



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-186

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the NEW YORK CITY DEPARTMENT OF EDUCATION

Appearances:

The Cuddy Law Firm, PLLC, attorneys for petitioner, by Francesca Adamo, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) failed to offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years but did not award all of the relief the parent requested. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

According to the parent, the student received a diagnosis of global developmental delay from a neurologist when she was two years old, and also received diagnoses of a seizure disorder and an eating disorder (Tr. p. 107; Parent Ex. A at p. 2). The parent further indicated that the student had received Early Intervention services and subsequently attended district 8:1+2, 10:1+2, and 12:1+1 special class settings, at which time she also received related services (see Parent Ex. A at pp. 2, 3). A CSE convened on February 17, 2017 for the student's annual review and to develop an IEP for the remainder of the 2016-17 school year and a portion of the 2017-18 school year (Parent Ex. B at pp. 1, 23). The February 2017 CSE found that the student was eligible to receive special education and related services as a student with an intellectual disability, and recommended a 12-month program consisting of a full time 12:1+1 special class placement in a

specialized school together with two 30-minute sessions per week of occupational therapy (OT) in a group of two, two 30-minute sessions per week of physical therapy (PT) in a group of two, one 30-minute session per week of speech-language therapy in a group of three, one 30-minute session per week of individual speech-language therapy, full time 1:1 paraprofessional services, and special transportation services (id. at pp. 19, 20, 23).¹ The CSE also recommended that the parent receive one 60-minute session per month of parent counseling and training (id. at p. 19).

A CSE convened on December 20, 2017 to develop an IEP for the remainder of the 2017-18 school year through the start of the 2018-19 school year (Parent Ex. C at pp. 1, 23). According to the IEP, the student had "reached the appropriate grade level" to complete State alternate assessments and would "begin testing in [s]pring of 2018" (id. at p. 1). The December 2017 CSE recommended continuing the student's full time 12:1+1 special class placement, OT, and 1:1 paraprofessional services as well as parent counseling and training (compare Parent Ex. B at p. 19, with Parent Ex. C at pp. 18-19). The December 2017 CSE modified the student's PT services to one 30-minute session per week in a group of two, and speech-language therapy to two 30-minute sessions per week in a group of two (compare Parent Ex. B at p. 19, with Parent Ex. C at pp. 18-19).

In a letter to the district dated May 7, 2018, the parent requested that "an IEP meeting be convened immediately to put additional supports in place for" the student (Parent Ex. G at p. 1). The parent expressed concern regarding the student's self-harming behaviors on the bus and requested that the district consider providing an aide during her bus ride (id.). In the letter, the parent requested that the district add feeding therapy to the student's program, and obtain a functional behavioral assessment (FBA) completed by a board-certified behavior analyst (BCBA), and a behavioral intervention plan (BIP) for the student to address her self-harming behaviors (id.).

On October 1, 2018 the student's teacher prepared a progress report and on October 2, 2018 an occupational therapist conducted an OT evaluation of the student (see Parent Exs. E; F). The CSE convened on October 3, 2018, and developed an IEP for the remainder of the 2018-19 and the beginning of the 2019-20 school years, continued to recommend the student's 12:1+1 special class placement, added transportation paraprofessional aide services and two 30-minute sessions per week of counseling, and modified the student's OT and speech-language therapy services (compare Parent Ex. C at pp. 18-19, 23, with Parent Ex. D at pp. 21-22, 25, 26).

According to the parent, for the 2019-20 school year the student continued to attend a district 12:1+1 special class in a specialized school and received two 30-minute sessions per week of counseling in a group, two 30-minute sessions per week of individual OT, one 30-minute session per week of PT in a group, and one 30-minute session per week each of group and individual speech-language therapy (Parent Ex. A at p. 2).² In an undated letter to the district, the parent indicated her disagreement with the district's evaluations of the student and requested independent educational evaluations (IEEs) at public expense conducted by specific evaluators including a

¹ The student's eligibility for special education and related services as a student with an intellectual disability is not in dispute (see 8 NYCRR 200.1[zz][7]).

² The student's IEP for the 2019-20 school year was not made part of the hearing record (see Parent Exs. A-W; IHO Ex. I).

neuropsychological, speech-language, assistive technology, OT, PT, applied behavior analysis (ABA), feeding, an FBA and, if necessary, a BIP (Parent Ex. H).³ The parent requested that the district respond within ten calendar days approving the independent evaluations or initiating a hearing to defend the district's own evaluations (id. at p. 2).

A. Due Process Complaint Notice

In the December 10, 2019 due process complaint notice, the parent alleged that the district denied the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years (Parent Ex. A at pp. 1, 8).⁴ The parent argued that the district had failed to comprehensively evaluate the student, and at the time of the due process complaint notice, the district had not responded to her request for IEEs, approved the IEEs she requested, or initiated a hearing to defend its own evaluations (id. at pp. 4-6). According to the parent, the district also failed to develop appropriate IEPs, address the student's behavioral needs, or offer an appropriate placement and related services for the school years in question (id. at pp. 5-8). As relief, the parent requested that the IHO convene an immediate hearing on the issue of IEEs, and order the district to fund the cost of the IEEs by specific providers in the following areas: neuropsychological, speech-language, assistive technology, OT, PT, ABA, feeding, FBA, and, if necessary, BIP (id. at pp. 8-9).

Next, the parent requested that the IHO direct the district to authorize any services or evaluations within 14 days (Parent Ex. A at p. 9). The parent then requested that the IHO direct the CSE to convene at a time convenient for the parent to review the results of the IEEs within 15 days of completion of the evaluations and develop an appropriate IEP based on the IEEs that included: an accurate and comprehensive statement of the student's current levels of performance, appropriate and measurable annual goals, appropriate related services, an appropriate assistive technology device, and 1:1 transportation paraprofessional services (id.). Additionally, the parent requested that the IHO direct the district "to find an appropriate public-school placement within 15 days of the order that provide[d] a specific behavior methodology throughout the day" (id.). The parent also requested that if the district was unable to find an appropriate public school within 15 days, that the IHO direct the district to identify an appropriate nonpublic school or alternatively, fund the tuition of a non-approved private school chosen by the parent (id.). Finally, the parent requested that the IHO order the district to fund compensatory education services in areas that included, but were not limited to, behavior support, speech-language therapy, OT, PT, parent counseling and training, and assistive technology training; to be provided outside of school hours by independent providers of the parent's choosing at the provider's customary rates, including transportation costs to and from all sessions (id.).

³ The parent's letter requesting IEEs is undated and the fax confirmation sheets reflect dates of "Oct 10," (Parent Ex. H). During the impartial hearing, the IHO entered Parent Exhibit H into the hearing record with a date of October 10, 2019 (see Tr. p. 19).

⁴A January 29, 2020 State complaint filed by the parent alleged that the district had failed to appoint an impartial hearing officer in accordance with § 200.5(j)(3) of the Regulations of the Commissioner of Education (see Parent Ex. I). In a March 19, 2020 State complaint decision, the State Education Department notified the parent of its findings (see Parent Ex. L).

B. Facts Post-Dating the Due Process Complaint Notice

On June 10, 2020, the parties proceeded to an impartial hearing (see Tr. pp. 1-10). In a motion dated June 19, 2020, the parent requested that the IHO issue an interim order to conduct the IEEs of the student that the parent had requested in her due process complaint notice (compare Parent Ex. P, with Parent Ex. A at pp. 8-9). During the June 23, 2020 hearing the district indicated that it would "not oppose" the parent's request for the IEEs and agreed to provide a neuropsychological evaluation, a speech-language evaluation, an assistive technology evaluation, an FBA and BIP, an ABA skills assessment, an OT evaluation, a PT evaluation, and a feeding evaluation (Tr. pp. 16-17). In an interim decision dated June 30, 2020, the IHO directed the district to fund the requested IEEs to be conducted by the specific clinicians or agencies selected by the parent at the requested rates (see Parent Ex. Q at pp. 3-4). At the hearing on July 17, 2020, the district conceded that it failed to offer the student a FAPE for the 2017-2018, 2018-2019 and 2019-2020 school years (see Tr. p. 31).

C. Impartial Hearing Officer Decision

In a decision dated November 3, 2020, the IHO found that the district failed to provide the student with a FAPE during the 2017-2018, 2018-2019 and 2019-2020 school years (IHO Decision at p. 14). The IHO first determined that it was appropriate for the CSE to review all of the IEEs, and conduct other evaluations if necessary (id.). Next, the IHO found that although the parent requested that the IHO order the district to include specific IEE recommendations in the student's IEP, it was "inappropriate for a hearing officer to replace a CSE" (id. at p. 15). Rather, the IHO "strongly recommend[ed]" that the CSE "thoroughly review" the IEEs and "develop an IEP that consider[ed] the many recommendations made by the private clinicians," including a placement with a behavior modification program that addressed the student's language based, executive functioning, and emotional regulation deficits (id.). The IHO also indicated that the CSE should consider the parent's request for OT, PT, speech-language, assistive technology and feeding therapy services and continuation of the 1:1 paraprofessional and transportation paraprofessional services (id. at p. 16). Therefore, the IHO declined "to make specific recommendations" regarding prospective programs and services on the student's forthcoming IEP (id. at pp. 15, 16).

Turning to the parent's request for compensatory education services, the IHO found that the student had not made academic progress and the related services provided to the student during the school years at issue were inadequate (IHO Decision at pp. 18-20). Accordingly, the IHO determined the amount of compensatory services that would place the student in the same position she would have otherwise occupied, after considering the three-year denial of a FAPE, the degree of the student's delays, and "the reasonable number of hours the student c[ould] participate in compensatory" services "in addition to normal school activities" (id.). Specifically, the IHO ordered the district fund the following compensatory services: 800 hours of tutoring; 180 hours of feeding therapy; 90 hours of PT; 70 hours of OT; 225 hours of speech-language therapy, and transportation costs to and from service sessions (id. at pp. 18-20, 22). In addition, the IHO ordered that all of the after school compensatory services be provided by independent providers of the parent's choosing and completed by September 30, 2023 (id. at pp. 18-20, 21, 22). The IHO also directed the district to fund the costs of the student's and parent's transportation in order to access the compensatory services (id. at p. 21).

Relating to the parent's other compensatory services requests, the IHO found that ordering 10 hours of assistive technology training was "premature" as the CSE must first determine if assistive technology services were appropriate for the student before assistive technology training could be recommended (IHO Decision at p. 21). Similarly, the IHO found that it was "premature" to order ABA services at that time due to the potential conflict with any other behavior modification program the student's eventual placement may utilize (*id.* at pp. 16, 21). Consequently, the parent's request for assistive technology training, ABA services, and ABA parent counseling and training was denied (*id.* at p. 21). The IHO ordered the CSE to reconvene within 10 days of receipt of the decision and develop an appropriate IEP for the student in accordance with the guidelines indicated in the decision (*id.* at p. 22).

IV. Appeal for State-Level Review

On appeal, the parent asserts that the IHO erred by reducing the amount of compensatory services awarded and failing to order the district to include specific IEE recommendations and a "new" placement on the student's IEP. Specifically, the parent argues that although the IHO "strongly recommended" that the district incorporate the findings of the independent evaluations on the student's IEP and defer the student for an approved nonpublic school placement, she did not order the district to take those actions. Next, the parent argues that the IHO erred by failing to order the specific number of recommended hours of compensatory services, and by reducing the amount of compensatory services awarded without evidence in the record to prove that the number of hours ordered was an appropriate remedy for a three-year denial of a FAPE.

As relief, the parent requests that the undersigned reverse the IHO's findings and order the district to conduct an IEP meeting within 15 days to develop an appropriate IEP that includes an accurate and comprehensive statement of the student's current levels of performance; appropriate measurable goals as recommended by the independent evaluators; 10 hours per week of home-based ABA; two hours per week of parent counseling and training; a small class of 6-8 students; individual and dyadic instruction throughout the day; implementation of the independent BIP; two 30-minute sessions per week of individual feeding therapy; two 30-minute sessions per week of individual PT; three 20-minute sessions of OT per week; two 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week in a group; an assistive technology device with software and applications as recommended by the independent evaluator; 1:1 transportation paraprofessional services; and 1:1 classroom paraprofessional services.

In addition, the parent requests that the undersigned direct the district find an appropriate public school placement within 15 days of the order that provides specific behavior methodology throughout the day; or alternatively, that the district locate an appropriate nonpublic school for the student. If the district cannot locate an appropriate nonpublic school within 30 days, the parent requests that the district fund the student's tuition to a nonapproved private school chosen by the parent.

Finally, the parent requests an order that the district fund the following compensatory services as recommended by the independent evaluators: 920 hours of ABA services; 184 hours of parent counseling and training; 1,380 hours of individual tutoring with a learning specialist certified in Orton-Gillingham or a comparable multisensory methodology; 276 hours of feeding

therapy; 184 hours of PT; 138 hours of OT; 414 hours of speech-language therapy; and 10 hours of assistive technology training.

In an answer, the district admits and denies the allegations set forth in the parent's request for review and argues that it should be dismissed for failure to comply with the practice requirements set forth in State regulations. The district asserts that the IHO properly declined to order the district to refer the student for a State-approved nonpublic school placement or fund tuition for a nonapproved private school of the parent's choice. Next, the district argues that the IHO awarded appropriate compensatory relief. Further, the district requests that the undersigned dismiss the parent's appeal with prejudice.

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]).⁵

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).

⁵ 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).

VI. Discussion

A. Prospective Placement

The IHO in this matter declined the parent's request that she order the district "to include specific recommendations that were made by private providers in the student's IEP, as to the student's class size, related service mandates as well as other program recommendations" because she determined that "it is inappropriate for a hearing officer to replace a CSE team, that typically includes psychologists, special education teachers and other professionals that routinely develop IEPs for students, and specify what recommendations the IEP should contain" (IHO Decision at p. 14). Similarly, although the IHO strongly recommended that the CSE consider deferring the student's case to the Central Based Support Team (CBST) for placement of the student in a nonpublic school and placement of the student by the CBST in a school "with a behavioral modification program embedded in its academic program, as well as the ability to provide a behavioral modification program specific to the student," she declined to order the CSE or CBST to do so (*id.*). On appeal, the parent urges the undersigned to reverse the IHO's determination in this regard and to order the CSE to develop an IEP that comports with the parent's preferred program and placement for the student going forward and to refer the student to the CBST for placement in a nonpublic school that offers the behavioral supports sought by the parent.

The IHO correctly determined that the prospective placement sought by the parent is an inappropriate remedy under the facts presented. Relief in the form of IEP amendments and the prospective placement of a student in a particular type of program and placement, such as the order sought by the parent in this matter directing the specific contents of a future IEP and nonpublic school placement, under certain circumstances, have 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 "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

At this point, the school years at issue—2017-18, 2018-19 and 2019-20—are over and, in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to produce an IEP for the 2020-21 school year (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]). As such, the more appropriate course is to limit review in this matter to remediation of past harms that have been explored through the development of the underlying hearing record and the resulting award of compensatory education by the IHO which the parent also challenges on appeal. Accordingly, there is no reason to disturb the IHO's denial of the parent's request for a prospective placement.

B. Compensatory Education

1. Student Needs

Although the accuracy of the student's needs as identified in evaluations and assessments in the hearing record are not directly in dispute on appeal, a discussion thereof provides necessary illumination of the primary issue on appeal; namely, whether the student's compensatory education award was appropriate.

According to the February 17, 2017 IEP the student had been assessed in fall 2016 using the Students Annual Needs Determination Inventory (SANDI) and the Formative Assessment Standards Task (FAST) (Parent Ex. B at pp. 1, 23). At the time of the assessment the student was eight years, one month old and overall, functioned at a high prekindergarten to low kindergarten level in reading and math skills (*id.* at pp. 1, 2). According to the February 2017 IEP, the student had shown "significant progress" and "growth in all academic areas" (*id.* at p. 2). Specifically, the student was progressing in identifying and counting numbers, and identifying letters and their sounds (*id.*). The student struggled with writing tasks, as it was not a "preferred activity" for her (*id.*). The student was beginning to vocalize her needs more, identify sight words and "create sentences using picture/word symbols" (*id.*). The student "actively" responded to questions and directions and recalled details of stories (*id.*). The student would not ask for help if she had difficulty, but rather sat silently waiting for assistance (*id.*). The student was able to use an iPad independently, but technology was not a "preferred choice" (*id.*). The student reportedly resisted doing her homework as she was easily frustrated (*id.* at p. 3).

The February 2017 IEP indicated that in the area of speech-language development, "informal observations" and a communication profile indicated that the student preferred to use gestures to communicate, but spontaneously spoke in one-to-two-word utterances and produced longer utterances when cued (Parent Ex. B at p. 1). The student was reportedly "well-behaved" and able to follow directions (*id.*). She displayed negative behaviors at times, which resulted in her isolating and attempting to hurt herself (*id.*). The student was friendly with peers and had become "more social," but still required encouragement to participate in group activities (*id.*). The parent had expressed concerns regarding the student's aversion to certain textures, reluctance to try different foods and restricted range of foods that she would eat but acknowledged that she did not have difficulty swallowing preferred foods (*id.*). The February 2017 IEP noted that the student's reluctance to try new foods had been observed at school and discussed with her OT (*id.*).

The student had shown growth in her social skills and the February 2017 IEP described her as happy, sweet and shy (Parent Ex. B at pp. 3, 4). She exhibited low self-esteem regarding her academic abilities and at times required 1:1 support to complete classroom activities but showed pride in her accomplishments (*id.* at p. 3). The student had begun participating more in group activities, transitioned well, and showed an appropriate range of emotions (*id.*). According to the IEP she needed "constant" encouragement to socialize with peers and teachers outside of a preferred setting (*id.*). The student was receptive to encouragement, redirection, and prompts, but needed "constant" adult modeling to participate in classroom activities (*id.* at p. 4). Since September, school staff had noticed a reduction in the student's "negative behaviors," was learning to self regulate and explain what upset her, and required less adult support and attention to maintain appropriate social interactions (*id.*).

According to the February 2017 IEP, the student exhibited delays in her fine motor coordination and perceptual skills (Parent Ex. B at p. 4). She was easily distracted and required prompts and redirection (id.). The IEP indicated that the student tended to "shut down" when something was too difficult but that she responded to verbal praise (id.). Her participation in gross motor activities had increased (id.). Regarding self-help skills, the IEP indicated that the student followed simple one and two step directions involving basic concepts, and was mostly independent with eating, toileting, and dressing (id. at p. 3).

The February 2017 IEP identified the student's management needs such as a small, structured classroom; visual supports; small units of instruction; short, simple directions; repetition, reteaching, and refocusing; hands-on activities; encouragement, positive reinforcement, and "constant praise" (Parent Ex. B at p. 5). In addition, the student's management needs included "maximum verbal and visual cues," information presented in multiple modalities, and sensory stimuli to increase sensory awareness and tolerance of different textures (id.).

According to the December 2017 IEP, the student had been assessed in Fall 2017 using the SANDI and the FAST (Parent Ex. C at p. 1). At the time of the assessment the student was eight years, eleven months old and similar to the February 2017 IEP, the student functioned at a high prekindergarten to low kindergarten level in academic skills (compare Parent Ex. B at p. 1, with Parent Ex. C at p. 1). Review of the student's IEPs shows that much of the present levels of performance, management needs, and some annual goals in the December 2017 IEP were similar to the February 2017 IEP, with a few exceptions (compare Parent Ex. B at pp. 7-18, with Parent Ex. C at pp. 7-17). Specifically, the December 2017 IEP indicated that the student was being provided "specifically designed instruction" including cue cards, "graduated guidance," modeling, "constant" repetition, written prompts and directions in symbol and picture format, a "[p]review-[t]each-[r]eview" method, direct instruction followed by repeated directions, frequent comprehension checks, and extended processing time, and instructional materials presented in alternative formats (Parent Ex. C at p. 2). In addition, the December 2017 IEP included a speech-language update which indicated that the student had made "great overall progress" in that she was speaking in longer phrases and with better articulation (id.). The student was more social and benefitted from prompting and encouragement to participate in group activities (id. at pp. 2-4). The student had become more receptive to being read to and more willing to participate in literacy activities (id. at p. 3).

Notably, the December 2017 IEP described the student as well-behaved, friendly, and able to follow verbal directions appropriately (Parent Ex. C at pp. 2-3). In addition, the student had reportedly developed a "strong bond" with her paraprofessional and was able to express her thoughts and concerns to the paraprofessional (id. at p. 4). The student was exhibiting negative behaviors "less and less at school" and required "a lot less adult support and attention to maintain appropriate social interactions" (id.).

At the time of the October 1, 2018 student progress report the student was in fourth grade and attending a 12:1+1 special class in a district public school (Parent Ex. E). According to the October 2018 progress report, the student was functioning at a kindergarten level academically (id. at p. 1). Specifically, the student answered simple wh- questions about a story read aloud when provided with picture cards and verbal prompting and worked independently when given clear instructions (id.). She completed basic math computation up to 10 using manipulatives,

counted objects, used a calendar, and identified basic shapes (id.). The student expressed her wants and needs using short phrases and answered questions using one-word responses (id.).

According to the October 2, 2018 OT evaluation report the student needed cues and prompts due to distractibility and followed directions if prompted to execute the steps (see Parent Ex. F). The report indicated that the student did speak verbally, but seldomly initiated conversations or expressed her needs (id. at p. 2). She did not work independently as she needed prompts to initiate and complete tasks (id. at pp. 2, 3). At times, the student "shut down" and engaged in self injury when frustrated and when prompted to continue working (id. at pp. 2, 3, 4). Her performance was reportedly "inconsistent" as she sometimes engaged with minimal cues, and other times required more prompting (id. at p. 2). The student had difficulty transitioning and needed extra time to adjust to new tasks (id.). The OT evaluation report noted that the student's diet was limited but that she could manage her tray at lunchtime, she dressed herself given help with fasteners, and she needed help with hygiene and grooming (id. at pp. 3, 4). Additionally, the student copied her name, but her letter formation, sizing and line placement was poor; and she was unable to copy written material from the board (id. at p. 4). The occupational therapist reported that the student exhibited "functional gross motor strength and coordination, and that she navigated the school environment "functionally" but at a slower pace than her peers (id. at pp. 3, 4). The student had made "minimal" progress on her goals (id. at p. 5). The occupational therapist recommended continued OT services to address the student's needs related to her fine motor skills, graphomotor skills, and feeding difficulties (id. at pp. 6, 7).

According to the October 3, 2018 IEP, the student had been recently assessed using the SANDI and the FAST (Parent Ex. D at pp. 1, 26). At that time, the student was attending a fourth grade 12:1+1 special class in a specialized school and according to the IEP functioning at a kindergarten level in all academic areas (id. at p. 1). Specifically, the student was able to identify most letters of the alphabet and was working on staying on task during read aloud and answering comprehension questions (id. at pp. 1-2). The student was working on writing her name and other letters with correct formation, rote counting to 20, identifying numbers to 10, and adding up to five using manipulatives (id. at p. 2).

The October 2018 IEP indicated that the student benefitted from a multi-modal approach to instruction, visual and verbal supports, visual cues, repetition, and scaffolding (Parent Ex. D at p. 2). The student's level of engagement and attention during classroom activities varied, and her inability to focus on and attend to tasks appeared to "considerably" impact her overall functioning (id.). The student had made "good progress" towards her speech-language annual goals in the area of story comprehension as she was able to label story components and recall story details (id.). Although the student preferred to speak in 1-2 word phrases, the IEP indicated that the student had made "good progress socially with both peers and adults" as she had become "much more talkative and outgoing with a greater variety of people" (id.). The student was reportedly "well behaved," followed directions appropriately, and responded to reinforcers (id.). According to the IEP, the student liked working in a small group, participated in class activities when motivated, and responded well to verbal praise and modeling (id.). Her self-image had reportedly improved, and she had become independent in self-care and "maintaining her behavior" (id. at p. 3). The student reportedly had a "positive working relationship" with her one-to-one paraprofessional (id. at pp. 3-4). The student still needed "to improve comprehension and narrative skills," had "difficulty

with expressive speech," and benefitted from repetition to process and retain information (id. at p. 3).

To address the parents' concerns about self-harm and provide the student with social/emotional support, the October 2018 CSE recommended that counseling services be added to the student's IEP, and that district staff complete an FBA and BIP (Parent Ex. D at p. 3). The October 2018 IEP noted that strategies and techniques were discussed with the parents to address the student's eating difficulties which would also be addressed by "sensory-based feeding therapy with the OT", as well as oral motor therapy, provided by the speech therapist (id.). The CSE identified the student's management needs including multi-sensory strategies, visual cues, tasks broken down, concrete examples, positive feedback, consistent routines, and repetition (id. at p. 5). The October 2018 CSE recommended that the student remain in a 12:1+1 special class in a specialized school and receive two 30-minute sessions per week of counseling in a group, two 30-minute sessions per week of individual OT, one 30-minute session per week of PT in a group, one 30-minute session per week of speech-language therapy in a group, and one 30-minute session per week of individual speech-language therapy (id. at p. 21). In addition, the October 2018 CSE recommended that the student receive full time individual paraprofessional services including on her bus ride (id. at pp. 21-22).

During the hearing, the parent stated that the student was independent with bathing and dressing, but needed assistance with brushing her teeth and hair, and tying her shoes (Tr. pp. 107-08). The student reportedly refused solid food, instead only consumed PediaSure, water and juice (Tr. p. 108). The parent stated that the student had once accidentally swallowed solid food and seemed "like she was choking" (Tr. pp. 108-09). The student engaged in behaviors at home when she was resistant to following directions, which resulted in self injury such as scratching herself, pulling her hair, biting herself, biting her clothes, and punching the wall; as well as closing herself in the bathroom and "attacking" her siblings (Tr. p. 110). The student reportedly engaged in those and other behaviors at school as well, and at one time "flipped a table" resulting in a "frantic" call from her teacher (see Tr. pp. 110-13). The parent described the student's communication abilities as "extremely limited," and she exhibited negative behaviors rather than asking for what she needed (see Tr. pp. 113-14). In addition, the parent reported that at times the student was difficult to understand, which also resulted in the student becoming "very upset," and the parent had to restrain the student to calm her down (Tr. p. 114).

2. Compensatory Education and IEE Recommendations

The parent asserts that the remedy for the district's three year denial of a FAPE requires a compensation award as recommended by the independent evaluators based on an hour-by-hour computation and comprising of: 920 hours of ABA services; 184 hours of parent counseling and training; 1,380 hours of individual tutoring; 276 hours of feeding therapy; 184 hours of PT; 138 hours of OT; 414 hours of speech-language therapy; and 10 hours of assistive technology training (Req. for Rev. at pp. 5-6). In determining whether the IHO awarded an appropriate level of compensatory education to remedy the denial of FAPE to the student for the three school years at issue, it is helpful to review the recommendations of the independent evaluators in light of the purpose of a compensatory education remedy and the entirety of the hearing 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]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [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]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). 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"]).

The independent BCBA testified that she conducted her independent assessment of the student during a one-and-a-half-hour remote observation, and that she also interviewed the parent, and reviewed "all of [the student's] IEPs" (Tr. pp. 38, 50-52, 56-57, 61). The BCBA stated that she was "in the process of writing [an] ABA skills assessment, functional behavioral assessment and behavior intervention plan" at the time of her testimony in July 2020 (Tr. pp. 24, 40). The BCBA testified that according to the parent, the student's then-current teachers addressed her avoidance behaviors by not placing demands on her, which resulted in a loss of learning opportunities (Tr. pp. 41-42, 56, 60-61). The BCBA stated that the student required a full-time ABA program with a BCBA on staff to create her BIP and monitor her progress (Tr. p. 43). In addition, the BCBA testified that she recommended home based services for the student consisting of ten hours per week of "ABA therapy," two hours per week of parent training, and coordination between the home and school providers and her parents (Tr. pp. 43-44). The BCBA testified that

the most important goal for the student was to "extinguish" her "dangerous" behaviors that were preventing her from accessing learning opportunities (Tr. p. 44). The BCBA recommended proactive strategies such as a visual schedule and rewards (Tr. p. 45). In addition, the BCBA recommended "high probability teaching" or "behavioral momentum," meaning to place several easier demands on the student before introducing a more difficult demand to increase the chance that the student would "emit the more difficult response" (Tr. p. 46). The BCBA had determined that the "vast majority" of the student's negative behaviors were a function of task avoidance or access to preferred activities (Tr. p. 47).

Turning to the recommendation for compensatory ABA services, the BCBA calculated ten hours per week, for 46 weeks per school year, over three years for a total of 920 hours of ABA services (see Tr. pp. 47-48). Additionally, the BCBA recommended compensatory parent counseling and training services consisting of two hours per week, for 46 weeks per school year, over three years for a total of 184 hours (see Tr. pp. 48-49). The BCBA based her calculation of the amount of compensatory hours upon the student's "pervasive and severe" target behaviors such as "throwing furniture, self-harm, running away, locking herself in rooms" (Tr. pp. 55-56). However, the BCBA acknowledged that she had not observed the student in a classroom setting, seen the student engaging in most of those behaviors, nor had she communicated with any of the student's current teachers or therapists regarding the behaviors (Tr. pp. 51-52, 56-58, 62-63).⁶ The BCBA testified that the student's teachers and therapists had not responded to the parent's request to make contact with the BCBA (Tr. pp. 53-54, 58-59). In addition, the BCBA acknowledged that she did not receive or review any information regarding the student's counseling services which addressed self-harm behaviors (Tr. pp. 57-58).

The occupational therapist who completed the student's independent OT evaluation testified that she utilized the Child Sensory Profile, the Pediatric Evaluation of Disability Inventory (PEDI-CAT), observation, parent report, and review of the student's 2017-18 IEP, in order to assess her skills in the areas of daily activities, mobility, socialization, cognition, managing complex tasks, writing, fine motor, strength, and sensory processing (Tr. pp. 70-71). The OT evaluation revealed that the student was not performing at an "age-appropriate" level and was not able to "fully access" the curriculum independently (Tr. p. 71).

Specifically, the occupational therapist testified that the student was having difficulty with her visual motor, writing, and fine motor skills due to "overall" weakness (Tr. pp. 71-72, 76). Further, the student demonstrated difficulty with daily activities, safety awareness, self-care, dressing, and sensory processing (Tr. p. 72). The student's attention to task was poor, as she often refused to participate in tasks presented (*id.*). She exhibited an impaired grasp and did not exhibit much control when using writing tools (*id.*). The student was able to write her first name with limited legibility and was able to trace other words (*id.*). According to the occupational therapist, the student's weaknesses affected her ability to use buttons and fasteners and tie her shoes (*id.*). The student needed help with some dressing tasks, toileting and bathing but did not "often" request assistance (Tr. pp. 74-75). The student fatigued easily during fine motor tasks and needed encouragement to continue the activity (Tr. p. 76). Reportedly she was "wary" of unfamiliar motor

⁶ The BCBA testified that she had observed the student "elope from the room multiple times" and lock herself in the bathroom during the observation (Tr. pp. 41, 63).

tasks which affected her motor planning and coordination (Tr. p. 77). The student exhibited "significant" deficits in oral sensory processing, tactile sensitivities, and resistance to certain textures (id.).

The occupational therapist recommended that the student receive individual OT services due to her attention and frustration tolerance, at a frequency of three 30-minute sessions per week (Tr. pp. 77-78). The occupational therapist testified that the student's services should focus on fine motor, visual motor, self-care and activities of daily living, sensory processing, attention, overall strength, and endurance (Tr. pp. 78-79). In addition, the occupational therapist opined that the clinician working with the student should have training in sensory processing and sensory-based feeding techniques (Tr. p. 79). Finally, the occupational therapist testified that she recommended 138 hours of compensatory OT services and opined that number of hours was necessary to get the student to "where she really needs to be fundamentally" (Tr. p. 79).

The physical therapist who conducted the independent PT evaluation testified that the student was assessed using the Pediatric Balance Scale, manual muscle testing, range of motion, general observation, parent interview, and a review of her IEP (Tr. pp. 153-55). The physical therapist reported that the student's muscle weakness prevented her from performing age-appropriate activities of daily living (Tr. p. 155). In addition, the physical therapist stated that the student was unable to safely navigate her environment due to lack of balance and poor muscle strength (Tr. p. 156). Further, the student was reportedly unable to perform tasks assessing her motor coordination (id.). According to the physical therapist, the student was non-compliant, lacked endurance, and she required frequent breaks and redirection during the testing (Tr. pp. 156-57). The student exhibited an "altered gait" which resulted in difficulty with balance and coordination while walking (Tr. p. 158).

The physical therapist recommended access to a sensory gym, two 30-minute sessions per week of individual PT in school (Tr. p. 159). Regarding compensatory services, the physical therapist recommended that the student receive 184 hours (two hours per week for 46 weeks for two years) of compensatory PT (Tr. pp. 158-59). The physical therapist asserted that the student's PT should focus on increasing her balance, coordination, strength and endurance in order to improve her ability to navigate the school environment safely (Tr. pp. 158-60).

The speech-language pathologist who conducted the independent speech-language evaluation of the student testified that she utilized the Oral Written Identification Spelling Test, the Word Identification and Spelling Test (WIST), an articulation screener, and the Oral and Written Language Scales (OWLS) (Tr. pp. 85, 86-87; see Parent Ex. R). The speech-language pathologist also used technical supports such as a speech generating device, augmentative communication, iPad, and Chromebook, to conduct an assistive technology assessment (Tr. pp. 85-86). The speech-language pathologist reviewed the student's 2018 IEP which revealed that the student "was able to use language in a far less restrictive manner" than what she observed during the evaluation (Tr. p. 86).

According to results of administration of the OWLS, the student had deficits in all areas of language functioning, including listening comprehension, oral expression, and written expression, with scores falling at about the three-and-a-half to five-year-old range (Tr. pp. 87, 89). The speech-language pathologist attempted to administer the WIST, however the student refused to participate

in any of the tasks presented, including identifying letters (Tr. p. 87). The speech-language pathologist opined that the results of the student's assessment were indicative of a language disorder and "pervasive disabilities... in all areas of language functioning" including reading comprehension (Tr. pp. 88, 89). The student refused to participate in the articulation screening tasks (Tr. pp. 89-90). The speech-language pathologist noted that the student spoke at a "very low vocal volume" which had a negative effect on her intelligibility; and exhibited indications of "velopharyngeal insufficiency" which the speech-language pathologist opined was likely due to a "muscular insufficiency" rather than a "structural anomaly" (Tr. pp. 90-92). The student exhibited signs of a phonological disorder as she presented with phonological processes including fronting, gliding, stopping, consonant cluster reduction, and final consonant deletion which affected her intelligibility (Tr. pp. 91-92). According to the speech-language pathologist, the student appeared to be "very self-conscious" when others were unable to understand her speech (Tr. p. 92).

The speech-language pathologist recommended that the student receive three 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week in a group to work on more "fundamental skills" than the student's current IEP recommended, and discussed goals to improve phonological processes, vocabulary development, listening comprehension, reading comprehension, and written expression (Tr. pp. 93-95). Regarding compensatory services, the speech-language pathologist recommended three hours per week "for the three years that are in review" for a total of 414 hours of home-based speech-language therapy to "bring [the student] to where she needs to be" (Tr. pp. 95-96).

The assistive technology portion of the evaluation revealed that the student "was not interested" in using a speech generating device to address her limited oral expression (Tr. pp. 96-97). The student was presented with an "iOS device" which resulted in an increase in her attention and was a "comfortable way" for her to access the curriculum (Tr. pp. 97-98). The speech-language pathologist recommended that the student access books read aloud online because she was able to attend better to literature when it was read to her, and she could gain some literacy skills that way (Tr. pp. 98-99). In addition, the speech-language pathologist recommended "phonological apps" to help the student identify letters and sounds (Tr. p. 99). The speech-language pathologist "tried" a "C- 22 Pen Reader" which she described as a "portable reading device" that the student could use "out in the community" (Tr. pp. 99-100). She also recommended that the student use an "Apple Pencil" to increase her comfort with writing, a keyboard, and "wireless ear pods" to both eliminate outside noise and prevent her from bothering her classmates (Tr. pp. 100-01). Finally, the speech-language pathologist recommended that the student receive 10 hours of training in order to learn how to use the recommended technology (Tr. pp. 102-03).

The speech-language pathologist who conducted the independent feeding evaluation of the student testified that the evaluation comprised conducting a "comprehensive case history" with the parent, observing the student's current diet, and evaluating her eating "process" (Tr. pp. 133-35). The feeding evaluation revealed that the student's feeding skills were developmentally at a six month old level (Tr. pp. 136). The speech-language pathologist testified that the student exhibited "significantly delayed" oral motor skills and significant sensory issues that affected her ability to eat an age-appropriate diet (*id.*). Although the speech-language pathologist concluded that the student's feeding issues were due to significant underlying difficulties, the student exhibited behavior such as food avoidance, which necessitated an oral-motor and sensory/behavioral dual approach to treatment (Tr. p. 139). She recommended that the student receive two 30-minute

sessions per week of individual feeding therapy at school to target oral motor skills, feeding skills, and mealtime structure, using sensory based strategies (Tr. pp. 138, 149).⁷ Regarding compensatory services, the speech-language pathologist recommended a "bank" of 276 hours of feeding therapy, which she calculated as one hour per week for 46 weeks over six years, reasoning that the student's needs were so significant, and she should have been receiving feeding therapy for six years (Tr. pp. 138-39, 150). The speech-language pathologist recommended that the compensatory feeding therapy should be provided three to four hours per week in the home (Tr. pp. 147-49).

The neuropsychologist who conducted the independent neuropsychological evaluation of the student stated that he performed a review of the student's records, phone interviews with the parent, and observations of the student (Parent Ex. W at pp. 2-3). The neuropsychologist conducted assessments of the student including the Vineland Adaptive Behavior Scales-Third Edition/Comprehensive Interview Form (Vineland-3), the Behavior Assessment System for Children-Third Edition, Parent Rating Scales for Children 6-11 (BASC-3), and the Gilliam Autism Rating Scale-Third Edition (GARS-3) (Parent Ex. W at p. 3).

The results of the GARS-3 placed the student at a level which corresponded to a finding that it was "Very Likely" that the student presented with autism spectrum disorder, with a severity level "Requiring Substantial Support" (Parent Ex. W at p. 3). However, the neuropsychologist noted that not all scores on the GARS-3 were consistent with an ASD diagnosis (*id.*). The results from the Vineland-3 showed that the student's overall functioning was in the moderately deficient range, with significant weakness in communication and socialization domains, but relatively higher scores in daily living skills (*id.*). The results of the BASC-3 revealed the student exhibited "a high degree of emotional and behavioral difficulties" including clinically significant scores for aggression, withdrawal, adaptive skills, leadership, functional communication, activities of daily living, anger control, functional impairment, developmental social disorders, and executive functioning (*id.* at pp. 3-4).

Based on the evaluation results, the neuropsychologist suggested "provisional diagnoses" of unspecified intellectual disability, language disorder, ADHD (predominantly inattentive type), and disruptive mood regulation disorder (Parent Ex. W at p. 8). The neuropsychologist opined that an autism diagnosis was not supported because the student was "socially related and strives to interact with others" (*id.*). In addition, an autism diagnosis was not supported because the student did not engage in repetitive or self-stimulatory behavior; but was able to engage in symbolic play, was affectionate towards familiar people, and understood humor (*id.*). The neuropsychologist provided numerous recommendations based on his evaluation including a small nonpublic school placement in a classroom of six to eight students; one-to-one or dyadic instruction for most of the day; monitoring of the student's understanding; positive behavioral interventions; an FBA and BIP; regular consultation between classroom staff, a speech-language therapist, and a psychologist or BCBA; IEEs; and a social skills group (*id.* at pp. 9-11). Regarding compensatory services, the neuropsychologist recommended that the student receive 276 hours of home/community based speech-language therapy, 138 hours (one hour per week for three years) of parent counseling and

⁷ The speech-language pathologist also recommended that the student's feeding therapy should take place during naturally occurring mealtimes (Tr. p. 141).

training, and 1,380 hours (10 hours per week for three years) of individual tutoring provided by a learning specialist certified in multisensory instruction (id. at pp. 10-11).

Here, rather than adopt the hour-for-hour model of compensatory services urged by the independent evaluators and the student's parents, while nonetheless considering the substance of services recommended by the evaluators, the IHO more appropriately based the award of compensatory education on the nature of the student's delays, the "reasonable" number of hours the student could participate in compensatory services in addition to normal school activities, and on the quantity of services which would place the student in the same position she would have otherwise occupied but for the three-year denial of a FAPE given her needs and level of progress reflected in the hearing record, including information that indicated the student received some level of services, educational programming and instruction during the three school years at issue (see L.M., 478 F.3d at 316 [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"]). Therefore, there is no reason to disturb the IHO's order of compensatory services, or the decision that the CSE must first determine if assistive technology, instruction using ABA or parent counseling and training services are appropriate for the student before they are recommended.

VII. Conclusion

In summary, a review of the evidence in the hearing record does not support a modification of the IHO's decision or an award of additional relief.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
February 25, 2021**

**CAROL H. HAUGE
STATE REVIEW OFFICER**