



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 22-013

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

### **Appearances:**

Advocates for Children of New York, Inc., attorneys for petitioner, by Daniela Nauffal, 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which failed to address her request for compensatory education in relation to the 2018-19 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for the 2018-19 and 2019-20 school years. The appeal must be sustained. The cross-appeal must be dismissed.

### **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 attended a district school from pre-kindergarten through fourth grade (Tr. pp. 529-30). In kindergarten (2013-14 school year), he struggled to learn basic reading skills and performed "well below grade expectations"; at the request of the school, he repeated the grade (Parent Ex. N at p. 3). During the student's second year of kindergarten (2014-15 school year) the parent requested an initial CSE evaluation (*id.*) The student was found eligible for special education as a student with a learning disability and provided with special education teacher support services (SETSS) for English language arts (ELA) and counseling services (*id.*). For first

grade (2015-16 school year) the student continued to receive SETSS, however, his counseling services were discontinued as he had met his goals (*id.*). The student's team at the time reported that he struggled to accurately identify letter sounds, easily lost focus, and had difficulty retaining information (*id.*). In February 2016, the student participated in a psychiatric evaluation, which reportedly yielded diagnoses of an attention deficit/hyperactivity disorder (ADHD), inattentive presentation; separation anxiety disorder; and an adjustment disorder with anxiety and depression (*id.* at p. 2).

When the student was in second grade (2016-17 school year) the parent obtained a private neuropsychological evaluation due to her concerns regarding the student's academic and attending difficulties (Parent Ex. N at pp. 1, 3). The results of the evaluation supported the ADHD and separation anxiety diagnoses identified in the psychiatric evaluation and in addition indicated that the student had specific learning disorders in reading, written expression, and mathematics (*id.* at pp. 12-14). Among other things the evaluator recommended that the student be placed in a specialized program in a structured setting with a lower student-to-teacher ratio that employed a comprehensive, evidence-based reading intervention program (*id.* at p. 14).

On June 5, 2017, a CSE convened and developed an IEP for the student, portions of which were projected to be implemented beginning that same day (Parent Ex. P at pp. 1, 12). The June 2017 IEP indicated that the student's reading skills were at a kindergarten level (Fountas and Pinnell instructional Level D) and his math skills were at a first-grade level (*id.*). The CSE found the student eligible for special education as a student with a speech or language impairment and recommended that the student receive two periods per day of integrated coteaching (ICT) services for math and three periods per day of ICT services for ELA, as well as two 30-minute sessions per week of group speech-language therapy services (*id.* at pp. 1, 9).

By letter dated October 10, 2017, the parent requested that the CSE meet to review the results of the April 2017 neuropsychological evaluation (Parent Ex. M). The parent indicated that she and her advocate had met with the district on June 20, 2017 because a CSE meeting had taken place on June 5, 2017 without her knowledge (*id.*).<sup>1</sup> The parent reported that the district refused to make changes to the student's IEP at that time but verbally agreed to provide the student with ICT services, SETSS, and individual speech-language therapy (*id.*). The parent noted that when she received the finalized June 2017 IEP there was no recommendation for SETSS and the IEP indicated that the student's speech-language therapy services would be provided in a group (*id.*; see Parent Ex. P. at p. 9). The parent indicated that she was attaching a copy of the finalized neuropsychological evaluation report to her letter (Parent Ex. M at p. 1).

In December 2017, a CSE convened and developed an IEP for the remainder of the student's 2017-18 school year (third grade) (Dist. Ex. 1 at p. 1). The December 2017 CSE considered the results of the April 2017 neuropsychological evaluation obtained by the parent and included cognitive test scores in the present levels of performance that indicated the student's overall intelligence was in the average range (*id.*). The IEP also reflected the results of

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<sup>1</sup> The school psychologist testified that the parent requested a CSE meeting because she thought an annual review had been held in June 2017 without her (Tr. pp. 119-21). The attendance page of the June 2017 IEP lists the name of a related services provider/special education teacher, a general education teacher, and a district representative (*id.* at p. 13). There are no signatures on the page to reflect who actually participated in the meeting (*id.*).

phonological testing conducted by the private evaluator that indicated the student performed "well-below average" on formal testing, which suggested he had "impaired phonological processing skills" (*id.*). The December 2017 IEP indicated that according to his then-current classroom teacher, the student functioned at the kindergarten level for reading (Fountas and Pinnell Level B) and all of his reading scores and writing score on the Benchmarks Universe Assessment were also at the kindergarten level (*id.*). The student's math skills were also at the kindergarten level (*id.*). The December 2017 CSE found the student eligible for special education as a student with a learning disability and recommended that the student receive ICT services in a general education classroom for one period of ELA per day and two periods of math per day (*id.* at pp. 1, 7). In addition, the CSE recommended that the student attend a 12:1 special class for ELA two periods per day and receive SETSS for ELA for two periods per week, SETSS for math one period per week, and group speech-language therapy two times per week for 30 minutes (*id.* at pp. 7, 10-11).

Turning to the IEPs at issue in this matter, a CSE convened on May 4, 2018 to develop the student's IEP for the 2018-19 school year (fourth grade) (Dist. Ex. 3). The present levels of performance indicated that the student was reading at Fountas and Pinnell Level C, which was equivalent to an end of kindergarten level (*id.* at pp. 1, 9-10). In addition to reading, the IEP noted that the student was functioning below grade level in written expression and mathematics (*id.* at p. 1). With regard to the student's academic needs, the May 2018 IEP stated that the district staff and the parent were concerned about the student's academic delays, especially in reading and writing (*id.* at p. 2).

For the 2018-19 school year, the May 2018 CSE found that the student continued to be eligible for special education as a student with a learning disability and recommended that the student attend a 12:1 special class for ELA three periods per week and a 12:1 special class for math two periods per week in a "[n]on-[s]pecialized" school and receive group speech-language therapy two times per week for 30 minutes (Dist. Ex. 3 at pp. 6-7, 9).<sup>2, 3, 4</sup> The IEP indicated that the parent, as well as the private education coordinator from the agency that conducted the April 2017 neuropsychological evaluation who attended the CSE meeting with the parent, requested placement for the student in a nonpublic school, but the district denied that request as it considered the option too restrictive for the student (*id.* at p. 10; *see* Parent Ex. N; Dist. Ex. 4).

A CSE met again on December 10, 2018 (Dist. Ex. 11 at p. 12). Evaluation results included in the resultant IEP indicated that as of December 7, 2018, the student was reading at Fountas and Pinnell Level D; according to the IEP, this which was equivalent to beginning first grade (*id.* at p.

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<sup>2</sup> The student's eligibility for special education as a student with a learning disability is not in dispute (*see* 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

<sup>3</sup> In a prior written notice to the parents dated June 25, 2018, the district summarized the special education services recommended by the May 2018 CSE and stated that the CSE believed it was in the best interest of the student to defer the start of the recommended services until September 5, 2018 (*see* Dist. Ex. 5 at pp. 1, 5).

