The University of the State of New York

The State Education Department
State Review Officer
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No. 20-110

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

Appearances:
The Law Office of Elisa Hyman, PC, attorneys for petitioners, by Erin O'Connor, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 the decision of an impartial hearing officer (IHO) which denied their request for specific home-based prospective and compensatory services. 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 parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. The student has received diagnoses of autism, selective mutism, mild intellectual disability, and auditory processing disorder, and as a younger child received special education services including occupational therapy (OT), physical therapy (PT), speech-language therapy, and instruction in a 12:1+1 special class placement (see Dist. Exs. 4 at p. 2; 8 at pp. 2, 4; 12 at pp. 1-2). A report indicated that results of cognitive testing conducted with the student in May 2016 yielded an IQ of 55, that he achieved "moderately low" scores on measures of his adaptive functioning, and an "extremely low" score on a measure of his nonverbal ability (see Dist. Ex. 8 at p. 2). In April 2017, a private evaluator conducted a speech-language and auditory processing evaluation of the student and concluded at that time he exhibited

"a significant communication impairment in the areas of expressive, receptive, and pragmatic language" as well as an auditory processing disorder (Dist. Ex. 12 at pp. 1, 10). According to the report, the student's communication disorder was "secondary" to his diagnosis of autism, and his selective mutism "further complicate[d]" the student's profile as he was not a verbal communicator in public, although his parent reported echolalic speech at home (id. at p. 10). The student's December 2017 IEP developed during second grade indicated that his reading and math skills were at a prekindergarten level, he continued to exhibit limited verbal communication and social interaction with peers at school, and he needed to improve his daily living, sensory motor, and fine motor skills (Parent Ex. C at pp. 1-3, 13). A report reflected information that, during an October 2018 evaluation (third grade), the student exhibited "gross motor stereotypies, poor eye contact and spatial relationships, echolalia and self-stimulatory behaviors" (see Dist. Ex. 8 at p. 2).

In a due process complaint notice dated July 10, 2019, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (fourth grade) and requested, among other things, "a home based program of at least 10 hours per week of [applied behavioral analysis (ABA)] instruction," and "1 hour of weekly parent training" (see Parent Exs. A at pp. 1, 12; C at p. 1).[1, 2] Additionally, the parents requested compensatory education in the form of a "bank of private 1:1 instruction and remediation," in the form of special education teacher support services (SETSS) ABA instruction from a provider selected by the parents (Parent Ex. A at p. 12; see Parent Ex. B at p. 2).

An impartial hearing convened on July 24, 2019 to address the student's pendency program (see Tr. pp. 1-16), and in an order dated that day, the IHO determined that the parties agreed that the last-agreed upon program was set forth in the student's December 12, 2017 IEP, which provided a 12-month program in a 12:1+1 special class placement for math and English language arts (ELA) together with 35 periods per week of individual SETSS ABA instruction provided in the special class, 60 minutes per week of in-school board certified behavior analyst (BCBA) SETSS supervision, five 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of counseling in a group, two 30-minute sessions per week of OT in a group, and two 60-minute sessions per month of parent counseling and training, in addition to the use of a dynamic display speech generating device and communication application at school and home (IHO Ex. I at p. 3; see Tr. p. 157; Parent Ex. C at pp. 10-11).[3]

The hearing continued on August 21, 2019 and concluded on January 9, 2020 after seven additional days of proceedings (Tr. pp. 17-354). In a decision dated May 15, 2020, the IHO determined that during the 2019-20 school year the student attended a district public school in a

[1] The parties have been involved in due process proceedings regarding the 2015-16, 2016-17, 2017-18, and 2018-19 school years (see Parent Ex. A at pp. 6, 9; Dist. Exs. 14; 15). As a result of the prior proceedings, in addition to other relief, the student has received awards of compensatory ABA services and speech-language therapy (see Dist. Exs. 14 at pp. 15-16; 15 at p. 9).

[2] The hearing record refers to the non school-based ABA services as "home-based," "at home," "after school" and "home/community based" services, interchangeably (see, e.g., Tr. pp. 61, 163, 244; Parent Ex. H at p. 1, 3-9).

[3] The December 2017 IEP indicated that the parent counseling and training was to be provided at an office, community, or school location (Parent Ex. C at p. 11).

12:1+1 special class placement and received 35 hours per week of SETSS ABA services together with weekly supervision provided by a BCBA, which was a school-based program with which the parties had "little disagreement" (IHO Decision at p. 5). As to the parties dispute about the student's need for home-based services, the IHO found that "the [s]tudent ha[d] not made significant progress in school or at home, even with the abundant ABA services awarded in past hearings, and provided after school, in addition to his in school-program of 35 hours of 1:1 ABA and other services," concluding that she did "not find that the home-based ABA services [were] effective" (id. at p. 6). The IHO also determined that the district did not develop an IEP for the 2019-20 school year and the student's program—with which "the parties [were] not truly in disagreement"—"fail[ed] to include sufficient services to address the [s]tudent's language needs," and resulted in a denial of a FAPE (id. at pp. 5-7).[4] As relief, the IHO ordered the district to reconvene a CSE meeting to, among other things, consider including strategies to reduce the student's anxiety and selective mutism and whether a different type of program would be more appropriate to promote learning, and amend the student's IEP to include five 60-minute sessions of speech-language therapy per week after school, in addition to the school-based program (id. at pp. 7-8). The IHO also ordered the district to fund 200 hours of speech-language therapy as compensatory services for the denial of a FAPE for the 2019-20 school year (id.).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues raised in the parents' request for review and the district's answer thereto is also presumed and will not be recited here. The crux of the parties' dispute on appeal is whether the IHO erred in determining that 10 hours per week of home-based ABA services were not a necessary component of the student's educational program and failing to award those home-based services prospectively, and also failing to award 460 hours of compensatory ABA services. The parents also assert that the IHO failed to rule on their request for prospective and compensatory home-based parent counseling and training, and erred in ordering the CSE to reconvene "to consider whether a different type of program would be more appropriate," as the student's in-school program was not at issue during the hearing.[5]

[4] The parent testified that a CSE convened "an IEP meeting" in October 2019 (Tr. p. 329). The district did not assert during the impartial hearing that the CSE developed an IEP for the student as a result of that meeting.

[5] The parents also allege that the IHO erred in failing to deem factual allegations in the due process complaint notice admitted, make determinations regarding each allegation in the due process complaint notice, hold the district to its burden of proof, develop the hearing record, and cite to the evidence in the hearing record, and in relying on facts not in evidence. As I am conducting an independent review of the hearing record, I find it unnecessary to examine in detail the merits of each of the parents' allegations relating to the adequacy of the IHO's reasoning and, therefore, this decision will focus on the parents' specific claims for relief. In addition, on appeal, the parents allege that the IHO erred by not finding that the district's violation of section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a) formed the basis for the parent's requested relief; however, State law does not make provision for review of such claims through the State-level appeals process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2] [providing that SROs review IHO determinations "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, an SRO has no jurisdiction to review any portion of the parents' claims regarding section 504 and such claims will not be further discussed herein (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state

In an answer, the district asserts that the IHO reasonably concluded that the student, either as compensatory education or prospectively, did not require home-based ABA services as the evidence in the hearing record showed that the student was making progress in his school-based program. Further, the district argues that the IHO properly rejected the parents' request for home-based parent training and counseling.[6]

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

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counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]).

[6] In a reply, the parents point to new case law in support of their request for compensatory education. State regulations direct that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered" by an SRO, "except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]). Here, as the district's answer does not interpose a cross-appeal or set forth any procedural defenses to the State-level review proceeding and, instead, counters the claims and arguments asserted by the parents in their request for review; the parents' reply is not permitted under State regulation. With that said, I have considered the parents' appeal in light of the controlling legal precedent in the Second Circuit.

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]

[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 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. Preliminary Matters—Scope of Review

In its answer, the district does not put forth a cross-appeal challenging the IHO's finding that the district denied the student a FAPE for the 2019-20 school year. Additionally, the district does not dispute the IHO's order directing that the student's IEP be amended to include five 60-minute sessions of speech-language therapy per week after school in addition to the school-based program or the award of 200 hours of compensatory speech-language therapy. As such, the IHO's denial of a FAPE determination and subsequent order and award pertaining to speech-language therapy have become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. Compensatory Education

I will turn next to the parents' assertion that the IHO erred in denying their request for 460 hours of compensatory ABA services for the district's failure to provide those services to the student during the 2019-20 school year and their argument that the evidence in the hearing record supported the student's need for home-based services. Related to the home-based ABA, the parents also assert that the IHO failed to make a determination about their request for 46 hours of compensatory home-based parent counseling and training. The district contends that the student made sufficient progress with the school-based program it provided to the student and that an award of compensatory home-based ABA services and parent counseling and training is not warranted.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also

Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

In this case, during the impartial hearing the district did not assert that a CSE convened to discuss the student's needs and develop an IEP for the 2019-20 school year (see Tr. pp. 1-354; Dist. Exs. 2-15), however, some information regarding the student's needs was entered into evidence such as a private April 2017 speech-language-auditory processing evaluation report, and district reports including December 2018 PT evaluation and FBA reports, February 2019 psychiatric, speech-language progress, and OT progress reports, and speech-language and OT progress reports dated September 2019 (Dist. Ex. 4-9; 11-12). Review of the reports prepared by the district shows that they reflected information about the student's performance and progress while in school, but none provided any discussion about the student's need for home-based ABA services (see Dist. Exs. 4-9; 11).

At the impartial hearing the district called two witnesses, a school psychologist who had known the student since he entered the public school and who was familiar with his educational program, and his classroom special education teacher during the 2019-20 school year (Tr. pp. 42, 47-48, 82, 84). The school psychologist testified she had received feedback from the student's teacher that during the 2019-20 school year thus far he was making progress as compared to what she knew about the student's performance at the end of the prior school year (Tr. pp. 58-61). The school psychologist opined that the student's in-school program of 35 hours per week of 1:1 ABA services pushed into the classroom during the 2019-20 school year was appropriate; however, she also testified that she did not know anything about the student's home-based ABA services—which he also received at that time—had not received any information about "what's being done" regarding ABA instruction at home, and that she was "not sure" whether she had an opinion about the student's need for home-based ABA services (Tr. pp. 59-62, 65-66; see Parent Ex. H). Despite this testimony, the school psychologist also opined that the student's improvements were "directly related to the services that [were] being provided through the IEP and the providers," and that the student was receiving appropriate support in school (Tr. p. 62).

At the time of her testimony on October 10, 2019, the special education teacher stated that since the beginning of the school year in September 2019 the student was completing classroom routines more independently, and showing improvement in writing numbers in "standard form and expanded form," distinguishing between plus and minus signs, and extending sentences using models, sentence starters, and graphic organizers (Tr. pp. 81, 87, 91-93). She indicated that at the end of the 2018-19 school year the student had achieved reading comprehension level "A, that currently they were "practicing" level "B," and that he was able to decode a word and read it (Tr. pp. 91-92, 111-12). According to the special education teacher, the student's ability to transition more independently between activities had improved, and she testified that he had recently raised his hand to participate in class, something he had not done previously (Tr. pp. 93-97). She opined

that the programming provided pursuant to the student's "operational" IEP was appropriate for him (Tr. p. 100).[8] However, as with the district's school psychologist, the special education teacher testified that she was not familiar with nor had she ever received "feedback" about "what's happening" with the student's home-based services, which he was also receiving at that time (Tr. pp. 99-100; see Parent Ex. H).

Turning to the parents' evidence regarding the student's need for home-based ABA services, the April 2017 private speech-language-auditory processing evaluation report included a recommendation that the student receive "ABA training to manage behavior and focus both in [the] classroom and at home" (Dist. Ex. 12 at p. 12). The September 2019 ABA progress report from the private agency—which provided both the student's in-school and home-based ABA services during the 2019-20 school year—indicated that the student required "ABA/SETSS support throughout his day in order to function in the classroom, as well as after school" (Tr. pp. 159, 167; Parent Ex. H at p. 1). The progress report provided a listing of the student's school-based and home/community-based goals that had been mastered and were being maintained (Parent Ex. H at pp. 2-4), and also then-current school-based and home/community-based goals (id. at pp. 5-16).[9] According to the report, "[w]ith the implementation of SETSS/ABA within the school setting and after school, [the student] [was] able to acquire skills required to function," and that "ABA/SETSS services [were] absolutely required for [the student] to function . . . after school at this current time" (id. at pp. 16-17). Recommendations included that the student receive "10 hours of after school ABA/SETSS to be utilized within the home and community setting," and "1 hour per week of Parent Training and Counseling" (id. at p. 17).

[8] Although the special education teacher testified about the type of collaboration she had with the student's in-school ABA providers, I note that she also stated that the ABA "therapist" had not informed her of any of the goals or programs the therapist developed for the student (compare Tr. pp. 90, 99, 103, with Tr. p. 105; Parent Ex. H at pp. 9-16).

[9] 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 environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see, e.g., F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13-*14 [S.D.N.Y. Jul. 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *11 [S.D.N.Y. Mar. 31, 2014]; see also 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]). On appeal the district did not raise the issue of generalization as a basis for why the student did not require home-based services; however, review of the September 2019 ABA progress report shows that some of the mastered and then-current home-based goals contained in the report were either identical or very similar to the school-based goals (see Parent Ex. H at pp. 2-16). Additionally, when confronted with the fact that many of the home/community based goals were "actually duplicative" of what's happening in a classroom, the BCBA responded "that's kind of the purpose" and that the goals "should be able to be replicated inside and outside the classroom" (Tr p. 223). Had the CSE convened and considered the student's need for home-based services, a recommendation for a program without the home-based component may have been supportable in light of this explanation relating to the purpose of the services. Ultimately, however, in this case the CSE did not convene or consider the student's needs for home-based services or otherwise.

The BCBA from the private agency testified that she provided "collaborative work on overseeing [the student's] data analysis and program updating" but that she did not provide direct ABA "therapy" to him, rather, he received ABA services from three other providers; two in school and one in the home/community setting (Tr. pp. 156, 158, 171, 181-83). Regarding the non school-based services, the BCBA testified that the student received ABA services at home and in the community at places such as the library, where the provider worked on skills including color identification, understanding positional and descriptive words, functional and daily living skills, community safety, and reading comprehension (Tr. pp. 171-72, 175-77). When asked to opine as to whether the 10 hours of home-based ABA services was an "integral part of [the student's] overall program," the BCBA replied that it was "absolutely integral, he requires it," adding that the student "[would] not make progress after school without it" (Tr. p. 177). According to the BCBA, the goals included in the progress report were "based upon direct observation of what [the student's] skill deficits [were]" and shared with the ABA providers (Tr. pp. 177-78). After reviewing the progress report, the BCBA stated that the student "ma[de] progress but it's slow and steady" noting that he had "a lot of mastered skills" (Tr. pp. 178-79).[10] She recommended that in addition to the student's then-current school programming, that the student receive "10 hours of afterschool ABA therapy" (Tr. p. 181).

Regarding the parents' request for home-based parent counseling and training, the BCBA testified that at the time of the hearing the parents were not receiving that service through the private agency, and opined that the school-based service was not "direct parent training about how to help [the student] acquire these skills at home" including self-check, dressing, feeding, self-care and daily living skills, which "really would fall more under the parent responsibility when [the student was] not receiving therapy" (Tr. pp. 220-21, 256-57). She added that the 10 hours of home-based ABA was a "different skill set" than the parent counseling and training, and although during home-based ABA instruction the parent would have the opportunity to observe the provider, that was not the same as the parents receiving direct training in how to implement skill acquisition, and the skills addressed were different (Tr. p. 257). According to the BCBA, training through her agency "consist[ed] of goals that [were] set in place directly for the parent[s], for them still to work on with [the student] outside of therapy sessions, and with guidance during therapy sessions" (Tr.

[10] In the decision, the IHO provided an accurate analysis of the student's then-current home/community-based goals contained in the private ABA progress report (compare IHO Decision at pp. 4-5, with Parent Ex. H at pp. 5-9). Specifically, the IHO relayed that although the report indicated the student was "Progressing Satisfactorily" or "Progressing Gradually" toward the home/community goals, the charts reflecting the data collected between June 2019 and September 2019 showed that either the student's skills were stagnant, or peaked and then showed an overall decrease by September 2019 (IHO Decision at pp. 4-5; see Parent Ex. H at pp. 5-9). This is precisely the type of thorough analysis of the evidence that IHOs are called to perform and her observations about the specific data are supported by the pages of the progress report she cited to. The IHO's conclusion that despite the amount of ABA services the student has received he continues to exhibit significant language delays is also supported by the evidence in the hearing record (IHO Decision at p. 4; see Tr. pp. 115, 267-70; Parent Ex. G). However, in addition to the IHO's findngs, it also appears that these goals had only been in effect for a short period and that there was insufficient time for the student demonstrate consistent progress on them, and while the evidence highlights an area of continued concern when the data was collected, it does not help the district establish the opposite conclusion—that the district's proposed programming was sufficient in the absence of the home-based services. Because the hearing record also provided documentary and testimonial recommendations that the student receive home-based ABA services, which the CSE admittedly failed to convene to discuss, the evidence in this case ultimately weighs more heavily in favor of the parents that compensatory home-based ABA services are warranted in this instance.

p. 180). She continued that the goals were "very specialized to [the student's] skill deficits and to any issues that c[ame] up for the parent that they would like to address, that they need[ed] support with" (Tr. pp. 180-81). The BCBA testified that she recommended the parents receive "one hour per week of parent counseling and training" (Tr. p. 181).

Here, the evidence is insufficient for the district to prevail by relying on witness opinion elicited during the impartial hearing that the student's school-based programming was sufficient to meet his needs, especially when the district failed to convene a CSE at all to discuss the student's needs—including the potential need for home-based services—and develop an IEP for the 2019-20 school year. Moreover, to counter the specific opinions offered by private evaluators and providers, the district's witnesses could offer little more than subjective, conclusory statements that the student's programming during the school day was sufficient. Rather, the time for district staff to gather information and opine about the student's programming is at a CSE meeting, especially where, as here, the district witnesses admitted that they did not know anything about the student's home-based ABA program or how it addressed his deficits.[11] Therefore, as the district failed to offer the student a FAPE and refute the parents' evidence that the student required home-based services, the student is entitled to the requested compensatory home-based ABA services and parent counseling and training.

C. Prospective Services

Next, the parents contend that the IHO erred in denying their request for "a prospective award of 10 hours per week of home-based ABA services" and failing to make a ruling regarding their request for one hour per week of prospective home-based parent counseling and training. In addition, the parents appeal the IHO's order that the CSE "immediately" convene to review evaluative information, consider the student's needs, and consider what school-based supports/strategies and programming would be appropriate for the student to address needs arising from his diagnoses of anxiety and selective mutism, asserting that the IHO ordered the reconvene sua sponte.

When fashioning relief, a compensatory education award that makes up for special education services that a student should have otherwise received previously is different than interfering with the cooperative educational planning process envisioned under the IDEA by Congress by dictating the services on a going forward basis. Thus, awarding prospective services to a student, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that

[11] During the hearing, counsel for the district attempted to discern specifically where and when the home/community based services were delivered and "exactly what [the home-based therapist was] working on every single day," topics that are appropriate for discussion during a CSE meeting (see Tr. pp. 182-93, 212-20, 238-39).

"services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

The parents alleged in the July 2019 due process complaint notice that for the 2019-20 school year, the district failed to, among other things, "develop and implement substantively and procedurally valid IEPs," and on appeal assert that "[t]he record established violations of FAPE that rendered the entire program and placement for the 2019-20 school year inadequate" and therefore, the IHO's order to reconvene a CSE to review the student's program is in line with what the parents had requested (Req. for Rev. at p. 7; Parent Ex. A at p. 1). However, as the 2019-20 school year is now over, and as the 2020-21 12-month school year has already commenced—with the sole IEP in the hearing record indicating that the student has been eligible for 12-month services in the past—at this point in time the CSE should have already convened to review the student's needs, and recommend an appropriate program and placement for the student for the current school year as it is required to (see Parent Ex. C at p. 11). The IDEA requires a CSE to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). Additionally, the IDEA requires districts to have an IEP in effect at the beginning of each school year for every student with a disability in the district's jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). Thus, it will not offend the collaborative process set out by Congress to direct the CSE to reconvene in this case, but that is a far cry from mandating the outcome of that process. The July 2019 due process complaint notice does not include allegations regarding the 2020-21 school year, and as such, any disputes the parents may have with the CSE process—including the considerations ordered by the IHO—or the IEP developed for the student for the 2020-21 school year are not properly before me.

Finally, the parents argue that due to the IHO's failure to develop the hearing record with request to the relief they sought, in particular that the IHO erred in limiting the relief to speech-language therapy, that "the SRO should order funding of independent evaluations concerning the student's [s]elective [m]utism" (Req. for Rev. at p. 8). Although not directly in dispute during the hearing, the IHO's concerns about the adequacy of the student's 2019-20 school-based program to address the student's anxiety and selective mutism are based upon a foundation in the evidentiary record. For example, the BCBA who consulted on the student's case testified that the student's "selective mutism abates outside of school," and that although "[h]e still sp[oke] quietly . . . he doesn't have symptoms of selective mutism outside of school" (Tr. pp. 157-58, 211-12; see Parent Ex. H at p. 1). The September 2019 ABA progress report, prepared in part by the BCBA who testified during the hearing, indicated that "[i]n the school setting, [the student's] severe anxiety continues to interfere with his ability to respond to teachers and peers and is having a major impact on his learning," and that despite ABA interventions, "the issue remain[ed] that it [was] very difficult for [the student] to respond while in the classroom," and he "still spen[t] a significant portion of his school day with sweaty palms and a tense body, indicating his extreme anxiety" (Parent Ex. H at pp. 1, 17). The parent testified that the student was "not himself in school" but that at home, he used his words and "his regular tone" (Tr. pp. 333-34). Accordingly, in light of the district's failure to recommend special education programming for the student and the evidence tending to support the IHO's concerns, I will order the district to arrange for an evaluation to assess the student's needs associated with his diagnosis of selective mutism, to assist in providing

additional information about the student's needs to the CSE in order to further assure the development of an appropriate IEP.

VII. Conclusion

Having determined that the district failed to introduce adequate evidence to rebut the parents' claims regarding the student's need for home-based ABA services and parent counseling and training during the 2019-20 school year, I find that the student is entitled to compensatory education services. However, for the reasons discussed above, prospective services beyond the 2019-20 school year are not appropriate as relief in this matter, and the necessary inquiry is at an end.

I have considered the parties remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated May 14, 2020, is modified by reversing that portion which denied the parents' request for compensatory education services in the form of home-based ABA and parent counseling and training;

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall fund 460 hours of home-based ABA services and 46 hours of home-based parent counseling and training as compensatory education services from a provider of the parents' choosing;

IT IS FURTHER ORDERED that within 60 days of the date of this decision, the district shall conduct speech-language and psychological evaluations appropriate to assess the student's needs related to his diagnosis of selective mutism by evaluators with expertise in selective mutism, with an opportunity for the evaluators to consider input from student's parents, teachers, related service and ABA providers; and

IT IS FURTHER ORDERED that, upon completion of the evaluations, the CSE should reconvene within 10 days to consider, among other things, whether the student continues to require ABA services in school or in the home and/or community and, after considering this issue, provide the parents with prior written notice describing the basis for the CSE's determination regarding home-based services.

Dated: **Albany, New York**
August 14, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER