "unique" case where the student should also be awarded compensatory education services.

Second, the district contends that there was no evidence in the hearing record that the student required 10 hours per week of home-based ABA therapy. The district refers to the student's

[4] Although not raised by the parents in their answer, I must raise the issue that the district failed to comply with the regulatory requirement that a request for review be verified by the party. 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]). I remind the district that in the future all pleadings must be verified by a party and not the attorney. However, since this issue did not prejudice the parents, as a matter within my discretion I decline to dismiss the district's 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).

academic and behavioral progress as evidenced in the hearing record (Req. for Rev. at p. 6). Based upon this evidence, the district argues that the hearing record does not support the IHO's determination that the student requires 10 hours per week of home-based ABA therapy.

Third, the district contends that the IHO erred in determining that the home-based ABA therapy was required to remedy the failure of the district to recommend 12-month services for the 2020-21 school year. The district argues that if the parents believed the student required 12-month services, they should have obtained such services prior to September 2020. Accordingly, the district argues that the parents' "request for relief to remedy the [district's] purported FAPE failings has been satisfied, and all other claims for or awards of compensatory relief should be annulled" (Req. for Rev. at p. 8). Further, the district claims that equitable considerations do not warrant an award of compensatory services for any alleged denial of FAPE during July and August 2020 because the parents agreed with the May 2020 CSE program recommendation, which included 10-month services, and did not express disagreement with the May 2020 IEP until their August 18, 2020 10-day notice letter.

Lastly, the district argues that there is "scant" evidence in the hearing record that the student demonstrated "substantial regression" during the summer months (Req. for Rev. at p. 8). The district points to a private neuropsychological evaluation which recommended 12-month services to "address [the student's] deficits and prevent regression," and the HH4K program director's affidavit testimony "that she observed 'some regression,' in skills over weekends or breaks, but only in reference to [the student] requiring ABA services and not 12-month services" (id. at p. 9). Based upon the foregoing, the district argues that the hearing record does not support the IHO's conclusion that the student required 12-month services, and therefore, it follows that the student is not entitled to any relief for the district's failure to recommend 12-month services for the 2020-21 school year.

In their answer, the parents generally deny the allegations contained in the district's request for review. The parents argue that the IHO did not err when she found that the student required a 12-month program, that the district failed to provide 12-month services, and that the student required 460 hours of home-based ABA compensatory educational services. Additionally, the parents argue that 10 hours of home-based ABA "is a necessary component" of the student's program, and the compensatory services were awarded for the district's failure to recommend and provide home-based ABA services, the district's failure to provide a 12-month program, and the district's failure to provide the student with any ABA services during July and August 2020 (Answer at p. 2).

The parents argue that the student is entitled to compensatory education in addition to tuition for the unilateral placement. According to the parents, the requests for tuition and compensatory education are to remedy the district's failure to offer the student a 12-month program for the 2020-21 school year.

The parents allege that the district's concession of a FAPE should be taken to mean that the district "conceded a denial of FAPE based on the allegations of the due process complaint notice, which included allegations that the [district] failed to provide the [s]tudent a FAPE when it failed

to provide a [12]-month program and ABA therapy in both the school and home environments" (Parents' Mem. of Law at p. 6).

Ultimately, the parents seek to uphold the IHO's award of 460 hours of home-based ABA compensatory education services as relief for the district's failure to provide 12-month services and failure to provide 10 hours per week of home-based ABA services for the 2020-2021 school year.

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" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[5]

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).

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

VI. Discussion

A. Preliminary Matters

1.Scope of Review

State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Here, neither party appealed the IHO's findings regarding the district's failure to offer the student a FAPE for the 2020-21 school year, the student's entitlement to tuition and transportation at HH4K as an appropriate placement, or the award of assistive technology devices and assistive technology training for the district's failure to offer the student a FAPE for the 2020-21 school year. As such, those findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

2. 12-Month Services

As a preliminary matter, I shall also address the district's appeal of the IHO's finding that the student required 12-month services for the 2020-21 school year (IHO Decision at p. 18).

The district fails to recognize that its argument pertaining to 12-month services is effectively waived when the district conceded that it denied the student a FAPE for the 2020-21 school year which included the summer 2020 program and services, and the district failed to appeal the IHO's finding of a FAPE denial for the 2020-21 school year (see Tr. p. 21).[6] In the absence of any additional evidence concerning clarification of the scope of its concession and for purposes of fashioning relief related to the denial of a FAPE for the 2020-21 school year, I will construe the district's concession of the FAPE issue at the impartial hearing as indicating that the district de facto admitted the totality of the deficiencies 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).

[6] In their due process complaint notice, the parents alleged that the district failed to offer the student a FAPE for the 2020-21 school year in failing to recommend a 12-month program to "prevent regression" (Parent Ex. A at p. 4).

Accordingly, in part, the district's failure to provide 12-month services resulted in a denial of FAPE to the student for the 2020-21 school year. However, because the IHO awarded tuition reimbursement at HH4K for the district's denial of FAPE for the 2020-21 school year, as shall be further discussed below, there is no basis for any further relief to the parents for the district's failure to provide 12-month services.

B. Relief

1. Compensatory Education Services Generally

As raised by the district in its appeal, it is first necessary to address whether an appropriate remedy for a denial of FAPE should consist of both tuition reimbursement and compensatory education for the 2020-21 school year.

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). A unilateral placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

Another form of relief available is compensatory education, which is an equitable remedy 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 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]). 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 Cnty., Ky. 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"]).

Some courts have held that compensatory education is not available as an additional or alternative remedy when reimbursement for the costs of a unilateral placement is also at issue for the same time period (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]; but see I.T. v. Dep't of Educ., State of Hawaii, 2013 WL 6665459, at *7-*8 [D. Haw. Dec. 17, 2013] [finding that the student was entitled to compensatory education for services the student received at the nonpublic school]). The Second Circuit Court of Appeals has not directly addressed this question and, generally, appears to have adopted a broader reading of the purposes of compensatory education than the Third Circuit (compare P.P., 585 F.3d at 739 [finding that "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education"], with E. Lyme, 790 F.3d at 456-57 [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]). Accordingly, unlike the Third Circuit, the Second Circuit's approach to compensatory education may leave room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but the parent's request for tuition reimbursement is denied under a Burlington/Carter analysis (see Application of a Student with a Disability, Appeal No. 16-050). However, if permitted, it would be the rare case where a unilateral placement is deemed to provide instruction specially designed to meet the student's unique needs, but the student is also deemed entitled to compensatory education to fill gaps in the services provided by such unilateral placement.

Here, in their due process complaint notice, the parents requested tuition at HH4K for the 2020-21 school year, as well as funding for home-based ABA compensatory services from a

"provider of the [p]arents' choice at their normal and customary rate" (see Parent Ex. A at p. 6). In support of their argument, the parents contend that their request for compensatory services for the 2020-21 school year "are requested not to make up for any deficiencies in HH4K's program but to make up for the lack of a home-based program for the [s]tudent" (Answer at p. 3). The parents cite Application of a Student with a Disability, Appeal No. 20-151, and argue that unlike that case the parents here "are not seeking compensatory education to fill gaps in the services provided by HH4K" (Parents' Mem. of Law at p. 11). The parents contend that the compensatory services are to address the district's failure to provide any services in summer 2020 and the district's failure to recommend home-based ABA for the 2020-21 school year. Furthermore, the parents argue that the district should not be "excused" from providing compensatory education services where the parents were unable to afford such services (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012]; Parents' Mem. of Law at p. 12).

The district on the other hand argues that because the IHO found that HH4K was an appropriate unilateral placement "it was incongruous to additionally find the [s]tudent was entitled to compensatory services to ameliorate deficiencies in [a] unilaterally secured program" (Req. for Rev. at p. 5). The district also argues that the parents never obtained the home-based ABA services, and therefore, under Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 (2d Cir. 2020), the services cannot be considered as part of the parents' unilateral placement (id. at p. 7).

A parent may obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "'private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365). However, for the outside services to represent a portion of the unilateral placement, the parent must undergo the financial risk associated with unilateral placements (see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] ["Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test"] [first emphasis added] [internal quotations marks and footnotes omitted]; see also Carter, 510 U.S. at 14). To the extent a parent cannot afford to front the costs of the services, the district may be required to directly fund the services, but only if it is shown that the parent was legally obligated to pay for the services but, due to a lack of financial resources, had not made payments (see Mr. & Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]).

Here, the hearing record does not include evidence of the parents' financial obligation for the home-based ABA services or their inability to pay. Indeed, the parents are not seeking funding for private related services they secured for the student; instead, they are seeking district funding

of compensatory education services to make up for gaps in the unilateral placement which does not provide the home-based ABA that the parents seek as part of their requested relief in this matter. Accordingly, there is no basis to find that this matter represents a unique or rare circumstance such that it would warrant an order requiring the district to fund both the unilateral placement and prospective compensatory education to make-up for deficiencies in the placement chosen by and arranged for by the parent.

2. Home-Based ABA Services

Even if compensatory education was an appropriate remedy in this matter, there is no basis in the hearing record for an award of home-based ABA services.

Several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see, e.g., F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13-*14 [S.D.N.Y. Jul. 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *11 [S.D.N.Y. Mar. 31, 2014]; see also Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]).

An ABA skills assessment was performed in July 2020 as a result of the previous IHO's award of an independent ABA skills assessment (see Parent Ex. E; IHO Ex. IV at p. 8). Of significance, this information was not available to the May 2020 CSE, and therefore, not reviewed or considered at the May 2020 CSE meeting.[7] The ABA skills assessment revealed that the student's language abilities were in the "developmental age of approximately 30 to 48 months" (Parent Ex. E at p. 4).[8] The student's communication abilities including speech, listening, conversation, and non-verbal communication were in the low range (id. at p. 13). The skills assessment also revealed that the student functioned at the "[e]xtremely low range when performing functional academic skills that form the foundations of reading, writing, and mathematics" (id.). The student's ability to make independent choices, exhibit self-control, and take responsibility when appropriate (self-direction) was also in the extremely low range (id.). Overall, the student's adaptive behavior was characterized as "extremely low functioning" compared to peers (id. at p. 14). While the student demonstrated strengths in the areas of "[t]act,

[7] "[I]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and . . . reasonably known to the parties at the time of the placement decision."

[8] At the time of the ABA skills assessment the student was seven years of age (Parent Ex. E at p. 1).

[l]istener responding, [p]lay, and [i]mitation," assessments revealed that the student's major deficits were in the areas of social, expressive language, and behavior domains (id.).

Based upon the ABA skills assessment, the BCBA recommended that the student receive 30 hours weekly of "data-driven instruction" that adhered to ABA methods in the school setting, and 10 hours per week of home-based ABA instruction (Parent Exs. E at p. 15; F at p. 22; R at p. 2).[9] The BCBA recommended that "at least [four of the home-based ABA] hours out of 10 occur during weekends" (Parent Ex. E at p. 15). The BCBA recommended home-based ABA instruction as it was "necessary" to his program as the student "exhibited problem behaviors" at school, in the home and in the community (Parent Ex. R at p. 2).[10] Those problem behaviors were generally described as "physical aggression, elopement and non-compliance" (id.). Further, the BCBA's affidavit testimony stated that because the student "engaged in problem behaviors that threaten[ed] his own safety and safety of others, and constitute[d] a barrier to quality of his life, home-based ABA should be provided" (id.). Finally, the BCBA wrote in her affidavit that ABA therapy "across settings" "support[ed] generalization and maintenance of treatment gains" which was the "process of practicing learned skills often and thoroughly enough to ensure that [the student] [wa]s able to use them when needed, in any given environment and with a variety of people" (id.).

In further support of the recommendation for home-based ABA services, the program director at HH4K described the student's progress at school and the need to continue the progress at home.[11] The program director for HH4K, in her affidavit testimony, stated that the program "offer[ed] a full-day individualized special education program with intensive ABA therapy" (Parent Ex. Q at p. 1).[12] The HH4K program director's affidavit testimony revealed that the student was "making steady academic gains" and had "met many of his academic goals" (id. at p. 2). He had moved up several reading levels, met his math goals, and was "making steady gains in his writing skills" (id.). Further, the behavioral strategies implemented helped the student increase his ability to self-regulate (id. at pp. 2-3). Although there was no evidence in the hearing record that home-based ABA services were provided while the student attended HH4K, the HH4K program director stated that the student "would benefit from having home ABA services added to his

[9] In her July 2020 assessment report, the BCBA also recommended an award of compensatory ABA services to the student for the district's failure to provide a FAPE for the 2017-18, 2018-19, and 2019-20 school years (Parent Exs. E at p. 16; F at pp. 23-24). The recommendation was for 10 hours per week of individual ABA instruction for 46 weeks each school year (138 weeks total for the three year period) for a total of 1380 hours of individual compensatory ABA services (id.).

[10] State regulation provides that "[t]he [IHO] may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross examination" (8 NYCRR 200.5[j][3][xii][f]).

[11] The HH4K program was described as an intensive program to help students "develop functional life skills and social skills by targeting behaviors and meeting developmental needs" by using "[b]ehavior modification strategies [] utilizing the principles of [ABA] under the guidance" of a BCBA (Parent Exs. K; O at p. 1).

[12] The October 2020 progress report stated that the student "require[d] explicit, direct teaching using ABA methodology to manage his competing behaviors that preclude[d] him from participation in a less restrictive environment" (Parent Ex. O at p. 10).

program" (id. at p. 3). The basis for this conclusion was that the student was "significantly behind" academically, socially, and behaviorally (id.). Furthermore, she testified that the home ABA instruction "would be beneficial for [the student] to have the additional services to help him generalize his skills to the home and community" (id.). The program director testified that the student had "made so much progress in school" and therefore, they would like to see that progress "transferred home" (Tr. p. 44).[13]

On a final note, both the April 2019 CSE and May 2020 CSE recommended parent counseling and training (Parent Exs. B at p. 10; C at p. 12).[14] In addition, on June 2, 2020, the previous IHO ordered 92 hours of compensatory parent counseling and training (IHO Ex. IV at p. 8). The hearing record contains no evidence concerning whether the parents participated in any parent counseling and training sessions, however, the services were recommended for the parents to obtain skills to assist the student within the home environment. Accordingly, the hearing record indicates that the home-based ABA could potentially also be excessive and duplicative of the parent counseling and training provided to the parents to assist them with the student's behavioral challenges and day-to-day functioning in the home.

Therefore, because the recommendations in the hearing record for the student to receive home-based ABA services was primarily for the purpose of generalizing the student's skills to the home setting and the program director of HH4K testified that the student was making progress in school without the home services, there is an insufficient basis to conclude that the student required home-based ABA instruction during the 2020-21 school year. While I understand the parents desire to see additional improvements in the student's experiences in the home, the district was not required to provide "every special service necessary to maximize the student's potential" (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 756 [2d Cir. 2018], cert. denied sub nom., 139 S. Ct. 322 [2018]).

VII. Conclusion

Having found that those portions of the IHO's decision which found that the district failed to offer the student a FAPE and ordered the district to fund the student's unilateral placement at HH4K are final and binding, the circumstances of this matter do not warrant compensatory

[13] As noted by the district in its request for review, the student no longer required medication while at HH4K (Parent Ex. P at p. 2; Req. for Rev. at p. 6). The mother's affidavit testimony was that since attending HH4K, the student "has learned to control himself more easily and more quickly, so he has not needed to go back on the medication" (Parent Ex. P at p. 2).

[14] State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's [IEP]" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]).

education in addition to the unilateral placement in order to remedy the district's failure to offer the student a FAPE for the 2020-21 school year.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated April 19, 2021 is modified by reversing that portion which ordered the district to fund 460 hours of compensatory home-based ABA services.

Dated: **Albany, New York**
July 12, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER