



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-004

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 Cynthia Sheps, 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 a decision of an impartial hearing officer (IHO) which did not order all of the relief sought by the parents to remedy respondent's (the district's) failure to provide their son with an appropriate educational program for the 2018-19, 2019-20, and 2020-21 school years. Respondent (the district) cross-appeals, requesting that the matter be remanded to the IHO. The appeal must be sustained in part. The cross-appeal must be sustained in part. The matter must be remanded to the IHO for further administrative proceedings.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

This matter concerns the 2018-19, 2019-20, and 2020-21 school years, for which the district conceded it failed to offer the student a free appropriate public education (FAPE). Given the disposition of this matter and that evaluative information as it relates to compensatory education is described in detail below, a full recitation of the student's educational history is not necessary. Briefly, the student has received diagnoses of autism spectrum disorder and attention

deficit hyperactivity disorder (ADHD) and has been found eligible for special education and related services as a student with autism (Parent Exs. C at pp. 1, 4; F at pp. 2, 7-8).¹

A CSE convened on October 11, 2018 to conduct the student's annual review and develop an IEP for the 2018-19 school year (Parent Ex. C at p. 1). Finding the student remained eligible for special education as a student with autism, the CSE recommended that the student attend a district nonspecialized school in a 12:1+1 special class and receive the related services of individual occupational therapy (OT) once per week for 30 minutes, group (2:1) OT once per week for 30 minutes, and individual speech-language therapy twice per week for 30 minutes per session (id. at pp. 1, 17-18, 21, 22). The CSE also recommended that the student receive the support of an individual, fulltime health paraprofessional to assist the student with poor attention and focusing skills (id. at p. 18).

The CSE next convened on October 8, 2019 (Parent Ex. D). Finding the student remained eligible for special education as a student with autism, for the 2019-20 school year, the CSE recommended that the student attend a district nonspecialized school in a 12:1 special class and receive the related services of individual OT once per week for 30 minutes, group (3:1) OT once per week for 30 minutes, individual speech-language therapy once per week for 30 minutes, and group (3:1) speech-language therapy twice per week for 30 minutes each session (id. at pp. 19-20, 25, 26-27). The CSE also recommended that the student receive daily support from an individual health paraprofessional (id. at p. 20).

According to an October 28, 2020 social history assessment, the parent believed that the student's overall needs could best be met at the Child School (Dist. Ex. 11 at p. 1). According to the parent, the student required 1:1 attention in order to learn and was being supported academically by a tutor provided by the parent for three hours per week beginning in September 2019 (id.).

The CSE convened on November 13, 2020 and recommended a 12-month program in a State-approved nonpublic day school in a 12:1 special class placement (Parent Ex. E at pp. 9-11, 13, 14). The November 2020 CSE further recommended the student receive the related services of individual OT once per week for 30 minutes, group (2:1) OT once per week for 30 minutes, individual speech-language therapy once per week for 30 minutes, group (3:1) speech-language therapy twice per week for 30 minutes each session, and special transportation (id. at pp. 9-10, 11, 13, 14-15). The CSE also recommended individual, daily health paraprofessional services (id. at p. 10).² In a prior written notice dated December 5, 2020, the district summarized the recommendations set forth in the November 2020 IEP (Parent Ex. L at pp. 1-3).

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

² The copy of the November 2020 IEP entered into evidence by the parents includes a different program recommendation (12:1 special class along with related services of individual OT once per week for 30 minutes, group (2:1) OT once per week for 30 minutes, individual speech-language therapy once per week for 30 minutes, and group (3:1) speech-language therapy twice per week for 30 minutes each session, and the support of a 1:1 paraprofessional) from the November 2020 IEP entered into evidence by the district (8:1+1 special class along

A. Due Process Complaint Notice

In a due process complaint dated December 8, 2020, which consisted of 18 pages and 145 enumerated paragraphs together with approximately 126 subparagraphs, the parents alleged that, for the 2018-19, 2019-20, and 2020-21 school years, the district denied the student a FAPE, including by failing to thoroughly and appropriately evaluate the student on a timely basis, develop a timely, substantively and procedurally valid IEP, offer the student timely and appropriate placements and services, timely and appropriately implement the student's IEPs, and provide adequate procedural safeguards and prior written notices (Parent Ex. A at pp. 1-17).³

As relief, among other things, the parents requested: findings that the district failed to offer the student a FAPE for the 2018-19, 2019-20, and 2020-21 school years; an interim order for the district to fund an independent educational evaluations (IEEs), including independent neuropsychological, speech-language, auditory processing, physical therapy (PT), OT, and assistive technology evaluations, as well as an independent applied behavior analysis (ABA) assessment conducted by a Board Certified Behavior Analyst (BCBA) or Licensed Behavior Analyst (LBA), an independent observation by a Ph.D.-level expert in behavior, and an independent functional behavioral assessment (FBA) and behavior intervention plan (BIP); compensatory education to restore the student to the position he would have been in had he not been denied a FAPE and for any failure to implement pendency, including a bank of hours for 1:1 instruction, ABA services, additional special education itinerant teacher (SEIT) services, tutoring, behavior therapy, services to improve executive functioning, assistive technology, assistive technology training, related services (such as OT, PT, speech-language therapy, counseling, social skills training and/or feeding therapy) as well as any other services recommended as a result of the requested independent evaluations; and a legally valid IEP which contained the student's pendency services as well as additional 1:1 instruction, ABA services, speech-language therapy services, OT, PT, 12-month services, behavioral support, and home-based services (Parent Ex. A at pp. 17-18).

B. Events Post-Dating the Due Process Complaint Notice

By letter dated January 21, 2021, the Child School offered the student a placement for the 2020-21 school year in a 12-month program in an 8:1+1 fourth grade special class with the related services of individual OT once per week for 30 minutes, group (3:1) OT once per week for 30 minutes, individual speech-language therapy once per week for 30 minutes, and group (5:1) speech-language therapy twice per week for 30 minutes each session (Dist. Ex. 12 at p. 1).

with related services of individual OT once per week for 30 minutes, group (3:1) OT once per week for 30 minutes, individual speech-language therapy once per week for 30 minutes, and group (5:1) speech-language therapy twice per week for 30 minutes each session, as well as parent counseling and training) (compare Parent Ex. E at pp. 9-10, with Dist. Ex. 13 at p. 15).

³ The parents also alleged systemic violations of section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. § 794[a]) and further stated that the case was being filed pursuant to 42 U.S.C. § 1983 (section 1983) (Parent Ex. A at pp. 1, 2, 15, 16-17, 18).

In a prior written notice dated January 27, 2021, the district notified the parents of its recommendation to place the student at the Child School, a State-approved, nonpublic day school, identifying the same program as described in the Child School acceptance letter (compare Dist. Ex. 14 at pp. 1-2, with Dist. Ex. 12 at p. 1). The hearing record reflects that the student began attending the Child School on February 1, 2021 (Tr. pp. 51, 108; Parent Exs. R at p. 4; U at p. 8).

C. Impartial Hearing Officer Decision

The parties convened for opening statements and the introduction of evidence on February 23, 2021 and a discussion also took place regarding the parents' prehearing motions and request for an interim order for IEEs (Tr. pp. 1-3; see Tr. pp. 1-21). According to the district's representative at the impartial hearing, an independent neuropsychological evaluation was being conducted pursuant to a partial resolution agreement (Tr. p. 9).⁴ Additionally, after discussing the provider rates, the district did not contest the parents' request for district funding of independent OT and speech-language evaluations (Tr. pp. 10-15). In an interim order dated February 24, 2021, the IHO awarded an independent speech-language evaluation and an independent OT evaluation (Parent Ex. G).⁵

After numerous status conferences, the parties convened for a one-day impartial hearing on October 22, 2021 (Tr. pp. 22-135).⁶ In a decision dated November 29, 2021, the IHO found that the district did not present any testimony to support a finding that the student was offered a FAPE for the 2018-19, 2019-20, and 2020-21 school years (IHO Decision at p. 4). The IHO further found that the district failed to explain the CSE's program and placement recommendations and, as a result, the district failed to meet its burden of demonstrating that the student had been offered a FAPE for the school years at issue (id.). Addressing the parents' requested relief, the IHO awarded the parent 184 hours of compensatory OT and 414 hours of compensatory speech-language therapy and denied the parents' requests for 5,796 hours of 1:1 ABA services, make-up services, IEP amendments and prospective placement, as well as for an independent feeding and swallowing and assistive technology evaluations, and an independent FBA and a BIP (id. at pp. 9-20).

With respect to the parents' request for 1:1 ABA services, the IHO found that the parents' witness was unable to explain what the student's progress would be after receiving such a large award of hours and further that there was no testimony describing whether the "hours would be

⁴ According to the district's representative, the district had also agreed to fund an independent assistive technology evaluation as part of the partial resolution agreement (Tr. p. 9). The hearing record includes updates related to the completion of the neuropsychological evaluation but there was no further discussion of the assistive technology evaluation being conducted as part of the partial resolution agreement (Tr. pp. 24-25, 36-37, 43, 50-51).

⁵ In another interim order, dated the same day—February 24, 2021—the IHO directed the district to respond to each of the allegations contained in the parents' due process complaint notice (Parent Ex. H).

⁶ Status conferences were held on April 8, 2021, May 21, 2021, June 16, 2021, July 14, 2021, August 19, 2021, September 13, 2021, and September 29, 2021 (Tr. pp. 22-30, 34-87). The hearing record also indicated that the IHO had granted an adjournment for a status conference scheduled for April 12, 2021, however the date remained calendared and the IHO briefly appeared without the parties (Tr. pp. 31-33).

provided in a practical matter for the Student," given that the compensatory services were in addition to the student's regular school day (IHO Decision at pp. 9-10). The IHO also determined that there was no evidence presented by the parents of any missed services and no explanation why the services were missed (id. at p. 10). The IHO declined to award prospective placement and directed the CSE to convene "within 20 days of receipt of all the evaluations []required" to be conducted and to consider all of the available information and develop a new IEP that comprehensively described the student and included appropriate related services and goals (id. at pp. 11-13). Concerning the parents' request for IEEs, the IHO found that the parent never requested IEEs and never disagreed with any district evaluations (id. at pp. 13-20).

The IHO ordered that the 184 hours of compensatory OT and the 414 hours of compensatory speech-language therapy be provided "at the lowest rates paid" by the district or "comparable rates to comparable providers" as relief for the district's failure to offer the student a FAPE for the 2018-19, 2019-20, and 2020-21 school years.

IV. Appeal for State-Level Review

The parents appeal and assert that the IHO erred in failing to award all of their requested relief and for failing to address all of the claims set forth in the due process complaint notice. Specifically, the parents argue 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 compensatory analysis by suggesting that the parents were seeking a "default judgement" award. The parents argue that the evidence in the hearing record was un rebutted and sufficient to support their request for 5,520 hours of compensatory 1:1 ABA services and that the student was entitled to the requested award. The parents further argue that the IHO was obligated to further develop the hearing record instead of denying any award of 1:1 ABA services. The parents allege that the IHO erred in sua sponte ordering the CSE to reconvene to create a new IEP for the student without the IHO providing notice to the parents or an opportunity to respond. The parents further allege that this award was an improper delegation of the IHO's responsibility to formulate an appropriate compensatory award for the denial of FAPE to the student. Additionally, the parents assert that, instead of the reconvene of the CSE, the IHO should have awarded declaratory relief identifying an appropriate program for the student for the 2020-21 school year because without such a determination there is uncertainty in the student's pendency rights.

The parents also allege that the IHO erred in failing to award independent assistive technology and feeding and swallowing evaluations as well as an independent FBA and BIP. The parents argue that they were not required to request a feeding evaluation in their due process complaint notice because they were not aware of this relief at that time. The parents next contend that the IHO failed to address all of their claims from the due process complaint notice, including the district's alleged failure to implement the student's IEPs, failure to provide adequate procedural safeguards, and failure to timely and comprehensively evaluate the student. The parents also argue that the IHO failed to address the numerous deficiencies in the student's IEPs, predetermination, and that remote learning failed to provide the student with a FAPE. Lastly, the parents allege that the IHO erred in denying that there was insufficient evidence to find the district violated section 504. As relief, the parents request that the IHO's denial of compensatory education and IEEs be reversed and that the parents be awarded 5,520 hours of compensatory 1:1 ABA services, funding

for an independent assistive technology evaluation, an independent feeding and swallowing evaluation, and an independent FBA/BIP, and a finding as to the student's appropriate program.

In an answer, the district responds to the parents' allegations with admissions and denials and asserts that the IHO correctly denied the parents' requests for a bank of compensatory ABA services and district funding of IEEs.⁷ The district argues that the IHO properly awarded the hours recommended in the OT and speech-language evaluations and properly denied the compensatory ABA service hours recommended by the neuropsychologist, further arguing that there was no evidence in the private neuropsychological evaluation report to demonstrate why the student needed the number of recommended hours to place him in the position he would have been without the denial of a FAPE. The district further contends that the recommendation has little to do with the student's needs or the district's failure to provide the student with an appropriate program. In addition, the district alleges that the unspecified number of hours for home-based ABA services are primarily for the purpose of generalizing skills to the home setting. The district contends that there is insufficient basis to conclude that the student required such a large bank of hours at home, afterschool, or on weekends and during school vacation. Further, the district argues that home-based services could be excessive and duplicative of the parent counseling and training already recommended for the student. Next, the district asserts that the IHO properly declined to award the parents' requested prospective placement and services as they lack merit. The district also alleges that the IHO properly denied the parents' requests for district-funded IEEs including independent feeding and swallowing and assistive technology evaluations, as well as an independent FBA and BIP, as the parents had failed to disagree with a specific evaluation conducted by the district.

With regard to the parents' assertion that the IHO failed to address all of the claims in their due process complaint notice, the district argues that the allegations serve no purpose as the district had not cross-appealed from the IHO's FAPE determination. As and for a cross-appeal, the district argues that the IHO erred in not awarding any compensatory academic education services and requests that the matter be remanded to the IHO to consider additional evidence and determine an appropriate remedy for the denial of a FAPE.

In a reply and answer to the district's cross-appeal, the parents object to the district's request for remand. According to the parents, the district's request for remand should be denied because the hearing record is clear as to a compensatory award and the district should not be given a second chance to present an argument or evidence about a compensatory award as the district had the opportunity to present evidence and cross-examine the parents' witnesses during the hearing but declined to do so.

⁷ 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 or the compensatory educational services awards for 184 hours of OT and 414 hours of speech-language therapy services. 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]).

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]).⁸

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. Independent Educational Evaluations and District Reevaluation

Initially, in the parents' due process complaint notice, they requested IEEs in nine areas: a neuropsychological evaluation, a speech-language evaluation, an auditory processing evaluation, a PT evaluation, an OT evaluation, an assistive technology evaluation, an ABA assessment, an observation by an expert in behavior, and an FBA/BIP (Parent Ex. A at p. 17). During the hearing, the district's representative indicated that the parties entered into a resolution agreement covering the request for a neuropsychological evaluation and an assistive technology evaluation (Tr. p. 9). A neuropsychological evaluation was conducted during the hearing; however, the hearing record does not include an assistive technology evaluation (Tr. pp. 43, 64, 109; Parent Ex. R). In addition, the IHO directed the district to fund IEEs in the areas of a speech-language and OT through an interim order during the hearing and these evaluations were conducted in April and May 2021

⁸ 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).

(Parent Ex. G; see Parent Exs. P; Q). At the conclusion of the hearing, the parents requested an independent assistive technology evaluation, an independent feeding and swallowing evaluation, an independent FBA and BIP, as well as an independent neuropsychological reevaluation at district expense (Parent Post Hr'g Br. at pp. 19-20). In her decision, the IHO found that there was no evidence that the parents requested these evaluations from the district or "disagreed with any of the requested evaluations" and denied the parents' request for IEEs (IHO Decision at p. 20). On appeal, the parents only request IEEs in the areas of assistive technology, feeding and swallowing, and an FBA and BIP (Req. for Rev. at ¶10). Accordingly, the IHO's denial of IEEs in the remaining areas is final and binding on the parties and will not be further discussed (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]).

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).⁹

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

⁹ Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that, if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

While there are claims that the district failed to adequately evaluate the student, and it shows that the parent initiated a claim for publicly funded IEEs in the December 2020 due process complaint notice, there is no evidence that the parents sought IEEs at public expense prior to their December 2020 due process complaint notice or how the district responded, if at all, to the parents' requests in the due process complaint notice other than to agree to the parents' requests for neuropsychological, OT, and speech-language evaluations.¹⁰ Additionally, although the parents' allegations regarding the district's evaluations of the student were generally vague and not directed at specific evaluations, the parents' due process complaint notice included numerous objections to the district's evaluations, in particular arguing that, at multiple points in time, the student was not evaluated in all areas of suspected disability (Parent Ex. A at ¶¶ 3, 13, 19-20, 25, 38, 52, 78, 86, 88[c], 88[l], 88[n], 104, 121-33, 135[a], 151).

Notwithstanding the parents' allegations in the due process complaint notice, the district did not offer any evidence at the impartial hearing in defense of its evaluations of the student.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

The neuropsychologist who evaluated the student in June 2021 recommended that the student receive an assistive technology evaluation and an FBA and BIP (Parent Exs. R at pp. 14-

¹⁰ While in past decisions, SROs have held that a parent may request a district funded IEE in a due process complaint notice in the first instance (see Application of a Student with a Disability, Appeal No. 19-094), this is not exactly the process contemplated by the IDEA and its implementing regulations (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). In cases such as this, it is becoming obvious that the parent is delaying the IEE request in favor of including it in their own due process complaint with the intent to litigate the issue rather than attempting to work with the district outside of due process, which tactic is unnecessary, especially when the district appeared to be willing to engage with the parents and agreed to pay for some IEE elements early on in this matter.

15; U at ¶¶ 82, 83). In addition, the speech-language pathologist who evaluated the student in May 2021 recommended that the student receive a feeding and swallowing evaluation (Parent Exs. Q at p. 18; S at ¶73). With respect to the latter, the district is correct that the parents did not request a feeding and swallowing evaluation in their due process complaint notice (see Parent Ex. A). The parents concede that they came to request a feeding and swallowing evaluation based on the recommendations set forth in the speech-language evaluation (see Req. for Rev. ¶ 10). Generally, if the IEEs request yet further evaluations, the district should have an opportunity to conduct those evaluations and, in this instance, it does not appear that the lack of the feeding and swallowing evaluation formed the basis of the parents' disagreement with the district evaluations in this instance. However, even if the lack of a feeding and swallowing evaluation did not underlie the parents' disagreement with the district's evaluation of the student, given the remand of this matter, as discussed below, the independent evaluation is alternatively appropriate in order to inform the hearing record below (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. Roberts, 2016 WL 6831122, at *7 [E.D. Pa. Oct. 27, 2016] [noting that an IHO "is permitted, and in some cases required, to order an [IEE] at public expense"], on reconsideration in part, Luo v. Owen J. Roberts Sch. Dist., 2016 WL 6962547 [E.D. Pa. Nov. 28, 2016], aff'd, 2018 WL 2944340 [3d Cir. June 11, 2018]; Lyons v. Lower Merriam Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010] [noting that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process"]; see also S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at *9 n.9 [D.R.I. Jan. 14, 2014] [acknowledging opinion that the regulation empowers hearing officers to solicit independent expert opinions but disagreeing that the regulation gives an IHO "the inherent power to make up remedies out of whole cloth"], aff'd, 773 F.3d 344 [1st Cir. 2014]).

In accordance with the forgoing, the district is directed to fund IEEs, in particular, the feeding and swallowing evaluation, an assistive technology evaluation, and an FBA.

B. Compensatory Education

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 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems

successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Here, the district conceded, or at least failed to meet its burden to prove, that it offered the student a FAPE for the 2018-19, 2019-20, and 2020-21 school years. The parents now request all of the compensatory ABA services sought at the impartial hearing. To be sure, the district was required under the due process procedures set forth in New York State law to address its burdens 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

However, 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] [rejecting "lump sum" grant of tutoring as a compensatory remedy for a multi-year denial of FAPE]).¹¹ 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"]). Moreover, if the sum and total of the compensatory education relief requested by the parent was ordered, including the monetization thereof, it would amount to a punitive award (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] [noting that "[t]he purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]).

Here, the parents' request for relief represents an hour-for-hour compensatory education remedy for the school years at issue without consideration of the program and services the student received. A request for compensatory education "should be denied when the deficiencies suffered have already been mitigated" or partially mitigated as the case may be (N. Kingston Sch. Comm.

¹¹ Authority specific to the issue of a parent's request for a default judgment due to a school district's failure to comply with provisions requiring a response to due process complaint notices tends to lean against entry of a default judgment in the absence of a substantive violation, and that the remedy is a due process hearing (G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 Fed. App'x 698, 699 [9th Cir. 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]). However, here, an impartial hearing, along with a full and fair opportunity to be heard, has been afforded to the district already, rendering such authority inapposite.

v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014], adopted at, 2015 WL 1137588 [D.R.I. Mar. 12, 2015] 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]; Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]).

In this matter, the IHO correctly denied the parents' request for 5,796 hours of ABA services (5,520 hours of 1:1 ABA services and 276 hours of home-based ABA services), as the hearing record in its current state does not support such an award.¹² Nevertheless, the student is entitled to some compensatory relief for a three-year denial of a FAPE, which the district also concedes in its answer and cross-appeal. That is, "[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 parents object to the district's request for remand and argue that it will unfairly provide the district a second opportunity to meet its burden to offer a compensatory remedy. However, the district has already conceded that the student was denied a FAPE for the 2018-19, 2019-20, 2020-21 school years and the parents have prevailed on that issue. Review of the hearing record shows that it is not complete for the computation of a compensatory award and, accordingly, remand is necessary to determine an appropriate award.

The psychologist who conducted the July 2021 independent neuropsychological evaluation opined that, due to the district's failure to provide the student with a sufficient and consistent program and services, the student "is entitled to a flexible, non-expiring bank of 5,520 compensatory remediation hours for 1:1 SETSS-ABA, social skills training, home-based ABA, and parent counseling/training" (Parent Ex. R at p. 14). The evaluator further stated that the hours were calculated based on three school years "during which time [the student] should have received a full-time (40 hours/week) ABA program" (id.). The evaluator also recommended an additional 276 hours of home-based ABA services (id. at p. 15). The psychologist's recommendation for 5,520 hours of compensatory ABA services was based on the faulty premise that the student did not derive any educational benefit whatsoever during the 2018-19, 2019-20, and 2020-21 school years and the recommendation also failed to account for the program the student was in at the end of the 2020-21 school year, as there is some indication in the hearing record that the student made progress after enrolling in the Child School on February 1, 2021.

At the time of the development of the October 2018 IEP, the student was seven years old and would have attended a second grade class had he not repeated first grade. A comparison of the October 2019 IEP with the October 2018 IEP indicated that the student made little progress

¹² In their request for review the parents are seeking 5,520 hours of ABA services; however, at the close of the hearing the parents requested 5,796 hours of ABA services (see Parent Post Hr'g Br. at pp. 17-19, 27).

while attending public school; however, he did make some progress. According to the October 2018 IEP's instructional/functional levels, the student was reading at a kindergarten level and performing at a first grade level in math (Parent Ex. C at p. 22). In reading, writing, and activities of daily living, the descriptions of the student were virtually identical from 2018 to 2019, and the student remained functioning at the same levels (compare Parent Ex. D at pp. 7-8, with Parent Ex. C at pp. 8-9). In math, the student was working on grade level during 2018 and 2019, and according to the October 2019 IEP, the student was able to solve addition and subtraction equations for numbers 1-20, an improvement from the prior school year (compare Parent Ex. D at p. 7, with Parent Ex. C at p. 8). The October 2019 IEP also indicated that the student was learning how to use repeated addition to multiply and could "do so for numbers 1-10" (Parent Ex. D at p. 7). Behaviorally, the October 2019 IEP indicated that the student's distractibility had improved, and that medication had been beneficial (compare Parent Ex. D at p. 8, with Parent Ex. C at p. 9). In speech-language therapy, the October 2019 IEP reflected that the student had made minimal progress since October 2018 (Parent Ex. D at pp. 8-9). At the time of the development of the October 2019 IEP, the student was eight years old and would have attended a third grade class, had he not repeated first grade. According to the student's instructional/functional levels from the October 2019 IEP, the student was reading at a kindergarten level and performing at a first grade level in math (Parent Ex. D at p. 26).

At the time of the development of the November 2020 IEP, the student was nine years old and would have attended a fourth grade class, had he not repeated first grade. A comparison of the November 2020 IEP with the October 2019 IEP indicated that in reading, the student had shown progress with longer, more complex words with blends at the beginning and had progressed from reading stories at a Fountas and Pinnell level C to a level E (compare Parent Ex. E at p. 1, with Parent Ex. D at p. 7). In math, the student was working on grade level in solving multiplication equations for numbers 1-10, he could easily count up to 100, and could add and subtract with regrouping (compare Parent Ex. E at pp. 1-2, with Parent Ex. D at p. 7). The student was beginning to learn to divide and required adult assistance, nevertheless, math continued to be an area of relative strength for the student (compare Parent Ex. E at pp. 2, 3, with Parent Ex. D at pp. 7, 9). In writing, the student remained "far below grade level"; however, he had shown improvement in the amount of pressure he used when writing and in penmanship (Parent Ex. E at p. 2). The descriptions of the student's functioning in activities of daily living and behaviorally were similar to the prior school year, while noting some differences related to distance learning (compare Parent Ex. E at pp. 2-3, with Parent Ex. D at p. 8). The November 2020 IEP indicated that the student had made moderate progress in speech-language therapy until remote learning began in March 2020, when the student regressed due to his difficulty sustaining attention (Parent Ex. E at p. 3). According to the November 2020 IEP, the student's instructional/functional levels were at the first grade level for both reading and math (Parent Ex. E at p. 14).

The parents obtained a private neuropsychological evaluation in October and November 2018 (Parent Ex. F at pp. 2-18). In an evaluation report dated November 30, 2018, the psychologist recommended placement in a fulltime, small, structured, integrated classroom with a small student-to-teacher ratio which could provide direct instruction by a special education teacher utilizing a specialized behavioral program (id. at p. 8). The private psychologist also recommended 12-month services, OT, speech-language therapy, a social skills group, and specific classroom accommodations (id. at pp. 9-10). The private psychologist also made specific recommendations

to address the student's attention deficits, working memory, and executive functioning delays (id. at pp. 10-11). The hearing record also includes a privately-obtained July 2019 psychosocial evaluation and a privately-obtained July 2019 psychoeducational evaluation (Parents Exs. N; O).¹³ The July 2019 psychosocial evaluation recommended afterschool programming, community habilitation, recreation, respite, a socialization skills group, and a special education advocate (Parent Ex. N at p. 5). The July 2019 psychoeducational evaluation recommended referral to the CSE to locate a new school placement, continued case management, and continued medication monitoring (Parent Ex. O at p. 5).

The occupational therapist who conducted the independent OT evaluation interviewed the student's fourth grade head teacher at the Child School on May 3, 2021 (Parent Ex. P at p. 1). The student's head teacher reported that the student had adjusted well to the school and made friends (id. at p. 2). The student demonstrated strong math skills and his greatest academic need according to the head teacher was in reading comprehension and answering "who, what, where, when, why, and how" questions (id.). The student required most questions to be repeated and rephrased (id.). The student reportedly also demonstrated difficulty forming some letters and with spacing so that his writing was legible (id.). The student required movement breaks every 20 to 25 minutes and the head teacher indicated that the whole class participated in these movement/brain breaks that were based on the program "Move 2 Learn" (id.).

The speech-language pathologist who conducted the independent speech-language evaluation obtained an "intake form" from the student's fourth grade head teacher on April 21, 2021 (Parent Ex. Q at p. 2). The student's head teacher reported that the student was performing at a second grade level for both reading and math (id.). The student read second grade passages fluently and applied decoding strategies when reading multisyllabic words and words containing long/short vowel sounds (id.). The student struggled with reading comprehension, responding to basic who, what, where, when, why, and how questions, locating the main idea and supporting details, answering inference questions, and determining facts from opinions (id.). The head teacher also indicated that the student struggled to include an introduction, middle and conclusion when writing in paragraph form; used basic sentences and did not include details or descriptive words (id.). In math, the student applied strategies for addition and subtraction of two-digit problems that required regrouping (id.). The student was able to identify the value of coins, add different coin combinations, and multiply a few facts for single digit numbers (id.). The student reportedly struggled with multiplying with digits 10, 11, and 12 and with choosing the correct operation for addition, subtraction, or multiplication when given a one or two-step word problem (id.). The student required word problems to be read aloud several times; reteaching, manipulatives, and directions broken down into simple steps; outlines/graphic organizers; verbal and nonverbal prompts; modeling; comprehension questions explained in detail; pictures/visual cues; and extended time to complete all assignments (id.). The student was reported to have strengths in math calculations but struggled with reading comprehension, writing, responding to basic

¹³ As part of the privately-obtained July 2019 psychoeducational evaluation, the student's cognitive functioning was assessed using the Stanford-Binet Intelligence Scales-Fifth Edition (SB-5) (Parent Ex. O at pp. 2-3). The student's results on the SB-5 were not consistent with the results obtained on the Weschler Intelligence Scale for Children-Fifth Edition (WISC-V) as reported in the district's October 2018 psychoeducational evaluation and in the July 2021 independent neuropsychological evaluation (compare Parent Ex. O at pp. 2-3, with Parent Ex. R at p. 17; Dist. Ex. 4 at p. 4).

questions, and following basic one-step directions (id.). When compared to peers with similar backgrounds and language acquisition histories, the student's language was reported to be "on the same level as his peers in the classroom" (id. at pp. 2-3). While the student enjoyed participating in classroom discussions, particularly in science and social studies, he was reported to lose focus and to be easily distracted by external stimuli (e.g., picking his nails, staring at his pencil, etc.) (id. at p. 3). It was also reported that "[the student] occasionally struggle[d] to complete a sentence when he [wa]s trying to explain his thoughts to an adult" (id.). Reportedly, the student may repeat what was asked of him or become confused (id.). He was described as being a "perfectionist" and as "a very hard worker," who became upset when he got an answer wrong (id.).

The psychologist who conducted the independent neuropsychological evaluation also conducted a classroom observation via live stream video on June 23, 2021, "in order to capture [the student] in his current school environment" (Parent Ex. R at p. 5). The psychologist noted that the classroom desks were separated in the classroom for social distancing precautions (id. at pp. 5-6). On the morning of the observation, the students were seated at their desks and engaged in an independent math worksheet activity (id. at p. 6). During the assignment, the psychologist reported that the student was consistently on-task and making the appropriate corrections to his work (id.). The student reportedly worked very diligently and was not distracted by other students in the classroom (id.). The student's teachers frequently checked in on him to review his progress (id.). According to the psychologist, at one point, the student's head teacher called over to the student and asked, "are you okay over there?"; the student did not look up from his paper and kept working (id.). The psychologist noted that the head teacher asked the student if he was finished with the page and the student did not respond (id.). The head teacher stated, "Yes? No?," the student reportedly kept his eyes on the paper and briefly replied, "No" (id.). The head teacher approached the student's desk to review his progress, and the psychologist noted that the student seemed unsure of how to approach multistep math problems (id.). The student was reportedly unable to finish each problem without the teachers guiding him through each step and correcting his computation errors (id.). The psychologist further noted that the student also relied on verbal instructions to move on to the next problem (id.). The psychologist also indicated that at the end of the lesson, the head teacher addressed the class and asked the students to clean up their desks and get ready for lunch (id.). It was observed that the student transitioned quietly and efficiently (id.).

Although the hearing record includes some information regarding the student's progress, the hearing record lacks specific progress reports. In particular, the student's progress towards his IEP goals during the 2018-19, 2019-20, and 2020-21 school years, service delivery records, as well as progress reports from the Child School beyond the anecdotal reports of the student's fourth grade head teacher are not included in the hearing record.

Overall, considering the above, the hearing record in this matter includes an adequate history of the student's functioning and the district concedes that it did not maintain the student in a classroom that was insufficiently supportive during the school years at issue. However, as discussed above, the hearing record also includes evidence that tends to indicate that the student has been successful and made academic gains since enrolling at the Child School on February 1, 2021. Accordingly, based on the student showing some progress in the district, the private evaluator's blanket recommendation, which did not seem to take that progress into account, cannot be relied on as a sole basis for making a compensatory education award.

In addition to the lack of information regarding the student's progress, the private evaluations also fail to sufficiently describe how an award of over 5,000 hours of 1:1 ABA services might be used by the student to get him to the position he would have been in but for the denial of a FAPE for the three school years at issue.

The psychologist who conducted the independent neuropsychological evaluation testified that because she would not be delivering services or providing supervision, she did not recommend specific goals or objectives and did not perform the type of assessments that would have established the student's present skill levels (Tr. pp. 123-26). The psychologist also testified that the Assessment of Basic Language and Learning Skills (ABLSS), the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP), and a transition assessment were required to identify the student's milestones (Tr. p. 125). She further testified that these assessments were part of assessing and measuring progress "with the eventual goal of being in a least restrictive environment... [a]nd then also there's a more in depth task analysis. So it's figuring out exactly where is that breakdown to achieving this particular skill or outcome" (Tr. p. 126). The psychologist elaborated that "it is very nuanced, and which is the idea to really target and develop goals and interventions, and then an ABA program is ideally based off of -- not entirely, but partially based off of those outcomes from those assessments" (*id.*).

When asked by the IHO what 1:1 ABA services would consist of for the student, the psychologist testified that it could include social skills training, community/vocational and adaptive living skills services, and parent counseling and training (Tr. p. 118-19). When asked to explain what the student's day would look like, the psychologist testified that "it could include the opportunity to provide more wraparound services. Not having a VB-MAPP or an ABLSS to know exactly where his skills deficits are... it would be incredibly important for his family to have services that they can access before school" (Tr. p. 119). The psychologist also provided examples of how 1:1 ABA instruction could be accessed throughout the day for the student (Tr. pp. 119-20).

The hearing record also reflects that the student has never received ABA services, and, although the November 2018 private neuropsychological evaluation recommended a specialized behavioral program, the psychologist did not endorse a specific methodology and did not recommend compensatory educational services despite noting the student's significant academic delays and poor progress (Parent Ex. F at pp. 5-8).

Because the student has never received instruction using ABA and because the psychologist did not determine the student's skill levels, the recommendation for a non-expiring bank of 5,520 hours of ABA services is not tethered to the student's need areas, does not specify the academic delays that will be addressed as a result of a three-year denial of a FAPE, and does not include a reasonable time frame within which the student could be expected to make academic gains he should have achieved had the district offered him a FAPE during the 2018-19, 2019-20, and 2020-21 school years. Accordingly, remand for further proceedings is necessary to answer these questions (see 8 NYCRR 279.10[c] ["A State Review Officer may remand a matter to an impartial hearing officer to take additional evidence or make additional findings"]).

The parents object to a remand of this matter asserting that the district should not be given a second chance to present an argument or evidence about a compensatory award. However, as discussed above, the hearing record does not include sufficient information upon which to base a

reasoned compensatory education award. Upon remand, the parents should articulate for the IHO how much and what form of compensatory education she seeks. Further, the district should, pursuant to the due process procedures set forth in New York State law (Educ. Law § 4404[1][c]), address its burden by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, as to what form of a compensatory education remedy would most reasonably and efficiently place the student in the position that she would have been but for the denial of a FAPE (E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524). Moreover, the IHO and the parties may consider extending the hearing timelines to allow for completion of the independent evaluations. In addition, the IHO should expand the hearing record to include, in addition to the progress reports noted above, the student's current present levels of educational performance in all academic content areas, his current social/emotional functioning, the student's activities of daily living, as well as any need areas indicated in the independent evaluations. Further, at the time of the impartial hearing, there was evidence to suggest that the parents were happy with the student's then-current program at the Child School, and the October 2020 social history indicated that the student's mother had requested placement at the Child School (Tr. p. 122; Dist. Ex. 11 at p. 1). The IHO should consider the student's progress at the Child School when determining the amount and type of compensatory award to which the student is entitled. It is possible that the student in this matter could benefit from some amount of 1:1 ABA services. However, the IHO is not required to award ABA services if an adequately developed hearing record on remand does not support such an award. Finally, once the student's current needs and appropriate programming are determined, the services the student received in prior school years, even if inadequate, may nevertheless have provided some assistance and are relevant to crafting a compensatory remedy.

VII. Conclusion

For the reasons stated above, this matter is remanded to the IHO to determine an appropriate award of compensatory educational services for a denial of a FAPE for the 2018-19, 2019-20, and 2020-21 school years and the district is directed to fund independent evaluations in the areas indicated.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated November 29, 2021 is modified by reversing those portions which denied the parents' request for an independent feeding and swallowing evaluation, an independent assistive technology evaluation, and an independent FBA and which denied the parents' request for compensatory education;

IT IS FURTHER ORDERED that the district fund an independent feeding and swallowing evaluation, an independent assistive technology evaluation, and an independent FBA;

IT IS FURTHER ORDERED that that the matter is hereby remanded to the same IHO who issued the November 29, 2021 decision to determine an appropriate compensatory educational award for the denial of a FAPE for the 2018-19, 2019-20, and 2020-21 school years in accordance with the directives identifying the information required to make such a determination contained within the body of this decision; and

IT IS FURTHER ORDERED that, if the IHO who issued the November 29, 2021 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
 February 10, 2022

SARAH L. HARRINGTON
STATE REVIEW OFFICER