The University of the State of New York

The State Education Department
State Review Officer
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No. 13-236

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Ilana A. Eck, Esq., of counsel

Littman Krooks, LLP, attorneys for respondent, Marion M. Walsh, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2012-13 school year was not appropriate and ordered the district to provide the student with compensatory services and amend the student's IEP to provide additional services as well as a publically-funded placement in a nonpublic school. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 34 CFR 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 received a diagnosis of a pervasive developmental disorder when he was 12 months of age and began receiving Early Intervention (EI) services in August 2009 (Parent Exs. C at p. 1; D at p. 1; I at p. 1). While in the EI program, the student received speech-language therapy, physical therapy (PT), occupational therapy (OT), and special instruction using applied behavior analysis (ABA) methods (Parent Exs. E at p. 1; I at p. 1). The student was thereafter referred to the Committee on Preschool Special Education (CPSE) and during preschool he received center-based special education services in a 6:1+2 classroom with speech-language therapy, OT, and PT (Parent Exs. L at pp. 1, 16, 18; M at pp. 1, 15, 17). At that time, the student's

cognitive functioning was below age level in the moderately impaired range (Parent Ex. F at p. 2; see Parent Ex. I at p. 2). The student presented with global developmental delays in the areas of communication, activities of daily living (ADLs), socialization, motor skills, and sensory development (Parent Exs. C at p. 4; D at p. 3; E. at pp. 1-2; F at pp. 3-4; G at pp. 1-2; I at pp. 1-3). The student did not use words to communicate, indicate toileting needs, or feed himself with a spoon (Parent Exs. E at p. 1; I at pp. 2-3). He presented with a short-attention span, impulsive behavior, and was easily distracted (Parent Ex. I at pp. 2-3). On December 15, 2011, the CPSE convened and, in conjunction with the student's then-current center-based program with related services, added five hours per week of home-based special education itinerant teacher (SEIT) services to the student's IEP (Parent Ex. A at pp. 1, 10-11).

On March 15, 2012, a CSE convened to develop the student's school-age IEP for the 2012-13 school year (Dist. Exs. 1; 7).[1] Finding the student eligible for special education and related services as a student with autism, the CSE recommended placement in a 6:1+1 special class in a specialized school for math (five times per week), English language arts (five times per week), social studies (five times per week), and sciences (five times per week) (Dist. Ex. 7 at pp. 1, 16, 18). The CSE also recommended the following related services: two weekly sessions of speech-language therapy for 30 minutes in a separate location; one weekly session of speech-language therapy for 30 minutes in the special education classroom; one weekly session of PT for 30 minutes in a separate location; two weekly sessions of OT for 30 minutes in a separate location; and one weekly session of OT for 30 minutes in the special education classroom (Dist. Ex. 7 at p. 16). The student attended the district's recommended program and the March 2012 IEP was implemented during the 2012-13 school year (Tr. pp. 143-44, 202-03).[2]

In July and August 2012, a developmental-behavioral pediatrician conducted an assessment of the student and determined, in a report finalized in September 2012, that the student met the criteria for diagnoses of an "[a]utistic disorder of significant severity," a communication/language disorder, and global developmental delay (Parent Ex. Q).

A. Due Process Complaint Notice

In an amended due process complaint notice dated January 16, 2013, the parent alleged that the district denied the student a FAPE for the 2012-13 school year and requested an impartial hearing (Parent Ex. R at pp. 1-5).[3] The parent raised claims related to the March 2012 IEP as well as allegations that the services delineated in this IEP were not implemented (id.).

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[1] The hearing record contains two versions of the March 2012 IEP (Dist. Exs. 1; 7). Although for purposes of this case the essential information related to the student and the recommended special education program and services is identical between the two exhibits, District Exhibit 7 contains progress reports for the annual goals and a signed attendance page, while District Exhibit 1 does not (compare Dist. Ex. 1, with Dist. Ex. 7). Hereafter District Exhibit 7 alone will be cited for purposes of this decision.

[2] The March 2012 IEP was later superseded by an IEP dated March 12, 2013, which was scheduled to be put into effect on March 26, 2013 (Dist. Ex. 9), thus the last portion of the 2012-13 school year is covered by a different IEP. As more fully explained below, the parent did not challenge any portion of this IEP (Tr. p. 133).

[3] The initial due process complaint notice was filed October 25, 2012 (IHO Ex. IV). The IHO granted the parent's request to amend her due process complaint to raise allegations regarding the district's alleged failure to implement the March 2012 IEP (Tr. pp. 11-12, 24-25).

As for her claims regarding the adequacy of the March 2012 IEP, the parent argued that the district removed home-based services utilizing ABA methodology from the student's IEP without "evidence or [reference to] evaluative data to support the removal" and despite evidence that the student required the services (Parent Ex. R at p. 2). The parent additionally contended that the IEP failed to include mandatory parent counseling and training (id. at p. 3).[4]

With regard to her claims concerning the implementation of the services listed in March 2012 IEP, the parent alleged that the setting in which the student's OT was provided was "inappropriate" because the public school did not provide a "playground or appropriate gym class" where the student could "generalize" his skills (id. at p. 2). The parent also argued that the student's "current classroom d[id] not utilize . . . ABA methodology" and that the district's failure to provide the student with ABA instruction caused regression related to the student's "eye contact, speech, and behaviors" (id. at pp. 2-3). The parent further contended that the "current classroom" did not address the student's toileting needs as evidenced by the classroom staff's improper training and inability to manage the student's toileting needs (id. at p. 3). The parent also argued that the student's "current classroom" did not provide him with a "feeding program" (id. at p. 3).[5] Finally, the parent argued that the student did not receive any of the PT services recommended by the March 2012 IEP (id.). As a result of these deficiencies, the parent alleged that the student did not make progress or receive educational benefits (id. at p. 2).

As a remedy for these alleged violations, the parent sought an order directing the CSE to reconvene to (a) recommend the student's placement in a 6:1+1 or 6:1+2 special class within a State-approved nonpublic school; (b) amend the IEP to include "appropriate toileting goals"; (c) develop an "appropriate IEP" that included ten weekly hours of "home-based ABA [services] at an enhanced rate of $110.00 per hour"; (d) amend the student's IEP to include parent counseling and training including "monthly meetings . . . between the [p]arent's[,] teacher[,] and related service providers"; and (e) develop and implement a feeding program in conjunction with the student's occupational therapist (Parent Ex. R at p. 4). The parent also sought "at least" 30 hours of compensatory PT services; 100 hours of compensatory home-based ABA services; and unspecified compensatory tutoring (id.)[6] The parent also invoked the student's right to a pendency (stay put) placement, identifying a December 15, 2011 IEP as the student's last agreed-upon placement (id. at pp. 4-5).

B. Impartial Hearing Officer Decision

On January 9, 2013, the parties proceeded to an impartial hearing, which concluded on September 11, 2013 after three non-consecutive days of hearings (Tr. pp. 1-311). Following the conclusion of the first day of the impartial hearing on January 9, 2013, the IHO issued an Interim decision dated March 26, 2013 addressing the student's pendency placement (Interim IHO

[4] In addition to the above allegations, the parent argued, without further elaboration, that the district "fails to provide appropriate services as mandated for children with autism" by State regulations (id.).

[5] Although this allegation is cast as an implementation claim, there is no reference to a feeding program in the March 2012 IEP (Parent Ex. R at p. 3; see Dist. Ex. 7). Indeed, the March 2012 IEP indicates that the student "is able to eat on his own once food is placed in front of him" (Dist. Ex. 7 at p. 1).

[6] The parent additionally sought an award of attorneys' fees as well as any other relief deemed appropriate by the IHO (Parent Ex. R at p. 4).

Decision). The IHO identified a December 2011 IEP under which the student received preschool special education services as the student's last agreed-upon educational placement (id. at pp. 5-6). Due to the fact that the student was now ineligible for preschool services because of his age, the IHO determined that "further proceedings" were needed to determine whether allowing the student to remain in his current kindergarten classroom "would constitute an impermissible modification of the student's pendency placement" (id. at p. 6). Until such proceedings, the IHO ordered the district to provide the student with the one-to-one, home-based SEIT services utilizing ABA methodology for five hours a week specified in the December 2011 IEP, retroactive to October 25, 2012 (id. at pp. 6-7).

Following the conclusion of the impartial hearing, the IHO issued a final decision dated November 12, 2013, finding that the district failed to offer the student a FAPE for the 2012-13 school year based on the cumulative effect of (1) the removal of five hours per week of home-based services from the student's IEP; (2) the omission of parent counseling and training from the March 2012 IEP; (3) the failure to implement the PT and OT mandates contained in the March 2012 IEP; and (4) the failure to adequately address the student's toileting needs (IHO Decision).

In the November 2013 decision, the IHO declined to address the parent's claim—raised for the first time in her posthearing memorandum—that the district failed to conduct a functional behavioral assessment or develop an appropriate behavioral intervention plan because this claim was not included in the parent's due process complaint notice (IHO Decision at pp. 10-11).[7] Next, the IHO found that the March 2012 IEP's failure to specify a specific educational methodology did not deny the student a FAPE and, further, that the student progressed under a different methodology utilized by the student's classroom teacher during the 2012-13 school year (id. at pp. 12-13).

Turning to the parent's contentions regarding the student's need for home-based services, the IHO found that the district improperly removed home-based services from the student's recommended program in the March 2012 IEP "without analysis, evaluation[,] or explanation," noting that the December 2011 IEP recommended these services and finding that "the abrupt deletion of [these] services[s]" after three months "required some educational and/or evaluative justification" (IHO Decision at p. 13). Finding no evidence in the hearing record to support the district's position, the IHO credited a January 2012 report written by the student's then-provider of home-based services indicating that the student "continue[d] to require 1:1 teacher support" and the September 2012 private developmental-behavioral evaluation report recommending that the student receive 10 hours per week of home-based behavioral modification services (id.).

The IHO next considered the parent's claims relating to the student's toileting needs, and found that the CSE's inclusion of "only a single goal" to address this need, coupled with the fact that the student made little progress toward reaching the goal, established that the IEP "was not

[7] The IHO further found that the parent did not seek the district's permission to pursue this claim, nor did the district open the door to this claim as a defense to a claim in the parent's due process complaint notice as articulated by the Second Circuit in M.H. v. New York City Dep't of Educ.,685 F.3d 217, 250-51 [2d Cir. 2012] (IHO Decision at p. 11; see N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *6 [S.D.N.Y. Aug. 13, 2013]; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free School Dist., 2013 WL 3975942, at *9; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]).

reasonably calculated to meet the student's toileting needs" (IHO Decision at p. 14). Accordingly, the IHO ordered the CSE, when it next convened to develop an IEP for the student, to "review the student's then-present toileting needs and recommend appropriate specialized instruction and/or services to meet those needs" (id.).

Turning to the implementation of the related services contained in the March 2012 IEP, the IHO credited the testimony of the student's mother and his teacher for the 2012-13 school year indicating that the student did not receive any of the recommended PT services, and received approximately half of the recommended OT services "in a setting without a usable gym or playground" (IHO Decision at pp. 14-15).

Finally, the IHO found that the March 2012 CSE improperly excluded parent counseling and training from the student's IEP and that this failure, combined with the above-identified deficiencies, constituted a denial of FAPE to the student (IHO Decision at pp. 15-16). The IHO ordered that a CSE reconvene within 30 days of his decision to amend the student's IEP to include (1) "appropriate" toileting goals; (2) 10 hours per week of home-based ABA services; (3) include parent counseling and training; and (4) refer the student for placement in a 6:1+1 special class in a State-approved nonpublic school (id. at pp. 18-19).[8] Additionally, to compensate the student for the district's failure to implement the student's related services and provide the student with home-based ABA services during the 2012-13 school year, the IHO ordered the district to provide the student with compensatory services including (1) 100 hours of home-based ABA services; (2) 30 hours of PT; and (3) 20 hours of OT (id. at pp. 17-19).

IV. Appeal for State-Level Review

The district appeals, arguing that the relief ordered by the IHO is not supported by the evidence in the hearing record. The district concedes on appeal that it did not offer the student a FAPE for the 2012-13 school year and raises five challenges to the relief ordered by the IHO. First, the district argues that the IHO erred by ordering the district to place the student in a nonpublic school because the IHO did not find that the March 2012 CSE's recommendation of 6:1+1 special class placement was inappropriate for the student. Additionally, the district objects to the IHO's order to the extent that it would apply to a school year (2013-14) that was not the subject of the impartial hearing. The district additionally contends that the relief awarded was excessive because the IHO awarded the student compensatory services to address the district's failure to offer the student a FAPE for the 2012-13 school year.

The district next argues that the IHO erred in awarding 10 hours per week of home-based ABA services because there is no evidence in the hearing record that the student required such services in order to receive educational benefits. The district notes that the IHO's award of 10 hours per week was derived from the privately obtained September 2012 developmental-behavioral evaluation that was conducted after the March 2012 CSE meeting, and there was no evidence that the parent requested that the CSE reconvene to consider the evaluator's report. Accordingly, the district argues that this evaluation constitutes retrospective evidence that cannot

[8] Specifically, the IHO ordered that the CSE "refer the student's program to the CBST" (IHO Decision at p. 18). The hearing record indicates that the CBST—or Central Based Support Team—is the district institution responsible for managing the enrollment of students in State-approved nonpublic schools (see Tr. pp. 79, 82, 84, 86-88).

inform any analysis of the appropriateness of the determination made by the CSE. The district also argues that the five hours of home-based services the student received pursuant to the December 2011 IEP were services specially designed for preschool students with disabilities, and it was improper for the IHO to order that preschool services be provided to a student ineligible for such services. In the alternative, the district argues that an award of only five, and not ten, weekly hours of home-based services is supported by the evidence in the hearing record, as the student made progress and received educational benefits while receiving five hours per week of home-based services. Similarly, the district contends that the IHO improperly awarded compensatory home-based ABA services to the student because there was no basis for such an award in the hearing record. Specifically, the district argues that the IHO employed the same erroneous reasoning he applied in awarding 10 weekly hours of ABA services. With regard to the IHO's directive that the CSE consider the student's toileting needs when next it convenes to develop an IEP for the student, the district argues that the issue is moot because evidence adduced at the impartial hearing reveals that the student is now toilet trained.

Finally, the district argues that the IHO's award of 30 hours of PT is inappropriate "to the extent that" the district has provided the period with authorization to privately obtain 27 hours of PT services at district expense. The district further contends that 27 hours represents the actual amount of PT services the district failed to provide. Additionally, the district argues that the compensatory PT and OT services ordered by the IHO should be provided by district employees.[9]

In an answer, the parent argues that the IHO's decision should be upheld in its entirety.[10] The parent additionally alleges that the district's petition in this matter was deficient, and the district responded to this allegation in a reply.

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. 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

[9] The district does not appeal from the IHO's award of 20 hours of compensatory OT services.

[10] The parent raises for the first time on appeal the argument that the district's failure to provide the parent with progress reports constituted a denial of FAPE. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing and may not raise issues 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 300.508[d][3][i]; 300.511[d]; 8 NYCRR 200.5 [j][1][ii]), or the original due process complaint 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 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see, e.g., N.K , 2013 WL 4436528, at *5-*7). The parent's claim cannot reasonably be read into her due process complaint notice and will not be considered.

(Rowley, 458 U.S. at 206-07; 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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at *15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012

WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Matter—Sufficiency of Petition

As an initial matter, the parent asserts that the district failed to provide a legal basis for its challenge to the IHO's decision.[11] This contention is without merit. The district's petition contains a factual recitation and a section devoted to legal argument. The argument section is divided into

[11] The parent also objects to the district's decision not to submit a Memorandum of Law with its Petition, as well as its decision not to submit a closing brief at the impartial hearing. Typically these filings are options available to the party who files them (see 8 NYCRR 279.4[a]; see also 8 NYCRR 200.5[j][3][xii][g] [the IHO "may receive memoranda of law from the parties"]).

five headings, each of which challenges a discrete portion of the IHO's decision. The petition contains a conclusion, clearly identifies the relief sought, and contains appropriate citation to the hearing record and the IHO's decision. In other words, the petition "clearly indicate[s] the reasons for challenging the impartial hearing officer's decision" and properly "identif[ies] the findings, conclusions and orders" to which the district objects (8 NYCRR 279.4[a]). Therefore, the district's petition complies with the practice regulations.

B. Home-Based ABA Services

The district appeals the portion of the IHO's order requiring that the district amend the student's IEP to include 10 hours per week of home-based ABA services. The district argues that this award is not supported by the evidence in the hearing record. I agree with the district that the hearing record does not support this award.[12]

The hearing record reveals that the student made progress while attending the district's offered public school placement and without receiving home-based ABA services. The student's special education teacher during the 2012-13 school year testified at the impartial hearing that she taught the student's 6:1+1 special class from September 2012 through June 2013 (Tr. pp. 253, 255). She also testified that the classroom included a paraprofessional who assisted her during group instruction and small group lessons (Tr. p. 256). Instructional supports used in the classroom during academic instruction included positive reinforcement and one-on-one work (Tr. p. 258). The special education teacher testified that she used certain techniques of ABA instruction in her classroom as well as components of the TEACCH methodology, which included one-to-one work and work stations with tasks that the student could complete independently (Tr. p. 259).[13] The special education teacher also collected data on each student in the class (Tr. pp. 259-60).

The special education teacher stated that when she first met the student in September 2012, none of his skills were apparent to her (Tr. p. 260). She additionally indicated that she wasn't sure what the student could or could not do because it was "very difficult" for him to sit and remain attentive to her or to a task (id.). In the beginning of the school year, the teacher indicated that the student's attention span for any particular task was about 15 seconds (Tr. pp. 262-63). The student was highly distractible and engaged in behaviors such as not sitting properly, fidgeting, and getting up out of his seat to run around the room (Tr. pp. 270-271, 282-83). At the beginning of the school year, the student did not respond to directions or his name, nor did he recognize himself in pictures (Tr. pp. 272-73, 282-83). In regard to specific academic skills, the special education teacher testified that the student could not identify colors, letters, or numbers (Tr. p. 261). According to the special education teacher, the student exhibited self-stimulatory behaviors with his hands and

[12] The IHO appears to have derived the 10 hours per week from the September 2012 private developmental-behavioral evaluation report (IHO Decision at p. 13; Parent Ex. Q). Were this evaluation report used as evidence to support a conclusion that the May 2012 CSE should have included home-based services on the student's IEP, it would constitute impermissible use of retrospective evidence (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 187 [2d Cir. 2012] ["[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision"]). However, consideration of this evaluation report for the purpose of fashioning equitable relief is appropriate under these circumstances.

[13] Although not defined in the hearing record, TEACCH is presumed to refer to the Treatment and Education of Autistic and Related Communication Handicapped Children methodology.

engaged in repetitive body movements but did not engage in any other behaviors more "significant" than those (Tr. pp. 261-62). The special education teacher stated that when the student first came to school in September he responded well to edible and tactile reinforcements, which she used to redirect him to tasks (Tr. p. 262).

With regard to the student's social/emotional functioning, the special education teacher stated that at the beginning of the 2012-13 school year, the student did not interact with, show interest in, approach, or communicate with peers (Tr. pp. 262-63). She testified that the student was nonverbal and that his gestures or actions indicated no attempt to socialize with his classmates (Tr. p. 263). Furthermore, she indicated that if a classmate took a toy away from the student while he was playing with it, the student displayed no reaction and instead moved on to "something different" (Tr. p. 266).

The special education teacher testified that she assessed the student informally and in January 2013 administered an assessment identified in the hearing record as the "ABLLS" (Tr. p. 257; see Tr. p. 147).[14] The special education teacher indicated that the student performed at the lowest level, which was considered the "early learner range" (Tr. p. 258). She stated that the student's performance on the ABLLS was commensurate with his academic functioning at that point in time (Tr. pp. 257-58). According to the special education teacher, at the start of the school year she "worked . . . hard" to develop the student's ability to sit and maintain attention, and that the student began exhibiting academic skills several months after the school year began (Tr. pp. 260-61). The special education teacher indicated the student completed matching and one-to-one correspondence tasks, practiced simple labeling using items in the classroom and books, and started recognizing himself in pictures (Tr. pp. 261, 272-73).

In March 2013, both the student's special education teacher and his speech-language pathologist reported that the student made progress over the course of the school year (Dist. Exs. 8 at p. 2; 9 at pp. 1, 9). In a March 2013 progress report, the speech pathologist reported "good progress" in the student's speech and language skills (Dist. Ex. 8 at p. 2). By March 2013, the student demonstrated the ability to follow familiar routine directives, identify common objects, and request items via picture exchange (id.). The speech-language progress report indicated the student exhibited comprehension of simple one-step directions when paired with a gestural cue (id. at p. 1).

According to the special education teacher, there was a "positive change" in the student from when he first started school in September as compared to the end of the school year, and that he was a "very, very different" child when he left her classroom in June (Tr. pp. 253-54, 264). The special education teacher indicated that by the end of the school year, the student's interfering behaviors were "very limited" compared to the beginning of the school year (Tr. p. 271). She also stated that the student understood positive reinforcement and responded well to the use of edibles as reinforcers (Tr. p. 265). The student was able to sit for a 30 minute circle time with an "extremely limited" amount of reinforcers (Tr. p. 264). The special education teacher stated if she had to give the student one reinforcer, that was "a lot" because he was engaged in, and responsive to, classroom material (id.). The speech-language pathologist, who worked collaboratively in the

[14] Although not identified in the hearing record, it is presumed that the teacher was referring to the Assessment of Basic Language and Learning Skills.

classroom with the special education teacher, testified that during the school year the student increased his ability to sit for longer periods of time (Tr. pp. 176, 181).

Academically, the special education teacher testified that the student's ability to match letters improved, and that he was beginning to label colors and numbers, and other objects through the use of the Picture Exchange Communication System (PECS) (Tr. pp. 264-65). She further stated that the student applied skills learned in the classroom while on a class trip to a grocery store (Tr. pp. 285-86). Regarding the student's communication skills, the special education teacher stated that instead of crying and not understanding how to make a request, the student now requested desired items using PECS (Tr. pp. 264-266). Additionally, the student spoke more words each day and his vocabulary improved (Tr. pp. 177-80, 271, 273-74).

Socially, the special education teacher stated that the student made more eye contact with her, was more attentive to faces, and attempted to imitate others' actions and mouth movements during speech attempts (Tr. pp. 264, 274). The student discriminated between pictures and sought out a communication partner in order to make requests for desired items with and without prompting (Dist. Ex. 8 at p. 2). The special education teacher indicated that at the end of the year, the student exhibited reactions to others such as trying to get a toy back from a peer who took it away from him, and that he initiated actions on an inconsistent basis (Tr. pp. 265-66).

The hearing record indicates that the student's special education teacher assisted in the development of the annual goals contained in the March 2013 IEP that were to be implemented through the end of 2012-13 school year into the 2013-14 school year (Tr. pp. 269, 276-77, 300-01; see Dist. Ex. 9 at pp. 3-6). The special education teacher testified that the student made limited progress toward his annual goals (Tr. pp. 277-79). The special education teacher stated that the student especially made progress requesting items using PECS, and that he met a goal requiring him to sit for 20 minutes with some redirection (Tr. pp. 278-79; see Tr. p. 265). The hearing record also shows that, during the course of the 2012-13 school year, the student made progress with respect to ADLs (Tr. pp. 283, 294; Dist. Ex 9 at p. 1).

Although in this instance the district denied the student a FAPE for the 2012-13 school year, based on the student's progress while in the district's program as detailed above, there is no basis in the hearing record to conclude that the student requires home-based services on a going forward basis. Accordingly, the IHO's decision directing the district to provide the student with ten hours of home-based ABA services must be reversed.

Furthermore, this portion of the IHO's Decision orders relief beyond the 2012-13 school year, and a review of the hearing record reveals that only the 2012-13 school year was at issue during the impartial hearing (Tr. p. 133; see Parent Ex. R; IHO Ex. IV). While a superseding IEP for this school year was developed on March 12, 2013, counsel for the parent did not seek to amend her due process complaint notice to include any new allegations pertaining to this IEP (Dist. Ex. 9). More importantly, counsel for the parent explicitly indicated at the impartial hearing that she was not challenging any aspect of the March 2013 IEP (see Tr. p. 133). Accordingly, it was inappropriate for the IHO to direct a modification to the student's IEP going forward given the development of a subsequent IEP.

Notwithstanding these points, when the CSE next convenes to conduct an annual review of the student's program, the district shall consider whether home-based educational services are

required to enable the student to benefit from instruction and, after due consideration thereof, provide the parent with prior written notice on the form prescribed by the Commissioner that, among other things, specifically indicates whether the CSE recommended or refused to recommend such services on the student's IEP and explains the basis for the CSE's recommendation in conformity with the procedural safeguards of federal and State regulations (34 CFR 300.503[b]; see 8 NYCRR 200.5[a]).

C. Referral for Nonpublic School Placement

The district also appeals the IHO's order requiring the district to "refer the student to the CBST for placement in a 6:1+1 special class in a New York State approved nonpublic school" (IHO Decision at p. 18). The district contends that the IHO made this finding without first determining whether the student's current 6:1+1 special class placement was appropriate. The district further argues that the prospective nature of this relief is improper given that the 2012-13 school year, the only school year in dispute in this proceeding, has ended.

