The University of the State of New York

The State Education Department
State Review Officer
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No. 15-011

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

Appearances:
Friedman & Moses, LLP, attorneys for petitioners, Alicia Abelli, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their daughter for the 2013-14 school year was not appropriate and ordered compensatory education. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has received diagnoses of autism, an intellectual disability, and an impulse control disorder (Parent Exs. A at p. 2; B at p. 1; C at p. 1; AA at p. 2). During the 2012-13 school year, the student attended a 9:1+3 special class in a State approved nonpublic school (the NPS) and received the related services of speech-language therapy and occupational therapy (OT) (Parent Ex. AA at p. 1). She also received instruction using applied behavior analysis (ABA) methods and speech-language therapy at home through an outside agency (id.).

On March 13, 2013, the CSE convened to conduct the student's annual review to develop an IEP for 2013-14 school year (Parent Ex. B at pp. 1-22). Finding that the student remained eligible for special education and related services as a student with autism, the CSE recommended a 12-month program consisting of a 9:1+3 special class placement, four 30-minute sessions of individual speech-language therapy per week, three 30-minute sessions of individual OT per week,

and one 30-minute session of individual physical therapy (PT) per week (id. at p. 15).[1] The CSE also recommended a behavioral intervention plan (BIP) to address the target behaviors of active aggression, hyperactivity, non-compliance, emotional agitation, self-stimulatory behaviors, verbal perseveration, self-injurious behaviors, and attention-seeking behaviors (id. at p. 4).[2]

At the time of the March 2013 CSE meeting, the parent expressed concern regarding the continuation of the student's home-based speech-language therapy and services using an ABA methodology; however, school personnel indicated that the home-based speech-language and ABA goals were addressed in school (Parent Ex. B at p. 3). School personnel also recommended a reduction in speech-language therapy to three 30-minute individual session per week, which the parent did not agree with (id.). Home-based services were not recommended by the March 2013 CSE and the student's case was deferred to the district's central based support team (CBST) "for an alternate educational placement" (id. at pp. 3, 14-15).

On July 31, 2013, the district sent a letter to the parents acknowledging that a public school site had not been offered in a timely manner and informing them of their right to place their child in an appropriate special education program in a State-approved nonpublic day school (Parent Ex. N). Given the limited time available, the parents were not able to locate and secure placement in a program utilizing principles of ABA, as they desired, for the 2013-14 school year, and instead continued the student's placement at the NPS's day program, where the student attended for the duration of the school year (Tr. pp. 267-70, 280, 286, 291-94).

A. Due Process Complaint Notice

The parents filed a due process complaint notice dated July 18, 2013, which contained a number of factual allegations embodied within 75 numbered paragraphs, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (Parent Ex. A). As relevant here, the parents asserted that the student's pendency placement was in a day program at the NPS with additional home-based services and alleged, among other things, that after the March 2013 CSE meeting the district failed to recommend a placement for the student and failed to have a completed IEP in place at the start of the 2013-14 school year (id. at pp. 5-11). The parents asserted a number of procedural inadequacies regarding the conduct of the March 2013 CSE meeting (id.). The parents also asserted that the district predetermined the student's program and impeded their participation at the March 2013 CSE meeting (id.) The parents further alleged a number of substantive inadequacies with the March 2013 IEP, including the lack of an appropriate home program, inappropriate goals, insufficient related services, and the lack of an appropriate functional behavioral assessment (FBA) and BIP (id.). The parents asserted that the student required placement in an "ABA-based" school, a 12-month school year program, and home-based or after-school ABA instructional services and other home-based services (id. at pp. 8-12). For relief, the parents requested 19 specific findings and orders, including district funding for placement in an appropriate "ABA-based" school and an order that the CSE develop an IEP containing a specific set of home- and school-based services (id. at pp. 11-12). The parents also

[1] The parents claim they did not receive a copy of the finalized IEP prior to the commencement of the impartial hearing (Tr. pp. 266-67).

[2] Although a BIP was not included with the March 2013 IEP, a March 2013 social history update report and a March 2013 psychoeducational update report indicated that there was a BIP in place at that time to address the student's behaviors (compare Parent Ex. B, with Parent Ex. Z at p. 1, and Parent Ex. AA at p. 1).

requested compensatory education and equitable additional services to remedy the district's failure to offer the student a FAPE for the 2013-14 school year (id.). The parents also requested several independent educational evaluations (IEEs) at district expense (id. at p. 12). Lastly, the parents asserted claims pursuant to section 504 of the Rehabilitation Act of 1973 (section 504) (id. at pp. 10-11).

B. Impartial Hearing Officer Decision

A hearing was held on February 10, 2014, to address the student's pendency (stay put) placement during the due process proceedings (Tr. pp. 1-18).[3] The parties agreed that the student's pendency placement consisted of a day program in the NPS and home services in the form of 10 hours per week of 1:1 ABA instruction and speech-language therapy four times per week for 30 minutes (IHO Decision at p. 3; Tr. pp. 4, 43,, 247-50). The impartial hearing convened on the merits on April 8, 2014, and concluded on July 24, 2014, after three days of proceedings (Tr. pp. 19-310). On the first day of the impartial hearing, the district conceded that it had not offered the student a FAPE for the 2013-14 school year and rested its case without presenting either testimonial or documentary evidence (Tr. pp. 25, 49).[4]

At the close of the impartial hearing, the IHO and the parties discussed consolidation of the instant matter with a subsequently initiated due process proceeding concerning the provision of a FAPE to the student for the 2014-15 school year (Tr. pp. 296-308). In an interim order dated September 9, 2014, the IHO declined to consolidate the two matters, in part reasoning that doing so would unduly delay a final determination in the instant matter (Interim IHO Decison at pp. 2-3).

In a decision dated December 8, 2014, the IHO found that the district failed to provide the student with a FAPE during the 2013-14 school year and examined the hearing record to determine what progress and/or regressions the student may have made within the program that was provided to the student during the school year (IHO Decision at pp. 10-12). The IHO determined that although the student's behaviors worsened during her attendance at the NPS during the 2013-14 school year, the NPS progress report indicated that the student had made progress on, or achieved, many of the goals on the March 2013 IEP (id. at pp. 11-12). The IHO also found that the goals on the IEP were appropriate and addressed all of the student's areas of need and were used both at the NPS and in the student's home ABA program (id.). Nonetheless, the IHO determined that the district was aware of the need for an immediate change in placement as of May 8, 2014, the date of a letter sent to the district by the NPS informing the district that a change in placement was needed, with additional support from a 1:1 behavioral paraprofessional in the interim (id. at p. 12; see Parent Ex. D). Noting that the district failed to provide a 1:1 paraprofessional until after the end of the 2013-14 school year, the IHO determined that compensatory education was appropriate

[3] In his decision, the IHO noted that several IHOs were appointed and then "inappropriately" recused themselves from the matter for a variety of reasons, resulting in a significant delay between the filing of the due process complaint notice and commencement of the impartial hearing (IHO Decision at pp. 2-3 n.1; see Tr. p. 21).

[4] The district conceded that it did not offer the student a FAPE, and the hearing record lacks any indication that the district intended to limit the scope of its concession (Tr. pp. 25, 49). In the absence of any clarification of the scope of its concession and for purposes of fashioning relief related to the denial of a FAPE, I will, in this instance, presume that the district intended to admit every deficiency alleged by the parent in the due process complaint notice regarding the March 2013 IEP.

for the time when the district knew or should have known there was a denial of FAPE at the NPS (IHO Decision at p. 12). The IHO found that ABA was a successful educational methodology for the student and determined that an appropriate compensatory award consisted of five hours of 1:1 ABA services for each school day from May 8, 2014 to the end of the 2013-14 school year (id. at pp. 12-13, 18-19). The IHO also determined that the student's program should have included parent counseling and training and awarded one hour of compensatory parent counseling and training for each week of the 2013-14 school year (id. at pp. 14-15, 19). The IHO further determined that the student's program should have included assistive technology for use in the home and directed the district to provide a specified device with five hours of training in its use (id. at pp. 15, 19).

In addition to the findings above, the IHO also determined that the CSE predetermined the student's program for the 2013-14 school year by failing to consider the student's need for a home-based program, and ordered the CSE to consider that need in developing the student's program for the 2014-15 school year (IHO Decision at pp. 13, 19). The IHO determined that the 10-hour per week home ABA program provided to the student was appropriate and necessary for the student, but disagreed with the parents' assertion that the student required 20 hours of home-based ABA services per week (id. at pp. 13-14, 19). The IHO also determined that the student benefited from the home-based speech-language therapy provided, and further agreed with the speech provider's recommendation that the sessions should be lengthened from 30 to 45 minutes (id. at pp. 14, 19).

Regarding the parents' request for funding for a speech-language therapy IEE, the IHO found that the parents were entitled to the IEE because they expressed disagreement with the results of an earlier speech evaluation conducted by the district (IHO Decision at pp. 15, 19). Regarding the parents' request for reimbursement for a privately-obtained educational evaluation, the IHO found that the parents were not entitled to reimbursement because, among other reasons, the evaluation was superfluous in that sufficient information about the student's educational needs existed in the hearing record before the private evaluation was conducted (id. at pp. 15-17, 19).

IV. Appeal for State-Level Review

The parents appeal, contending that the IHO correctly determined that the district failed to provide the student a FAPE during the 2013-14 school year, but disagree with many of the IHO's subsequent determinations stemming from that finding. Specifically, the parents contend that the IHO should have found that the district failed to offer a FAPE for the entire school year at issue, and that the IHO's decision to address the length of the FAPE deprivation, given the district's concession, prejudiced the parents, who were not on notice that they had to prove the length of the FAPE denial in requesting their relief. Specifically concerning the IHO's finding that compensatory education was appropriate for the time when the district knew or should have known there was a denial of FAPE at the non-public school, the parents contend that rather than the May 8, 2014, date identified by the IHO, the district was instead on notice by April 8, 2014, when the district conceded it failed to offer the student a FAPE during the impartial hearing (see Tr. pp. 29, 45).

The parents next assert that the hearing record established that the student required a full-day in-school ABA program that also included speech-language therapy, OT and PT. They also assert that the IHO correctly determined that the student required a home program with speech-language therapy, but contend that the hearing record established that the student required 20 hours per week of 1:1 after-school ABA, 2 hours per week of home-based parent training, and 2 hours

per week of "BCBA supervision."[5] Specifically, the parents assert that in light of the district's failure to offer a FAPE during the entire 2013-14 school, the IHO should have awarded 5.5 hours of compensatory 1:1 ABA services for each day of the 2013-14 school year "on a 52-week basis" (2470 hours); 2 hours of compensatory parent counseling and training for each week of the year (104 hours); and 2 hours of BCBA supervision for each week of the year (104 hours).[6] The parents also assert that the IHO should have determined that the student required assistive technology for use in the student's day program as well as in the home. In addition to the requested compensatory relief and among other things, the parents request an order directing the CSE to develop and issue an IEP with 10 specified features.

Lastly, the parents assert that the IHO erred in failing to address their claims related to Section 504 and erred in failing to award reimbursement for the cost of their privately-obtained educational evaluation.

The district submits an answer, denying the claims raised in the petition and asserting that the IHO correctly determined the appropriate compensatory services. The district asserts that the IHO had discretion to determine the length and form of the compensatory education required to place the student where she would have been, in terms of progress, had the depravation of FAPE not occurred. The district contends that the compensatory services ordered by the IHO were sufficient, and that the enhancements to the order sought by the parents have no support in the hearing record and instead reflect maximization of benefit and generalization of skills into the home, which are not required. The district explicitly declined to cross-appeal any of the IHO's findings and requests that the IHO's orders remain undisturbed.[7]

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[5] According to the hearing record BCBA stands for Board Certified Behavior Analyst (Tr. pp. 193, 196). In New York State the practice of applied behavior analysis by a "licensed behavior analyst" and the practice of behavior analysis by a "certified behavior analyst assistant" have become regulated and subject to licensure, certification, or exemption (see generally Educ. Law §§ 8800-8808; 8 NYCRR subpart 79-17, 79-18). Under the statute, "applied behavior analysis" or "ABA" means "the design, implementation, and evaluation of environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvement in human behavior, including the use of direct observation, measurement, and functional analysis of the relationship between environment and behavior" (Educ. Law § 8801**).**

[6] The parents also offer an alternative remedy, mirroring the IHO's award but lengthened to remedy a denial of FAPE for the whole of the 2013-14 school year. The alternative compensatory education remedy would consist of 25 hours of 1:1 ABA instruction per week for 52 weeks (1300 hours) and 52 hours of parent counseling and training.

[7] Counsel for the parent requested an extension of time in which to reply to the district's answer; however, she did not file a reply with the Office of State Review. However, counsel did not notify the office of her intention not to serve a reply until several days after her time to do so had expired, indicating that she "was traveling out of the country" on the day the reply was due to be served on the district. I note that counsel requested the date to which her time to serve a reply was extended, and it is unclear why she was not aware in advance that she would be out of the country. Furthermore, attorneys with the firm with which counsel is affiliated have on multiple occasions requested extensions of time in which to serve pleadings which ultimately were not served on the opposing party (see Application of the Dep't of Educ., Appeal No. 15-019; Application of a Student with a Disability, Appeal No. 11-150), and they share in the ethical responsibility to attend to client matters if the appearing attorney becomes unavailable. Counsel for the parent and her firm are directed to promptly update the Office of State Review and opposing counsel regarding changes regarding scheduled pleading submissions, and are strongly cautioned that if their pattern of neglecting filings for which extensions have been granted continues the future, it may result in the unfortunate consequence of applying more stringent terms to extensions sought by counsel for the parent or her firm or denying such requests altogether.

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 (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 [2d Cir. 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 [2d Cir. 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 [2d Cir. 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 [2d Cir. 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]).

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 Matters

1. Consolidation of Matters

State regulations concerning the conduct of impartial hearings provide that when a subsequent due process complaint notice is filed while a due process complaint is pending before an IHO involving the same parties and student with a disability, the IHO with the pending due process complaint notice "shall be appointed" to the subsequent due process complaint notice involving the same parties and student with a disability, unless that IHO is unavailable (see 8 NYCRR 200.5[j][3][ii][a]). The IHO may consolidate the new complaint with the pending complaint or provide that the new complaint proceed separately before the same IHO (8 NYCRR 200.5[j][3][ii][a][2]). When considering whether to consolidate multiple due process complaint notices, the impartial hearing officer is required to consider relevant factors including: (1) the potential negative effects on the child's educational interests or well-being; (2) any adverse financial or other detrimental consequences; and (3) whether consolidation would impede a party's right to participate in the resolution process, prevent a party from receiving a reasonable opportunity to present its case, or prevent the impartial hearing officer from timely rendering a decision (see 8 NYCRR 200.5[j][3][ii][a][4][i-iii]). In declining to consolidate the two matters

under consideration herein, the IHO asserted both impediment on the resolution process and undue delay in reaching a decision in the present matter as reasons not to consolidate the complaints (Interim IHO Decision at p. 3). I find that the IHO acted with sound discretion in deciding against consolidating the two matters and therefore I decline to endorse the parents' contention that the IHO erred in doing so.[8]

2. Section 504 Claims

The parents appeal the IHO's failure to hear their claims pursuant to section 504. The New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and an SRO does not review section 504 claims (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012]; see also Educ. Law § 4404[2] [providing that SROs review determinations of IHOs "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, I have no jurisdiction to review any portion of the parents' claims regarding section 504 and, while the IHO was designated to hear IDEA claims, I express no opinion as to whether the IHO was also appointed by the district to hear section 504 claims as well as there is no evidence to support such a determination.

B. Independent Educational Evaluation

The parents contend that the IHO erred in failing to award reimbursement for the cost of their privately obtained educational evaluation. In particular, the parents contend that the IHO erred in finding that the evaluation in question was "superfluous," that it did not constitute a proper evaluation, and that the evaluator was not qualified to conduct an educational evaluation. The district asserts that the IHO correctly declined to order reimbursement for the evaluation because there is no evidence in the hearing record demonstrating that the parents disagreed with a particular district evaluation, which is a predicate for entitlement to an IEE at public expense.

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

[8] However, as State regulations explicitly states that all subsequent due process complaint notices involving a student filed while an impartial hearing involving that student is currently pending before an IHO shall be assigned to that IHO, it was arguably unnecessary for the IHO to recuse himself from the subsequently filed case on the basis that he considered it "inappropriate to preside over issues for the same student for the following school year as such is inconsistent with the rotational system" (IHO Interim Decision at p. 3). The IHOs continue to be assigned through a rotational process and State regulations effectuate this rotational system in a manner that also promotes efficiency by permitting the consolidation of multiple overlapping due process proceedings in appropriate circumstances.

Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Informal guidance from the United States Department of Education's Office of Special Education Programs indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area (Letter to Baus, 65 IDELR 81 [OSEP 2015]) If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

The CSE conducted several evaluations and received progress reports from the student's home providers to determine the student's functioning levels (see generally Parent Exs. B; K; R; S; T; Z; AA). The student presented with significant behavioral difficulties at home and at school, including aggressive behavior toward herself and others, emotional agitation, self-stimulatory behaviors, attention seeking behaviors, and verbal perseveration (Parent Ex. AA at p. 1). The student had a behavior plan and was taking medication to address difficult behaviors (Parent Ex. Z at p. 1). The student's academic skills were determined to be at a kindergarten to first grade level (Parent Ex. AA at pp. 2-3). The student also exhibited significant deficits in expressive, receptive, and pragmatic language skills (Parent Exs. B at p. 2; K at p. 2; R at pp. 3-4). The student was able to perform most activities of daily living with minimal prompting (Parent Ex. B at p. 1). She did not exhibit age-appropriate social skills (id. at p. 3; Parent Ex. AA at p. 3). The student needed assistance to stay focused and complete tasks, as she exhibited symptoms of inattention, cognitive impulsivity, and distractibility (Parent Exs. B at pp. 2-3; R. at p. 3). Physically, the student presented with right-sided upper/lower extremity atrophy, and postural/core weakness, along with balance, coordination, and motor planning deficits, and poor fine motor skills (Parent Ex. B at p. 3).

The parents had the student evaluated by a BCBA—resulting in the evaluation at issue—in May 2014, subsequent to filing a due process complaint and after several days of hearing (compare Parent Ex. C, with Parent Ex. A, and IHO Decision at pp. 1-2). According to the evaluation report, counsel for the parents requested the evaluation to provide recommendations regarding the student's ongoing instruction (Parent Ex. C). There is no mention in the evaluation report, or elsewhere in the hearing record, of a specific disagreement with evaluations conducted by the CSE (see id.). The evaluator reviewed documents, observed the student in school and at home, and offered recommendations regarding the student's educational program (id.). Based on observations of the student at home and in school, the evaluator reported that the student: did not follow directions; required 1:1 support; was able to work independently for some activities; exhibited aggressive behaviors on an inconsistent basis; was able to complete simple academic tasks; was able to complete many basic self-care tasks; and responded well to structure and repeated practice (id.). The evaluator's observations are consistent with results from previous evaluations and progress reports available to the district and do not provide new or additional information regarding the student's needs that would assist in the development of an appropriate educational program (compare id., with Parent Exs. B, S, T, Z, and AA). Additionally, the

evaluator recommended a highly intensive, individualized program of instruction in a 1:1 staffing ratio, following the principles of ABA, as well as a BIP, related services, and a home-based program, recommendations not inconsistent to those provided by the student's then-current school placement (compare Parent Ex. C, with Parent Ex. D).

Here, the district correctly asserts that there is no evidence in the hearing record identifying that the parents disagreed with a district evaluation and no indication, prior to the filing of the due process complaint notice, that the parents had requested an IEE from the district. Accordingly, for all the reasons stated above, I decline to disturb the IHO's finding that the parents were not entitled to public funding for the private educational evaluation (K.B., 2012 WL 234392, at *5; R.L., 363 F. Supp. 2d. at 234-35).[9]

C. Relief

The parents assert that the IHO erred in addressing the duration of the FAPE deprivation given that the district conceded it failed to offer a FAPE during the 2013-14 school year, and were prejudiced thereby because they had "no notice" of the need to introduce evidence regarding the scope or nature of the FAPE deprivation. I disagree for two reasons. First, the IHO explicitly put the parents on notice of their right to present evidence about fashioning an equitable remedy and of his view that the case was "about remedy now" and that the parents were "going to be presenting evidence on it and [the district was] going to question your remedy" (Tr. pp. 33, 43, 46-47, 49-52). Specifically, the IHO informed parents' counsel that the parents would be required to "present evidence on what remedy [they are] seeking, because I need to have at least some guidance on that, and some evidence, some facts to be able to craft a remedy for the 2013-14 school year or beyond" (Tr. p. 50). Second, as set forth in more detail below, an IHO's power to craft a compensatory education or additional services remedy is equitable in nature and fact specific, and an award should have the objective of placing the student in the position he or she would have been in had the district complied with its obligations under the IDEA. Thus, an IHO requires an evidentiary record containing evidence regarding the scope and nature of the FAPE deprivation, upon which to craft an award that is 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 (see, e.g., Application of a Student with a Disability, Appeal No. 14-172 [reducing a quantitatively determined award of additional services based upon evidence in the hearing record demonstrating that the student received some special education services and received some degree of benefit therefrom]; Application of a Student with a Disability, Appeal No. 13-031 [finding upon a review of the hearing record that the IHO correctly determined that compensatory educational services or additional services were not an appropriate remedy because the student made significant progress during the school year at issue]; Application of a Student with a Disability, Appeal No. 11-121 [holding in a matter wherein the district conceded that it failed to offer the student a FAPE during the school years at issue that there was no evidence in the hearing record that supported the student's need for additional reading services above those ordered by the IHO]). The IHO could not and should not make such findings in the absence of an adequate record and was well within his authority to require the parties to assist him in ensuring appropriate record

[9] In leaving the IHO's finding in place, I do not, pass judgment on the other bases for denial of reimbursement for the private educational evaluation identified by the IHO (see IHO Decision at pp. 15-17). However, an evaluation may take the form of an observation, and the practice of ABA includes evaluation of a student through observation (see Educ. Law § 8001; 8 NYCRR 200.4[b][iv]; see also Tr. pp. 193-98).

development. Accordingly, I decline to find that the IHO erred in examining the hearing record regarding the scope and nature of the FAPE deprivation in an effort to craft an award that was 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.

1. Compensatory Education

On appeal, the parents request modification of the IHO's compensatory education order and request an order providing for 2470 hours of 1:1 ABA instruction, 104 hours of parent counseling and training, an assistive technology device for use in the home and in school, and 104 hours of BCBA supervision, all based upon provision of services on a 52-week basis ().[10] Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147, 151 [N.D.N.Y. 1997]). Within the Second Circuit, compensatory relief in the form of supplemental special education or related services has been awarded to 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 *23 [E.D.N.Y. Oct. 30, 2008]; see generally R.C. v. Bd. of Educ., 2008 WL 9731053, at *12-*13 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who have been denied appropriate services, if such deprivation can be remedied through the provision of additional services before the student becomes ineligible for special 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]; see, e.g., Application of the Dep't of Educ., Appeal No. 13-048; Application of a Student with a Disability, Appeal No. 11-091).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also 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

[10] I note that the parents do not assert how the amount of compensatory services they seek would, or could, be delivered in practice. In challenging the IHO's decision, the parent has identified any rationale that would support an award of services during periods when schools are not in session. While the student's eligibility for 12-month services is not at issue, the hearing record is devoid of evidence that the student required services to be provided every week of the year. Rather, a February 2013 progress report indicates that after not receiving services between July 11, 2012, and August 6, 2012, the student required a two-week period to regain her prior level of functioning (see Parent Ex. G at p. 1). State regulations provide that a district must provide a student with 12-month services when the student will experience "substantial regression," defined as the "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], [eee]; 200.6[k][1]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf).

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] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]). Accordingly, an award of additional services 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"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30. 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; 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. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

In light of the above, an examination of the evidence in the hearing record regarding the student's progress or lack thereof during the school year is warranted in order to determine what compensatory additional services may place the student in the position she would have been had the district complied with its obligations under the IDEA. The student's IEP for the 2013-14 school year included annual goals and short-term objectives that targeted study skill, reading, mathematics, speech-language, social/emotional/behavioral, and daily living skill needs (Parent Ex. B at pp. 5-14). Based on the student's progress report from the nonpublic school dated June 26, 2014, the student achieved 7 of 18 goals and 22 of 36 short-term objectives/benchmarks during the 2013-14 school year (Parent Ex. U). Of the remaining 11 goals that were not achieved, the student was making satisfactory progress toward six goals, gradual progress toward four goals, and inconsistent progress toward one goal (id.). Of the 14 remaining short-term objectives that were not achieved, the student required moderate assistance to complete tasks on four objectives, moderate to intensive assistance was required to complete tasks on four objectives, inconsistent progress was reported on two objectives, and four objectives had not been introduced by the end of the marking period (id.). According to the school psychologist who completed quarterly behavioral progress reports, the student's target behaviors increased, behaviors were typically high in intensity and long in duration, and aggressive behavior fluctuated from week to week over the course of the 2013-14 school year (Parent Exs. E at p. 12; F at p. 19; U at p. 17).

In addition to the four 30-minute individual sessions of speech-language therapy the student received in school, the student also received four 30-minute individual sessions of speech therapy at home during the 2013-13 school year (Parent Ex. L at p. 1). According to the progress report from the student's home-based speech therapist dated July 10, 2014, out of the five then-current long term goals, the student achieved one goal, made significant progress on three goals, and made some progress on one goal (Parent Ex. V at pp. 1-2). Although progress had been made, the speech therapist indicated that the student was inconsistent at times, she continued to require visual and verbal prompting, cuing, and modeling, and more time was needed to address the

student's needs (id.). Progress reports from the student's home-based ABA providers indicated that the student made slow but steady progress toward her goals (Parent Exs. H; I; J).[11] The home-based ABA provider testified that the student made "tremendous progress in regards to academics" and "significant progress" toward her behavior goal during home sessions (Tr. pp. 107-09).

The parents argue that the IHO erred in finding that the student made "significant progress" at the nonpublic school during the 2013-14 school year because several of the objectives she achieved were similar to those achieved in prior school years. However, after comparing the 2012-13 and 2013-14 goals and objectives, the majority of the student's annual goals and objectives changed from 2012-13 to 2013-14 (compare Parent Ex. U, with Pet. Ex. C). Although a few of the objectives remained similar, there were adjustments made to the criteria, such as the percentage of success expected to meet the objective (i.e., 40 percent vs. 60 percent), the amount of assistance provided to the student (i.e., moderate vs. minimal), or the length of time the student was expected to engage in a particular activity (id.). For example, the student achieved an objective that required her to "respond to a simple "Wh" question asked by a therapist, using at least three words per utterance, with 40% success with moderate assistance" during the 2012-13 school year, but she did not achieve an objective that required her to "respond to a simple "Wh" question asked by a therapist, using at least three words per utterance, with 60% success with moderate assistance" (Pet. Ex. C at pp. 5-6). During the 2013-14 school year the student achieved objectives that required her to "use single words or phrases to comment or request an object with 60% success with minimal assistance" and "respond to a simple "Wh" question asked by a therapist, using at least three words per utterance, with 60% success with minimal assistance" (Parent Ex. U at p. 4). Therefore, it appears that the student made some progress on achieving her annual goals during the school year and no reason appears in the hearing record to disturb the IHO's finding that the student made progress during the 2013-14 school year.

On May 8, 2014, the director of the student's non-public school wrote a letter to the CSE requesting a new school placement for the student due to her extensive behavioral/management needs (Parent Ex. D). The director indicated that the student's target behaviors had increased in frequency, intensity and duration over the past two years and the school was no longer able to provide an appropriate educational program (id.). In addition, the director requested that the student's IEP be amended to include a 1:1 aide to help manage her behavioral needs while she remained at the school (id.). However, the parent testified that the 1:1 aide was not provided until after a July 2014 CSE meeting (Tr. p. 248). Regarding behaviors in the home, one of the student's home ABA providers conducted a functional analysis of the student's behaviors and testified regarding the student's progress with maladaptive behaviors in the home during the school year (Tr. pp. 103-05; Parent Ex. J).

a. Compensatory 1:1 ABA Instructional Services

The hearing record reveals that during the 2013-14 school year, the student received 10 hours of ABA services per week provided at home (Tr. p. 249). In their petition, the parents assert that because the district conceded that it failed to offer the student a FAPE during the entire 2013-14 school year, the IHO erred in limiting the compensatory award to "five hours of ABA for each school day from May 8, 2014 to the end of the [school year]" (IHO Decision at p. 13). As

[11] Parent Exhibits I and J are not dated; however, the home-based ABA provider testified that Exhibit I was from January 2014 and Exhibit J was from May 2014 (Tr. pp. 132, 137).

previously stated, in the absence of any clarification of the scope of its concession and for purposes of fashioning relief related to the denial of a FAPE, I will, in this instance, presume that the district intended to admit every deficiency alleged by the parents in the due process complaint notice regarding the March 2013 IEP. Nonetheless, while the parents are entitled to the asserted facts in light of the district's concession, they are not necessarily entitled to "default" relief.[12]

In this case, as set forth above, the IHO determined that compensatory additional services were appropriate for the time when the district knew or should have known there was a denial of FAPE at the nonpublic school (IHO Decision at p. 12). As the district does not contest the IHO's award of compensatory 1:1 ABA services, it is final and binding on the district and need not be further addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). However, I agree with the parents' assertion that in light of the district's concession regarding FAPE, a compensatory award of 1:1 ABA instructional services encompassing a denial of FAPE for the whole of the school year is appropriate. The facts that the student made some progress in reaching her annual goals during the school year despite the inappropriate setting at the NPS and that the student received 1:1 ABA services at home during the school year necessarily impact the question of what level of "make-up" services would likely redress the harm. Also relevant are the facts that the student will continue to receive 1:1 ABA services as well as a full-day in-school program with related services, such that consideration must be given as to how much additional instruction could reasonably be tolerated by the student in a given day. Under the circumstances, as the hearing record lacks sufficiently quantifiable proof of the student's progress in relation to the number of ABA hours the student received, the district will be directed to provide, as compensatory additional services, one hour of 1:1 ABA services for each day district schools were in session during the 2013-14 12-month school year prior to May 8, 2014, the date upon which the IHO's original compensatory framework commenced, to be used by December 31, 2015. The location where the services will be provided is to be determined by the parties (either at home or at school, in consideration of the services the student is already receiving).[13] To the extent otherwise required by State or federal law, the district shall not be relieved of its obligation to ensure that the student receives transportation to and from these services on a 12-month basis.

b. Compensatory Parent Counseling and Training

The IHO directed the district to provide the parents with one hour of parent counselling and training for each week in the 2013-14 school year; however, the parents requested at the impartial hearing—and request in their appeal—that the district be directed to provide compensatory parent counseling and training services in the amount of two hours for each week

[12] Summary disposition procedures akin to those used in judicial proceedings are permissible under the IDEA; however, they should be used with caution and are only appropriate in instances in which the parties have had a meaningful opportunity to present evidence and the nonmoving party is unable to identify any genuine issue of material fact (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 68 [2d Cir. 2000]. In these circumstances, I believe any notion of default relief would be disfavored in light of the authorities requiring fact-specific inquiries when fashioning equitable relief such as compensatory education.

[13] The compensatory additional services directed herein are structured to be provided within a reasonably condensed time-frame so that the parties and future CSE participants can more easily determine what progress is thereafter made by the student, independent from services that the student receives as a result of a compensatory award or through pendency. Going forward, the parties should make a concerted effort to work cooperatively to consider using methods of progress measurement that can distinguish progress achieved as a result of pendency and compensatory services from progress achieved as a result of services recommended by the CSE.

such services were not provided during the 2013-14 school year. State regulations require that an IEP indicate the extent to which parent training will be provided to parents (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, courts have held that a failure to include parent counseling and training on an IEP will rarely rise to the level of a denial of a FAPE and the Second Circuit has explained that "because school districts are required by 8 NYCRR 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP" (R.E., 694 F.3d at 191; see R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *2 [2d Cir. Mar. 19, 2015]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 169-70 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]).

Here, it is undisputed that the March 2013 CSE did not recommend parent counseling and training as a related service in the student's IEP as required by State regulation (see Parent Ex. B). The IHO agreed with the parents that parent counseling and training should have been provided and noted that the parents would have benefited from the service in aiding them with behavior management and addressing the student's daily living needs (IHO Decision at p. 14; see Tr. pp. 133). However, the IHO declined to follow the recommendation for two hours per week of parent counseling and training put forth by the private BCBA (id. at pp. 14-15). The IHO reasoned that taken as a whole, the BCBA's recommendations "reflected maximization of services not permissible under the IDEA" (id.). The hearing record also reflects that the parents received some amount of informal training from an ABA instructor who delivered home services to the student during the 2013-14 school year (see Tr. pp. 89-92, 133). As part of the overall relief set forth below, the district is directed, when next it convenes a CSE to develop an IEP for the student, to provide for parent counseling and training in accordance with State regulations (8 NYCRR 200.4[d][2][v][b][5], 200.13[d]). Given that the parents will be receiving appropriate parent counseling and training moving forward, the IHO's award of compensatory parent counseling and training additional services was an appropriate exercise of his broad remedial authority and there is no reason to disturb it.

c. Compensatory Assistive Technology

State regulations provide that assistive technology devices and services are generally required to the extent necessary to permit a student to benefit from instruction (8 NYCRR 200.4[d][2][v][b][6], [d][3][v]). Accordingly, a compensatory award of assistive technology services will be granted only when the services are necessary to assist the student in accessing the instructional portions of her compensatory award (see Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-121). A May 2014 assistive technology evaluation report indicates that the recommendations for assistive technology were intended to support, reinforce, and permit the student to practice, academic skills, rather than constituting services required for the student to access her curriculum (Parent Ex. K at pp. 7-9). A recommendation for a particular assistive technology device or service as an additional support for a student does not necessarily indicate the student's need for that device or service (High v. Exeter

Twp. Sch. Dist., 2010 WL 363832, at *5 [E.D. Pa. Feb. 1, 2010] [holding that "although assistive technology will almost always be beneficial, a school is only required to provide it if the technology is necessary"]).

Here the IHO ordered the district to provide the student with an assistive technology device for use in the home with five hours of training (IHO Decision at p. 19). According to the hearing record, the student is familiar with the device and used it in her home program for telling time, sight words, categorization, and reinforcement (Tr. pp. 277-78). There does not appear to be any testimony regarding the student's use of, or need for, assistive technology at the NPS. A detailed assistive technology evaluation is present in the hearing record; however, it recommended a portable word processor for the student's use in school on a trial basis, rather than the specific assistive technology device requested by the parents (Parent Ex. S at pp. 1, 6). In light of the above, I decline to modify the assistive technology portion of the IHO's order, although as set forth below I have also directed the district to consider the student's assistive technology needs the next time the CSE convenes to review the student's program.

d. Compensatory Behavior Consultant Supervision

On appeal the parents contend that the IHO erred in deciding to not award compensatory BCBA supervision additional services, asserting that two parent witnesses recommended two hours of BCBA supervision per week and the district failed to offer testimony rebutting those recommendations (see Tr. pp. 116-17, 213-15). However, I decline to alter the IHO's decision on this issue for two reasons. First, the hearing record indicates that one of the asserted needs for BCBA supervision is to coordinate between the home and the school-based programs to promote generalization of skills and abilities into the home environment (Tr. pp. 209-13). Several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly in cases such as here, where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]; see also K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *14 [S.D.N.Y. Aug. 23, 2012] [upholding the administrative determination that home-based ABA services that were desired to generalize skills and improve the student's custodial care in the home were not required], aff'd, 530 Fed. App'x 81; Student X, 2008 WL 4890440, at *17; A.D. v. New York City Dep't of Educ., 2008 WL 8993558, at *7 [S.D.N.Y. Apr. 21, 2008]). Second, it appears from the hearing record that many of the roles and duties that are envisioned for a BCBA supervisor are being performed by the student's ABA providers in the existing home-based program, such that it is unnecessary to award additional services to compensate the student for the district's failure to provide her with a FAPE (compare Tr. pp. 90-94, with Tr. pp. 212-14).

2. Directives to the CSE

Notwithstanding these points, because the district has thus far apparently decided not to address the difficult questions of methodology and whether the student requires a home-based

program,[14] despite their having been placed squarely at issue for successive school years by the parents, when the CSE next convenes to conduct an annual review of the student's program the district will be directed to consider whether home-based educational services, the provision of instruction using ABA methodology, parent counseling and training in accordance with State regulations (8 NYCRR 200.13[d]), or assistive technology devices and services are required to enable the student to benefit from instruction and, after due consideration thereof, provide the parents with prior written notice on the form prescribed by the Commissioner specifically indicating whether the CSE recommended or refused to recommend such services or methodologies on the student's IEP and explaining the basis for the CSE's recommendation therein, as well as the evaluative information relied upon in reaching these determinations (8 NYCRR 200.5[a]; see 34 CFR 300.503[b]).[15]

VII. Conclusion

For the reasons stated above, I find that the IHO's compensatory additional services awards relating to 1:1 ABA instruction, assistive technology, and parent counseling and training were appropriate equitable remedies designed to redress the district's failure to provide her a FAPE for the 2013-14 school year. Additionally, for the reasons stated above I find that the student is entitled to receive an increased amount of compensatory additional ABA services in the amount identified. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the district shall provide the student with additional services in the form of 1 hour of 1:1 ABA services for each day in the 2013-14 school year prior to May 8, 2014, to be used by December 31, 2015; and

IT IS FURTHER ORDERED that upon reconvening the CSE for the next annual review of the student's IEP, the parties shall discuss the topics as directed above and the district shall, within 10 days thereafter, provide prior written notice to the parents in conformity with State and federal regulations and the body of this decision.

Dated: **Albany, New York**
April 15, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER

[14] Federal and State regulations explicitly contemplate that districts may be required to recommend home and hospital instruction to provide a disabled student with a FAPE if that is the least restrictive environment in which the student can receive educational benefits (see 34 CFR 300.115; 8 NYCRR 200.6[i]).

[15] To the extent that the prior written notice directives set forth in this decision may be interpreted as exceeding the requirements of federal and State regulations, it is intentionally awarded as appropriate remedial relief designed to address the parties' recurring disagreement evidenced in this case.