<sup>4</sup> The school psychologist testified that the CSE recommended the student for a "full-time" 12:1 special class but that it appeared as it did on the IEP due to requirements of the district's Special Education Student Information System (SESIS) (Tr. pp. 306-07).

1).<sup>5</sup> In addition, the IEP indicated that according to iReady Math results the student's overall scores were on a mid-first grade level and his geometry scores were on a second-grade level (id.). The IEP noted that, as reported by the student's teacher, the student was below grade level in reading, had made slow progress academically, and was functioning on a beginning first grade level in ELA (id.). Although the IEP indicated that the student was functioning at a Fountas and Pinnell Level D for reading, it also stated that while reading independently without supports the student's comprehension level was lower (id.). With regard to writing, the December 2018 IEP indicated the student could create sentences, but they did not have the correct punctuation and/or grammar (id.). In addition, the student struggled to write a complete sentence on his own because he had a difficult time spelling words independently (id.). According to the teacher's report reflected in the IEP, the student had shown progress in his then-current setting in only a short time (3 months) (id.). It was the teacher's professional opinion that the student was in an appropriate educational setting (id. at pp. 1-2).

Although the December 2018 IEP indicated that the student had demonstrated progress it also reflected that the parent thought the student's progress had been too slow and that his progress would be better in a nonpublic school (Dist. Ex. 11 at p. 13). The IEP indicated that, to address the parent's concerns, the district offered the option of adding SETSS to the student's 12:1 special class program, but the parent declined the service (id.).<sup>6</sup> According to the IEP, the CSE considered placement in a nonpublic school day program, as requested by parent and private education coordinator, as well as placement in a specialized school program, but determined that those programs were too restrictive at that time (id.). The December 2018 IEP indicated that the student would benefit from remaining in his then-current small, self-contained (12:1) class in a community school to address his academic needs/ delays, especially in reading and writing (id.). The IEP continued the recommendation for the 12:1 special class for ELA and math but updated the frequencies from weekly to daily to reflect that the student would attend a 12:1 ELA special class three times per day and a 12:1 math special class two times per day (compare Dist. Ex. 11 at p. 9, with Dist. Ex. 3 at p. 7).

In or around January 2019, the student's mother obtained a neuropsychological reevaluation of the student due to her concerns that he was not making progress in his areas of difficulty despite receiving special education services (Parent Ex. D at p. 1). The January 2019 neuropsychological reevaluation report indicated that the student's scores on cognitive testing were consistent with his previous neuropsychological evaluation (id. at p. 5). The report also indicated that the student evidenced significant weaknesses in language skills (id. at p. 8). In addition, the student exhibited impairments in reading, including phonological awareness and rapid naming; writing, including spelling, structure, word form, and mechanics; and mathematics, including computation and problem-solving skills (id. at pp. 8, 19). With respect to the student's social/emotional development, the neuropsychological reevaluation report stated that the student

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<sup>5</sup> Although the December 2018 IEP indicated Level D on Fountas and Pinnell was equivalent to beginning first grade, a Fountas and Pinnell text level gradient included in the hearing record indicates that Level D is equivalent to the end of kindergarten (Parent Ex. Q). The student's June 2017 IEP also referred to Fountas and Pinnell Level D as being at the kindergarten level (Parent Ex. P at pp. 1, 12).

<sup>6</sup> The parent refutes this characterization and testified that she had "never refused any services for the student" (Tr. pp. 574-75).

evidenced symptoms of inattention and anxiety and suggested that the combination of these areas of difficulty were significantly affecting his functioning in school, at home, and in the community (id. at pp. 8-9). The January 2019 neuropsychological reevaluation report offered similar diagnoses to those offered in the April 2017 neuropsychological evaluation; however, the student's specific learning disorder with impairment in mathematics was characterized as moderate as opposed to severe, and, whereas the student was previously diagnosed as having a separation anxiety disorder, the reevaluation characterized the student as having an unspecified anxiety disorder (compare Parent Ex. D at p. 9, with Parent Ex. N at p 14). In addition, the January 2019 neuropsychological reevaluation offered a new diagnosis of a language disorder (Parent Ex. D at p. 9).

Similar to the April 2017 neuropsychological evaluation report, the January 2019 neuropsychological reevaluation report stated that the student required placement in a specialized school for students with language and learning disorders that provided evidence-based interventions for language and academic skills built into the daily curriculum (Parent Ex. D at p. 9). The neuropsychological reevaluation report suggested that the student be provided with intervention using programs such Orton-Gillingham or Lindamood-Bell (id. at p. 10). Additional recommendations included specific interventions to target the student's deficits in writing and mathematics (id. at pp. 10-11). The reevaluation report also noted that the student "requires effective, evidence-based instruction outside of the school setting to remediate his profound learning delays" (id. at p. 11).

On June 6, 2019, the parent executed an enrollment contract for the student's attendance at Aaron for the 2019-20 school year (Parent Exs. H-I).<sup>7</sup>

In an August 21, 2019 letter to the district, the parent provided notice that she disagreed with the December 2018 IEP relevant to the 2019-20 school year, planned to unilaterally enroll the student in the Aaron School beginning on September 5, 2019, and would seek tuition payment for such placement from the district (Parent Ex. C at pp. 1, 4). The letter indicated that, should the district offer any additional placements, the parent would consider them (id. at p. 4).

The student attended Aaron beginning in September 2019 (Parent Ex. S ¶ 22; see Parent Ex. F).<sup>8</sup>

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<sup>7</sup> Aaron has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>8</sup> After the student began attending Aaron, a CSE convened on November 18, 2019 (Dist. Ex. 9 at p. 10). The November 2019 CSE recommended the student be placed in a 12:1+1 special class for all core academic classes for 35 hours per week in a district "[n]on-[s]pecialized" school (id. at pp. 7, 10). The CSE changed the student's related services recommendation from two 30-minute group sessions of speech-language therapy per week to one 30-minute session of individual speech-language therapy per week and one 30-minute session of group speech-language therapy per week (compare Dist. Ex. 9 at p. 8, with Dist. Ex. 11 at p. 10).

## **A. Due Process Complaint Notice**

In a due process complaint notice, dated February 18, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 and the 2019-20 school years (see Parent Ex. B at pp. 1-2).

Specific to the May 2018 IEP, the parent alleged that, despite reports that the student had not made meaningful process in reading and had not benefited from a 12:1 special class for ELA, the CSE again recommended a 12:1 special class for ELA, along with group speech-language therapy services (Parent Ex. B at p. 4). According to the parent, the May 2018 CSE "again ignored" the recommendation for specialized reading supports contained within the April 2017 private neuropsychological evaluation (id.). In addition, the parent took issue with the CSE's failure to recommend support for the student in other academic subjects such as social studies and science (id.). Finally, the parent alleged that the IEP included "impermissibly vague promotion criteria" (id. at pp. 4-5).

Concerning the December 2018 IEP, the parent alleged that the CSE failed to consider the student's lack of progress when reviewing his programming and inappropriately continued the recommendations for a 12:1 special class for ELA and math, along with group speech-language therapy (Parent Ex. B at p. 5).

The parent alleged that she obtained the January 2019 private neuropsychological reevaluation due to concerns that the student was not making progress and that the evaluation revealed that the student had "made no meaningful gains since his first evaluation in January 2017" and that he exhibited "'profound weaknesses' in reading, writing, and math skills" (Parent Ex. B at p. 5).

For the 2018-19 and 2019-20 school years, the parent alleged that the district "made a series of minimal, incremental changes . . . while ignoring information that [the student] need[ed] a more specialized setting to meaningfully progress" (Parent Ex. B at p. 6).

The parents alleged that Aaron was an appropriate unilateral placement for the student and, for relief, requested district funding of the costs of the student's attendance at Aaron for the 2019-20 school year, as well as transportation and reimbursement for the cost of the student's meals (Parent Ex. B at pp. 5-6).

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

An impartial hearing convened on September 9, 2020 and concluded on June 16, 2021 after 10 days of proceedings (Tr. pp. 1-606). During the February 26, 2021 hearing date, the parties and the IHO discussed the parent's proposed amended due process complaint notice, dated July 28, 2020, which added specific allegations regarding the November 2019 IEP and requested compensatory education as relief to remedy the district's alleged failure to provide the student with a FAPE for the 2018-19 school year (Tr. pp. 12-31; compare Parent Ex. B, with Amended Due Process Compl. Notice). The IHO found that the district had not agreed to the amendment and, further, declined to accept the amendment but indicated her intent to "entertain arguments and discussion regarding what . . . relief" would be appropriate (Tr. pp. 29-31).

In a decision dated January 10, 2020, the IHO determined that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years (IHO Decision at p. 17).<sup>9</sup> With respect to the 2018-19 school year, the IHO found that the district failed to sustain its burden to prove that the annual goals developed at the CSE meeting(s) were "related to the student's actual functioning" (*id.* at p. 16). In addition, the IHO determined that the district's witness "essentially corroborated the claims of the parents" when she testified that "the CSE was fully aware that what they were recommending was not meeting the student's needs" and "seemed almost indignant that the school was providing the student with the maximum amount of support" (*id.* at pp. 15-16). The IHO found that, notwithstanding the CSE's knowledge, it "continued to recommend the same failing program" and noted that the May 2018 CSE recommended the same singular reading goal "even though the student was clearly making no progress in reading" (*id.* at p. 16). The IHO found that the CSE inappropriately focused its recommendations on keeping the student "in his public community school" rather than "basing its decisions upon the needs of the student" (*id.*).

In addition, the IHO found that "[t]he CSE failed to consider the important information" contained in the January 2019 private neuropsychological reevaluation, including the results of standardized testing, showing that the student had not made meaningful progress since he was evaluated in 2017 and demonstrated "'profound weaknesses' in reading, writing, and math skills," with reading falling below the first percentile (IHO Decision at p. 16).

Next, the IHO found that the parents met their burden to prove that Aaron was an appropriate unilateral placement for the student for the 2019-20 school year and that the student made progress and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 16-17).

As relief, the IHO ordered the district to directly fund the costs of the student's tuition at Aaron for the 2019-20 school year (IHO Decision at pp. 17-18). The IHO denied the parent's request for the costs of the student's meals, finding that there was insufficient evidence in the hearing record upon which to make a finding (*id.*). Finally, the IHO indicated that "[a]ll other requested relief [wa]s denied" (*id.* at p. 18).

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

The parent appeals, arguing that the IHO erred by failing to grant any relief for the district's failure to provide the student with a FAPE for the 2018-19 school year. Specifically, the parent alleges that the IHO erred by not addressing her request for compensatory tutoring services. The parent seeks 800 hours of tutoring with EBL Coaching.

In an answer and cross-appeal, the district denies the parent's material allegations and argues that the IHO was correct to not consider compensatory education since the parent did not request it in the February 2020 due process complaint notice and the IHO declined to accept the July 2020 proposed amended due process complaint notice. Alternatively, the district argues that

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<sup>9</sup> The IHO's decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (*see* IHO Decision at pp. 1-25).

the evidence in the hearing record does not support the parent's request for 800 hours of compensatory tutoring services.

As for its cross-appeal, the district alleges that the IHO erred in finding that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years. The district indicates that both the May and December 2018 CSEs considered the April 2017 private neuropsychological evaluation but properly declined to wholesale adopt its recommendations. To the extent the IHO relied upon the January 2019 private neuropsychological evaluation, the district argues that this was not available to the CSEs and, therefore, could not be used to retrospectively assess the May and December 2018 CSEs' recommendations. As for annual goals, the district asserts that the goals in each IEP were aligned with the student's needs and designed to enable him to make progress. The district argues that, contrary to the IHO's characterization, the district school psychologist testified that the May 2018 CSE's recommendations were designed to provide the student with "'maximum' support." In addition, the district asserts that the evidence shows that the student made progress during the beginning of the 2018-19 school year leading up to the December 2018 CSE meeting. Finally, the district alleges that the IHO's determination relating to the 2019-20 school year consisted of a "conclusory statement" that the district failed to sustain its burden and that the question of the district's offer of "a placement" to the student was not properly before the IHO since the parent did not raise any challenges relating to the location at which the IEP would be located in her due process complaint notice.

In an answer to the district's cross-appeal, the parent denies the district's material allegations and argues that the IHO correctly found that the district denied the student a FAPE for the 2018-19 and 2019-20 school years.

## **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>10</sup>

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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 the Impartial Hearing**

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

With respect to the parent's appeal of the IHO's failure to address the parent's request for compensatory education to remedy the denial of a FAPE for the 2018-19 school year, the district

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<sup>10</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).

asserts that the IHO correctly disregarded the request because the IHO declined to accept the parent's proposed amended due process complaint notice dated July 28, 2020, which contained the request for compensatory education. Therefore, the district argues that the parent's claims were thereby limited to those brought in the original due process complaint notice dated February 18, 2020, which had no request for compensatory education.

It is undisputed that the February 2020 due process complaint notice did not explicitly seek relief in the form of compensatory education (see Parent Ex. B) and that the IHO declined to accept the parent's July 2020 proposed amended due process complaint notice (Tr. p. 31). However, the district's argument that compensatory education relief must always be predicated on raising it in a due process complaint notice in some form is an overly simplistic view of the requirements. Instead, with respect to relief (versus alleged violations), State and federal regulations require the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]).

Moreover, the parent continued to pursue her request for compensatory education notwithstanding that the IHO declined to accept the amended due process complaint notice, and the IHO expressed her intent to consider relief in that form. In particular, the IHO stated that, "[a]s far as the relief requested in the course of the hearing, I note that the Parents have set any further relief deemed appropriate in the complaint. I will entertain arguments and discussion regarding what that relief will be" (Tr. p. 31; see Parent Ex. B at p. 6).<sup>11</sup> Subsequently, the parent reiterated the request for compensatory education during her counsel's opening statement without objection (see Tr. pp. 78-85). During the impartial hearing, the parent called the director of EBL Coaching as a witness to make a record as to the amount of compensatory education that would be required to remediate any denial of FAPE the IHO might find, and the district objected to the need for the witness (see Tr. pp. 485-504). The IHO overruled the objection, noting that the purpose of her testimony would be "to address the appropriateness of the requested relief in the form of compensatory services" (Tr. p. 487). Further the IHO stated that "[t]o the extent that the parents want to place evidence in the hearing record from [the director] to assist in determining how much compensatory education should be awarded, they're absolutely entitled to do that . . . so she will be allowed to testify" (Tr. p. 491). Also noteworthy is the IHO's statement that, "if I found that the Aaron School was appropriate for the '19/'20 school year, then the student wouldn't be in need of compensatory education for the '19/'20 school year. So it's really just the '18/'19 school year in which compensatory education is actually an issue" (Tr. p. 490). The EBL Coaching director thereafter testified at length concerning the student's need for remediation and compensatory services, under appropriate cross-examination by counsel for the district (see Tr. pp. 502-26). At the close of the impartial hearing both parties brought arguments concerning compensatory

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<sup>11</sup> The statement in the February 2020 due process complaint notice to which the IHO referred was the parent's request for "[a]ny further relief deemed appropriate" (Parent Ex. B at p. 6; see Tr. p. 31), but such catch all language that amounts to any relief that can be dreamed up at an unknown point in the future is too vague to be of use. It is the proper hearing practices by the parent's attorney—raising the specific request early on and then bringing it up again throughout the impartial hearing—that are far more compelling than the boilerplate language included in the due process complaint notice.

education in their post-hearing briefs (Parent Post-Hr'g Br. at pp. 24-27; Dist. Post-Hr'g Br. at pp. 10-12).

Notwithstanding the IHO's statements throughout the hearing, in her final decision, she did not discuss the parent's request for compensatory education (see generally IHO Decision). It is unclear if this was an oversight or a determination that the relief was not warranted; however, absent any analysis in the decision, the parties and the undersigned are left to wonder as the IHO's rationale. In any event, as the parent stated her request for compensatory education early in the process and the IHO expressed her intent to consider the relief, this is not an instance where the district would be surprised or otherwise prejudiced by consideration of a compensatory award. In light of the above, and in consideration of the fact that there is sufficient evidence concerning compensatory education award in the hearing record upon which to base a determination, I find that the parent's request for compensatory education may be considered as part of the appeal.

The district raises another question about the scope of the impartial hearing in its cross-appeal. In particular, the district contends that the parent's allegation that the district failed to notify the parent of the particular public school location to which it assigned the student to attend for the 2019-20 school year was not properly before the IHO because the parent did not raise any challenge concerning this issue in the February 2020 due process complaint notice but only raised the issue in a post-hearing brief (see Answer & Cr.-Appeal ¶ 13; see also Parent Ex. B; Parent Post-Hr'g Br. at p. 19; but see Tr. p. 81). The February 2020 due process complaint notice does not raise an issue relating to the assigned public school site (Parent Ex. B). However, while the IHO found that the district had not met its burden to show that it offered the student a FAPE during the 2019-20 school year, it does not appear that the IHO based her determination that the district failed to offer the student a FAPE on a finding that the district had not identified a school location for the student to attend for the 2019-20 school year (see IHO Decision at pp. 6-7, 15-17). Accordingly, as the IHO did not rely on this issue, this is not a basis for a finding that the IHO erred.

The district also alleges that the IHO's determination relating to the 2019-20 school year was conclusory. However, the IHO examined the May and December 2018 IEPs in some detail, albeit at times without distinguishing to which IEP she was referring or whether her specific findings were applicable to both IEPs (see IHO Decision at pp. 15-17). The December 2018 IEP set forth a projected implementation date of December 20, 2018 and a projected date of annual review of December 11, 2019 (see Dist. Ex. 11 at p. 1). Thus, the program set forth in the December 2018 IEP was the operative program at the beginning of the 2019-20 school year when the parent made the decision to unilaterally place the student at Aaron, and, as such, "[t]he appropriate inquiry is into the nature of the program actually offered" (R.E. 694 F.3d at 187-88; see Parent Ex. C; Dist. Ex. 11 at p. 1). The substantive adequacy of the program offered in the December 2018 IEP was clearly at issue throughout the hearing, having been raised as an issue in the parent's February 2020 due process complaint notice, maintained in the parent's post-hearing brief, and addressed by the IHO (Parent Ex. B at p. 5; Parent Post-Hr'g Br. at pp. 13-16; IHO Decision at pp. 15-17). Accordingly, the discussion of the district's offer of a FAPE to the student for the 2019-20 school year will focus on the program set forth in the December 2018 IEP.

Lastly, neither party has appealed the IHO's determinations that the Aaron school was an appropriate unilateral placement for the student during the 2019-20 school year and that equitable

considerations weighed in favor of an award of tuition reimbursement (see IHO Decision at pp. 16-17). 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. May and December 2018 IEPs**

As for its cross-appeal, the district alleges that the IHO erred in finding that the district school psychologist's testimony supported a finding that the May and December 2018 CSEs' recommendations were inappropriate. In addition, the district alleges that the evidence in the hearing record shows that the student was making progress in the district program.

The main component of the recommended program which is in dispute is the May and December 2018 CSEs' recommendations that the student attend a 12:1 special class for ELA and math in a district community school. However, given the student's primary areas of need, the appropriateness of the recommendations for the 12:1 special class must consider the degree to which the IEPs provided for specially designed reading instruction.

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including via a resource room program, as a consultant teacher service, in a special class, or as a related service ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>). In addition, the guidance specifies that the CSE should "consider what prior instructional methods and strategies have been utilized with the student to avoid reinstating programs that have not proven effective in the past" and further indicates that "[i]nstructional methodology may be discussed at the [CSE] but is not specified on an IEP" (*id.*).

The student's IEP for the 2018-19 school year was initially developed at the May 2018 CSE meeting (Dist. Exs. 3 at p. 9; 4 at p. 1). The prior written notice indicates that the CSE used a December 11, 2017 classroom observation in its decision to recommend a 12:1 special class for the student (Dist. Ex. 4 at p. 1).<sup>12</sup> The IEP itself reflects information gleaned from the April 2017 neuropsychological evaluation report, as well as the student's teacher and speech-language therapist (Dist. Ex. 3 at pp. 1-2).

The school social worker who conducted the classroom observation noted that there were 22 students, two teachers, and one paraprofessional in the student's classroom (Dist. Ex. 7 at p. 1). The student correctly answered a question in both a large group lesson and in his small group reading lesson (*id.*). The social worker noted that the student was in the lowest reading group and

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<sup>12</sup> The classroom observation report shows that the observation took place on either December 4, 2017 or December 6, 2017 (Dist. Ex. 7 at p. 1). The resultant report was written on December 11, 2017 (*id.* at p. 2).

his reading material consisted of a five-page book with two to three words per page (id.). She indicated that out of the three students in the reading group, the student participated the most (id.).

The April 2017 neuropsychological evaluation report indicated that the student demonstrated variability in his cognitive profile (Parent Ex. N at p. 12). Administration of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) yielded a full-scale IQ of 92; however, his indices scores ranged from a high of 114 on processing speed to a low of 79 on fluid reasoning and working memory (id. at p. 18). In contrast, the student performed in the high average to superior range on the Naglieri Nonverbal Ability Test – Individual Administration, which suggested that he had well-developed nonverbal reasoning abilities (id. at p. 5). The evaluator reported that despite the student's inconsistent performance his "overall cognitive profile was suggestive of nicely developed cognitive aptitude, "which [wa]s good to see and w[ould] serve him well in the future" (id. at p. 12). Additional testing conducted by the evaluator revealed that the student experienced difficulty with phonological processing, language, academics, and attention (see id. at pp. 6-13). With regard to attention, the neuropsychological report indicated that the student displayed a vulnerability in his selective attention over a brief period of time, although he exhibited good focused and sustained attention on a longer nonverbal measure of attention (id. at pp. 6, 12). The report stated that the majority of the student's executive functioning skills were intact, and he demonstrated adequate cognitive flexibility, inhibition, task initiation, and concept generation (id.). However, the report noted that the student demonstrated weaknesses in visual memory and in general did not benefit from cues to assist him with his visual or verbal memory (id. at p. 9). According to the report, the student displayed adequate expressive language skills but also weaknesses in receptive language (id. at pp. 7-8, 12-13). The student had difficulty identifying letters and their corresponding sounds, struggled to spell single-syllable words and produce cogent short sentences, and had difficulty calculating and solving applied math problems (id. at pp. 9-10, 13). The student's mother and teacher reported that he displayed age-appropriate social skills both at home and in school (id. at p. 11).

In summary, the April 2017 neuropsychological evaluation report indicated that the student was a creative, caring, and friendly child with many strengths, including intact cognitive functioning and good social skills (Parent Ex. N at p. 14). However, the report noted that despite several strengths, the student continued to struggle daily in the classroom (id.). Consistent with teacher report, the student demonstrated significant deficits in his academic skills across reading, math, and writing tasks (id.). In addition, the student displayed neurocognitive weaknesses crucial for developing literacy skills, including variable rapid naming skills and poor phonological processing (id.). The April 2017 neuropsychological evaluation report indicated that the student reported feeling anxious about his performance at school as well as having a negative perception of school, which was likely exacerbated by the fact that his academic impairments and attending problems made it difficult for him to succeed and perform at school (id.). The evaluation report stated that "it [wa]s crucial" that the student be educated in a setting that could support his academic and emotional needs (id.).

The April 2017 neuropsychological evaluation report included numerous recommendations and noted that "in particular," the student "should be educated in a setting with a comprehensive evidence-based reading intervention program, such as the Wilson Reading Program" (Parent Ex. N at p. 14). The evaluation report stated that, despite being provided ELA SETSS since he repeated kindergarten, the student had not made significant academic progress

and emphasized that it was imperative that the student receive additional individualized attention that focused on individual word reading skills including letter sound correspondence and word decoding; reading comprehension; written expression, including spelling; and mathematics, including learning problem solving skills and strengthening understanding of math concepts (id. at p. 15).

As indicated above, at the time of the May 2018 CSE meeting the student was attending a 12:1 special class for ELA and also receiving ICT services and SETTS for both ELA and math (see Dist. Ex. 1 at p. 7). According to the IEP, the student was reading at Fountas and Pinnell Level C, which was equivalent to an end of kindergarten level (Dist. Ex. 3 at pp. 1, 9-10). The present levels of performance, which included a narrative update provided by the student's teachers, indicated that the student was functioning below grade level in reading and mathematics (id. at p. 1). More specifically, the IEP indicated that the student's comprehension skills were below grade level (id.).<sup>13</sup> The IEP also noted that the student was able to identify 25 upper case letters, 25 lower case letters, and 25 letter sounds (id.). In addition, the student was able to identify all of the pre-primer sight words (id.). The IEP stated that with regard to writing, the student functioned on a first-grade-level and he was able to write simple sentences using his alphabet chart and sight words list (id.). However, the student was unable to write a paragraph independently and he required teacher assistance to complete all of his writing tasks (id.). The IEP stated that in math, the student functioned on a beginning second-grade level, and he was able to add and subtract three-digit numbers without regrouping and add three-digit numbers with regrouping (id.). He was unable to subtract three-digit numbers with regrouping and struggled to solve word problems, even when they were read to him, because of the vocabulary used (id.). According to the IEP, the student scored "a 27 %" on the Math Ready Assessment (id.). The IEP indicated that, based on teachers' observations, the student was able to read Level B and Level C texts with visual supports and he was able to answer simple questions based on the texts (id.). But the IEP also indicated that there were days that the student could not read simple consonant-vowel-consonant (CVC) words like sit, cat, and had, and he needed to be prompted to sound out the words (id.). According to the IEP, the student got easily distracted by environmental stimuli such as lights and lost focus easily during academic instruction (id.).

In addition to teacher reports, the May 2018 IEP included an update from the student's speech-language provider who indicated that since the last meeting, the student had made some small improvements related to letter-sound correlations with individual presentations but that he did not carry over these improvements with decoding unfamiliar words or apply them when spelling independently (Dist. Ex. 3 at p. 2). The student could sound out the words when given cues and prompts (id.). The IEP noted that the student's memory for sight words had improved, as had his independent attempts at completing assignments (id.). However, it indicated that the student still guessed at most unfamiliar words (id.).

During the impartial hearing the district did not offer a description of the reading instruction it provided leading up to the May 2018 CSE meeting or the instruction it expected the student would receive in the recommended program, nor did it explain why it did not recommend

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<sup>13</sup> The December 2017 IEP indicated that comprehension was a strength for the student (Parent Ex. 1 at p. 1). It appears that by the time the May 2018 IEP was developed for the 2018-19 school year comprehension was difficult for him (Dist. Ex. 3 at p. 1).

explicit, multi-sensory reading instruction for the student, given his severe reading deficit. While the May 2018 IEP suggested that the student had learned to identify 5 new uppercase letters, 10 new lowercase letters, and 5 new letter sounds between December 2017 and May 2018, it also showed that the student's reading skills remained at the kindergarten level, that he required visual supports to read simple texts, and that his ability to read common CVC words was inconsistent (Dist. Ex. 3 at p. 1). The IEP also suggested that the student made little if any progress in writing and math (see id. at pp. 1-2). In May 2018, the student's instructional/functional level for reading remained at the kindergarten level, the same level he was at in June 2017 (compare Dist. Ex. 3 at p. 10, with Parent Ex. P at p. 12). Although the May 2018 IEP suggested that the student's instructional/functional level for math improved from a first-grade level to a second-grade level between June 2017 and May 2018 there are no progress reports or assessments that reflect that growth (compare Dist. Ex. 3 at p. 10, with Parent Ex. P at p. 12). The same goals reported as being met in the student's December 2017 IEP, were reported as not being met in the May 2018 IEP (compare Dist. Ex. 1 at pp. 3-7, with Dist. Ex. 3 at pp. 3-6).

The district school psychologist characterized the blended program of the 12:1 special class, along with ICT services and SETSS, recommended in the December 2017 IEP as "the maximum kind of support" and also as an opportunity for the school staff "to see if the 12:1 small-group would work better for him because of his attention and focusing and distractibility problems" (Tr. p. 127). The district school psychologist testified that the May 2018 CSE recommended that the student attend a 12:1 special class for five periods per day so that the student would "be fulltime in a small class rather than having a variety of services" and because, during the 2017-18 school year, he "seemed to benefit" from the time he spent in a 12:1 special class (Tr. pp. 139-40).<sup>14</sup> She further indicated that, in response to the parent's concerns that the student was not making enough progress, the CSE "tried to work with her to give her a more restrictive placement" (Tr. pp. 145-46). As for the student's progress leading up to the May 2018 CSE meeting, the school psychologist testified that the student was "making . . . slow but steady progress," which the committee felt was commensurate with his abilities, particularly given the student's difficulties with "attention, focusing, and related memory problems" (Tr. pp. 147-48). Based on this view, the school psychologist indicated that the CSE declined to recommend a nonpublic school for the student (id.).

The parent testified that she shared her concern with the December 2017 CSE that the student still reading below grade level despite receiving more services, and that he was anxious because he could not work as well as his classmates (Tr. pp. 542-45). The parent reiterated her concerns at the May 2018 CSE meeting but was advised by the district that all children learn in different ways and at different "speeds," and that her expectations were too high (Tr. p. 545).

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<sup>14</sup> As noted above, while the May 2018 CSE may have intended to recommend five periods per day of the 12:1 special class, the IEP actually included a recommendation for five periods per week (Dist. Ex. 3 at p. 7). Further, while the school psychologist indicated that the CSE recommended a "full-time" special class program including subjects other than ELA and math (Tr. p. 352), this is not what the IEP reflects (Dist. Ex. 3 at p. 7). The parent testified that the student attended special classes for ELA and math and general education classes for other subjects (see Tr. pp. 544-45). The district did not offer evidence of the student's class schedule or otherwise demonstrate what classes the student actually attended during the 2018-19 school year.

While the May 2018 CSE changed the student's program recommendations relative to the December 2017 CSE meeting, beyond the district school psychologist's broad reference to how "intensive" and "restrictive" the 12:1 special class would be (Tr. pp. 145-46, 351-52), the district did not explain how the 12:1 special class for ELA and math would be better suited to address the student's significant delays in the areas of reading and math than the blended program of the 12:1 special class, ICT services, and SETSS.<sup>15</sup> As noted, the school psychologist testified that the varied recommendations of the December 2017 IEP would permit district staff to see if the student did better in the special class environment (Tr. p. 127), but the hearing record includes no evidence comparing how the student fared with the different special education supports recommended in the December 2017 IEP beyond the general testimony from the psychologist that he "seemed to benefit" from the special class (Tr. pp. 139-40).

The CSE met again on December 10, 2018 (Dist. Ex. 11 at p. 12). The present levels of performance indicated that the student was reading at a Fountas and Pinnell Level D, which the IEP reported as being equivalent to a beginning first-grade level but which other document in the hearing record indicate would be equivalent to kindergarten level (*id.* at p. 1; *see* Parent Exs. P at pp. 1, 12; Q). The student had difficulty with decoding and comprehension (Dist. Ex. 11 at p. 1). The IEP noted that the student's math skills were at a first to second grade level (*id.*). With regard to writing, the December 2018 IEP indicated the student could create sentences, but they did not have the correct punctuation and/or grammar and the student had difficulty spelling (*id.*). His writing skills were judged to be at a first grade level (*id.*). The IEP indicated that the student needed to be refocused when completing a task and that he appeared to lose focus as an escape to avoid work (*id.*). According to the IEP, the student continued to make slow but steady progress (*id.*).

The December 2018 IEP indicated that the student could benefit from remaining in his then-current small, self-contained (12:1) community school class to address his academic needs/delays, especially in reading and writing (Dist. Ex. 11 at p. 13). Speech-language therapy recommendations were consistent with the previous IEP (*id.* at p. 10).

Although the student's teacher reported that he had made progress in the 12:1 special class setting, it is hard to reconcile her statement with the narrative description of the student in the December 2018 IEP and information contained in prior IEPs. While the December 2018 IEP indicated that the student continued to function at a kindergarten level (Fountas and Pinnell Level D) in reading, it qualified this statement by indicating that the student's reading comprehension level was actually lower (Dist. Ex. 11 at p. 1). The December 2018 IEP indicated that the student could identify 20 pre-primer sight words while earlier IEPs indicated that the student could identify 25 pre-primer sight words (December 2017) or all pre-primer sight words (May 2018) (*compare* Dist. Ex. 11 at p. 1, *with* Dist. Ex. 1 at p. 1, *and* Dist. Ex. 3 at p. 1). The May 2018 IEP indicated

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<sup>15</sup> While the student's level of access to nondisabled students—i.e., the "restrictiveness" of the program—contemplated by the May 2018 IEP may have changed relative to the December 2017 IEP (*see* 34 CFR 300.114[a][2][i]; 300.116[a][2]; 8 NYCRR 200.6[a][1]), the degree of such change is unclear since both programs contemplated that the student attend a community school with nondisabled students but receive some instruction in a self-contained group (*compare* Dist. Ex. 3 at pp. 6-7, 9, *with* Dist. Ex. 1 at pp. 7, 10-11). In any event, the change in the degree of access of nondisabled peers does not explain the different support the student would receive in the program recommended in the May 2018 IEP.

that the student was able to identify 25 upper and lowercase letters and 25 letter sounds, but the December 2018 IEP indicated that the student continued to confuse lowercase letters and had difficulty determining the letters that represented short vowel sounds (compare Dist. Ex. 11 at pp. 1, 2, with Dist. Ex. 3 at p. 1). In terms of the student's mathematical abilities, the December 2018 IEP indicated that the student could add and subtract one and two-digit numbers, with and without regrouping, using pictures and manipulatives (Dist. Ex. 11 at p. 1). But an earlier IEP (May 2018) stated that the student could add and subtract three-digit numbers without regrouping and add three-digit numbers with regrouping (Dist. Ex. 3 at p. 1). Also, the student's December 2017 IEP indicated that he had met a goal related to "identify[ing] what [a] math word problem [wa]s asking and generating possible solutions," but the December 2018 IEP indicated that the student could not identify clue words or important information needed to solve math word problems (compare Dist. Ex. 11 at p. 1, with Dist. Ex. 1 at p. 6). With respect to writing, the December 2018 IEP indicated that the student struggled to write a complete sentence on his own, whereas the May 2018 IEP indicated that the student was able to write simple sentences using his alphabet chart and sight word list (compare Dist. Ex. 11 at p. 1, with Dist. Ex. 3 at p. 1). In addition, the student's December 2017 IEP indicated that the student had met an annual goal related to writing 2-5 sentences with minimal assistance (Dist. Ex. 1 at p. 5).

While the May and December 2018 IEPs provided that the student would attend a 12:1 special class, there is no cogent explanation in the hearing record as to whether the student would or did receive specially designed reading instruction in this class or otherwise as part of his programming (Andrew F., 137 S. Ct. at 1002 [noting that school authorities may fairly be expected to "be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances"]; see also R.E., 694 F.3d at 186-88 [finding that testimony that "explains or justifies the services listed in the IEP" is permissible and may be considered]). Further, there is no indication in the hearing record that the CSE considered what instructional methods or strategies had been used with the student and whether or not such methods or strategies were effective or whether a particular methodology might be appropriate to meet the student's needs ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem.). This information would have been particularly relevant since the parent had repeatedly expressed concern about the student's rate of progress. The parties dispute whether the district offered the student additional services in the form of SETSS during the 2018-19 school year, but in testimony the school psychologist seemed to suggest that it was the parent's responsibility to request an appropriate education for her son rather than the district's obligation to provide it in the first instance (see Tr. pp. 153-55, 205-06, 277, 328-29, 346-47, 355-58, 574-77; Dist. Ex. 11 at p. 13).<sup>16</sup>

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<sup>16</sup> Even had the parent had told the district she did not want the student to receive SETSS, the parent's expressed preference would not have relieved the district of its obligation to ensure that the student's special education program and related services aligned with the student's needs (Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 657-58 [8th Cir. 1999] [noting that although the district's obligation "to permit parental participation in the development of a child's educational plan should not be trivialized . . . , the IDEA does not require school districts simply to accede to parents' demands"]; cf. Loretta P. v. Bd. of Educ., 2007 WL 1012511, at \*6 [W.D.N.Y. Mar. 30, 2007] [observing that no party claimed "that the [d]istrict's acquiescence to the parents'

The foregoing demonstrates that the student had overall average cognitive ability, albeit with weaknesses in memory and attending, yet after repeating kindergarten and receiving special education services for four years he was barely able to read at a kindergarten level and had difficulty writing a simple sentence. In addition, his math skills were delayed by several years. The district has not explained how the programs recommended in the May and December 2018 IEPs would change this course for the student particularly absent a clear recommendation for specially designed reading instruction. Based on the above, there is insufficient basis in the hearing record to disturb the IHO's determination the district offered the student a FAPE for the 2018-19 or 2019-20 school years.

### **C. Compensatory Education**

As discussed above, early in the impartial hearing, the parent raised a request for compensatory education to remedy the district's failure to offer the student a FAPE for the 2018-19 school year, which the IHO indicated she would consider; however, the IHO did not discuss relief in this form in her decision. On appeal, the parent requests 800 hours of tutoring services with EBL Coaching.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first

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request for home instruction was compatible with the IDEA or [the student's] right to an IEP which satisfied the [d]istrict's obligation to provide a [FAPE]"

place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

As discussed above, the student made minimal academic progress during the 2018-19 school year. In addition to the present levels of performance reported in the December 2018 IEP, the results of the January 2019 neuropsychological reevaluation showed that the student's decoding and spelling skills remained weak.

More specifically, the January 2019 neuropsychological reevaluation report indicated that the student's scores on cognitive testing were consistent with his previous neuropsychological evaluation (Parent Ex. D at p. 5). In addition, the student demonstrated average verbal and nonverbal reasoning abilities, intact processing speed skills, and strong visual-spatial problem-solving skills (id. at p. 8). According to the report, this suggested that the student had good intellectual potential and the capacity for academic success should he receive appropriate supports and services targeting his area of weakness (id.). While the neuropsychological reevaluation report indicated that the student's visual-spatial perception, fine motor, and visual-motor integration skills were adequate it also indicated that the student continued to demonstrate areas of neurocognitive, academic, and psychiatric difficulty (id.). The report also indicated that the student evidenced significant weaknesses in language skills (id.). In addition, the student exhibited impairments in reading, including phonological awareness and rapid naming; writing, including spelling, structure, word form and mechanics; and mathematics, including computation and problem-solving skills (id. at pp. 8, 19). With respect to the student's social/emotional development, the neuropsychological reevaluation report stated that the student evidenced symptoms of inattention and anxiety and suggested that the combination of these areas of difficulty were significantly affecting his functioning in school, at home, and in the community (id. at pp. 8-9). The January 2019 neuropsychological reevaluation report indicated that this was concerning, given that the student had been receiving significant special education supports since kindergarten (id. at p. 9). The neuropsychological reevaluation report stated that it was clear that the student required more services and supports than what he was receiving at the time in order to make progress (id.).

A review of the academic testing conducted as part of the neuropsychological reevaluation indicates that the student's performance on measures of spelling and decoding remained very weak. Administration of the Kaufman Test of Educational Achievement, Third Edition (KTEA-3) in January 2019 yielded an academic skills battery composite score of 69 (2nd percentile) that was 10 points higher than the student's composite score of 59 (<1st percentile) in January 2017 (compare Parent Ex. D at pp. 18-19, with Parent Ex. N at p. 22). Although the student attained higher standard scores on measures of letter/word recognition, reading comprehension, and spelling, his performance remained below the second percentile in each of these areas (Parent Ex. D at pp. 18-19). The student demonstrated more noticeable gains in math where his composite score improved from the 1st percentile to the 7th percentile and written language where his composite score improved from the 1st percentile to the 5th percentile (compare Parent Ex. D at pp. 18-19, with Parent Ex. M at p. 22). On the Comprehensive Test of Phonological Processing, Second Edition (CTOPP-2) the student's phonological awareness index score dropped from 65 (1st percentile) to 60 (<1st percentile), his phonological memory index score increased from 70 (2nd percentile) to 85 (16th percentile), and his score on the rapid symbolic naming index was 58 (<1st

percentile) (compare Dist. Ex. D at pp. 18-19, with Parent Ex. N at p. 20).<sup>17</sup> The student's performance on the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5) declined on each index measured (compare Parent Ex. D 18, with Parent Ex. N at p. 21).

The January 2019 neuropsychological reevaluation report stated that the student required placement in a specialized school for students with language and learning disorders that provided evidence-based interventions for language and academic skills built into the daily curriculum (Parent Ex. D at p. 9). With regard to the student's deficits in his reading skills and the underlying neurocognitive skills that support literacy development (i.e., phonological awareness, rapid naming) and given the high reading demands in school, the report indicated it was "imperative" to give the student additional supports targeting phonological awareness using a multisensory approach, rapid naming skills, decoding skills, single word knowledge, reading rate, reading accuracy, reading fluency, reading comprehension skills beginning at the sentence level, and reading comprehension strategies that were explicitly taught (id. at p. 10). The neuropsychological evaluation report suggested that the student be provided with intervention using programs such as Orton-Gillingham or Lindamood-Bell (id.). Additional recommendations included specific interventions to target the student's deficits in writing and mathematics (id. at pp. 10-11). Moreover, with regard to compensatory services, the January 2019 neuropsychological evaluation report stated,

Despite receiving special education services for a number of years, all of [the student's] academic skills currently fall significantly below grade expectation, and he has not mastered many of the core skills necessary for academic success. While it is likely that [the student's] academics will improve in a more specialized educational setting, it is very unlikely that he will make sufficient academic progress in order to reach grade level without additional interventions. Given this, [the student] also requires effective, evidence-based instruction outside of the school setting to remediate his profound learning delays. It is critical that such services be provided by an instructor who is specifically trained to work with students with a similar cognitive and academic profile.

(id. at p. 11).

The neuropsychologist who conducted the January 2019 neuropsychological reevaluation testified that she administered the KTEA-3 because the same test was administered to the student as part of the April 2017 neuropsychological evaluation, and she wanted to be able to monitor the student's progress over time (Tr. p. 393). She noted that at the time of the January 2019 neuropsychological reevaluation the student performed "below the first percentile, so far below his intellectual potential and below grade level and [test results] indicated that he really hadn't made meaningful progress in reading since the last evaluation" (id.). The neuropsychologist reported that the student performed below the fifth percentile on assessments of writing (id.). She

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<sup>17</sup> Administration of the rapid letter naming subtest of the CTOPP-2 was discontinued in the January 2017 assessment and therefore no index score was reported (see Parent Ex. N at p. 20).

stated that he struggled with spelling and with expressing his thoughts and ideas through writing and opined that the student "hadn't really made meaningful progress in writing and continued to be below grade level and below his intellectual potential" (Tr. pp. 393-94). The neuropsychologist reported that, similarly, in math the student performed in the seventh percentile, below his intellectual potential and below his grade level (Tr. p. 394). She indicated that the student had not made meaningful progress across math skills including in his ability to do math computation, his knowledge of underlying math concepts, or his ability to do math word problems (id.).

A September 29, 2020 report from the director and founder of EBL Coaching (director) indicated she evaluated the student to determine his academic areas of strength and weakness and his specific instructional needs, and to help determine his reading, spelling, mathematics, and written expression skill levels (Parent Ex. E). To assess the student's reading skills, the director reported that she asked the student to sound out a series of words using the Wide Range Achievement Test (WRAT) (id.). Using this same diagnostic exam, the student was asked to spell a series of words to test his encoding skills (id.). He also completed a series of mathematics problems to assess his mathematics skills (id.). To gain a sense of the student's written expression abilities, the director asked the student to complete a writing sample using the Test of Written Language (TOWL) (id.). Finally, the director used the Qualitative Reading Inventory (QRI) to assess the student's reading comprehension skills (id.). The director reported that based on her assessment, the student tested at a mid-first grade level for spelling, an upper first grade level for decoding, and a mid-third grade level for mathematics (id.). He also tested at a second-grade level for reading comprehension, and a first-grade level for writing, all well below the expected levels for his grade.

The director's testimony was consistent with her September 19, 2020 report (Tr. pp. 512-514). She indicated that based on the student's cognitive abilities and her experience working with students with similar profiles, she believed that the student had the potential to make progress in his areas of weakness (Tr. p. 514; see Tr. p. 509, Parent Ex. D). The director recommended that the student receive remediation for decoding and spelling using the Orton Gillingham approach, as well as other research-based, multisensory techniques, to develop his reading comprehension, writing, and math skills (Tr. pp. 514-15). The director described the Orton Gillingham approach as a specific research-based, multisensory technique designed to help students develop their decoding and encoding skills, essentially for reading and spelling (Tr. p. 517). She noted that a great deal of research indicated Orton Gillingham was "the best" multisensory approach for students, like the student in the instant case, with learning disabilities in reading, writing, and math (Tr. p. 518). She indicated EBL's work with the student would focus on all his core academic skills, decoding, spelling, reading comprehension, writing and math (Tr. p. 519). The director explained that the student would be matched with an EBL special education provider that specialized in using Orton Gillingham and similar research-based multisensory techniques with students with similar profiles to the student (id.).

The director of EBL's testimony indicated that given the student's overall profile, along with her evaluation of the student and her review of the student's records, she recommended the student receive an average of ten hours of compensatory education per week over a two-year school time span, equivalent to 800 hours (Tr. pp. 515, 519). The director testified that she was not paid for the initial evaluation of the student, but the cost of the tutoring would be \$125 per hour (Tr. pp. 508; 520).

Based on the district's failure to provide the student with appropriate reading instruction during the 2018-19 school year, which resulted in the student making minimal academic progress, I find the recommended 800 hours of compensatory instruction reasonable to help the student learn to read and catch up to a more appropriate instructional level commensurate with his cognitive potential.

## **VII. Conclusion**

Based on the foregoing, the evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years. However, the IHO erred in failing to order compensatory education to remedy the district's failure to offer the student a FAPE for the 2018-19 school year, and the evidence in the hearing record supports the parent's request for 800 hours of compensatory tutoring. As neither party has appealed the IHO's determinations that the Aaron School was an appropriate unilateral placement for the 2019-20 school year and that equitable considerations weighed in favor of the parents' request for relief, the necessary inquiry is at an end.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated January 10, 2022, is modified by reversing that portion which denied the parent's request for compensatory services;

**IT IS FURTHER ORDERED** that the district shall fund the costs of 800 hours of compensatory services in the form of tutoring hours from EBL coaching.

**Dated:**           **Albany, New York**  
                      **April 27, 2022**

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