The IHO improperly ordered the district to enroll the student in a private school without considering whether the district was capable of providing the student with a FAPE.[15] A district is not obligated to consider removal from the public school to a nonpublic placement if it is able to provide the student with an appropriate educational program within the public education system (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *19 [S.D.N.Y. Sept. 16, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 148 [S.D.N.Y. 2006] ["IDEA views private school as a last resort"]; see R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1014-15 [5th Cir. 2010] [noting that under the IDEA, "removal to a private school placement [is] the exception, not the default . . . [t]he statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education"] [emphasis in original]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363 [S.D.N.Y. 2009]; Patskin, 583 F. Supp. 2d at 430-31; see also 8 NYCRR 200.6[j][1][iii] [State funding for private schools is only available if the CSE determines that the student cannot be appropriately educated in a public facility]). "'[I]f the district can supply the needed services, then the public school is the preferred venue for educating the child'" (T.G., 2013 WL 5178300 at *19, quoting W.S., 454 F. Supp. 2d at 138).

Here, there is no evidence in the hearing record suggesting that the district could not provide the student with an appropriate classroom placement. As detailed above, the hearing record contains substantial evidence that the student made progress in the district's recommended placement outlined in the March 2012 IEP. Nevertheless, the IHO determined that placement in a nonpublic school was warranted due to multiple deficiencies with the March 2012 IEP and the district's failure to implement the IEP's OT and PT mandates during the 2012-13 school year (IHO Decision at pp. 12-19). However, the existence of deficiencies in the student's educational program or its implementation does not, in and of itself, demonstrate that the student cannot be provided with an appropriate education within the public school system (see Suffield Bd. of Educ. v. L.Y., 2014 WL 104967, at *12 [D. Conn. Jan. 7, 2014] [holding that "directing [a district] to place [a student] at [a nonpublic school] is an extraordinary remedy in equity" that is not warranted by the

[15] The parent did not raise any objections to the appropriateness of the student's 6:1+1 placement in her due process complaint notice and does not make any such contentions on appeal.

denial of a FAPE absent evidence that the district cannot provide a program that is capable of meeting the student's needs]).

Moreover, the IHO's order directed the district to place the student in a nonpublic school without reference to, or an analysis of, the IDEA's requirement that a student's recommended program be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; see 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428).[16] The Second Circuit applies a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see J.S v. N. Colonie, 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; see also Oberti v. Bd. of Educ., 995 F.2d 1204, 1217-18 [3d Cir. 1993]; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]).

A review of the hearing record indicates that the March 2012 CSE determined that a 6:1+1 placement represented the LRE for the student (Dist. Ex. 1 at p. 16; 7 at pp. 20-21). The March 2012 CSE considered integrated co-teaching services but rejected them because "such a setting would not be supportive enough to address [the student's] significant delays in communication, cogniti[on] and social[-]emotional skills" (Dist. Ex. 1 at p. 16; 7 at p. 20). Further, the CSE included a regular education teacher, evidence suggesting that the CSE considered the possibility of educating the student within a regular education environment (Dist. Ex. 7 at p. 21; see 8 NYCRR 200.3[a][1][ii] [CSE must include "not less than one regular education teacher of the student whenever the student is or may be participating in the regular education environment"]). Therefore, it was inappropriate for the IHO to ignore the CSE's determination, circumvent the process by which the student's IEP is required to be developed collaboratively between the parents and district staff, and unilaterally direct the district to place the student in a nonpublic school placement without consideration of LRE principles (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *14 [S.D.N.Y. Dec. 23, 2013]; T.G., 2013 WL 5178300, at *20 [the CSE is "under no obligation to discuss private placements . . . because [it] reached the decision that there were less restrictive public placements that were appropriate"; thus, district did not err by "omit[ting] any discussion of non-public placemen[ts]"]; A.D., 2013 WL 1155570, at *7-*8; see also Cooke Center for Learning and Dev. v. Mills, 19 A.D.3d 834, 836 [3rd Dep't 2005] ["The federal law prefers a 'public' education, where a 'child is educated in the school that he or she would attend if nondisabled,' if possible"]; Matter of Pelose, 66 A.D.3d 1342, 1344 [4th Dep't 2009] ["Indeed, the central purpose of the IDEA …and article 89 of the Education Law is to afford a 'public' education for children with disabilities"]). Although many portions of the IHO's analysis were well-reasoned

[16] It is beyond dispute that the LRE requirement applies to placement of a student by a district in a State-approved nonpublic school (see 8 NYCRR 200.7[c][1] ["An application shall be made to the commissioner by the board of education for approval of the placement of a student with a disability in an approved private educational facility which has been determined to be the least restrictive environment for the student"] [emphasis added]; see also 8 NYCRR 200.6[5][i][a] [State Education Department empowered to order corrective actions against districts, including "review by the district's committee on special education of all private placements deemed by the department to be inconsistent with the right to placement in the least restrictive environment"]).

and supported by the evidence, for the foregoing reasons, this portion of the IHO's order must be modified as the district requests.

D. Relief—Compensatory Services Award

On appeal, the district contends that the IHO erred by ordering compensatory relief in the form of 100 hours of home-based ABA services and 30 hours of PT. Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147, 150-51 [N.D.N.Y. 1997]). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also 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]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see 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]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *24 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

Here, the question of whether or not the district offered a FAPE to the student for the 2012-13 school year has been resolved by the district's concession on appeal that it did not. The remaining question is whether an award of compensatory additional services is necessary to remedy the district's admitted denial of FAPE. This inquiry necessitates a review of the services provided to the student as well as a consideration of what, if any, services are necessary to put the student in the position he would have occupied had he been offered a FAPE.

1. Compensatory ABA Services

Turning first to the 100 hours of home-based ABA services awarded by the IHO, the IHO's Interim Order on Pendency ordered the district to provide the student with five hours per week of home-based services utilizing ABA instruction as of October 25, 2012, the date of the parent's initial due process complaint notice (Interim IHO Decision at pp. 6-7). The parent testified that the student did not receive these home-based services until May 2013 (Tr. pp. 211-13). Aside from this statement, the hearing record is unclear as to if and when the district provided the home-based services ordered by the IHO. Therefore, based on the parent's unrebutted testimony regarding the delivery of these pendency services, it appears that the student was entitled to receive more than 100 hours of home-based services between October 25, 2012 and May 2013 pursuant to the IHO's pendency order.[17]

Above and beyond this pendency relief, the IHO determined that an additional award of compensatory services was appropriate because the CSE removed home-based services from the student's IEP without justification (IHO Decision at p 17). While the district failed to introduce any documentary evidence or testimony justifying its cessation of home-based services, the student has been, or should have been, receiving five hours of home-based services pursuant to the IHO's Interim Order on Pendency, as this was the amount of home-based services the student received pursuant to the December 2011 IEP (Parent Ex. A at p. 10). As detailed above, however, the hearing record supports a conclusion that the student made significant progress without such ABA services during the 2012-13 school year. And while the IHO credited the September 2012 private developmental-behavioral evaluation's recommendation of 10 hours per week of home-based services, this recommendation was based on the supposition that the student was currently receiving 10 hours of home-based services at the time of the evaluation (Parent Ex. Q at pp. 3, 8, 11, 13-14).[18] Thus, the evaluator's figure of 10 hours per week was not an independent assessment of the student's needs, but simply an endorsement of what she believed to be the amount of services the student was currently receiving (id.). This evidence does not support the conclusion that the student requires additional compensatory services in the form of home-based ABA services.

Even assuming for purposes of argument that an award of compensatory education was appropriate, a review of the hearing record does not reveal how IHO calculated the award, which the district now challenges. The IHO states that 100 hours per week represented the "difference" between the five hours the student received under the December 2011 IEP and the 10 hours

[17] Because neither party has offered any evidence or argument in this regard, I have not factored school holidays into this calculation.

[18] While the evaluation report indicates that the parent informed the evaluator that the student received 10 hours of home-based services during July and August 2012, there is no other evidence in the hearing record to support this claim, and the parent was not asked to clarify this discrepancy during her testimony (Parent Ex. Q at pp. 1, 3, 13).

recommended in the private evaluation (IHO Decision at p. 17). However, while IHOs have considerable latitude in fashioning appropriate relief, to survive challenge of this kind there should be some discernable indication in the hearing record that supports how an award fairly compensates for the educational losses occasioned by a district's denial of FAPE. Therefore, the IHO's award under these circumstances was not supported by evidence in the hearing record.[19]

Nevertheless, there is an alternative basis in the hearing record that supports the IHO's directive. Due to the student's pendency entitlement in this matter—which neither party contests on appeal—the IHO's award of 100 hours of compensatory home-based services utilizing ABA instruction is warranted based on the district's failure to implement the student's stay put placement during the pendency of this matter. As noted above, the district is directed to evaluate the student's continued need for home-based instruction the next time a CSE is convened to develop the student's educational program. This should not be an onerous task, as a review of the hearing record reveals that, at two resolution sessions following the filing of the parent's initial and amended due process complaint notices, the district offered the parent a significant amount of home-based services.[20] If the parties continue to have concerns and cannot reach a consensus, they are encouraged to discuss their positions and provide evaluative or evidentiary support at the student's next CSE meeting.

2. Compensatory PT Services

The district argues that a compensatory award of 30 hours of PT is not supported by the evidence in the hearing record and that, in any event, the district met its obligation to provide these services by issuing a related service authorization (RSA).[21] The parties do not dispute that the district issued an RSA to the parent for PT services (Tr. p. 220). Beyond this, however, the

[19] As part of the district's motion to dismiss, it submitted forms authorizing the parent to obtain home-based services at district expense, including 10 hours per week from January 16, 2013 to June 26, 2013 (IHO Ex. VI at pp. 1-2, 8). The only plausible explanation in the hearing record I could see for the requested 100 hours is the difference between the requested services and the student's pendency entitlement for a 20 week span, presumably from the beginning of the 2012-13 school year in September 2012 until January 16, 2013 (see Parent Ex. R at p. 4; IHO Ex. XVII at p. 19).

[20] Both due process complaint notices were the subject of resolution session meetings held on November 7, 2012, and January 31, 2013, according to the district's uncontested assertions (see IHO Exs. I at pp. 1-2; VI at pp. 1-3). It appears from the hearing record that the district offered the parent substantially all of the relief requested in both her original and amended due process complaint notices (compare Parent Ex. R, and IHO Ex. IV, with IHO Ex. I, and IHO Ex. VI). The parent rejected both offers and, inexplicably, an impartial hearing went forward that lasted more than a year (IHO Exs. II at p. 1; III at pp. 1-2; VII; see IHO Decision). Upon review of the hearing record, it appears that there were no barriers preventing the parent from accepting, at least in part, the services offered by the district at these resolution sessions (see Application of the Dep't of Educ., Appeal No. 12-176 [parent accepted all relief offered by the district at a resolution session save one disputed service]). Although the IDEA does not compel a particular result stemming from the resolution process, a parent's unreasonable refusal to accept all of his or her requested relief is an equitable consideration to be weighed in fashioning appropriate relief (20 U.S.C. § 1415[f][B][iv]).

[21] Although undefined in the hearing record, related service authorizations are district-generated forms entitling parents to obtain related services from private providers at district expense (see IHO Ex. VI at pp. 4-7). The State Education Department has issued guidance indicating that it is permissible for districts to contract with private entities to provide related services to students with disabilities ("Questions and Answers Related to Contracts for Instruction," Office of Special Educ. [June 2, 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html).

evidence in the hearing record is unclear. At the impartial hearing, the district argued that it provided the student with an RSA for 27 hours of compensatory PT services (Tr. pp. 166-67), and the RSA was attached to the district's second motion to dismiss (IHO Ex. VI at pp. 6-7). However, although the impartial hearing lasted into the fall of the 2013-14 school year, the district did not introduce any evidence indicating that these 27 hours of PT services were, in fact, provided to the student (Tr. p. 246). The parent testified without rebuttal that she requested the district's assistance in locating an appropriate provider to implement the PT services guaranteed by the March 2012 IEP and the district failed to assist her (Tr. pp. 220-21). Based on this testimony, and to the extent that the district did not provide PT services according to its own resources, the district failed to establish that it employed reasonable procedures to ensure that the student's PT needs were met. Accordingly, I see no reason to disturb the IHO's award of 30 hours of compensatory PT services. The district argues that the student should have received an award of 27 instead of 30 hours of compensatory PT services. The IHO fashioned his award of PT services as a compensatory remedy for the district's failure to offer the student a FAPE for the 2012-13 school year (IHO Decision at pp. 18-19). The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Bd. of Educ. v. Munoz, 16 A.D.3d 1142; see also Reid, 401 F.3d at 524 [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"]) and that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [a student's] educational problems successfully" (Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007]). Therefore, the IHO was within his discretion in to award 30 hours of PT services as a compensatory remedy and did not err by declining to utilize a "rote hour-by-hour" approach in determining the amount of the award (id., 478 F.3d at 316).[22] Thus, the IHO's compensatory education award in the form of PT services was reasonable, supported by the evidence, and is upheld.[23]

E. Toileting

Finally, the district appeals the portion of the IHO's order requiring it to consider the student's toileting needs when a CSE next convenes to review the student's educational program. In light of the district's concession that it did not offer the student a FAPE, as well as the fact that

[22] Because there is no dispute that the district failed to provide PT services guaranteed by the student's March 2012, I have afforded the IHO flexibility in designing this portion of compensatory relief. Even assuming for purposes of argument that an hour-by-hour calculation were appropriate, there is no evidence in the hearing record indicating that 27 hours represents the amount of PT services the district failed to provide the student.

[23] The district's argument that district personal should be permitted to provide the student with the compensatory PT and OT services is disingenuous considering that the district referred the parent to private providers following its failure to provide the student with the PT recommended by the March 2012 IEP. However, the parent has not indicated that she is seeking to have these services provided by private therapists, nor does the IHO's decision appear to require such (IHO Decision at pp. 18-19 [stating that the district "shall be ordered to provide the student with" compensatory services and ordering that "the CSE shall . . . provide the student with . . . compensatory additional services"]).

the same obligation to consider and then address the student's needs flows from the statute itself, there is no reason appearing in the hearing record to disturb this portion of the IHO's order.

VII. Conclusion

Upon review of the hearing record, the IHO's order that the student's IEP be amended to include 10 hours of home-based services was improper. Additionally, the IHO's order requiring the district to place the student in a nonpublic school lacked evidentiary support in the hearing record and was not consistent with the IDEA's LRE mandate. While I differ with the IHO as to the reasoning, the IHO's order of 100 hours of compensatory services shall be upheld as services the student should have received pursuant to pendency. Further, I find no reason to disturb the IHO's award of 30 hours of compensatory PT services given the district's admission that it failed to provide these services pursuant to the March 2012 IEP, or his directive requiring the CSE to consider the student's toileting needs when it next convenes to develop an IEP for the student.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated November 12, 2013, is modified by reversing those portions which ordered that the district amend the student's IEP to refer the student to a non-public school and ordered that the CSE amend the student's IEP to include 10 weekly hours of home-based services utilizing ABA instruction; and

IT IS FURTHER ORDERED that at the student's next annual review regarding the student's special education programming, the district shall consider whether the student requires home-based educational services to receive educational benefit and, thereafter, shall provide the parent with prior written notice consistent with the body of this decision.

Dated: **Albany, New York**
February 7, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER