The University of the State of New York

The State Education Department
State Review Officer
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No. 21-116

**Application of a STUDENT WITH A DISABILITY, by his 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:**
Queens Legal Services, attorneys for petitioner, by Amy Leipziger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nathaniel Luken, 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 denied in part her requests for relief to remedy respondent's (the district's) failure to provide the student with an appropriate educational program and services for the 2017-18, 2018-19, and 2019-20 school years. 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

When living in another State, the student attended general education classrooms for preschool and kindergarten (including a year repeated); after an illness that resulted in "a significant loss in functional abilities," the student was hospitalized and then attended school in a "rehabilitation hospital," followed by a period when he was home schooled (see Parent Ex. G at p. 2). The student has received diagnoses including "Autism with features of Obsessive-Compulsive Disorder and significant delays in academic, adaptive and social functioning," as well as a genetic syndrome related to a chromosome deletion (see id. at pp. 1-2).

The student moved to the district in 2017 and began attending a second grade 12:1+1 special class in a community school pursuant to a comparable services plan (see Parent Exs. D at

pp. 1, 3, 6; G at p. 2). A CSE convened on October 30, 2017 to conduct the student's initial review and developed an IEP with a projected implementation date of November 20, 2017 (Parent Ex. D at pp. 1, 22). Having determined that the student was eligible for special education as a student with an intellectual disability, the CSE recommended that he attend a 12:1+1 special class in a specialized school for an extended school year (id. at pp. 1, 17-18, 22). In addition, the October 2017 CSE recommended one 30-minute session per week of counseling in a group, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of individual occupational therapy (OT), full-time individual heath paraprofessional services, transportation paraprofessional services, adapted physical education, testing accommodations, 23 annual goals with short-term objectives, and numerous supports to address the student's management needs (id. at pp. 7-24). The student began attending the recommended program in or around December 2017 (see Parent Ex. G at p. 2).

A CSE convened on October 25, 2018 to conduct the student's annual review and developed an IEP with a projected implementation date of October 26, 2018 (Parent Ex. E at pp. 1, 24). The CSE continued the recommendation for a 12:1+1 special class in a specialized school for an extended school year with the same paraprofessional supports and related services but for the addition of another 30-minute session of individual OT per week, one 30-minute session of OT in a group, and one 60-minute session of parent counseling and training per month (compare Parent Ex. F at pp. 19-21, with Parent Ex. D at pp. 19-21). The CSE developed eight annual goals with short-term objectives and recommended testing accommodations and numerous supports to address the student's management needs (Parent Ex. E at pp. 6-18, 20-22). The student continued attending the recommended program at the same public school site until, attendant to a change in the family's residence, he moved to a different school for the second half of the 2018-19 school year (Parent Ex. G at p. 2).

A CSE convened on November 20, 2019 to conduct the student's annual review and developed an IEP with a projected implementation date of December 6, 2019 (Parent Ex. F at pp. 1, 26). The CSE changed the student's eligibility category, finding him eligible for special education and related services as a student with autism (compare Parent Ex. F at p. 1, with Parent Ex. E at p. 1).[1] The CSE recommended that the student attend a 6:1+1 special class in a specialized school for an extended school year (Parent Ex. F at pp. 20-22). In addition, the November 2020 CSE recommended adapted physical education, one 30-minute session per week of counseling in a group, two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, one 30-minute session of OT in a group, four 1-hour sessions of parent counseling and training per year in a group, full-time individual behavior support paraprofessional services, transportation paraprofessional services, testing accommodations, 12 annual goals with short-term objectives, and numerous supports to address the student's management needs (id. at pp. 12-29). The IEP indicated that the student required a behavior intervention plan (BIP) (id. at p. 14). In the beginning of 2020, the student transitioned to a different public school site following an incident with a paraprofessional at the prior school (Parent Ex. G at p. 2).

[1] The student's eligibility for special education and related service as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

### A. Due Process Complaint Notice

In a due process complaint notice dated February 8, 2020, the parent alleged that the district failed to offer or provide the student a free appropriate public education (FAPE) for the 2017-18, 2018-19, and 2019-20 school years (Parent Ex. A). For all three school years, the parent asserted that the CSEs failed to develop appropriate annual goals to address the student's deficits and failed to recommend appropriate behavioral supports and modifications, appropriate speech-language therapy and assistive technology or that the student's placement be deferred to the central based support team (CBST) to locate a nonpublic school for the student (id. at pp. 3-5).

For relief, the parent requested district funding of independent educational evaluations (IEEs), including neuropsychological, speech-language, OT, and assistive technology evaluations, as well as an independent functional behavioral assessment (FBA) and BIP (Parent Ex. A at p. 5). The parent also sought compensatory education to consist of district funding of applied behavior analysis (ABA) services to be delivered by a Board Certified Behavior Analyst (BCBA) of the parent's choosing "at market rate" and 1:1 speech-language therapy to be used over five years, as well as the costs of transportation if applicable (id. at pp. 5-6). The parent requested that, upon completion of the requested IEEs, the district be required to reconvene the CSE to develop an IEP based on the recommendations in the IEEs and to consider deferring the student's placement to the CBST to locate a nonpublic school (id. at p. 6).

### B. Impartial Hearing Officer Decision

An impartial hearing convened on July 21, 2020, and over four days of proceedings, the IHO and the parties discussed the parent's request for IEEs and the parent offered evidence in support thereof (see Tr. pp. 1-36; see also Parent Exs. A-C).[2] In an interim decision dated October 2, 2020, the IHO ordered the district to fund IEEs of the student, including neuropsychological, speech-language, and OT evaluations, as well as an independent FBA and BIP (Interim IHO Decision at p. 4). The parties convened for two hearing dates during which the parties updated the IHO as to the status of the IEEs (Tr. pp. 37-45); thereafter, the substantive portion of the impartial hearing was conducted over three dates between February 3, 2021 and March 12, 2021 (Tr. pp. 46-171). During the impartial hearing, the district did not offer any documentary or testimonial evidence but did present an opening statement arguing that the November 2019 IEP offered the student an appropriate program, cross-examined the parent's witnesses, and submitted a post-hearing brief (see Tr. pp. 48-49, 57-59, 76-84, 95-101, 107-12, 123-25; Dist. Post-Hr'g Brief). The following IEEs were completed and entered into evidence: a neuropsychological evaluation completed on November 4, 2020, a speech-language evaluation completed on January 11, 2021; and an FBA and BIP conducted over several days in February 2021 and dated February 13, 2021 (Parent Exs. G; H; I). As the impartial hearing drew to a close, the IHO and the parties were still working to obtain an OT IEE (Tr. pp. 32, 81).

In a decision dated April 12, 2021, the IHO found that the district did not meet its burden to show that it offered the student a FAPE for 2017-18, 2018-19, or 2019-20 school years (IHO Decision at pp. 6, 12). As for the 2017-18 and 2018-19 school year, the IHO noted that the district

[2] The district did not appear at the August 14, 2020 and September 1, 2020 hearing dates (see Tr. pp. 13-15, 18-19).

did not dispute any of the parent's allegations (id. at p. 6). Regarding the 2019-20 school year, the IHO rejected the district's arguments that its recommendation that the student attend a 6:1+1 special class was appropriate (id.). The IHO noted the district's argument that the recommended 6:1+1 special class was consistent with recommendations in the November 2020 neuropsychological evaluation but found that the evaluation had recommended a nonpublic school unless the district program offered ABA and that the district had not presented evidence that the recommended program included instruction using ABA (id.). Moreover, the IHO found that the district failed to present documentary or testimonial evidence to defend against allegations in the due process complaint notice that the IEP for the 2019-20 school did not address the student's behavior needs or provide sufficient speech-language therapy (id.).

Turning to the parent's requested relief, the IHO first rejected the district's argument that the parent's request for compensatory education relating to the 2019-20 school year should be denied on equitable grounds relating to the parent's invocation of the student's right to pendency (IHO Decision at p. 9). The IHO held that the parent was not required to place the student in a program she deemed inappropriate (id.).

As for compensatory services to remedy the denial of FAPE, the IHO considered the recommendations and evidence in the hearing record and ordered the district to "provide a bank of 200 hours of speech and language therapy by provider of parent's choice" and to "provide a bank of 500 hours of compensatory ABA by a provider of parent's choice"; the IHO indicated that the parent and provider could "determine how many hours should be allocated for parent training" and specified that "[a]ll compensatory services [would be] valid for a two-year period" (IHO Decision at pp. 11-12). In addition, the IHO ordered the district to provide a metro card to the student for services not provided at home or at school (id. at p. 12). Noting that the November 2020 neuropsychological evaluation recommended an assistive technology evaluation, the IHO ordered the district to conduct the evaluation (id. at pp. 7, 12).

Finally, the IHO denied the parent's request that specific amendments to the IEP be ordered based on the IEEs completed during the impartial hearing, including the recommendation for speech-language therapy, noting that an evaluation does not necessarily "dictate what should be on an IEP" (IHO Decision at p. 7). Likewise, the IHO denied the parent's request that the CSE be required to defer the student's placement to the CBST to locate a nonpublic school placement for the student, opining that it was "not [her] role to take over the role of the CSE" (id.). However, the IHO found that the CSE "should give serious consideration to whether they should defer the matter to CBST for a non-public school setting with ABA" (id. at pp. 8, 11).

## IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by not ordering all of the relief sought. Specifically, the parent argues that the IHO erred by disregarding the parent's evidence and "arbitrarily reducing" the number of hours of compensatory ABA and speech-language therapy awarded compared to the number of hours sought. In addition, the parent contends that the IHO should have ordered district funding of a Prompts for Restructuring Oral Muscular Phonetic Targets (PROMPT) therapy evaluation. The parent also alleges that the IHO erred by denying her request that the CSE be required to defer the student's placement to the CBST to locate a nonpublic school.

In an answer, the district responds to the parent's allegations, argues that some of the parent's claims are not properly raised, and otherwise asserts that the IHO's decision should be upheld in its entirety.[3]

## 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.

[3] This matter has been pending before the Office of State Review for several months, during which time the district requested multiple extensions of the timeline for answering the parent's request for review in order to engage in good faith settlement negotiations with the parent (see 8 NYCRR 279.10[e]). According to representations from the district, the parties had reached a settlement agreement and were only awaiting final signatures on the stipulation to resolve the dispute. However, without further explanation, the district served and filed an answer, apparently representing the end of the attempts to settle the matter.

§ 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]).[4]

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).

[4] 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. Scope of Review

It is first necessary to identify what issues are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

The IHO's findings with respect to the district's failure to meet its burden to prove that it offered the student with a FAPE for all three school years at issue, the IHO's orders that the district conduct an assistive technology evaluation of the student, and the two-year time limit for receipt of the ordered compensatory education have not been appealed by either party. Therefore, those aspects of the IHO's decision have become final and binding and they will not be reviewed on appeal (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. Relief

#### 1. Compensatory Education

The parent asserts that the IHO failed to provide a reasoned analysis based on the evidence in the hearing record for her award of compensatory education and impermissibly substituted her judgment over the opinions of the parent's experts.

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]; 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]). 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"]).

Turning first the parent's request for compensatory ABA services, the number of requested hours was based on the recommendation of the BCBA who conducted the February 2021 independent FBA and BIP (see Parent Ex. I; see also Parent Ex. K ¶ 3). Within the FBA and BIP report, the BCBA opined that the program and placement the student was attending at that time did not meet his needs, "ha[d] not been able to provide proper behavioral intervention to reduce his maladaptive behaviors in his academic environment," and, rather, had reinforced target behaviors causing the student's behaviors to "pervade[] every aspect of his life" (Parent Ex. I at pp. 22-23). To put the student in the position he would have been had the district provided appropriate special education, the BCBA recommended that the student receive a bank of ABA services totaling 2,760 hours, representing 20 hours per week for three school years (with each school year including 46 weeks) (Tr. pp. 94-95; Parent Exs. I at p. 24; K ¶ 18).[5] The BCBA also recommended a bank of 184 hours of parent counseling and training (representing two hours per week over two school years) "to enable the Parent to reinforce the behavior plan in place at school and collaborate effectively with [the student's] team of educators," which the BCBA opined the parent should have been receiving "for the last 8 years" (Parent Ex. I at p. 24; see Parent Ex. K ¶ 19). During the impartial hearing, the BCBA elaborated that the compensatory education was recommended to "address[] the years in which he was not given these services" and to "account[] for the delay" that she observed and allow the student to "catch up" (Tr. p. 93). In addition, the psychologist who conducted the November 2020 neuropsychological IEE testified that it "would be very helpful" for the student to receive compensatory ABA services at home, particularly given the student's need to work on "adaptive skills and focusing" (Tr. p. 128; see Parent Ex. G).

As for compensatory ABA instruction, the IHO reviewed the February 2021 independent FBA and BIP and found that the evidence supported that the student would benefit from "some ABA" (IHO Decision at pp. 10-11). However, the IHO found that the district had not been "required to provide any one type of methodology" during the school years at issue and that the recommendation for compensatory ABA instruction amounting to 20 hours per week for three

[5] In the FBA and BIP and in her affidavit, the BCBA calculated 1,840 hours but, during the impartial hearing, she amended her calculations to total 2,760 hours (compare Tr. p. 94, with Parent Ex. I at p. 24 and Parent Ex. K ¶ 18).

years was "unrealistic and overly burdensome" (id. at p. 11). Therefore, the IHO found the student was entitled to 500 hours of compensatory ABA services to be delivered by a provider of the parent's choice at "market value" (id.). The IHO directed that the parent and provider determine how many of the 500 hours would be allocated for parent training (id.).

As for speech-language therapy, the private speech language pathologist who conducted the January 2021 speech-language IEE recommended that the student's program going forward should include three 60-minute sessions of individual speech-language therapy per week and two 60-minute sessions of speech-language therapy in a group per week (Tr. pp. 66, 76; Parent Ex. J ¶ 15; see Parent Ex. H). In addition to this, the speech-language pathologist recommended a bank of 690 compensatory hours of speech-language therapy representing five hours per week over 46 weeks for approximately three school years (Tr. pp. 67-68; Parent Ex. J ¶ 20). The speech-language pathologist opined that the speech-language therapy services that the student had received during the school years at issue had been insufficient and that student had not made "much progress" or experienced "much growth"; however, she did characterize that the student had made "slight growth" (Tr. pp. 72-74). She testified that her recommendations for compensatory education were "qualitative" in that they were based on the student's delays, age range, and the goal of getting the student to be able to communicate functionally (Tr. pp. 74-75, 82-83).

The IHO reviewed the recommendations in the January 2021 speech-language IEE but found that the district had not been required to provide five hours per week of speech-language therapy during the school years at issue and that, although the student required some compensatory speech-language therapy, the recommendation for 690 hours of compensatory speech-language therapy was "excessive" (IHO Decision at pp. 9-10). Therefore, the IHO found that the student was entitled to 200 hours of compensatory speech-language therapy to be delivered by a provider of the parent's choice at a rate not to exceed $90 per hour (id. at p. 11).

The parent argues that the IHO did not explain a basis for reducing the number of hours of compensatory ABA services and speech-language therapy sought by the parent. While the IHO may have been brief in her explanation, overall, it is clear that she considered the amount of compensatory education services sought by the parent to be "unrealistic," "overly burdensome," and "excessive" (IHO Decision at pp. 9-10, 11). The IHO opined that any request for compensatory education needed to be balanced with the individual needs and age of the student and that the student would require time to engage in school-based activities as well as "socializing, extra-curricular activities and leisure time" (id. at p. 9). The IHO noted that the student may move to a different school in the near future and that his "needs will change constantly over the next few years" (id. at pp. 9, 12).

It was appropriate for the IHO to take into account the services and program the student received during subject school years in that, while the district failed to meet its burden to demonstrate that it provided the student with a FAPE, this is not an instance where the student received no program or services during the school years at issue. The IHO faced an unenviable position of crafting an award in an instance where the district failed to effectively defend against the allegations in the due process complaint notice, leaving the IHO to ponder, without a full record on the issue, how much it would take to remedy the underlying violation as alleged by the parent. While the district failed to present evidence or its view of an appropriate compensatory education award, the IHO was not required to award all of the relief that the parent sought. Such an outright

default judgment awarding compensatory education—or as in this case, any and all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]).

Here, the IHO took into account what the district was required to provide, noting that the district was not required to deliver ABA services or five hours per week of speech-language therapy (see IHO Decision at pp. 9-11). To be sure, the recommendations of the student's IEPs were at issue; however, in light of the allegations in the due process complaint notice and the evidence in the hearing record, the IHO exercised appropriate restraint in crafting a compensatory award. With respect to compensatory ABA services, although the due process complaint notice alleged that the CSEs failed to recommend appropriate behavioral supports and modifications or an appropriate "learning setting," it did not allege that the CSEs knew or should have that the student required an intensive ABA program in order to receive educational benefit but failed to recommend it or that the district failed to deliver any portion of the recommended program and services for the school years at issue (see Parent Ex. A at pp. 3-5). In addition, although the parent alleged that the CSEs' recommendations for two 30-minutes sessions of speech-language therapy was insufficient to meet the student's needs (see Parent Ex. A at pp. 3-5), the IHO did not have to accept without question the view of the parent's expert that, to place the student in the position he would have been but for the inappropriate IEPs, the student required five times as much speech-language therapy as recommended by the CSEs. This is particularly so given the speech-language pathologist's acknowledgement that the student made some progress, however slight, during the school years at issue, and it is unclear the extent to which the speech-language pathologist took into account the services the student received or the "slight growth" he had demonstrated in calculating her recommendation for speech-language therapy, if at all (see Tr. p. 72).

In addition to considerations related to what the student received, it was also appropriate for the IHO to consider the student's program going forward when calculating the compensatory education award (see Demarcus L. v. Bd. of Educ. of the City of Chicago, 2014 WL 948883, at *8 [N.D. Ill. Mar. 11, 2014] [denying compensatory education partially due to the prospective revisions to the student's IEP]). It is also understandable that the IHO would consider the student's tolerance for services and instruction before calculating an award (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [SDNY Mar. 30, 2017] ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]).

In light of the above, I find that the IHO did not impermissibly substitute her judgement over that of the parent's witnesses with respect to the compensatory education she ordered; rather, the IHO appropriately employed her discretion to craft a compensatory education remedy in light of the student's circumstances and individual needs, and the parent has not pointed to a convincing reason to disturb the IHO's discretionary award.

**2. PROMPT Therapy Evaluation**

Without citation to the hearing record, the parent argues that she "provided indisputable evidence that [the student] would benefit from PROMPT Therapy" and that, therefore the IHO

erred in failing to order a PROMPT therapy evaluation (Req. for Rev. ¶ 38). However, as the district correctly points out, the parent did not request a PROMPT therapy evaluation in her due process complaint notice or in her post-hearing brief to the IHO (see Parent Ex. A; Parent Post-Hr'g Brief). Additionally, while the private speech-language pathologist who conducted the January 2021 speech-language IEE of the student did indicate that the student would benefit from PROMPT therapy, she did not recommend a PROMPT therapy evaluation (see Tr. pp. 67, 83; Parent Ex. J ¶ 18). In light of the above I decline to find that the IHO erred in failing to order the district to conduct a PROMPT therapy evaluation.

**3. Prospective Relief**

The parent argues that the hearing record is replete with evidence supporting the student's need for a nonpublic school placement and that the IHO erred in declining to order the CSE to defer the student's placement to the CBST.

The psychologist who conducted the neuropsychological IEE recommended that the student attend a class with no more than eight students in a specialized "[a]utism program" that incorporates an ABA "component" (Parent Ex. G at p. 10). The psychologist indicated that, to his knowledge, that there was one school in the district that offered an ABA program, but that, short of the student of being assigned to that particular district school, he would require a nonpublic school setting (Tr. pp. 121-22). The BCBA who conducted the independent FBA and BIP recommended that the student attend a specialized school with a BCBA on staff and a "one-to-one instructional format" (Parent Ex. I at p. 22). In her testimony, the BCBA specified that she recommended a "full time non public or private ABA program" (Parent Ex. K ¶ 8; see Tr. pp. 91, 95).

Notwithstanding the views of the parent's experts, an award of prospective placement or services for 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 "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

In declining to order prospective placement in a nonpublic school or a specific set of directives required to be included in a future IEP for the student, the IHO avoided stepping into the role of the CSE (see Application of a Student with a Disability, Appeal No. 19-018 [explaining that it is far less problematic for an IHO to order discrete forms of compensatory education because it is expected that such remedial services will be provided in a setting in which the CSE will also continue to have the responsibility to develop and implement a comprehensive IEP taking into account all aspects of the student's needs]). In particular, the IHO acknowledged that the CSE might have access to evaluations that might not have been made a part of the hearing record (see IHO Decision at p. 7). Indeed, at the time of the IHO's decision, the school years at issue—2017-18, 2018-19 and 2019-20—were over and, as of the date of this decision, in accordance with its

obligation to review a student's IEP at least annually, the CSE should have already now twice convened to produce IEPs covering all or portions of the 2020-21 and 2021-22 school years (see 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 school year]). If the parent remains displeased with the CSEs' recommendations for the student, she may seek appropriate relief by challenging the IEPs in a separate proceeding.

In light of the above, I decline to overturn the IHO's order in this matter, which required the district to "reconvene within 14 days of receipt of this decision to consider new evaluations and create [a] new IEP" and "give serious consideration to deferring case to CBST based on evaluations" but which declined to go so far as to prospectively require the CSE to recommend a nonpublic school for the student (IHO Decision at p. 11).

**VII. Conclusion**

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

**THE APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**December 13, 2021**

**SARAH L. HARRINGTON**
**STATE REVIEW OFFICER**