



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 21-213

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

**Appearances:**

The Law Office of Elisa Hyman PC, attorneys for petitioners, by Erin O'Connor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which found that respondent (the district) failed to offer or provide the student an appropriate educational program and services for the 2018-19, 2019-20, and 2020-21 school years but denied, in part, their request for certain compensatory education as relief. 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 is bilingual (English and Spanish) and according to his parents was diagnosed with a speech delay at the age of two for which he received speech-language therapy through the Early Intervention Program (EIP) (Parent Ex. Q at p. 1). In August 2019, the student underwent a psychological evaluation "in order to assess his cognitive and adaptive functioning and to assist in both diagnostic clarity and in determining service eligibility" (Parent Ex. Q at p. 1). The student attended prekindergarten for the 2019-20 school year, and was referred for an evaluation to determine his eligibility for special education due to "parental concern about his language, sensory, motor, social, and attentional issues"; evaluations were conducted in October 2019 (Parent Ex. R at pp. 1, 3, 8, 15, 19). Thereafter, a Committee on Preschool Special Education (CPSE) convened on or about November 18 and November 20, 2019, found the student eligible for special education

as a preschool student with a disability, and recommended that, for the 2019-20 school year, he receive five hours per week of individual bilingual special education itinerant teacher (SEIT) services, one hour per week of speech-language therapy in a group of two, and one hour per week of individual occupational therapy (OT) (Parent Ex. J at p. 1; see Parent Exs. U; W at ¶¶ 29, 38). The student began receiving the services recommended in the November 2019 IEP in his preschool classroom (Parent Ex. J at p. 1). School buildings were shuttered statewide in March 2020 due to the COVID-19 pandemic. The student received services remotely beginning in mid-March 2020 (Parent Ex. W at ¶ 41).

A CSE convened on March 23, 2020 to conduct the student's initial review as a school-age student for the 2020-21 school year, found the student eligible for special education as a student with a speech or language impairment. and recommended that he attend a 12:1+1 special class and receive one 30-minute session of individual speech-language therapy, two 30-minute sessions of speech-language therapy in a group of two, and two 30-minute sessions of individual OT (Parent Exs. J at p. 1; K at p. 2; W at ¶ 51).<sup>1</sup> In a prior written notice dated June 11, 2020, the district summarized the recommendations of the March 2020 CSE and notified the parents of the particular public school site to which it assigned the student to attend for the 2020-21 school year (Parent Ex. K). Instead, the student enrolled in a charter school in August 2020 for the 2020-21 (kindergarten) school year after graduating from his prekindergarten program in the summer of 2020 (Parent Ex. W ¶¶ 61, 63). The student's class at the charter school was a general education classroom with integrated co-teaching (ICT) services, which the student attended remotely (Parent Ex. W ¶¶ 64-65).

### **A. Due Process Complaint Notice and Subsequent Events**

By due process complaint notice, dated September 8, 2020, the parents alleged, among other things, that the district failed to appropriately evaluate the student and offer a free appropriate public education (FAPE) for the 2018-19, 2019-20, and 2020-21 school years and requested, in part, independent educational evaluations (IEEs) on an interim basis including speech-language, auditory processing, neuropsychological, OT, assistive technology evaluations, as well as an independent functional behavior assessment (FBA) and behavior intervention plan (BIP) (see Parent Ex. A).

The parents filed an amended due process complaint notice, dated November 13, 2020 (Parent Ex. B). In a partial resolution agreement executed by the parties on November 13 and November 16, 2020, respectively, the district agreed to fund the IEEs requested by the parents (Parent Ex. F). The parties also executed a pendency agreement on November 25, 2020, which provided that the student's stay-put placement during the pendency of the proceedings was based on the November 2019 CPSE IEP, as well as the student's "operative placement," and consisted of a 10-month program of five hours per week of SEIT services, three 30-minute sessions of individual speech-language therapy, and two 30-minute sessions of individual OT (Parent Ex. C).

An auditory and language processing IEE was conducted on December 4, 2020 which found that the student presented with an auditory processing disorder and a significant

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<sup>1</sup> Copies of the student's November 2019 and March 2020 IEPs were not entered into evidence during the impartial hearing.

communication impairment with deficits in the areas of receptive, expressive and pragmatic language, as well as a mild articulation disorder (Parent Ex. M at pp. 1, 8). The speech-language pathologist who conducted the evaluation recommended, among other things, that the student be provided an FM unit, speech-language therapy five times per week (two weekly individual sessions and three weekly sessions in a small group setting for no longer than 30 minutes per session) and compensatory speech-language services in the amount of 200, 30-minute sessions for each year of deprivation with no expiration date (*id.* at p. 10). An OT IEE was conducted on January 20, 2021, which found that the student had significant delays in the areas of sensory processing and regulation, core stability, fine motor skills, and self-help skills, which had negatively impacted the student's ability to participate in his academic curriculum (Parent Ex. G at pp. 1, 20). The occupational therapist recommended that the student receive three 45-minute OT sessions per week and a bank of compensatory OT services in the amount of 92 hours (one hour per week for 46 weeks for 2 years) with no expiration date (*id.* at pp. 20-21).

A neuropsychological and educational IEE was conducted on January 24, 2021 during which the student was administered the Wechsler Preschool and Primary Scale of Intelligence, fourth edition (WPPSI-IV), resulting in a full-scale IQ of 62 and reflecting that the student's verbal abilities, working memory, and processing speed were deemed extremely low relative to his peers, however, his non-verbal cognitive functions, visual-spatial processing and fluid reasoning were relative strengths (Parent Ex. J at pp. 1, 3-4, 8). With respect to language functioning, the neuropsychologist found that the student demonstrated significant receptive and expressive language delays and performed in the very low range receptively and in the low average range expressively (*id.* at pp. 4, 8-9). With regard to attention, executive functioning, and memory, the student reportedly had significant difficulties in attention, hyperactivity, and impulsivity with the most prominent challenges identified in impulse control, self-monitoring, cognitive flexibility, emotional regulation, and working memory, which were confirmed through formal testing in which the student demonstrated significant challenges in speeded processing, and short-term working memory (*id.* at pp. 5, 9). Academically, the student was found to have significant challenges in reading comprehension and below-age level skills in spelling and math, although math was identified as a personal strength (*id.* at pp. 5-6, 9). In terms of social/emotional and behavioral functioning, the student was identified with difficulties related to inattention, hyperactivity, social functioning, atypical behaviors, anxiety, and physical symptoms, and was noted to have challenges with sleep and temper issues at home (*id.* at pp. 6-7, 9). The neuropsychologist stated that the student's profile, which included social communication issues, restricted interests, repetitive behaviors, sensitivity issues and behaviors, and struggles with transitions and changes in routines, was highly consistent with autism spectrum disorder (*id.* at p. 10). The neuropsychologist found that the student met the criteria for diagnoses of autism spectrum disorder and attention deficit hyperactivity disorder (*id.*). The neuropsychologist recommended that, due to the district's failure to identify the student as a student with autism spectrum disorder, the student should receive a large bank of remedial services "for the missed opportunities for services over the past 3 school years," including 6,240 hours of 1:1 applied behavior analysis (ABA) instruction during the school day, 234 hours of social skills training, 1,560 hours of individual academic intervention, 1,560 hours of home-based ABA, and 312 hours of parent counseling and training (*id.* at p. 11).

An independent FBA was conducted on January 18, 2021 through February 4, 2021, the results of which were set forth in a report dated March 13, 2021, along with a BIP (Parent Ex. N).

After noting the documents reviewed, which included the January 2021 neuropsychological and educational IEE, the Board Certified Behavior Analyst (BCBA) who conducted the FBA identified problem behaviors that the student engaged in that prevent him from functionally engaging with his environment, including: (1) elopement, in which the student left his chair and ran away when any non-preferred task was given, left the designated area when asked to sit with the evaluator, and abandoned the designated area every five to ten minutes; (2) non-compliance, in which he ignored directions, did not want to participate in non-preferred activities, and was reported to ignore the other person's directions and pay attention to something else, at home and in school; (3) off-task behavior, in which the student focused for less than one minute on a non-preferred task or activity, focused for less than five minutes on a preferred song or video, looked at other things nearby when called or given a direction, and looked at the evaluator then looked at other things (e.g., his toys, the ceiling) when asked to engage in a task (*id.* at pp. 6-7). The BCBA concluded that the functions of the student's target behaviors were that they resulted in attention from his parents and teachers, resulted in a reduction or removal of demands, granted him access to preferred activities, items or routines, or were inherently enjoyable (*id.* at p. 11). In making a recommendation for the student's educational program and compensatory hours, the BCBA stated that the student's behaviors largely achieved the identified functions and that his learning history illustrated that persistent mismanagement and lack of appropriate strategies to constructively address his communication and behavioral needs had reinforced the problematic behaviors so that they "permeated every aspect of his life" and prevented him from developing necessary foundational skills (*id.* at pp. 11-12). The BCBA recommended that the student attend a 12:1+1 classroom with a full-day (40 hours per week) of 1:1 ABA instruction, 10 hours per week of home-based ABA by a BCBA, Licensed Behavior Analyst (LBA), or ABA trained special education teacher, two hours per week of parent counseling and training, and compensatory education of 1,560 hours (10 hours per week times 52 weeks times 3 years) of ABA therapy and 312 hours (2 hours per week times 52 weeks times 3 years) of parent counseling and training (*id.* at pp. 11-13).

The parents amended their due process complaint notice a second time on May 17, 2021, adding claims and requested relief, which reflected the recommendations made in the IEEs completed between December 2020 and January 2021, but which otherwise reiterated allegations and requested relief as set forth in the initial and first amended due process complaint notices (compare Parent Ex. A, and Parent Ex. B, with May 2021 Amended Due Process Compl. Notice). Generally, the parents alleged that, for the 2018-19, 2019-20, and 2020-21 school years, the district failed to timely and adequately evaluate the student; failed to create appropriate IEPs and placements; and failed to follow the procedural requirements of the IDEA (May 2021 Amended Due Process Compl. Notice at pp. 1-2). The parents further asserted that the district violated child find provisions, failed to provide adequate procedural safeguard and prior written notices during the school years at issue, and failed to provide translation and interpretation services and critical records to the parents in their native language (*id.* at p. 2). In addition, the parents asserted that the district violated section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a), and the IDEA by "adopting and implementing systemic and blanket policies regarding special education service delivery that have affected the services offered" to the student (*id.*).

As relief, among other things, the parents requested: (1) findings that the district failed to offer the student a FAPE for the 2018-19, 2019-20, and 2020-21 school years; (2) an order for a physical therapy (PT) evaluation at reasonable market rates; (3) compensatory educational services of 6,240 hours of 1:1 instruction with ABA during the school day, 234 hours of social skills

training, 1,560 hours of individual academic instruction, 1,560 hours of home-based special education teacher support services (SETSS) with ABA, 312 hours of parent counseling and training, 600 hours of speech-language therapy services, and 92 hours of OT; (4) an order directing the district to fund the educational program recommended in the IEEs; and (5) interpretation and translation services, "enhanced market rates" for ordered services, and reimbursement for out-of-pocket expenses (May 2021 Amended Due Process Compl. Notice at pp. 13-15).

## **B. Impartial Hearing Officer Decision**

An impartial hearing convened on February 11, 2021 and concluded on August 25, 2021, after six days of proceedings (Tr. pp. 1-75).<sup>2</sup> In a decision dated September 11, 2021, the IHO determined that the district failed to meet its burden to prove that it provided the student with a FAPE for the 2018-19, 2019-20, and 2020-21 school years (IHO Decision at p. 4). In particular, the IHO found that the district did not present any testimony to support a finding that it offered the student a FAPE for the three school years at issue, the district "explicitly stated that it did not defend FAPE for any of the school years," and that the "only issue" to be decided was "remedy" (*id.*). In addition, the IHO concluded that there was "absolutely no explanation, let alone a cogent and responsive explanation" for the CSE's program and placement recommendations (*id.*).

With respect to the parents' request for compensatory education, the IHO denied the parents' request for 6,240 hours of 1:1 ABA services during the school day, 234 hours of social skills training, 1,560 hours of individual academic instruction, 1,560 hours of home-based ABA, and 312 hours of parent counseling, finding that these requested services were "not appropriate in their form and amount of compensatory education for the [s]tudent's three-year FAPE deprivation" (IHO Decision at pp. 9-10). The IHO found that there was no testimony that an award of these additional services "would place the student in the position he . . . would have been in had the district complied with its obligations under the IDEA" nor as to "how the incredibly large number of compensatory hours would be provided to this 6-year old student," noting that the additional number of hours requested would be "in addition to the child's regular school day" (*id.* at p. 10).

However, the IHO ordered the district to provide a bank of 92 hours of compensatory OT services and a bank of 200 hours of compensatory speech-language therapy services (IHO Decision at pp. 12, 22). The IHO found that the requested services were "an appropriate form and amount of compensatory education for the [s]tudent's three-year FAPE" denial, using a "quantitative and qualitative analysis" and based on the parents' witnesses' testimony and reports, further finding that their testimony was "credible and convincing" and based on detailed and comprehensive evaluations of the student, and that the "appropriateness of the number of hours of compensatory services requested" was also supported by evaluations and testimony which was uncontroverted (*id.* at pp. 12-13).

With respect to the parents' request for an order directing the district to fund the educational program recommended for the student in the IEEs going forward, the IHO stated that she believed that "a request that would help the student is a deferral to the [central based support team (CBST)]

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<sup>2</sup> Although the parents' exhibits were not specifically admitted into evidence on the record, they were discussed and objections were considered (*see* Tr. pp. 39-42); additionally, the exhibit list attached to the IHO's decision includes them under the heading of documents entered into the record (IHO Decision pp. 24-27).

where a placement could be located that could provide 1:1 ABA if that was warranted"; noting, however, that this was not the requested relief, the IHO declined what she termed the parents request "that [she] usurp the authority of the [district] and CSE and authorize [her] own IEP recommendations and services for the student" (IHO Decision at pp. 10-11). Instead, the IHO ordered the CSE to reconvene within 20 days of receipt of all evaluations of the student, consider all the available information, consider the program recommended in the IEEs and requested by the parents and if not implemented "articulate an evidence-based reason" as to why (id. at pp. 11-12, 22-24).<sup>3</sup> The IHO also directed the district to prepare a new IEP that "comprehensively describes the [s]tudent and includes appropriate related services and goals" (id. at p. 12).

The IHO further found that to the extent that pendency services were not fully implemented, "those services are due to the student and shall be calculated within 30 days of this order and reserved in a bank of hours for the student" (IHO Decision at pp. 13, 22).

With respect to the parents' request for a PT evaluation, the IHO found that the record failed to establish that the parents requested or disagreed with a PT evaluation from the district, as required for an IEE, but ordered the district to conduct an evaluation (IHO Decision at pp. 21, 22). The IHO also denied the parents' requests for future evaluations as premature (id. at p. 21). Finally, the IHO denied the parents' discrimination claims under section 504 (id.).

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<sup>3</sup> The IHO summarized the requested program as including the following:

- i. Small, classroom setting 12:1+1 of children without behavior issues and 40 hours of full-day 1:1 . . . (ABA) per week within the classroom setting;
- ii. OT 3x45x1:1;
- iii. Implementation of a Sensory Diet;
- iv. [speech-language therapy] 5x per week for 30 minutes, 2x1:1 and 3x3:1[;]
- v. Social skills training 3x weekly for 30 minutes in a group setting during the school day;
- vi. 1:1 academic instruction for 10 hours weekly from an ABA provider. However, if one cannot be sourced, then SETSS-ABA should be delivered by . . . a highly skilled therapist, with 1 hour of supervision weekly provided by a . . . (BCBA) or . . . (LBA);
- vii. 10 hours a weekly of home-based ABA from an ABA provider. However, if one cannot be sourced, then SETSS-ABA should be delivered by a highly skilled therapist, with 1 hour of supervision weekly provided by a . . . (BCBA) or . . . (LBA);
- viii. Parent counseling and training 2x weekly for 60 minutes from an ABA provider. However, if one cannot be sourced, then SETSS-ABA should be delivered by a highly skilled therapist, with 1 hour of supervision weekly provided by a . . . (BCBA) or . . . (LBA)[;]
- ix. 12-month Extended School Year[;]
- x. The District will fund a FM System (personal binaural unit - or sound field unit) for use at school and at home[;]
- xi. Accommodations include: preferential seating, up front close to the teacher, away from distractions; extended time for testing, given in a quiet area, pre-teaching, study notes and guides ahead of lessons. Repetition, explanation and clarification, lengthy information broken down with adequate pacing and pause time for processing. Visual supports and a word bank; then the DOE is to prepare a new individualized education program that comprehensively describes the Student and includes appropriate related services and goals

(IHO Decision at pp. 22-24).

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

The parents appeal. The parents assert that the IHO failed to hold the district to its burden of production and persuasion with respect to the question of remedy, erroneously shifting the burden to the parents to establish the appropriate remedy. The parents also assert that the IHO erred in her analysis of compensatory education by suggesting that the parents were seeking a "default judgement" award. In addition, the parents argue that the IHO erred in her quantitative/qualitative analysis of the parents' requested relief by completely rejecting the neuropsychologist's recommendations as purely quantitative thereby denying the parents any compensatory remedy for the three-year FAPE denial. The parents contend that the IHO's conclusion about the compensatory request is belied by the record as the neuropsychologist specifically testified that the student needed the large number of hours to make up for the three years of services he did not receive during a critical development time so that he could approach age-level skills and as to how the parents could use the hours going forward. The parents further contend that they were entitled to their requested compensatory relief and that the IHO's award did not fully compensate them. Further, the parents assert that the IHO erred in sua sponte ordering the district to create a prospective IEP for the 2021-22 school year with a deferral to CBST, instead of ordering compensatory education. The parents also claim that the IHO failed to rule on claims raised in the due process complaint notices and make specific findings with respect to the denial of FAPE, including that the district failed to provide interpreters and translated documents, timely and adequately evaluate the student, provide adequate procedural safeguards and prior written notices, as well as numerous IEP deficiencies and the parents' systemic claims. Lastly, the parents contend that the IHO erred in failing to rule that the district violated section 504.<sup>4</sup> As relief, the parents request a reversal of the IHO's denial of compensatory services and the order directing the CSE to reconvene, and an award of: (1) 6,240 hours of 1:1 ABA instruction (or a minimum of 1,560 hours of 1:1 ABA instruction); (2) 234 hours of social skills training; (3) 1,560 hours of 1:1 academic intervention; (4) 1,560 hours of home-based ABA; and (5) 312 hours of parent counseling and training.

In an answer, the district asserts that the IHO decision should be affirmed and the parents' request for review dismissed. The district argues that, having not appealed the IHO's FAPE findings, the issue to be decided is whether the IHO erred in not awarding the compensatory service hours recommended by the neuropsychologist. The district asserts the IHO properly awarded the hours recommended in the OT and speech-language evaluations and properly denied the compensatory service hours recommended by the neuropsychologist, further arguing that there was nothing in the neuropsychologist's evaluation to suggest that his recommendations would put the student in the place he would have been but for the denial of FAPE except the statement that

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<sup>4</sup> An SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. May 12, 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at \*11 [S.D.N.Y. Aug. 5, 2016]). Therefore, I do not have jurisdiction to review any portion of the parents' claims regarding violations of section 504 and they will not be further discussed.

the hours should be calculated for the missed opportunities for services over the past three school years. The district argues that the parents' remaining allegations lack merit and do not warrant disturbing the IHO's determinations.

## 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]).<sup>5</sup>

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

## **VI. Discussion**

### **A. Scope of Review**

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]). In addition, an IHO's

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<sup>5</sup> 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).

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 challenged the IHO's findings that the district failed to offer the student a FAPE for the 2018-19, 2019-20 and 2020-21 school years, the order for the district to conduct a PT evaluation, the compensatory services awards for 92 hours of OT and 200 hours of speech-language therapy services, or the order for the district to calculate missed pendency services and reserve them in a bank of hours for the student. 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]).

### **B. Relief—Compensatory Educational Services**

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]; 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, 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"]; L.M., 478 F.3d at 316 [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"]).

Initially, the parents submitted both documentary and testimonial evidence relating to the student's need for compensatory services (see Tr. pp. 39-57; Parent Exs. G; H; J; M; N; O; T). Conversely, the district did not submit any evidence proposing an appropriate compensatory remedy (see Tr. pp. 39). Although the district briefly cross-examined the neuropsychologist, it declined to present an opening statement at the time of the hearing or submit a closing brief (see Tr. pp. 45-52, 73). The district was required under the due process procedures set forth in New York State law to address the issue by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that

would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at \*4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; see also E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524). Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district, it is not an SRO's responsibility to craft the district's position regarding the appropriate compensatory education remedy.

While the district failed to present evidence or its view of an appropriate compensatory education award, the IHO was not required to award all of the relief that the parents sought. Such an outright default judgment awarding compensatory education—or as in this case, any and all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]). Indeed, an award ordered so blindly could ultimately do more harm than good for a student (see M.M., 2017 WL 1194685, at \*8 ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). On the other hand, "[o]nce a plaintiff has established that she is entitled to an award, simply refusing to grant one clashes with Reid, which sought to eliminate 'cookie-cutter' awards in favor of a 'qualitative focus on individual needs' of disabled students" (Stanton v. Dist. of Columbia, 680 F. Supp. 2d 201, 207 [D.D.C. 2010], quoting Reid, 401 F.3d at 524, 527; see Lee v. Dist. of Columbia, 2017 WL 44288, at \*1 [D.D.C. Jan. 3, 2017]).

The source of the parents' request for the additional hours of compensatory education services (including 6,240 hours of 1:1 ABA instruction, 234 hours of social skills training, 1,560 hours of 1:1 academic intervention, 1,560 hours of home-based ABA, and 312 hours of parent counseling and training) is the January 2021 neuropsychological and educational evaluation, which was accompanied by the neuropsychologist's direct testimony by affidavit that summarized the evaluation's content and recommendations; the neuropsychologist was briefly cross-examined by the district including with regard to the calculation of the recommended hours (Tr. pp. 45-52; Parent Exs. J; O). In denying the parents' request for the hours of compensatory education services recommended by the neuropsychologist, the IHO found that there was no testimony that an award of these additional services "would place the student in the position he . . . would have been in had the district complied with its obligations under the IDEA" nor as to "how the incredibly large number of compensatory hours would be provided to this 6-year old student," noting that the number of compensatory education hours requested would be "in addition to the child's regular school day" (IHO decision at p. 10). The IHO was not persuaded by the testimony of the neuropsychologist who stated that the student needed the large number of hours to "make up for many years of missed opportunities" and for the district's failure to identify the student during his "absolutely crucial, critical" early developmental years when he could have been provided with "evidence-based intervention," such as ABA, which, according to the neuropsychologist, "is the chief recommendation that supports children with autism spectrum, as far as their communication, adaptive skills, academic functioning, social and emotional functioning" and the lack of which for this student "was really a detriment to his functioning," and "c[ould] have really significant, long-term impacts if he d[id] not receive a significant amount of intervention to help close those gaps" (Tr. pp. 54-55).

However, as the IEEs agreed upon by the parties as part of the October 2020 partial resolution agreement in this matter had been completed by January 2021, were available prior to the start of the impartial hearing in February 2021, and had been entered into evidence during the impartial hearing, as had evidence regarding the student's progress from 2019 through 2021, I find that the IHO should have grappled more with the information provided by these other sources during the relevant time frame rather than rejecting all of the recommendations in the January 2021 neuropsychological and educational evaluation as too large and unsupported by the testimony of the neuropsychologist as to how these additional services would place the student in the position he would have been in had the district provided the student with a FAPE (see Tr. pp. 39-41; Parent Ex. F; IHO Decision at p. 10). While I largely concur with the IHO's analysis of the compensatory educational services sought by the parents as inadequately supported by the record and of such a magnitude that the number of hours requested run the danger of overwhelming the student and resulting in diminishing returns for the purpose of placing him in the educational position he would have been in but for the denial of FAPE, the IHO's approach also leaves the student without an adequate remedy for an admitted three-year denial of FAPE by the district.

As such, I believe a review of the evaluative information and progress reports, other than the neuropsychological report, that contain assessments of the student which occurred between 2019 and 2021 may be useful in determining whether the IHO correctly declined to award much of the compensatory educational services sought by the parents.

### **1. 2019 Evaluation**

Relevant to the analysis of an appropriate compensatory award is the level of the student's functioning prior to or early in the time period when the denial of a FAPE began and the student's expected rate of progress in acquiring skills and information had the district offered the student a FAPE, which would take into account factors such as the student's cognitive skills and age.

The earliest evaluative information contained in the hearing record is the August 2019 psychological evaluation (Parent Ex. Q). A review of the August 2019 psychological evaluation reflects that the student was evaluated using the Stanford-Binet Intelligence Scales - Fifth Edition (SB-5), the Vineland Adaptive Behavior Scales – Third Edition (Vineland-3) and a clinical interview (Parent Ex. Q at pp. 1-2). The evaluation report stated that, according to the parents, the student was diagnosed with a speech delay at age two via the EIP and previously used gestures to communicate (id. at p. 1). The student reportedly "sp[oke] in sentences but ha[d] some difficulty expressing himself, 'd[id] not ask questions,' 'walk[ed] on his tip-toes when he d[id] not wear shoes,' and ha[d] temper tantrums and bec[ame] angry (e.g., '[he] hit[] himself and his mother') 'when corrected, when wanting something, and when he d[id] not want to go to bed'" (id.). The student attended day care at the time of the evaluation but did not receive services; however he had previously received speech-language therapy services through EIP (id.). The evaluator noted that the parents wanted the student to receive speech-language therapy (id.). The evaluator reported that the student presented as a "hyperactive individual" who moved around the evaluator's office, reached for test manipulatives, and played with paper fish during the clinical interview between the evaluator and the parents (id. at p. 2). According to the evaluator, during testing the student said "No, no, no" when asked certain test questions, attempted to leave the testing room, and required three short breaks (id.). Prompting and redirection were used in order for the

student to complete testing and the evaluator noted that the student appeared to be performing to the best of his abilities and was tested in English (by the evaluator who was bilingual) (id.).

The psychological evaluation reflected that when the student was administered the SB-5 (in English), he received a full scale IQ of 50, within the mild to moderate intellectual disability range and well below the first percentile (Parent Ex. Q at pp. 1-2). Despite a statistical "quirk" in the test which gave the student credit on three subtests for which he did not pass any item administered to him, and thus possibly "somewhat overestimate[d]" the student's IQ scores, the results were deemed valid by the evaluator given that the student was able to pass a sufficient number of items on the remaining seven subtests to produce "meaningful and reliable IQ scores" (id. at p. 2). The student scored within the mild intellectual disability range on the quantitative reasoning and visual-spatial processing indexes with composite scores of 59 on both (id. at p. 3). Composite scores for the knowledge, fluid reasoning, and working memory indexes were not reported because the student did not pass any items on one of the two subtests comprising the index (id.).

Also as part of the psychological evaluation, the Vineland-3 was administered through an interview (in Spanish) with the student's father (Parent Ex. Q at p. 3). With regard to communication skills, the student scored within the "[l]ow" range (id.). Within the receptive area, the student reportedly followed instructions with one action and one object and responded to "what" and "who" questions, did not typically respond appropriately to at least three more-advanced gestures or identify at least three objects pictured in a book (id.). With regard to expressive skills, the student reportedly used negatives in sentences, said his correct age when asked, and used "and" in phrases or sentences, however, did not typically use at least three more-advanced gestures, use possessives in phrases or sentences, or ask questions beginning with "who" (id.). With regard to written communication, the student reportedly recognized one or more simple signs and identified at least 10 alphabet letters, however, did not typically recognize his own name in printed form or understand in what direction his language was written (id.).

With regard to daily living skills, the psychological evaluation reflected that the student scored within the "[m]oderately [l]ow" range (Parent Ex. Q at p. 3). Within the personal area, the student reportedly wiped or blew his nose using a tissue, washed and dried his face and wiped or cleaned his face and hands as needed during or after meals, however, did not typically put clothing on with the right side forward and correct side out or cover his mouth and nose when coughing or sneezing (id.). Within the domestic area, the student reportedly demonstrated care around hot objects and when using sharp objects and cleaned up his own spills (id.). He did not typically put his dirty clothes in the proper place to be washed, remove his dirty shoes before entering his home, or put away his possessions when done using them (id.). Within the community area, the student reportedly used appropriate manners when eating in public, said all seven days of the week in order when asked, and looks both ways when crossing streets or roads, however, did not typically respect the right to personal privacy for himself and others, state the name of various coins when asked, or say the current day of the week when asked (id. at pp. 3-4).

With regard to socialization skills, the student scored within the "[m]oderately [l]ow" range on the Vineland-3 (Parent Ex. Q at p. 4). Within the interpersonal skills area, the student reportedly tried to make friends with others his age, maintained culturally appropriate eye contact during social interactions, and answered politely when familiar adults made small talk, however, did not

typically state the relationship of his family members to himself, use words to express his own emotions, or imitate relatively complex actions several hours after watching someone else perform them (id.). Within the play and leisure area, the student reportedly sought out others for play or companionship, played with other children with minimal supervision, and joined in with a group when nonverbal cues indicated that he was welcome, however, he did not typically share his possessions when told to do so, protect himself by moving away from those who try to hurt others or destroy things, or play simple make-believe activities with other children (id.). Within the coping skills area, the student reportedly acted appropriately when introduced to new people, changed his behavior intentionally depending on how well he knew another person, and apologized with sincerity after hurting another's feelings, but did not typically recover quickly from a minor setback or disappointment, use words or gestures to express distress, or request help when encountering a problem beyond his own capability to solve (id.).

With regard to motor skills, the psychological evaluation reflected that the student scored within the "[m]oderately [l]ow" range (Parent Ex. Q at p. 4). Within the gross motor skills area, the student reportedly hopped on one foot at least once without falling, pedaled a tricycle or other three-wheeled vehicle around corners, and caught a beach ball-sized ball from at least 6 feet away, but did not typically hop forward on one foot with ease without holding on, catch a tennis- or baseball-sized ball from a distance of two or three feet, or ride a balance bike or bicycle with training wheels for at least 10 feet (id.). Within the fine motor skills area, the student reportedly opened and closed scissors with one hand, drew a circle freehand while looking at an example, and poured liquid from one container to another with little or no spilling, but did not typically color simple shapes or animals or draw more than one recognizable form (id.).

The student's psychological evaluation report concluded that the student's overall adaptive behavior skills fell within the "[m]oderately [l]ow" level of adaptive functioning, with a Vineland-3 adaptive behavior composite standard score of 71, at the 3rd percentile (Parent Ex. Q at p. 4).

Initial assessments conducted in October 2019 as part of the CPSE's initial evaluation of the student yielded similar results (compare Parent Ex. R, with Parent Ex. Q).

The foregoing provides a baseline of sorts. The hearing record is, however, lacking an articulation of the student's expected rate of progress based on his age and cognitive levels, which would be beneficial to understanding where the student would have been had the district offered the student a FAPE. Notwithstanding this gap in the hearing record, there is sufficient reason to disregard the calculations of the neuropsychologist, as the IHO did, and calculate an award that takes into account the student's age, cognition, and actual progress during the relevant school years.

## **2. 2021 Progress Reports**

While the student did not receive special education during the 2018-19 school year, he began receiving SEIT and related services in November 2019 and continued thereafter for the remainder of the 2019-20 school year pursuant to the November 2019 IEP and then during the 2020-21 school year pursuant to pendency (Parent Exs. C; J at pp. 1-2). Relevant to calculating an award of compensatory education is considering what progress the student made during the subject time period, which includes taking into account any benefit the student may have received

as a result of his educational programming despite the FAPE denials (see Somberg v Utica Community Schs., 2017 WL 242840, at \*4 [E.D. Mich Jan. 20, 2017] [declining to award full-time tutoring for years during which student was denied a FAPE, since the student "did make some advancement over the course of his time in high school, even though he was not presented with what he was due under IDEA"], aff'd, 908 F.3d 162 [6th Cir. 2018]). While the January 2021 neuropsychological and educational evaluation report identified some areas of educational deficits that accrued during the period of the denial of a FAPE (Parent Ex. J), there is also evidence in the hearing record that the student received some educational benefits (see Parent Exs. C; V).

A progress report by the student's kindergarten SEIT, dated May 21, 2021, indicated that the student was attending the charter school remotely (Parent Ex. V at p. 1). The SEIT reported that the student received five hours of 1:1 SEIT support services at home beginning on September 22, 2020 and also received speech-language therapy and OT services remotely (id.). Overall, the SEIT noted that, although the student had made significant progress, the 1:1 SEIT services were important to ensure his continued progress as the student presented with academic delays that made it difficult for him to perform optimally (id.). The provider reported that the student needed frequent support and redirection throughout the day as well as frequent redirection to pay attention and focus on the task at hand, as he lost focus at times which impacted his learning and performance (id.). The report stated that the student made disruptive noises and screams which interfered with him participating along with his peers via Zoom, as it was disruptive to the lesson and his peers, and the teacher would mute his microphone (id.). The report stated that the student required 1:1 SEIT services to support him to do his work and follow along with activities, and that it was important that he continue to receive 1:1 SEIT services to address his delays and be provided with support to continue to progress (id.). Finally, the report noted that the student presented with social/emotional delays related to social interaction and emotional regulation, as he struggled to deal with his emotions appropriately (id.).

With regard to the student's language delays, the May 2021 SEIT stated that, with current levels of 1:1 support, the student was able to recognize alphabet letters and associate them with the correct sounds and was beginning to identify words that begin with a specific letter sound (Parent Ex. V at p. 3). Although the SEIT noted that this skill was still hard for the student, she reported that with work and reinforcement he was making slow and steady progress (id.). The SEIT report reflected that the student could recognize sight words that were familiar to him and was beginning to read simple words but needed the prompt to break down the word for him to read it correctly (id.). The report stated that the student had difficulty following classroom instructions without support, was easily distracted when listening to a story read by the teacher, and needed directives to stay on task (id.). The student had a hard time grasping what the story was about and responding to questions, had to have the story broken down and explained to him in order to understand the context of the story, and was able to answer basic questions but could not answer higher end questions (id. at pp. 3-4). The student reportedly was able to identify upper and lower case letters, recognize written sight words, and could read simple stories, however, was not able to understand consonants and vowels and was not able to sort them (id. at p. 4). He still had difficulty understanding syllables and number of syllables, finding words that start with the same letter or sound, and was not able to distinguish between long and short vowels (id.). According to the SEIT progress report, the student was not able to explain what happened in a story or respond to a focus question, had difficulty comparing things and using adjectives, and was not able to predict what he thought would happen next (id.). The report stated that the student still had

difficulty using a capital letter in the beginning of a sentence and a punctuation mark at the end. (id.) The SEIT noted that with 1:1 SEIT support, the student had made improvements in answering basic questions but still could not answer higher level questions (id.). She explained that SEIT services aided the student by providing him with visual cues and prompts to assist with decoding and comprehension skills and concluded that the student needed continued 1:1 support to acquire decoding and comprehension skills and continue to make progress to master grade level reading skills (id.).

With regard to the student's writing, the May 2021 SEIT report stated that, with support, the student's writing skills had improved but his ability to hold a pencil was inconsistent and he tended to write in a manner that was very light and soft and that his coloring was hurried and not within the lines (Parent Ex. V at p. 4). The student reportedly became frustrated when his work was not finished when the classroom teacher was ready to move on (id. at pp. 4-5). The SEIT stated that the student had mastered writing his first and last name but the letters were big and not within the lines, and that he was able to write letters and numbers but emphasis was placed on developing writing within the lines (id. at p. 5). According to the SEIT, SEIT services provided the student with 1:1 modeling and a review of writing skills (id.). She noted that the student needed prompts to formulate letters and numbers the correct way as well as prompts to write from top to bottom and not bottom to top (id.). The SEIT provider recommended that the student continue to receive 1:1 SEIT support to develop grade level writing skills (id.).

With regard to math, the May 2021 SEIT report stated that the student's math skills fell below grade level expectations and that he needed specialized 1:1 instruction and repeated directions when presented with math work (Parent Ex. V at p. 2). Due to language delays the student struggled to follow instructions, needed tasks to be broken down into smaller groups, and benefited when he was pre-taught a skill 1:1 by his SEIT teacher and 1:1 support was given to review and reinforce skills (id.). The report reflected that the student could rote count up to 60 using 1:1 correspondence when given the support to stay on task, however, would get distracted while counting higher amounts and lose track (id.). When provided with directives, the student could continue to count with 1:1 correspondence (id.). The report stated that the student was able to identify shapes and a few three-dimensional shapes, however, had a hard time distinguishing between two- and three-dimensional shapes (id.). He was able to identify numbers and write numbers to 100, however he would sometimes mix up numbers when writing them (id.). The student was reportedly able to categorize items and follow patterns but had a hard time understanding one more and one less and needed manipulative and visual aids to help him understand (id.). He was able to use a ten frame and count on ten frames up to 60 but did not understand a number line, was not able to skip count by twos, did not understand the concept of fewer and more or the same, was not able to compare numbers and did not understand the concept of more, less, and equal (id. at pp. 2-3). According to the SEIT, the student was beginning to understand the concept of addition and subtraction, as an emerging skill, but was not able to tell time, had difficulty following size patterns and growing patterns, and had difficulty with locations such as left, right, middle or inside and outside and besides or next to (id. at p. 3). He was reportedly able to classify/sort by color or shape but needed the teacher to give a model in order to understand the task and was not able to use tally marks without help (id.). The report stated that the student required directives, visuals, and manipulatives in order to focus during a math task and help him follow through with "the question," and became easily distracted and needed directives to return to the task for completion (id.). Manipulatives such as cubes or tiles were reportedly used

to aid the student during math and provide him with visual models to help him understand a math problem, and math instruction was provided when the provider explained and helped the student with his math homework (id.). The provider recommended that the student continue 1:1 instruction and review as it was needed for him to acquire new skills and progress towards grade level expectations (id.).

With regard to other areas, the May 2021 SEIT report stated that the student learned best with visual cues and repetition, benefited from 1:1 pre-teaching in order to follow a lesson in class, needed a lot of 1:1 review to understand new skills and concepts and 1:1 reinforcement to master them (Parent Ex. V at p. 5). In addition, the report stated that visual cues were given to encourage memory retention and that due to his language delay the student learned best with visuals and manipulative and also the student needed instruction to be broken down into a simple task for him to understand (id.). As to social development, the May 2021 SEIT report described the student as good natured and eager to please, and stated that he wanted to do the right thing and followed directions to the best of his ability (id. at pp. 5-6). When answering questions, the report stated that the student was not on target but his answer was somewhat related to the question (id. at p. 6). The student reportedly lagged behind his peers when given instructions, had a hard time following simple two step instructions, and his eye contact skills had improved but were still not consistent (id.). With regard to physical development, the SEIT progress report noted that the student's balance and agility were age appropriate, he could participate in dancing and exercise with ease, decreasing tippy-toe walking was being targeted, and the student was in general good health (id.). With respect to management needs and support services, the SEIT recommended that the student continue to receive 1:1 SEIT services to provide him with support to enable him to meet his goals and improve in his areas of delay, as well as continue OT and speech-language therapy services to address delays, on a 12-month basis (id.).

A teacher report by the student's kindergarten teachers at the charter school, dated May 25, 2021, reflects that the student was evaluated in reading using the STEP Reading Assessment as a tool to gauge the student's readiness for reading, phonological awareness, fluency, encoding ability, and comprehension on various dates during the 2020-21 school year (Parent Ex. TT at p. 1). The results showed that the student was performing below grade-level in letter-name identification, letter-sound identification and phonemic rime in August 2020; on grade-level with respect to letter-name identification, letter-sound identification, phonemic rime, matching first sounds, segmentation, and comprehension in November 2020; on grade-level for letter-name identification, letter-sound identification, phonemic rime, matching first sounds, segmentation, accuracy, and oral reading comprehension in March 2021; and below grade-level for letter-name identification, letter-sound identification, phonemic rime, matching first sounds, segmentation, accuracy, and oral reading comprehension in May 2021 (id.).

The May 2021 teacher report indicated that with regard to word analysis skill strengths, the student typically scored between 80 percent (4/5) and 100 percent (5/5) on weekly sight words quizzes and since November 2020, had consistently made growth with all phonics skills in isolation (identifying capital and lowercase letters, identifying letter sounds, blending the onset and rime to say a word, matching the first sound in words with picture support, and breaking down phonemes) as well as in his ability to identify sight words in a text and recall a 3-4 word pattern in a text (Parent Ex. TT at p. 1). With respect to word analysis skill growth, the report indicated that the student was working on applying his phonics skills to reading texts and while the student knew

26 out of 26 letter sounds, he struggled to decode words when reading and often became frustrated and appeared agitated when being prompted to sound out words (id. at p. 2). Overall, the student reportedly relied on recall to state words both in and out of context, and when reading books (with pictures) he relied on recall, the first letter/sound, and pictures to state the words, however, with prompting, support, and praise, the student was able to isolate the sounds in a word but then struggled to blend the sounds in order to be able to encode the word (id.).

With respect to reading comprehension, the May 2021 teacher report noted the student's strengths as being able to use picture support to recall facts in a text and that he had improved his ability to comprehend and answer "what" and "who" questions (Parent Ex. TT at p. 2). With respect to comprehension skill weaknesses, the student reportedly struggled with comprehension as he did not fully understand how to answer "where," "why," or "how" questions and, as a result he over-relied on picture support rather than text to answer questions and often searched pictures for how to accurately answer questions that were posed (id.). The teacher report suggested that the student's strategy might be a result of having a limited vocabulary (id.).

With respect to sight word assessments given to the student, the May 2021 teacher report described the results of the student's average weekly sight word assessment scores as 73 percent in trimester 1 (below grade level), 93 percent in trimester 2 (on grade level) and 97 percent in trimester 3 (on grade level) (Parent Ex. TT at p. 2). The student was also administered interim sight word assessments in which the student scored 13 percent in October 2020 (below grade level), 87 percent in March 2020 (on grade level) and 93 percent in May 2021 (on grade level) (id.).

In writing, the May 2021 teacher report indicated that as the student had only submitted one writing assignment in the previous seven weeks and therefore most of her analysis of the student's writing performance was based on anecdotal information from class (Parent Ex. TT at p. 2). According to the teacher report, with significant prompting and support the student could use a given sentence stem that had appropriate grammar and mechanics and insert his ideas in a way that maintained the appropriate sentence structure and was then able to re-read his sentence and point to specific items in his sketch that match what was written in his sentence (id. at pp. 2-3). The student reportedly did not fully understand the writing process or how to express himself in oral or written language, and even with significant prompting and support, the student did not generate his own sentences based on writing topics but the only way he expressed his ideas in writing class (oral or written) was by using a sentence stem that was given to him (id. at p. 3). Once he could repeat the sentence stem, the student then needed prompting to insert his ideas so that he could articulate a complete sentence and in order to get those ideas on paper the student needed the sentence to be repeated back to him one word at a time (id.). The teacher report stated that with significant prompting and support, the student could use two to three words to articulate his understanding of a topic/prompt so that he could sketch a picture that matched the topic and with additional prompts and support, he could add relevant details to his pictures such as the setting or additional characters (id.). The student's primary area of growth in writing was being able to demonstrate an understanding of the topic/prompt so that he could generate ideas on his own but he still required significant prompting and support (id.).

With regard to math, the May 2021 teacher report reflected that the student was on grade level based on interim assessments administered in which he scored 80% in November 2020 and

100% in March 2021 (Parent Ex. TT at p. 3). However, the report stated that the student was an emerging counter which was "below grade level proficiency" (*id.*). When independently counting 43 tiles he was able to neatly organize his tiles, count by ones, and state how many he had all together based on the last number he said, and was also able to independently count up to 39 before needing support with the number sequence (*id.*). The student was able to use a hundred chart to accurately write numbers up to 67 and with prompting and support, he could count up to 67 objects by ones and tens (*id.*). He was able to compare numbers and sets of quantities within 20 to state greater or less than, and was also able to identify a missing number within a set up to 20 but did not consistently count carefully especially when using more than 30 objects (*id.*). The teacher report stated that it was best to ensure that the student knew he can get a reward (such as a special snack or a special dance/wiggle break) for trying his best, taking his time, and going at a steady pace so that he was more likely to do his best work (*id.*). When problem solving, the student reportedly struggled to understand the context of a problem but when given numbers and told to add them together he could find the total, complete a number bond, and repeat the number sentence/equation that matched (*id.*).

With regard to the student's behavior, the teacher report stated that due to the nature of remote learning the student had not receive Tier 3 behavioral intervention from his classroom teachers (Parent Ex. TT at p. 4). The teacher noted that the student could become easily agitated if all systems and routines were not 100 percent consistent and that when agitated the student struggled to calmly articulate that he needed help, screamed, stood up or rolled on his chair, and sometimes hit the adult he was with or attempted to throw his materials (*id.*). With regard to motivation, the student's teacher reported that the student was motivated by public praise (*id.*). The student struggled to stay on task without consistent prompting and adult support (*id.*). When working on harder tasks the student benefitted from being reminded of stars/smiley faces he could earn, being encouraged to calm down and taking a break (*id.*). The teacher indicated that in order to follow directions, the student needed them broken down to 3-5 words, and the directions should be accompanied by an image and physical support from an adult (*id.*). The student was unable to work independently, struggled with emotional regulation and self-control and benefited from an adult sitting next to him at all times (*id.*). According to the teacher report, the student struggled with social dialogue beyond greetings which made it difficult for him to develop genuine friendships (*id.*).

### **3. Compensatory Education Award**

The student's progress reports and evaluations reviewed herein indicate that, despite the denial of FAPE for three school years, and without the provision of 40 hours a week of 1:1 instruction as recommended by the neuropsychologist, the student nonetheless was able to attain a number of grade-level skills and his behaviors, while continuing, were not so severe as to prevent him from making demonstrable progress in several areas of the curriculum and increasing his grade-level skills and abilities. As such, I find that the neuropsychological and educational evaluation's recommendations for compensatory education are problematic in the amount of hours requested, given that the student's progress reports and other evaluations demonstrate some positive progress among his areas of challenge without the significant amount of ABA services recommended by the neuropsychologist. Generally, compensatory services are not designed for the purpose of maximizing a student's potential or to guarantee that the student achieves a particular grade-level in the student's areas of need (see [Application of a Student with a Disability](#),

Appeal No. 16-033; cf. Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Rather, an award of compensatory education should place the student in the position that he would have been in had the district acted properly (see Parents of Student W., 31 F.3d at 1497 [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]). The amount of ABA instruction recommended by the neuropsychologist appears to promote at best a maximization of the student's skills above and beyond what is necessary to place him where he would have been educationally but for the FAPE denials and at worst an overly burdensome program of extra instructional hours that could not be easily reconciled with the student's programming going forward. However, the neuropsychological report and the assessments detailed above do support a finding that, due to the student's need for a certain amount of 1:1 instruction and his persistent behavioral challenges, some amount of ABA therapy could be used to remediate problem behaviors and put the student in the position he would have been in but for the three-year denial of a FAPE.

In light of the totality of evaluative information available about the student, the FBA recommends what appears to be a reasonable middle ground between the neuropsychologist's excessive recommendation and the IHO's failure to award any amount of services, namely a bank of compensatory hours of ABA to put the student in the position he would have been in, had the district provided appropriate special education services when his developmental delays and problematic behaviors were first recognized and thereafter during his subsequent schooling that occurred during the period of the three-year FAPE denial (Parent Ex. N at pp. 11-12). As the evaluative data and progress reports above show, given the student's needs, he likely would have been benefited from additional support in his programming and an award based on 10 hours per week of ABA therapy is reasonable. As such, I find that the 10 hours of ABA therapy per week multiplied by 42 weeks and then multiplied by three years is equivalent to a total of 1,260 hours of ABA therapy, is based on the recommendations in the FBA (id. at pp. 11-13) and is a reasonable remedy for the three year FAPE denial.<sup>6</sup> Additionally, the FBA also recommended a bank of compensatory hours for parent counseling and training to enable the parents to reinforce the behavior plan at school and to collaborate effectively with the student's team of educators (id.). I find that, based on the recommendations of the FBA, a compensatory award based on two hours of parent counseling and training per week over three years is sufficiently supported by the evidence; thus, two hours per week multiplied by 42 weeks over three years or a total of 252 hours of compensatory parent counseling and training will be awarded. I do not, however, accept the recommendations that the compensatory award have no timeframe whatsoever within which the should be used and find that based upon the three-year denial of FAPE, it is appropriate that the

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<sup>6</sup> Although the BCBA calculated her award based on 52 weeks, this is in excess of the amount of schooling generally included in a 12-month school year program; rather, 42 weeks is closer to the standard school year based on the 180 instructional days in a 10-month school year, plus an additional 30 days during the 12-month portion of the school year (see Educ. Law § 3604[7]; 8 NYCRR 200.1[eee]). While the parents alleged in this matter that the district should have provided the student with 12-month school year services, there is no allegation—let alone evidence in the hearing record to support a finding—that the student experienced regression during periods when schools were not in session to the degree that he required special education for 52 weeks. Thus, for purposes of calculating an award, I will rely on a 42 week should year.

compensatory education be used within six years, which will give the student and providers sufficient flexibility in using the hours awarded in this decision.

A final word about compensatory education is warranted in this matter. In terms of the parents' complaints regarding remote instruction or services during remote instruction, both the United States Department of Education (USDOE) and the New York State Education Department's (NYSED's) Office of Special Education have issued guidance acknowledging that the global pandemic and the resulting closure of schools resulted in "an inevitable delay" in districts providing services to students with disabilities or engaging in the decision-making process regarding such services ("Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104 [OCR & OSERS 2020]; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 1, Office of Special Educ. Mem. [June 2021], available at [http://www.p12.nysed.gov/specialed/publications/2020-memos/documents/\\_compensatory-services-for-students-with-disabilities-result-covid-19-pandemic.pdf](http://www.p12.nysed.gov/specialed/publications/2020-memos/documents/_compensatory-services-for-students-with-disabilities-result-covid-19-pandemic.pdf)). In addition, the USDOE has noted reports from some local educational agencies that they were "having difficulty consistently providing the services determined necessary to meet [each] child's needs" and that, as a result, "some children may not have received appropriate services to allow them to make progress anticipated in their IEP goals" ("Return To School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act," 79 IDELR 232 [OSERS 2021]).

To address these delays and other delivery-related issues that occurred as a result of the pandemic, OSEP and NYSED's Office of Special Education have indicated that, when school resumes, a CSE should convene and "make individualized decisions about each child's present levels of academic achievement and functional performance and determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child's receipt of appropriate services" ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 1, 3; see also "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104; "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak," 76 IDELR 77 [OCR & OSERS 2020]; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at pp. 2-5, Office of Special Educ. Mem. [June 2020], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf>). The CSE's review might include a discussion of whether the student has new or different needs compared to before the pandemic, whether the student experienced a loss of skill or a lack of expected progress towards annual goals and in the general education curriculum, whether evaluations of the student or implementation of an IEP was delayed, and whether some of the student's IEP services could not be implemented due to the available methods of service delivery or whether such methods of service delivery were not appropriate to meet the student's needs ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 3-4; see "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 1).

If the parent disagrees with a CSE's determination regarding the student's entitlement to compensatory services, State guidance notes that:

Parents of students with disabilities may resolve disputes with school districts regarding the provision of FAPE by pursuing one of the dispute resolution options provided for in the IDEA. A parent may file a State complaint directly with NYSED in accordance with Commissioner's Regulation section 200.5(l), request mediation in accordance with Commissioner's Regulation section 200.5(h), or file a due process complaint and proceed to hearing in accordance with Commissioner's Regulation section 200.5(j).

("Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 5; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 6).

In sum, the USDOE and NYSED's Office of Special Education have indicated that, under these unique circumstances, a CSE should have the first opportunity to consider the student's needs and whether any additional services may be warranted as a result of the pandemic. There is no indication that this has yet occurred for this student. Therefore, to the extent it has not already done so, the parents may request a CSE for this purpose or raise their concerns at the student's next annual review. The compensatory award herein may very well sufficiently compensate the student; however, the CSE can still consider whether further services are warranted specifically to make up for loss of skill relating to the delivery of remote instruction over and above the amount awarded herein.<sup>7</sup>

Finally, although the parents assert that the IHO erred in sua sponte ordering the district to create a prospective IEP for the 2021-22 school year with a deferral to CBST, instead of ordering compensatory education, that is not the case. The IHO did not order a prospective placement and, instead, simply ordered the district to convene a CSE and consider the IEEs, including the program recommendation contained therein. Therefore, as the IHO did not order a deferral to the CBST, there is no need to modify that portion of the decision.

## **VII. Conclusion**

Having determined that the evidence in the hearing record does not support the IHO's denial of compensatory ABA instruction and parent counseling and training, the IHO's decision will be modified, in part, with respect to the parents' request for relief for those items.

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

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<sup>7</sup> As I mentioned previously; however, the evidence thus far suggests that the student was progressing, so it is unclear what further information could be available that would justify compensatory services, but the parties should nevertheless follow the process established by the administrative agencies in light of the COVID-19 pandemic.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision dated September 11, 2021, is modified by reversing that portion which denied the parents' request for compensatory ABA instruction and parent counseling and training.

**IT IS FURTHER ORDERED** that the parents are awarded 1,260 hours of compensatory ABA therapy and 252 hours of parent counseling and training to be used within six years of the date of this decision.

**Dated:**           **Albany, New York**  
                      **February 9, 2022**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**