The University of the State of New York

The State Education Department
State Review Officer
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No. 17-109

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

Appearances:
Law Offices of Bonnie Spiro Schinagle, attorneys for petitioners, by Bonnie Spiro Schinagle, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail Eckstein, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the respondent (the district) did not recommend an appropriate program for their son for the 2016-17 school year and ordered, among other things, the district to provide compensatory education. The appeal must be sustained in part and remanded to the IHO for further proceedings.

II. Overview—Administrative Procedures

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

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student, who is currently 15 years old, has reportedly received diagnoses of autism, attention deficit hyperactivity disorder (ADHD), Tourette's syndrome, and obsessive-compulsive disorder (OCD), in addition to having several complex medical issues, which include "the possibility of seizure disorder" and food allergies and sensitivities (Tr. p. 567; Parent Exs. B at p. 1; C at p. 1; IHO Ex. II at pp. 1, 5). According to the student's mother, the student was evaluated

"for the early intervention" and it was determined that he met the criteria to receive services (Tr. p. 552). The parent also took the student to "a center that [specialized] in autism" when the student was two years old, but he did not meet the criteria for autism at that time (id.). When the student was four years old he was diagnosed with "PDD/NOS" and started to receive applied behavior analysis (ABA) services (id.).

During the 2014-15 and 2015-16 school years the student attended the Manhattan Children's Center (MCC), and the student's placement for the 2015-16 school year was funded by the district as the result of a settlement agreement (Tr. pp. 564-65, 630-32). The hearing record is not entirely clear as to what the student's program at MCC consisted of; however, the student's mother testified that MCC provided the student with a six hour school day, consisting of all 1:1 ABA services, including speech and OT with providers trained in ABA, and approximately five to ten hours of ABA services per week in the home (Tr. p. 667; see Parent Ex. E at p. 1). On or around May 30, 2016, while still attending MCC, the student suffered a grand mal seizure resulting in hospitalization for approximately three days (Tr. pp. 570, 644, 662). According to the student's mother, when the student returned to MCC, his "behaviors became so high and frequent that it was very difficult for any teaching to take place" (Tr. p. 570). The student also had difficulty sleeping, and the student's mother reported that there were times when "he didn't sleep for three days in a row, and on the fourth night, he would finally crash" (id.). The parent opined that at that time the student was "out of control" (Tr. pp. 570-71). As a result of the student's increased non-compliant and self-injurious behaviors, both MCC and the parent determined that the student should be removed from the school until a new program could be found (Tr. pp. 570-71; IHO Ex. II at pp. 1, 21). The parent testified that the student's behaviors "calmed down a bit" when he was removed from school, and indicated she believed the school setting was putting too much pressure on the student (Tr. p. 571).

According to the student's parent, during summer 2016 the student did not have an IEP in place (Tr. p. 555). The parent reported that the CSE did not schedule a meeting until she contacted them (Tr. p. 633). In October 2016 the CSE convened to develop an IEP for the student's 2016-17 school year (IHO Ex. II).[1] The CSE determined that the student was eligible for special education as a student with autism and recommended a 6:1+2 special class but deferred to the district central based support team (CBST) to locate a placement in a State approved non-public day school, and further recommended a 6:1+1 special class pending placement by the CBST (id. at pp. 1, 16-17, 23). The CSE also recommended the following related services: four individual speech-language therapy sessions per week for 30 minutes, one group (2:1) speech-language therapy session per week for 30 minutes, four occupational therapy (OT) sessions per week for 30 minutes, one individual counseling session per week for 30 minutes, one group (2:1) counseling

[1] While the IEP is dated September 20, 2016, additional information in the hearing record indicates that the CSE meeting took place in October (see IHO Ex. II at p. 21). First, the IEP contains references to evaluative information occurring after September 20, 2016 (see IHO Ex. II at pp. 3, 21). The parent and the ABA provider also testified that the CSE meeting occurred at the end of October 2016 (Tr. pp. 369-70, 419, 563-64). Moreover, a notation on the exhibit list attached to the IHO Decision indicated that "[b]oth parties agreed that this IEP was actually developed at the end of October" and that the "district representative asserted that the meeting was on October 19, 2016" (Tr. pp. 30, 562-64; IHO Decision at p. 18). For those reasons, the CSE meeting and the IEP developed at that meeting will hereinafter be referred to as the October 2016 CSE meeting and the October 2016 IEP.

session per week for 30 minutes, and one group session of parent counseling and training per month for 60 minutes (id. at p. 17).[2] In addition, the CSE recommended a full time 1:1 health paraprofessional to monitor the student's feeding, ambulation, and safety (id.).

A. Due Process Complaint Notice

By due process complaint notice dated October 27, 2016, the parents alleged that the district denied the student a FAPE for the 2015-16 and 2016-17 school years (IHO Ex. I at p. 6).[3] The parents claimed that the October 2016 CSE's recommendation of a 6:1+1 special class in a District 75 school did not appropriately address the student's "severe and self injurious behaviors" (id. at p. 4). The parents also claimed that the district failed to offer 1:1 ABA therapy, an alternative behavior modification service, any home-based therapeutic services for the interim placement for the 2016-17 school year, and did not recommend any particular scientifically-based methodology (id. at pp. 4-5). Additionally, the parent raised claims related to the district's failure to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP), failure to offer parent counseling and training, and failure to offer social skills training (id. at pp. 5-6). The parent further maintained that the district failed to recommend sufficient speech-language therapy, counseling, and OT services, and failed to evaluate the student in all areas of suspected disability (id. at pp. 5-6).

For relief, the parent requested that the district provide independent OT, speech-language, and psychiatric evaluations, an "appropriate IEP for the 2016-17 school year," and the immediate provision of home instruction as follows: 1:1 academic tutoring with a special education teacher who is also a board certified behavior analyst (BCBA), 1:1 speech-language therapy, OT, and counseling with a therapist who is also a BCBA, and 1:1 "behavioral support with a BCBA" (IHO Ex. I at p. 7; see Tr. p. 362;). The parent also requested compensatory counseling services, OT, speech-language therapy, and ABA therapy, as well as reimbursement of any private therapy paid for by the parent (IHO Ex. I at p. 7).

B. Impartial Hearing Officer Decision

The parties convened for an impartial hearing on February 1, 2017 which concluded on November 2, 2017, after fifteen days of proceedings (see Tr. pp. 1-695).[4]

On March 2, 2017, the IHO issued an interim decision, finding that the parties agreed that the student could not attend any school placement during the pendency of the proceeding due to his "difficult to control behaviors," and, that they agreed that the student should be provided with

[2] The October 2016 IEP also included a recommendation for adapted physical education services four times per week for 35 minutes (IHO Ex. II at p. 16).

[3] During the impartial hearing the parents' attorney stated that the parents claims related to the 2015-16 school year were no longer part of the hearing (Tr. pp. 63-64, 265).

[4] As a result of ongoing settlement discussions, several of the hearing days were used to provide the IHO with updated information concerning the possibility of settlement and to request additional extensions (see Tr. pp. 104-10, 112-18, 120-24, 180-97, 257-78).

the following home-based services: 30 hours per week of 1:1 ABA services, two hours per month by a BCBA to supervise the ABA provider, six hours during the first two months for the BCBA to develop an interim behavior plan, two 30-minute sessions of counseling services per week, five 30-minute sessions of speech-language therapy per week, and four 30-minute sessions of OT per week (IHO Ex. IV at p. 3). Furthermore, the IHO determined that the parents were entitled to parent counseling and training to be provided by either the ABA provider or the BCBA which "shall be included in the hours set forth above" (id.). The IHO also ordered the district to issue authorizations within three days of the date of the interim decision for the parents to obtain the services above "as of October 27, 2016 and through the pendency of these proceedings" (id.).

On September 26, 2017 the IHO issued an interim decision denying consolidation of the instant matter with a second due process complaint notice filed by the parents, finding that the instant proceeding was filed more than ten months prior to the second matter and that consolidation would have a negative impact on the student's education as "any compensatory services awarded…would be delayed as testimony in the later case was taken" (IHO Ex. V at pp. 2-3).

In a final decision dated December 1, 2017, the IHO found that the March 2, 2017 interim decision directing pendency should have met the student's needs because it "fell within the range of hours that [the student's psychologist] recommended," and offered more than the amount of services provided to the student at MCC (IHO Decision at pp. 13-14). Next, the IHO found that "any failure of the [s]tudent to receive all services during the school year" was not the district's responsibility because the parent agreed to find providers on her own for the interim services ordered by the IHO (id. at p. 14). Despite finding it was not the district's responsibility, the IHO awarded the student compensatory education in the amount previously ordered in the interim decision on pendency that had not already been provided to the student between July 1, 2016 and June 30, 2017 (see IHO Decision pp. 15-16).[5] Moreover, the IHO found that the district shall assist the parent in locating providers going forward (id. at p. 15). The IHO also found no reason to award more compensatory education than the parties agreed to in principle during their settlement discussions, as the only "sticking point" was whether those services should "have an expiration date" (id.).

Next, the IHO determined that the district failed to offer the student a FAPE for the period between July 1, 2016 and October 26, 2016 because the district conceded FAPE for this time period during the hearing (IHO Decision at p. 15). As to whether the district offered the student a FAPE for the remainder of the school year from October 27, 2016 through June 30, 2017, the IHO determined that the issue was moot since the parties had agreed to the services provided in the March 2017 interim decision directing pendency and that those services would have met the student's needs for the school year if the decision had been fully followed (id.). The IHO also ordered the completion of an FBA, as well as speech-language and OT evaluations (id.).

[5] In an apparent typographical error, the IHO stated that services not provided from "July 1, 2017…through June 30, 2017" will be provided to the student (IHO Decision at p. 15). Based upon the context provided throughout the IHO Decision, I assume the IHO meant July 1, 2016.

IV. Appeal for State-Level Review

On appeal, the parents claim that the IHO failed to consider what services the student should have received to "make meaningful progress" during the 2016-17 school year and any additional amounts of ABA instruction to account for any skills that had been lost. The parents also claim that the IHO improperly relied on the March 2017 interim decision directing pendency as a basis for determining a compensatory education award for the student. The parents explain that the March 2017 interim decision did not account for hours to recoup skills lost due to the lack of services provided to the student before the decision was entered. The parents also maintain that the hearing record is void of testimony that the student would have made "legally sufficient progress" had the student been provided with all services in the interim decision on pendency. Moreover, the parents claim that the progress made by the student in the 2016-17 school year was not "real progress since the maladaptive behaviors remained significant and interfered with learning."

Next, the parents argue that the record establishes that they made "good faith efforts to provide appropriate instructors" for the services in the March 2017 interim decision directing pendency. Additionally, the parents claim the IHO ignored any regression that occurred during the 2016-17 school year and only attributed the student's regression to the 2015-16 school year. Also, the parents maintain that there was no evidence to support the IHO's determination that the student's regression was attributable to increased behaviors after the student had suffered a seizure on May 30, 2016. Rather, the parents claim the evidence established that the student regressed during the 2016-17 school year as a result of a lack of an "intensive behavioral program he needed to make meaningful progress."

For relief, the parents request that the student be provided with a bank of 1840 hours of 1:1 ABA instruction, 92 hours of BCBA oversight of the ABA instruction, and 92 hours of parent counseling and training to make up for the denial of FAPE in the 2016-17 school year, and that this be provided "without deduction of the hours previously deliver[ed] under the" interim decision directing pendency. The parents further request that the student be provided with a bank of 1840 hours of ABA instruction to recoup for regression.[6] Furthermore, the parents request that the bank of hours be available to the student until he turns 21 years old and not otherwise be subject to an expiration date. Finally, the parents request that the portion of the IHO's decision finding that the issue of FAPE from October 27, 2016 to June 30, 2017 was moot be reversed, and that it be determined that the district denied the student a FAPE for the entirety of the 2016-17 school year.

In an answer, the district denies the parents' allegations of IHO error and requests an order affirming the IHO's decision in its entirety. The district asserts as a defense that the IHO's compensatory education award for the student was appropriate. The district further asserts as a defense that the compensatory education relief requested by the parent is unreasonable and unnecessary.

[6] The parent explains in the memorandum of law that a calculation of a compensatory education award should "not only seek to make up the one year of instruction that [the student] should have had, but shall also account for the fact that he lost a year of progress as well" (Parent Mem. of Law at p. 10).

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132,

quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[7]The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Mootness

I will turn first to the IHO's determination that the issue of whether the district denied the student a FAPE from October 27, 2016 to June 30, 2017 was moot since the parties had already agreed to the services delineated in the interim decision on pendency, which the IHO found would have met the student's needs for the remainder of the 2016-27 school year (IHO Decision at p. 15). On appeal, the parents request that the IHO's mootness finding be reversed, and that it be determined that the district denied the student a FAPE for the entirety of the 2016-17 school year.

In this case, a finding of mootness is unnecessary as the district previously conceded that it had denied the student a FAPE for the 2016-17 school year during the impartial hearing, which

[7] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

the district has reconfirmed in its answer, specifically stating that "the [district] agrees that the concession was unqualified and not limited to the time period set forth by the IHO" (Tr. pp. 95, 355; Answer ¶6, n. 2). Therefore, the IHO should have determined that the district failed to offer the student a FAPE for the entirety of the 2016-17 school year, rather than limiting the finding to the first four months of the school year. As to whether specific claims raised by the parent in the due process complaint notice are now moot, I find no need to address this matter, but I otherwise note that in most instances, a claim for compensatory education continues for the duration of litigation as a live controversy and, therefore, will not be rendered moot (see Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215, 219 [N.D.N.Y. 1993] [demand for compensation to correct past wrongs remains as a live controversy even if parents are satisfied with student's current placement];see also Toth v. New York City Dep't of Educ., 2018 WL 258793, *2 [2d Cir. 2018]). For that reason, the IHO's mootness finding must be reversed.

B. Interim Decision

As an additional matter, there was confusion by the parties and the IHO during the hearing as to whether the March 2, 2017 interim decision was a determination as to pendency. The IHO specifically noted at the hearing on February 24, 2017 that the decision was a decision on pendency, even though she later noted it was "not based on pendency" because it was "based on the parties' agreement," despite later recognizing that such an agreement is "a kind of pendency anyway" (Tr. pp. 19, 43, 144, 172, 318-19). The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).

The IHO's interim decision expressly stated that the services described therein were to be provided "throughout the pendency of the[] proceedings" (IHO Ex. IV at p. 3). As the parents and district agreed during the hearing to the specific services that would be provided to the student during the pendency of these proceedings, the IHO's decision commemorating that agreement in writing functions as a decision on pendency. Thus, I find that the interim decision issued by the IHO on March 2, 2017 is, for all intents and purposes, an interim decision directing the student's pendency placement and that the agreed upon services included within that order constitute the student's pendency placement for the remainder of these proceedings.

C. Compensatory Education

1. Pendency as Compensatory Education

The parents claim that the IHO improperly relied on the interim decision on pendency to determine the compensatory education awarded in this proceeding. While the IHO briefly identified that compensatory education is a form of relief available for a denial of a FAPE, the

IHO did not adequately analyze how the awarded compensatory education would have made up for the denial of FAPE (see IHO Decision at p. 9). As noted previously, the IHO found that the March 2, 2017 interim decision on pendency "should have met" the student's needs because the number of hours awarded to the student under pendency fell within the range of hours recommended by the student's psychologist and were more than the amount provided to the student while he attended MCC (IHO Decision at pp. 13-14).[8] As a result, the IHO awarded the student compensatory education in the same amount ordered under the IHO's interim decision on pendency to the extent that they had not already been provided to the student between July 1, 2016 and June 30, 2017 (see IHO Decision at pp. 15-16). While the extent of a student's success with pendency services may be relevant information in crafting compensatory education relief, the parent is correct that the IHO relied far too heavily on the interim decision directing pendency and failed to engage in the fact-intensive analysis needed to develop an appropriate compensatory education award in a decision founded upon an adequate record.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E. Lyme Bd. of Educ., 790 F.3d at 456; 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 education services the school district should have supplied in the first place"]; Student W. v. Puyallup Sch. Dist., No. 3, 31 F.3d 1489, 1497 [9th Cir. 1994]).

An appropriate compensatory education award 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

[8] The IHO previously noted that the psychologist's testimony was contradictory and that the psychologist may have an interest in continuing to provide certain services to the student since she had previously provided ABA services to him (see IHO Decision at p. 12, fn. 2).

disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

As noted above, the district conceded that the student was denied a FAPE for the 2016-17 school year, and did not call any witnesses or provide any evidence at the hearing (Tr. pp. 95, 327-28, 355). While the issue of FAPE may have been laid to rest early on in the hearing, the record did not include information necessary for the IHO to conduct a fact-specific inquiry to determine the services the district should have provided in the first place, and thus, craft an appropriate compensatory education award. In this matter, the student was not educated under the October 2016 IEP, yet, in conceding FAPE for the later portion of the school year the district must have concluded that the October 2016 IEP failed to meet the threshold for offering a FAPE in some manner and that the student would likely have received some greater benefits in accordance with an IEP designed to offer a FAPE. In order to determine the services the district should have recommended, clear identification of the student's needs must be established in the hearing record, including the evaluative information that either was or should have been used by the district to formulate the student's IEP. Unfortunately, as further described below the hearing record lacked such information, and so it is incumbent upon the IHO to develop the record on remand with respect to this information.

2. Student's Needs during the 2016-17 School Year

a. Evaluative Information Available to October 2016 CSE

A district must establish what evaluative materials were reviewed by the CSE in developing a student's IEP (L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110 [2d Cir. 2016]). As noted in the October 2016 IEP, the hearing record establishes that the district considered evaluative information that likely provided a considerable amount of information regarding the student's functioning. However, little evaluative information that was relied upon by the October 2016 CSE was included in the hearing record.

It appears that the October 2016 CSE primarily relied on evaluations which were not included in the hearing record. The October 2016 IEP indicated that a September 9, 2016 psychological evaluation was conducted (IHO Ex. II at p. 1).[9] As reported in the IEP, administration of the Abbreviated Stanford-Binet Intelligence Scales-Fifth Edition yielded a full-scale IQ of 50, falling within the extremely low range (id.). Similarly, both the student's verbal and non-verbal abilities were within the extremely low range (id.). The Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) completed with the parent revealed that the student showed delays across all domains consistent with his diagnosis of autism (id.). Moreover, the student was rated in the low range in communication, daily living skills, and socialization, as well as his adaptive behavior composite, and the student was within the clinically significant range on the maladaptive behavior index (id.). The October 2016 IEP also indicated that a September 2016 administration of the Woodcock-Johnson Test of Achievement found that the student's overall

[9] The October 2016 IEP also noted that this was the student's triennial evaluation (IHO Ex. II at p. 1).

reading skills were extremely limited, in the "upper kindergarten level" (id.).[10] The IEP also noted that the student had limited sight word vocabulary, "scoring in the extremely low range at a beginning kindergarten level" for letter-word identification, though he could read three letter "high frequency words" (id.). Additionally, the student's decoding skills were identified as emerging (id. at pp. 1-2). However, the IEP did not identify who authored the Vineland-II assessment, the psychological report, or the Woodcock-Johnson Test of Achievement, nor did it indicate who presented these reports to the CSE (id.). Furthermore, the IEP did not identify the date the Vineland-II was administered(id.).

The October 2016 IEP also identified and summarized the results of a "speech report" (IHO Ex. II at pp. 2-3). According to the October 2016 IEP, the student increased his ability to complete tasks independently (id. at p. 2). The student could request food, desired objects, and activities with one to two-word phrases (id. at pp. 2-3). The student could also repeat four to five-word phrases and could follow simple commands (id. at p. 3). The student responded to social greetings and was able to refuse undesired items or activities (id.). The IEP noted, among other things, that the student's receptive and expressive language was severely impaired (id.). Pragmatically, the student did not engage in simple conversational turn-taking, consistently answer simple yes/no questions, or make choices, express his emotions, or indicate what was bothering him (id.). The student's speech production was often unclear, and he failed to speak with proper vocal intensity (id.). Similar to other assessments identified above, the IEP did not identify who authored or presented the speech report to the CSE, or the date the report was created (see id. at pp. 2-3). The October 2016 IEP also identified that the results of a "parent rating on the Behavior Assessment System for Children-Second Edition (BASC-2) were used during the CSE meeting (id. at p. 4). As noted in the IEP, the BASC-2 assessment indicated that the student was at risk for externalizing behaviors, he displayed a high number of "disruptive, impulsive and uncontrolled behaviors," though his aggression was rated within normal limits; in addition, on the "Behavioral Symptoms Index" the student was viewed as engaging in clinically significant levels of atypical behaviors, consistent with a diagnosis of autism (id.). The October 2016 IEP further indicated the student learned to follow a simple visual activity schedule using icons to represent daily activities (id. at p. 2). However, it is unclear if the student learned these skills while at MCC, at home, or in both environments (see id. at pp. 2-3).

The only evaluative information included in the hearing record was submitted by the parents, including two reports drafted by the student's psychologist: a July 12, 2015 clinical recommendation report and a July 9, 2016 report (Tr. pp. 458, 460-61, 463-64; see Parent Exs. E at pp. 1, 3; H at pp. 6-9). The parent also provided two undated educational updates, as well as an April 25, 2017 educational update, and an undated service request rationale from the student's ABA provider (Parent Exs. B; C; H at pp. 11-15).[11] The October 2016 IEP indicates that the CSE

[10] The edition of the Woodcock-Johnson assessment is not clear, but it is likely the IV edition.

[11] One of the educational updates provided by the parent, similar to the psychologist's July 9, 2016 report, was included as evidence attached to the psychologist's affidavit (Parent Ex. H at p. 13). In addition, copies of Parent's Exhibits B and C were also included as evidence attached to the psychologist's affidavit (Parent Ex. H at pp. 11, 14).

reviewed a report drafted by the student's psychologist, but it does not clearly identify whether it was either of the reports included in the record (see IHO Ex. II at p. 4).[12] The parent also submitted five graphs into evidence, most of which were undated (Parent Ex. H at pp. 16-21).[13] At the hearing, the psychologist testified that the parent provided her with the graphs, that they represented "data of [the student's] programming from previous providers that worked with" the student, and that she did not know who filled out the graphs (Tr. pp. 487-88). In any case, there is no information indicating whether these graphs were available to the October 2016 CSE, or who was otherwise using, creating, or relying on these graphs (see generally IHO Ex. II).

The Court in L.O. cautioned that, when a CSE fails to accurately document the evaluative data it relied on in developing an IEP, reviewing authorities or courts, often times months or years later, are left to speculate as to how the CSE formulated the student's IEP and it causes other errors or omissions in the IEP to be called into question (L.O., 822 F.3d at 110-11). While the evaluations used by the October 2016 CSE were identified in the IEP, as noted, these evaluations were not included in the hearing record, and so it is unclear to what extent the information provided in the October 2016 IEP accurately identified the student's needs. On remand the IHO shall ensure that the evaluations used by the CSE are included in the hearing record. Information therein relevant to addressing the student's needs should be appropriately factored into a decision regarding compensatory education relief.

b. Evidence of the Student's Educational History at MCC and Effectiveness of ABA Programming

In addition, the October 2016 CSE members apparently discussed further information that would be relevant to compensatory education relief, some of which was briefly addressed during the hearing, but otherwise remained unelaborated upon in the record.

The October 2016 CSE noted that the student had recently faced major medical difficulties over the past six months (IHO Ex. II at p. 4).[14] The October 2016 CSE reported that the student had diagnoses of autism, Tourette's syndrome, ADHD, and OCD, and that the student also had a history of seizures, and that the parent was concerned with regards to pica, food allergies, and safety while eating (id. at pp. 1, 3-5). During the October 2016 CSE meeting the parents also identified that the student had attended MCC during the two years preceding the CSE meeting but had been removed from the school as a result of his increased non-compliant and self-injurious behaviors (id. at p. 1). The parent subsequently expressed concern that "there may be neurological factors contributing to [the student's] regression and increased behavioral challenges" (id. at p. 5).

[12] The July 2016 report indicated that at the time it was written, the private psychologist's company was providing speech-language therapy and ABA services to the student for approximately one year (Parent Ex. H at p. 6).

[13] The first graph labeled "Categories" identified a year as "2016" in handwriting at the bottom of the page (Parent Ex. H at p. 16). The psychologist testified that the graph was from the "2015/16 school year" (Tr. pp. 488-90). She further testified that the other graphs must also have been from the same time period because based on the handwriting they were completed by the same person (Tr. pp. 488-90).

[14] This was also noted by the psychologist in the July 9, 2016 report (Parent Ex. H at p. 7).

She also reported that she was "pursuing neurological testing to rule out a seizure disorder" as the student had grand mal seizures in the past due to over-hydration, and that he was being seen at a medical center for a three day "inpatient process involving an MRI, EEG and additional tests" (id.). The student's mother also testified that on May 30, 2016 the student suffered a grand mal seizure that resulted in his hospitalization for three days, and that once he returned to MCC his behaviors had become particularly difficult (see Tr. p. 570).[15] The parent testified that, as a result of the seizure, she removed the student from school and traveled to an out-of-State neurological center to make sure that the student was "medically fit to be in school" (Tr. pp. 570-71). While the student's mother acknowledged that the student's seizure affected his behaviors, she believed that the student maintained his academic skills through the summer (Tr. pp. 644-45). Additionally, the hearing record does not contain any evidence as to whether neurological testing had been (or should have been) conducted or the outcome of any such testing. Of greater concern, the hearing record contains very little information that would be relevant to determining the student's medical, educational, psychological, social, and physical status for the time prior to and immediately following the grand mal seizure that had occurred on May 30, 2016.

Evidence of the student's then-current level of functioning and needs at the time of the October 2016 CSE meeting is necessary to determine what would have been an appropriate program for the student at the start of the 2016-17 school year. As the October 2016 CSE meeting was part of a triennial reevaluation, the CSE, and other qualified professionals, were required to review the existing evaluation data on the student, along with input from the parent, to identify what additional data, if any, was necessary to determine whether the student continued to be a student with a disability in need of special education and related services and to determine the student's present levels of academic achievement and related developmental needs and whether additions or modifications to the student's program were necessary (20 U.S.C. § 1414[c][1]; 34 CFR 300.305[a]; 8 NYCRR 200.4[b][5][i]-[ii]). As by the end of the 2015-16 school year, the student regressed to such an extent that MCC and the parents agreed he could no longer attend MCC (IHO Ex. II at p. 1), a review of the effectiveness of the instruction the student received at MCC—reportedly six hours of 1:1 ABA instruction per day over a period of two years (Tr. p. 667)—was warranted (see Application of the Dep't of Educ., Appeal No. 15-107 [the effectiveness of a particular teaching methodology is a consideration in designing an appropriate program]). Therefore, on remand, the IHO should develop the hearing record with respect to the program and services the student received while the student attended MCC, including the specific academic skills that were addressed, either through discrete trial training or within the natural setting, any data demonstrating whether the student made progress, and if so, what progress was made over the course of the year, and any other information related to the student's medical, educational, psychological, social, and physical status for the time prior to and immediately following the student's May 30, 2016 seizure.

To the extent that the parent's consent is required to obtain medical information and personally identifiable information released by a private school, consent must be obtained before making any such requests (see 8 NYCRR 200.2 [a][7][i]). Additionally, the parents should not unreasonably withhold consent regarding information about the student's programming and

[15] The mother originally stated that the seizure occurred at the "end of June," but later corrected this to reflect that it had taken place in May 2016 (see Tr. p. 644).

progress at MCC during the 2015-16 school year when seeking an equitable award of compensatory education services for the 2016-17, as the student's progress under the special education programing for the immediately preceding school year is highly relevant in this inquiry and their cooperation is among the equitable factors that can be considered in crafting an relief.

The October 2016 IEP also identified recommendations that were set forth in the management needs section of the document (see IHO Ex. II at pp. 5-6). Among them were discreet trial training, preferred reinforcement, a token reinforcement system, 1:1 support, and data collection (id.). These recommendations are consistent with the recommendations made by the student's psychologist, specifically that the student requires a school with 1:1 "ABA programming," structured teaching utilizing discrete trial training, and the use of a reinforcement system (Parent Ex. E at p. 2). However, the October 2016 IEP did not explicitly identify whether the student required an ABA therapy approach in his programming in order to receive a FAPE, and if so, which type(s) of ABA therapy. Therefore, on remand the IHO must develop the hearing record, with arguments from the parties, as to what an appropriate program would have been for the student, including whether the student required ABA therapy, and if so, the specific amount and type of services, as well as the difference between what educational benefit an appropriate program would have conferred on the student and what the October 2016 IEP would have provided if that IEP would have been attempted.

c. Evidence of Progress or Regression During the 2016-17 School Year

The parent also claims the IHO ignored the student's regression during the 2016-17 school year, and that the evidence in the hearing record established that the student regressed because he lacked the "intensive behavioral program he needed to make meaningful progress." 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; Newington, 546 F.3d at 118-19). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]. The record in this case lacks specific quantifiable data detailing the skills that the parent claims the student lost. For instance, the ABA provider testified that the student required "consistent practice" and that whenever there was a break in his instruction—as little as a single week in some instances—the student would exhibit "regression" regarding his adaptive behaviors, as well as an increase in maladaptive behaviors, and would have to be retaught "with respect to required skills" (Tr. pp. 376-79). However, the ABA provider was not specific as to how consistent instruction had to be for the student, testifying that due to the student's maladaptive behaviors instruction had to be "more consistent than most" (Tr. p. 378-79). Similarly, the psychologist testified that the student "has a history of regression of skills," but rather than providing specifics, she testified that over the course of a weekend the student could regress and not be able to maintain skills that he previously learned, and so, consistency was the most important part of the student's programming (Tr. p. 472). The parent similarly opined that the student was capable of regressing over the course of a weekend (Tr. pp. 616-17). The psychologist further explained that data from "years ago" had shown that the student regressed when there were gaps in service, though neither this data nor

more current data regarding gaps in services was entered into the record (Tr. p. 472). It is also difficult to tell whether the "regression" being discussed in the hearing record was actually a loss of skills once learned or an increase in interfering behaviors (compare Tr. pp 378-79 with Tr. p. 472). Although being asked to render an opinion regarding regression, the psychologist felt uncertain about providing a professional opinion, had difficulty remembering the dates of the data she referenced, and did not know who collected the data (Tr. p. 478-490).[16] On remand, in addition to the evidence discussed above, the IHO should develop the hearing record with respect to the nature of the student's regression and the specific skills that the student had lost as a result of the district's concession that it failed to offer the student a FAPE for the 2016-17 school year.

As a final point, the October 2016 CSE recommended an interim placement and deferral to the CBST for a placement recommendation, and the parent testified that sometime after the October 2016 CSE meeting the district recommended a 6:1+2 special class at "QSAC" as the student's placement (Tr. pp. 635-36; IHO Ex. II at p. 21).[17] However, there was no testimony at the hearing or evidence in the record showing that the district's updated placement recommendation was memorialized on an IEP. To the extent that this information may have been updated in a subsequent IEP, any evidence related to the student's placement at QSAC is relevant to the issue of crafting compensatory education relief, and any subsequent IEPs for the 2016-17 school year should be included in the hearing record for this purpose.

3. Services Provided in the 2016-17 School Year

When conducting a thorough fact-intensive analysis for crafting compensatory education relief, the IHO should also take into consideration changes in the student's program that might otherwise mitigate the very deficiencies experienced by the student (N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014] [noting that a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated"], report and recommendation adopted, 2015 WL 1137588 [D.R.I. Mar. 12, 2015] see Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]; see also Application of a Student with a Disability, Appeal No. 17-015 [identifying that deficiencies suffered by a student could be mitigated through a pendency placement that offered supports sufficient to effectuate the purposes of a compensatory education award). In this case, the parents claim that the progress made by the student as a result of the ABA services provided pursuant to pendency was not "real progress since the maladaptive behaviors remained significant and interfered with learning."

Initially, the parent testified that the student did not have a program in place for the summer of the 2016-17 school year, but that the parent did have "some people working with him" including a BCBA that had "worked with him through the school year" and other paraprofessionals that were

[16] The IHO attempted to clarify matters on the issue of regression but there was no firm conclusion in light of the muddled testimony identifying a mere handful of documents.

[17] At the hearing, the attorney for the district also noted that the student was accepted to QSAC in October 2016 (Tr. p. 27).

provided through "some settlement compensatory hours that were still available" (Tr. p. 555). The student's mother also testified that the student was able to maintain his academic skills through the end of summer 2016 (Tr. pp. 645-46). The hearing record does not indicate why the student would be receiving "compensatory hours" during the 2016-17 school year in accordance with a settlement. Despite the parent's testimony, the parties and the IHO should have clarified whether the parties' previous settlement extended into the 2016-17 school year, which, depending on the circumstances, could be relevant to the period of time for which a compensatory education award would be calculated. On remand, the IHO requires evidence as necessary as to determine whether a previous settlement agreement: (1) covered any portion of the 2016-17 school year, including the summer 2016, (2) included a bank of compensatory hours that may have been used for services during the 2016-17 school year, and (3) resolved any matters related to the 2016-17 school year, despite the IHO noting that a settlement for the 2016-17 school year failed (IHO Decision at p. 7).

Although the student's mother testified that the student's behaviors "calmed down a bit" when he was removed from school, and indicated she believed the school setting was putting too much pressure on the student (Tr. p. 571), she also testified that the student's behaviors regressed at the end of the 2016 summer and were so high when the ABA provider began providing services on September 30, 2016, that she could not even probe the student's skills (Tr. pp. 646-47). From September 30, 2016 through the end of the 2016-17 school year the student intermittently received ABA services (see Tr. pp. 396-98; Parent Ex. G). The interim decision on pendency provided the student with 30 hours of ABA services per week and related services, amongst other things (Interim Decision at pp. 2-3). The amount of time per month that the ABA provider spent working with the student from October 2016 through June 2017 was considerably lower than the 30 hours a week, or approximately 120 hours a month, ordered by the IHO (Tr. pp. 396-402; see Parent Ex. G). During the hearing, the ABA provider testified that she worked with the student for the following hours per month: approximately 22 hours in October 2016, 17.5 hours in December 2016, 21. 5 hours in January 2017, 13.75 hours in February 2017, 43.8 hours in March 2017, 41.6 hours in April 2017, and 58 hours in June 2017 (Tr. pp. 397--02).[18] The ABA provider testified that she was unsure how many hours she worked with the student in October and November 2016 or May 2017 because she did not have her invoices with her (Tr. pp. 398, 400-01).[19] The ABA provider further testified that she had worked with the student for a maximum of three to four hours a day, while her average time spent with the student throughout the 2016-17 school year was between one and one half to three hours per day (Tr. pp. 409-10). Even though the student received less than the number of hours provided in the interim decision regarding pendency, evidence in the hearing record indicates that the student had made progress during this time.

The ABA provider testified that she was unable to introduce "academic programming" when she first began working with the student because his self-injurious behaviors compromised safety and interfered too much (Tr. pp. 366-67, 369). The ABA provider also identified that by

[18] The hearing record does not include invoices for October or November 2016 or May 2017 because the provider did not have them with her during the hearing (Tr. pp. 400-02; Parent Ex. G).

[19] The parent also generally testified that a second provider worked with the student approximately seven hours per week (Tr. pp. 648-49). However, it is unknown what services this individual provided or the length of time that she provided services to the student.

November the student's self-injurious behaviors peaked, occurring approximately 50 times an hour; additionally, the student was biting himself 25 to 30 times per hour (Tr. pp. 376, 422-23; Parent Ex. B at p. 1). However, by December 2016 or January 2017, the ABA provider observed that the student was only biting himself five times per hour (see Tr. pp. 376, 422-23; Parent Ex. B at p. 1). She further testified that the student maintained these levels for the remainder of the school year (see Tr. pp. 376, 422-23). The student's mother similarly testified that the student's arm biting decreased significantly during the 2016-17 school year, and she believed that the student was making progress, even though she believed it took "much longer to get the behaviors under control" than in previous years (Tr. pp. 602-03).[20] The parent also stated that the student showed progress and regained some lost skills when he received instruction from the ABA provider (Tr. pp. 652-53). The student's mother further testified that by the end of the 2016-17 school year the student "calmed down considerably" (Tr. pp. 624-25). The parent attributed the student's decrease in behaviors to the "consistency of the behavior plan," whereas the ABA provider opined that "differential reinforcement" allowed the student to decrease his behaviors (Tr. pp. 424-25, 621). The ABA provider and the student's mother testified that, as a result of the student's decreased behaviors, the student began receiving academic instruction by January or February 2017 (Tr. pp. 425-26, 652-53). During this time, the ABA provider noted that she worked with the student on reading (phonics and decoding), math, concepts about print, "telling time, decoding simple 3 letter words and identifying 2-digit numerals"; moreover, "the schedule of reinforcement ha[d]…been thinned to reinforcer delivery every 2 minutes" (Tr. p. 412; Parent Ex. B at p. 1). The ABA provider further opined that the student was making progress in academic instruction, even though it was "slow going" (Tr. pp. 426-27). Additionally, the April 25, 2017 educational update completed by the ABA provider identified that the student "has shown significant improvement in adaptive behavior" (Parent Ex. B at p. 1).

The psychologist also testified that the student made progress in the 2016-17 school year (Tr. pp. 516, 533). However, the psychologist's testimony regarding the student's progress was ambiguous as when presented with the ABA provider's April 2017 educational update she testified that the student's progress was both minimal and significant at different times during the hearing (Tr. pp. 516, 533). The psychologist also testified that the ABA service hours ordered in the interim decision on pendency were insufficient and resulted in regression (see Tr. pp. 525-27; Parent Ex. H at p. 3).

It appears the student did receive some supports and services at home for the 2016-17 school year such that it is unclear what if any award of compensatory education would put the student in the same position but for the district's failure to provide the student a FAPE. For that reason, on remand the IHO is directed to develop the record with respect to the nature of the ABA services the student received during the period the student was denied a FAPE, including the specific academic skills that were addressed, either through discrete trials or within the natural environment, data demonstrating whether the student made progress, and if so, what progress was made over the course of the year, to the extent practicable, the results of any assessments used by

[20] The parent also noted that by the end of the 2016-17 school year the student's self-injurious behaviors were still worse than at the end of the 2015-16 school year, prior to his seizure, but that he was getting close to the 2015-16 end of school year level again (Tr. pp. 603-04).

the ABA provider and any information related to the program books reviewed by the ABA provider in the beginning of the 2016-17 school year, and any additional evidence related to services the student may have received as a result of pendency in the 2016-17 school year.[21] [22] As noted above the IHO should also gather evidence related to whether the student continued to receive services under a settlement agreement in place for a portion or all of the 2016-17 school year.

Additionally, the parent maintains that the hearing record is void of testimony that the student would have made "legally sufficient progress" had the student been provided with all services in the interim decision on pendency. The parent also argues that the record establishes that the petitioners made "good faith efforts to provide appropriate instructors" for the services in the interim decision. The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme Bd. of Educ., 790 F.3d at 456 [full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [services that the district failed to implement under pendency awarded as compensatory services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]). Due to the analysis that the IHO undertook in the first instance and her reliance on the interim decision on pendency as the basis for her award of compensatory education, it is unclear to me whether the parent is actually raising compensatory pendency claims separate from the other compensatory education claims raised herein and discussed in detail above. Thus, on remand the IHO should develop the record on this point and issue additional findings as necessary.[23]

[21] The mother testified that a speech-language provider had come to their house for a short time, but that it "didn't work out," and otherwise the student has not received any related services pursuant to the pendency decision during the 2016-17 school year (see Tr. p. 649; 656-60).

[22] The ABA provider testified that when she first started working with the student she administered the Assessment of Basic Language and Learning Skills (ABLLS), which identified the student was at a kindergarten reading level (Tr. p. 413). However, this assessment is not in the record. The ABA provider also testified that she "reviewed some of the records that were in the [student's] home" that were part of the student's program book; she further noted that it is typical "in ABA programs to have a program book that's kept in the home so that other providers can all contribute to the data collection" (Tr. pp. 370-71). Despite the ABA provider's testimony, the record does not include the student's program book, and there was little evidence of data collected in the 2015-16 school year or the 2016-17 school year, except for the April 25, 2017 educational update and the graphs provided in the psychologist's affidavit (see Parent Exs. B; H at pp. 16-21).

[23] However, I remind the IHO that a student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]), and that the parties agreed the parents would hire providers of their own choosing (see Tr. pp. 76-77; IHO Ex. IV at p. 3).

As a final note, in the request for relief the parent requested approximately 4000 hours of ABA services to make up for the denial of FAPE for the 2016-17 school year. The district objects to this request by describing it as unreasonable and unnecessary (Answer ¶ 17). At least one court has aptly noted that ABA services may be the subject to the law of diminishing returns (M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017] ["services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). In rendering a determination as to an appropriate award, the IHO should also consider that the purpose of compensatory education is not to punish the district (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] [noting that "[t]he purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]). In addition, the purpose of any award of compensatory educational services is not to maximize the student's potential or to guarantee that the student achieves a particular grade-level in his areas of need, and it would not serve the needs of the student if the delivery of an award of compensatory educational services only served to overwhelm the student or otherwise adversely impacted the student's current special education program or services.

VII. Conclusion

State regulations explicitly authorize an SRO to remand a matter to an IHO to take additional evidence or make additional findings (8 NYCRR 279.10[c]; see F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that an SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

For the reasons stated above, the portion of the IHO's order directing compensatory education for the student in the form of services ordered under the interim decision on pendency that were not provided to the student between July 1, 2016 and June 30, 2017 must be reversed and the matter remanded to the IHO to develop the hearing record on the issue of an appropriate compensatory education award in accordance with the directives outlined in this decision. The IHO is reminded that the purpose of an award of compensatory relief is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; Newington, 546 F.3d at 123). Accordingly, as discussed above, even though the district concedes that it did not offer the student a FAPE for the 2016-17 school year, the IHO should review the program offered by the district, determine the failings in the district's offered program, and craft a remedy to make up for those areas where the district did not offer an appropriate program. As discussed above, in order to make a reasoned determination, the IHO should receive evidence regarding the student's needs during the 2016-17 school year, including the evaluative information available to the October 2016 CSE, evidence of the student's educational history—particularly with respect to the effectiveness of the ABA programming the student received at MCC, and evidence of progress or regression during the 2016-17 school year.

I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the IHO's decision dated December 1, 2017 is modified, by reversing so much thereof which ordered compensatory education in amounts identical to the March 2, 2017 interim decision on pendency for the 2016-17 school year; and

IT IS FURTHER ORDERED that this matter is remanded to the IHO who issued the December 1, 2017 decision for further proceedings in accordance with this decision; and

IT IS FURTHER ORDERED that if the IHO who issued the December 1, 2017 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
February 20, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER