The University of the State of New York

The State Education Department
State Review Officer
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No. 21-183

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:
The Cuddy Law Firm, PLLC, attorneys for petitioner, by Simone James, Esq.

Liz Vladeck, General Counsel, attorneys for petitioner, by Gail Eckstein, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which did not order all of the relief sought by the parent to remedy respondent's (the district's) failure to provide her son with an appropriate educational program for the 2019-20 and 2020-21 school years. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student moved to the United States in April 2018 and enrolled in a general education fourth grade class (Parent Exs. A at pp. 1-2; G at p. 2). Prior to coming to the United States, the student had reportedly received diagnoses of a specific developmental disorder of motor function, attention deficit hyperactivity disorder (ADHD) – predominantly inattentive type, other developmental disorders of scholastic skills, and "[l]earning [p]roblems" (Parent Ex. G at p. 3). The parents referred the student to the CSE and subsequently, between May and October 2018, the district conducted a social history, a classroom observation, a psychoeducational evaluation, a speech-language evaluation, and an occupational therapy (OT) evaluation, and solicited information from the parent and teachers (Parent Ex. G at pp. 2-8; see Parent Ex. J at p. 1). The student began fifth grade in a monolingual general education classroom with integrated co-

teaching (ICT) services (Parent Ex. G at p. 3). In October 2018, a CSE convened and developed an IEP for the student, found him eligible for special education as a student with a speech or language impairment, and recommended that he attend a 12:1 special class for core subjects and receive English as a new language (ENL) services, as well as two 30-minute sessions per week of bilingual speech-language therapy and two 30-minute sessions per week of OT (Parent Exs. G at pp. 2-4, 6; J at p. 1).[1, 2] The October 2018 CSE reportedly considered a bilingual classroom placement for the student, but, because the parent preferred that the student remain in the public school site he had been attending, which did not offer a bilingual class, it was decided that the student would remain in his then-current school location and the possibility of a bilingual placement would be revisited towards the end of the school year (Parent Ex. G at p. 4).

The student began the 2019-20 school year (sixth grade) attending a general education class with ICT services in a district public school and received ENL services and related services of speech-language therapy and OT (Parent Ex. B at pp. 1, 3, 6).

A CSE convened on November 13, 2019 and developed an IEP for the student with an implementation date of November 24, 2019 (Parent Ex. B at pp. 1, 18). Finding that the student remained eligible for special education as a student with a speech or language impairment, the CSE recommended a bilingual program consisting of a 12:1 special class in Spanish for core subjects in a "[n]on-[s]pecialized" district school, along with related services (provided in Spanish) of two 40-minute sessions of speech-language therapy per week and two 30-minute sessions of group OT per week (one push-in and one pull-out) (id. at pp. 1-2, 13-14, 17, 20). The IEP reflected that, if there was no provider available in the recommended language, the student would be provided interim services in English pending the availability of a bilingual provider (id. at p. 19).

In a letter dated December 2019, the parent stated her disagreement with the district's September 2018 psychoeducational evaluation of the student and requested an independent educational evaluation (IEE) at public expense (Parent Ex. J at p. 1). In particular, the parent sought a neuropsychological IEE to be conducted by an identified bilingual evaluator (id.).

In a January 2020 letter addressed "To whom It may Concern and/or Board of Education," the student's treating psychiatrist indicated that the student had received diagnoses of an unspecified intellectual disability, development disorders of speech and language and of scholastic skills, post-traumatic stress disorder (PTSD), and other phobic anxiety disorders (Parent Ex. L). The psychiatrist indicated that the student suffered from PTSD and school phobia following an incident in which the student was pushed by another student from a stair, resulting in the student requiring medical treatment (id.). The psychiatrist requested that the student be provided with a paraprofessional "to improve the student's academic performance" (id.).

A bilingual psychologist conducted a neuropsychological IEE of the student on March 5, 2020, the results of which were set forth in a report dated April 17, 2020 (Parent Ex. G). The

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] The district evaluations, conducted between May and October 2018, were not included in the hearing record, nor was the October 2018 IEP.

psychologist reported that the student "present[ed] as functioning [at] or near average level in . . . his cognitive skills and key areas of neuropsychological functioning including all nonverbal and visual reasoning skills and concept recognition with low average word knowledge and verbal reasoning skills" but that he demonstrated "very severe word level reading" and writing difficulties (dyslexia and dysgraphia), as well as delays in receptive and expressive language skills and fine motor skills and attention difficulties (id. at p. 22). The psychologist opined that "[g]iven the extent and nature of [the student's] severe word level reading problems, receptive and expressive language difficulties, attention and fine motor skills [the student] need[ed] the resource and expertise of a nonpublic school" but noted that to his knowledge there were no such schools that accepted Spanish dominant students (id. at p. 23). The psychologist recommended that, as an interim placement, the student remain in a small bilingual classroom setting that included 10 hours per week of pull-out instruction through special education teacher support services (SETSS) and that the student receive related services of speech-language therapy, OT, and counseling (id. at pp. 22-23).[3] The psychologist suggested that the student should remain in the interim setting until he developed greater English skills and stated that, if the interim recommendations did not lead to marked improvement, a referral to a nonpublic school would be needed (id. at p. 23). The psychologist emphasized the urgent need to improve the student's underlying skills and English skills and recommended tutoring outside of school and a multisensory reading program (id. at p. 22). The psychologist noted the student might exhibit signs of an auditory processing disorder (id. at p. 23). The psychologist recommended that the student undergo an assistive technology evaluation and be referred for a neurological evaluation (id. at pp. 22-23).

A CSE convened on May 28, 2020 to review "the results of a reevaluation requested" by the parent and developed an IEP with an implementation date of June 8, 2020 (Parent Ex. C at pp. 1, 17). The IEP set forth results from the March 2020 neuropsychological IEE (id. at pp. 1-3). The CSE generally continued the special class and related services recommendations from the November 2019 IEP (compare Parent Ex. C at pp. 12-13, 16, with Parent Ex. B at pp. 13-14, 17). The CSE considered but rejected the option of a nonpublic school placement based on the student's need for bilingual instruction (Parent Ex. C at pp. 18-19). According to the IEP, a neurological evaluation and an assistive technology evaluation would "be considered in the near future" (id. at p. 19).

In a letter dated June 16, 2020, the district advised the parent that, although the student's IEP included a recommendation that he attend a bilingual special education program, the student's then-current public school did not offer a special class with instruction in Spanish (Parent Ex. M). The letter indicated that if the parent wished for the student to attend a school that offered a bilingual special education program, she should inform the district by July 15, 2020 (id.).

The parent contacted the district in a letter dated July 8, 2020, indicating that the district had not evaluated the student since 2018 and that the evaluations conducted in 2018 were not comprehensive (Parent Ex. K at p. 1). The parent requested that the district "immediately evaluate" the student in all areas of suspected need by conducting physical therapy (PT), OT, bilingual speech-language therapy, assistive technology, and audiological processing evaluations, as well as

[3] The psychologist recommended that eight hours of SETSS instruction address the student's reading difficulties and be provided or supervised by a reading specialist and two hours of SETSS instruction address the student's math difficulties (Parent Ex. G at p. 23).

an applied behavior analysis (ABA) skills assessment and a functional behavioral assessment (FBA), along with a behavioral intervention plan (BIP) if warranted (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated September 11, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19, 2019-20, and 2020-21 school years (Parent Ex. A). In particular, the parent alleged that the district denied her an opportunity to meaningfully participate in educational planning for the student, failed to appropriately evaluate the student, and failed to conduct an FBA or develop a BIP to address the student's distractibility or assess the student to determine if research-based methodologies such as ABA could address his behaviors (id. at pp. 5-6, 8). The parent contended that the present levels of performance included in the student's IEPs did not accurately reflect the student's needs and abilities and that the annual goals were inappropriate, vague, and unmeasurable and were not formulated to allow the student to make progress (id. at pp. 6-7). The parent indicated that the student required more support than was recommended in the October 2018, November 2019, and May 2020 IEPs in order to function in an academic setting, such as the program and placement recommended in the April 2020 neuropsychological IEE, i.e., a special class in a nonpublic school or, while such a school was being located, a special class along with pull-out SETSS (id. at pp. 5, 8). The parent alleged that, although the district had recommended the student's placement in a bilingual special education program as of June 2020, it failed to provide the parent with any information about the program (id. at p. 5). The parent argued that the IEPs developed for the student included insufficient recommendations for English classes, speech-language therapy, OT, PT, and parent counseling and training and failed to provide for a paraprofessional, a 12-month school year program, or assistive technology (id. at pp. 6-8). The parent also contended that the period of remote learning during the school closure due to the COVID-19 pandemic was not individualized to meet the student's specific learning needs (id. at p. 8).

Regarding implementation of the student's IEPs, the parent asserted that, while the October 2018, November 2019, and May 2020 IEPs provided that the student would attend a 12:1 special class, the student was attending a "large ICT classroom" (Parent Ex. A at p. 5). The parent also contended that the district failed to provide the student with all the related services mandated on his IEPs (id. at p. 9).

Concerning IEEs, the parent alleged that, in July 2020, she informed the district of her disagreement with district evaluations and requested IEEs and that, as of the date of her due process complaint notice, the district had failed to approve the requested IEEs or initiate an impartial hearing to defend its evaluations (Parent Ex. A at p. 9).

For relief, the parent requested "an immediate interim order" for IEEs, including independent OT, speech-language therapy, and assistive technology evaluations to be conducted by Rachel Bouvin Speech Services at specified rates and a bilingual ABA skills assessment and an FBA and a BIP to be conducted by a Board Certified Behavior Analyst (BCBA) with Manhattan Psychology Group at specified rates (Parent Ex. A at pp. 9-10). The parent requested that the CSE be required to reconvene to review the IEEs and develop an IEP for the student to include a paraprofessional, SETSS in reading and math, 1:1 reading instruction, and individual and group

counseling services (id. at p. 10). The parent also sought an order requiring the district to locate an appropriate public school for the student and, if unable to do so, to locate an appropriate State-approved nonpublic school and, if unable to do so, to fund a private school of the parent's choosing, and provide door-to-door transportation to any such new placement (id. at pp. 10-11). Until an appropriate school was located, the parent requested that the district be required to fund 30 hours of push-in ABA services by a bilingual provider (id. at p. 10). The parent also sought compensatory education services, including SETSS for reading and math, ABA therapy, speech-language therapy, OT, PT, counseling, parent counseling and training, and assistive technology training services, as well as transportation to and from such services (id.). The parent requested that the foregoing relief be implemented by way of a special needs trust to include funds for the private placement and compensatory education services (id.).[4]

B. Impartial Hearing Officer Decision

An impartial hearing convened on March 9, 2021 and concluded on July 9, 2021, after four days of proceedings (see Tr. pp. 1-229). The hearing date on April 9, 2021 was devoted to the issue of the IEEs, which the parent requested be ordered in an interim decision (see Tr. pp. 10-56). The district's representative indicated that the district was "not actually contesting or objecting to any of the evaluations" but stated the district's position that the rates to be charged for the ABA skills assessment and FBA were "excessive" (Tr. p. 20). The district did not state an objection to the rates for the requested OT, speech-language therapy, or assistive technology IEEs (id.).

In an interim decision dated April 28, 2021, the IHO denied the parent's request for an independent BIP as premature as the hearing record did not include an FBA that suggested the need for a BIP (Interim IHO Decision at p. 3).[5] Next, the IHO found that the witness from Manhattan Psychology Group did not have direct knowledge of the agency's fee structure and, therefore, did not offer credible testimony regarding the basis for the proposed rates for the independent bilingual ABA skills assessment and FBA (id.). Therefore, the IHO ordered the district to fund an independent FBA at the rate of $3,173 and an ABA skills assessment at the rate of $3,173, representing a ten percent reduction compared to the requested $3,525 for each evaluation (id. at pp. 3-4). As the district did not oppose the rates for the requested OT, speech-language therapy, and assistive technology IEEs, the IHO ordered the district to fund the evaluations at the amounts requested (id.). The ordered IEEs were conducted in May and June 2021 (Parent Exs. Z; AA; BB; CC; DD).

At the June 18, 2021 hearing date, the district stated that it did not intend to offer any documentary or testimonial evidence (Tr. pp. 62-63). The parent's attorney clarified the relief sought, including an "appropriate placement" to include "criteria" outlined in the IEEs (a bilingual program with a small classroom size, a focus on reading and writing, support from a

[4] Relying on the district's "historical inability to appoint a hearing officer in a timely manner," the parent also alleged that any such delay would deny the student a FAPE and requested that the district immediately appoint an IHO to address the parent's claims (Parent Ex. A at pp. 9-10).

[5] The IHO originally issued an interim decision dated April 14, 2021, but that decision had typographical errors and was superseded by the corrected interim decision dated April 28, 2021. All citations herein are to the corrected interim decision.

paraprofessional, parent counseling and training, OT, speech-language therapy, and instruction using Orton-Gillingham and/or ABA methodology) and provision of an assistive technology device, as well as compensatory education consisting of 180 hours of speech-language therapy, 138 hours of OT, 184 hours of parent counseling and training, 920 hours of behavior therapy, and 50 hours of assistive technology training (Tr. pp. 66-67, 79-82). The district's representative, in turn, stated the district's position that it should have "an opportunity to review the data and reconvene in order to make a decision about the student's placement," that it should be given the option to provide an alternative assistive technology device if necessary, that the requested 920 hours of compensatory behavior therapy "appear[ed] to be a bit excessive," and that the rates proposed for delivery of the compensatory education services by the parent's preferred providers were not appropriate (Tr. pp. 72-73, 76).

In a decision dated July 25, 2021, the IHO found that, based on the district's failure to present any documentary or testimonial evidence at the impartial hearing, it had failed to meet its burden to prove that it offered the student a FAPE for the 2019-20 or 2020-21 school years (IHO Decision at p. 11). Turning to relief, the IHO reviewed the evidence offered by the parent (id. at pp. 11-17). The IHO did not find the testimony or recommendations of the BCBA from Manhattan Psychology Group who conducted the independent ABA skills assessment and FBA to be credible (id. at p. 12-16). The IHO questioned the results of the June 2021 ABA skills assessment and FBA given that the BCBA did not identify any reports from the student's teacher or parent regarding maladaptive behaviors that were unrelated to the student's limited understanding of the English language or auditory processing deficits and that neither the psychologist who conducted the April 2020 neuropsychological IEE of the student nor any of the other evaluators who conducted IEEs of the student in May 2021 indicated that the student exhibited maladaptive behavior (id. at pp. 12-17). Further, the IHO noted that the BCBA testified that the student had received a diagnosis of autism and had been recommended to receive behavior therapy but that the source of this purported diagnosis and recommendation was not identified (id. at p. 16). The IHO also declined to accord weight to the testimony of either the BCBA or the clinical director of behavioral and education services at Manhattan Psychology Group (Manhattan Psychology Group director) since both had an interest in the student being awarded ABA and parent counseling and training services given that their agency would deliver such services (id. at pp. 15, 16). Specific to parent counseling and training, the IHO found nothing in the hearing record to indicate that the parent needed such a service (id. at pp. 16-17). Based on the foregoing, the IHO denied the parent's request for compensatory ABA and parent counseling and training services (id. at p. 17).

The IHO found the testimony of the speech-language pathologist from Rachel Bouvin Speech Services who conducted the May 2021 speech-language IEE to be credible (IHO Decision at p. 12). However, the IHO struck the testimony of the speech-language pathologist from Rachel Bouvin Speech Services who conducted the May 2021 assistive technology evaluation since the witness had not been available to complete her testimony and the parent's attorney declined the opportunity to continue her testimony on another day (id. at p. 17). Relying on the assistive technology evaluation report, the IHO found no explanation for the recommendations for a "Microsoft Surface 3," a scanner, or 50 hours of training for the use of the assistive technology device, and no evidence regarding who would provide the service to the student or the rate that would be charged (id. at pp. 17, 18-19). Nevertheless, the IHO found that, based on the assistive technology IEE, assistive technology in the form of various software and applications (Snap and read literacy software by Don Johnston, Lee Paso a Paso—Learn to read Spanish Step by Step,

Lee Paso a Paso 2, membership to Epic-books via audio, Raz-Kids, read and write literacy software by Texthelp, Google Docs account, Google translate, Microsoft account for built-in text to speech), as well as a C-Pen reader, would be appropriate for the student (id. at p. 18). The IHO further found that the student should receive 28 hours of assistive technology training representing four hours of training for each tool found appropriate with the exception of Lee Paso a Paso 2 and the adding of Google and Microsoft accounts, for which the IHO indicated the student would not require training (id. at p. 19).

As to the rates for compensatory education services, the IHO found the testimony of the director of services at New York Therapy Placement to be lacking in specificity regarding what providers would or could deliver services and indicated that, though the witness stated that the agency charged $210 per hour for services, she was not definite regarding how much of that fee went to a provider (IHO Decision at pp. 16, 17-18). The IHO also accorded no weight to documents in evidence that set forth rates for services since no witness testified to the rates and the documents themselves were not notarized or signed (id. at pp. 18, 19). The IHO indicated that the parent could obtain the assistive technology training for the student from a provider "at a rate not to exceed $130 an hour, a rate commensurate to other related services in the community, when an agency is not involved and the entire free goes to the related service provider" (id. at p. 19).

Taking the foregoing into consideration, the IHO ordered the district "to provide" compensatory education services, to be delivered by bilingual providers, including 200 hours of SETSS with a reading specialist at a rate not to exceed $130 an hour, 200 hours of speech-language therapy at a rate not to exceed $150 an hour, 140 hours of OT at a rate not to exceed $150 an hour, and 28 hours of assistive technology training at a rate not to exceed $130 an hour (IHO Decision at pp. 19-20). The IHO also ordered the district to conduct bilingual audiological and dyslexia evaluations of the student (id. at p. 20). The IHO found that the student should receive a metro-card to attend evaluations and compensatory education services and that providers should "submit reports every three months to [the district] and parent" (id.). Regarding the student's program and placement going forward, the IHO determined that the student should attend a 12-month school year bilingual program in a class with two teachers and no more than 12 students and receive paraprofessional services and assistive technology (id.). The IHO indicated that the district should refer location of an appropriate school placement for the student to the central based support team (CBST) "if the parent is not satisfied with the bilingual class" (id.). Finally, the IHO ordered that "[a]ll future IEPs, evaluations and correspondence to the parent shall be in Spanish as well as English" (id.).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred by denying portions of the relief sought. Initially, the parent asserts that the IHO "inaccurately reported alleged facts" in his decision and "conveyed significant bias." Specific to the IEEs awarded by the IHO in the interim decision, the parent argues that the IHO erred by arbitrarily reducing the amount that the district would be required to fund for the independent ABA skills assessment and FBA. Turning to compensatory education services, the parent alleges that the IHO erred in denying the parent's request for compensatory behavior therapy and parent counseling and training services and in reducing the requested hours of compensatory assistive technology training services. The parent also asserts that the IHO erred in relying on extrinsic evidence, disallowing questions related to provider rates

during the impartial hearing, and arbitrarily reducing the rate for the compensatory education services. In addition, the parent argues that the IHO erred in denying the parent's request that a BIP be developed for the student.

In an answer, the district responds to the parent's allegations with admissions and denials and argues that the IHO's decision should be upheld in its entirety.

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]).[6]

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Scope of Review

First, it is necessary to identify which of the parties' arguments 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

[6] 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).

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]).

Here, neither party has appealed the IHO's finding that the district denied the student a FAPE for the 2019-20 and 2020-21 school years, or his orders requiring the district to fund IEEs or conduct bilingual audiological and dyslexia evaluations of the student or to provide the student with a specified program on a going-forward basis. In addition, aside from the rates for services, neither party has appealed the IHO's order requiring the district to provide bilingual compensatory education services, including 200 hours of SETSS with a reading specialist, 200 hours of speech-language therapy, or 140 hours of OT. Therefore, the IHO's determinations on these issues 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]). Also, the IHO's decision does not contain a finding as to whether the district offered the student a FAPE for the 2018-19 school year (see IHO Decision). The parent does not appeal, nor mention, the lack of a determination on this issue. Therefore, all claims related to the 2018-19 school year are deemed abandoned (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]).

B. IHO Bias

Turning to the parent's allegations of IHO bias, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

The parent alleges that the IHO appeared to be biased against members of the Manhattan Psychology Group, citing the IHO's determinations reducing the rates of IEEs and denying recommendations for a BIP, compensatory behavior therapy, and parent counseling and training, as well as some brusque remarks made and questions posed by the IHO during the testimony of the BCBA and director from Manhattan Psychology Group, and credibility determinations made by the IHO. The parent also asserts that bias was demonstrated by the IHO's expectation of testimony from the speech-language pathologist who conducted the May 2021 speech-language IEE about fees charged by her agency when that was not the parent's intent in calling such witness.

However, these allegations of error are the subject of the present review and do not rise to the level of establishing bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994]; Application of a Student with a Disability, Appeal No. 13-083). Accordingly, the parent's allegations to the contrary are without merit.

The parent also cites the IHO's striking of the testimony of the speech-language pathologist who conducted the assistive technology IEE. Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision. Additional hearing days, if required, shall be scheduled on consecutive days wherever practicable" (8 NYCRR 200.5[j][3][xiii]).

A review of the hearing record shows that the witness in question, the speech-language pathologist who conducted the assistive technology evaluation, testified at the July 9, 2021 hearing date and the IHO and the parent's attorney were able to pose some questions to the witness (see Tr. pp. 207-15); however, due to a scheduling conflict, the witness was not available to complete her testimony that day (Tr. p. 215). During the discussion of the speech-language pathologist's availability, the district stated its position that it did not object to the assistive technology recommendations, and only requested that the IHO allow for reasonable and comparable alternatives to those recommendations in the event the recommended items were no longer in stock or available (Tr. pp. 215-17). The parent's counsel then agreed that the IHO could rely on the assistive technology evaluation rather than recalling the witness (Tr. p. 217). Overall, based on this discussion, it was within the IHO's discretion to strike the limited testimony offered by the speech-language pathologist given her inability to complete her testimony. Moreover, the parent has not pointed to any aspect of the speech-language pathologist's testimony which would have altered the IHO's determinations had he relied upon it. As the IHO acted within his discretion in striking the testimony, this ruling is not evidence of the IHO's bias against the parent.

With respect to how the IHO addressed the parent's counsel, a review of the hearing record does not suggest bias, rather it suggests that the IHO attempted to stick to timelines, cut to the chase with respect to certain issues, and prevent repetitive, irrelevant, or duplicative testimony and questioning (see e.g., Tr. pp. 101-02, 103, 105, 110, 152). The hearing record shows that, while the IHO may have strived to hurry things along, he did not act in such a manner as to deprive the parties of those minimal process requirements to which they are entitled (see 8 NYCRR 200.5[j]).

C. Independent Educational Evaluations—Rates

The parent appeals the IHO's determination to limit district funding to rates that were ten percent less than those requested by the parent for the independent ABA skills assessment and FBA.

The IDEA provides parents with a number of procedural safeguards. Among them is the "right . . . to obtain an independent educational evaluation of the child," which in turn means "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question" (34 CFR 300.502[a][1], [3][i]; see 8 NYCRR 200.1[z]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense that was sought for additional information]). Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

Regarding the issue of the maximum reimbursement rate, when a parent requests an IEE, the district must provide the parent with a list of independent evaluators from whom the parent can obtain an IEE, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the list (Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

In her due process complaint notice, the parent requested IEEs, including a bilingual ABA skills assessment and an FBA to be conducted by a BCBA with Manhattan Psychology Group at the rate of $3,525 each (Parent Ex. A at p. 10). During the impartial hearing, the BCBA from Manhattan Psychology Group testified that these were the rates charged (Tr. pp. 42-43). During the impartial hearing, while the district stated its position that the costs of the ABA skills

assessment and the FBA were excessive (Tr. p. 20), it did not allege that the IEE rates exceeded the district's cost containment criteria and it did not offer into evidence its policy regarding reimbursement rates for IEEs or its maximum rates for specific tests.[7] Nor did the district offer any evidence that the rates sought by the parent were excessive, such as evidence of rates charged by other evaluators for similar assessments.[8] There is no evidence of the district's reimbursement rate in this case, and that is not the type of fact of which one may take judicial notice, especially when the parent must be given the opportunity to challenge cost containment policies as applicable to IEEs of a particular child. Thus, as the district failed to pursue the issue of the cost of the IEEs by developing an evidentiary record on the question, the IHO erred in reducing the amount to be reimbursed.

D. Compensatory Education

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. 2008]; 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

[7] State regulation concerning IEEs provides that, if a parent requests an IEE, the district must either ensure the IEE is provided at public expense "or file a due process complaint notice to request a hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria" (8 NYCRR 200.5[g][1][iv] [emphasis added]; see 34 CFR 300.502[b][2][1]-[ii]).

[8] The BCBA from Manhattan Psychology Group testified that the rates charged by the agency were based on the rates of BCBAs providing evaluation and direct services to the geographic area (Tr. p. 43). The IHO sustained an objection, stating that there was no documentation as to the standard rate in the record, and that the parent would have to provide documentation to support that statement (id.). However, it was the district's burden to come forth with such documentation.

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"]).

1. Behavior Therapy, Parent Counseling and Training, and Independent BIP

The parent asserts the IHO erred in arbitrarily denying her request for compensatory behavior therapy services and parent counseling and training, as well as her request for an independent BIP at district expense. The parent notes that, during the impartial hearing, the district did not object to an award of compensatory behavior therapy but only objected to the number of hours that the parent sought and offered no objection to the parent's request for compensatory parent counseling and training. The parent also points out that the district failed to present any evidence regarding an alternative amount of compensatory behavioral therapy for the student.

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]). Indeed, an award ordered so blindly could ultimately do more harm than good for a student (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. 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"]).

The parent argues that her requests for behavior therapy and parent counseling and training services were supported by the testimony of the BCBA and the director from Manhattan Psychology Group. In considering the evidence, the IHO found that the BCBA and the director of Manhattan Psychology Group were interested parties and that the hearing record contradicted some of the director's testimony and the BCBA's evaluation results (see IHO Decision at pp. 13-17). This amounts to a credibility determination and, generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]).

Even putting aside the IHO's credibility findings, a review of the IHO's decision shows that he explained his discretionary award of compensatory SETSS and his decision to deny the parent's request for compensatory ABA, parent counseling and training services, and district funding of a BIP, citing evidence of the student's needs and describing the relative weight that he accorded the evidence in reaching this conclusion (see IHO Decision at pp. 12-17).

The source of the parent's request for 920 of compensatory ABA, 184 hours of compensatory parent counseling and training, and the BIP was the June 2021 independent ABA skills assessment and FBA completed by the BCBA from Manhattan Psychology Group (see Parent Exs. CC; DD). In addition to a document review (Parent Ex. CC at pp. 1-12), the June 2021 independent ABA skills assessment consisted of direct observation of the student in home and at school over three days and included an administration of the Verbal Behavior Milestones Assessment (VB-MAPP) and the Adaptive Behavior Assessment System-Third Edition (ABAS-III) (id. at pp. 12-13). According to the evaluation report, administration of the VB-MAPP yielded a score of 66 out of a possible 170, demonstrating that the student was "still an early learner, but . . . beginning to show some solid learning and language skills" (id. at p. 13). Administration of the ABAS-III yielded a general adaptive composite standard score of 49, which fell in the <0.1 percentile rank (id. at p. 19). The BCBA opined that the results of the evaluation demonstrated that the student was struggling and had not received "a fair or appropriate education" and that, "[a]s a result, his behaviors ha[d] been chronically mismanaged" (id. at pp. 22-23). The BCBA noted that the results of administrative of the VB-MAPP showed "major delays across domains, which severely exacerbate[d] his maladaptive behaviors" (id. at p. 23). The BCBA recommended that the student attend a specialized school with 1:1 support and oversight by a BCBA to collect data and implement a BIP and receive 10 hours per week of home-based ABA therapy and that the parent receive parent training (id. at pp. 23-25). As for compensatory education, the BCBA opined that the student should have been receiving 10 hours per week of behavior therapy "during the time FAPE was denied to him," totaling 920 hours over two years (id. at p. 25).

For the June 2021 independent FBA, the same BCBA who conducted the ABA skills assessment engaged in a document review, observed the student in the classroom on two occasions, and interviewed the parent and the student's teachers (Parent Ex. DD at pp. 1, 14). The BCBA indicated that the student's target behaviors included noncompliance (ignoring or refusing to follow directions), off-task behaviors, crying, and refusing to comply with requests (id. at pp. 12-13). The BCBA indicated that the behaviors were "mostly maintained by escape/avoidance, attention and automatic" (id. at pp. 13, 17). The BCBA described his observation of the student in a monolingual English language arts (ELA) class with a paraprofessional translating everything to him and reported the teacher's description that, although the student " obviously trie[d], . . . he [wa]s unable to read or write independently, and as the result, [would] become[] frustrated easily," putting his head down and crying (id. at p. 14). The teacher reported to the BCBA that "other than his frustration, which cause[d] emotional distress, and noncompliance related to his inability to keep up with pace of the class, no other maladaptive behaviors have been exhibited by [the student]" (id.). The BCBA described his next observation of the student in ELA class, noting that the student's continual need to use Google translate was causing him to fall behind his classmates (id. at p. 15). For math, according to the BCBA, the teacher reported that the student's greatest weakness was his tendency to get "easily frustrated" and emotional (id.). In terms of data collected, the BCBA reported that, during the observation period, the student engaged in noncompliance eight times in 30 minutes, response refusal 11 times in 30 minutes, and off-task behaviors 80% of

the time (id. at p. 16). The BCBA set forth in the FBA the same programmatic and compensatory education recommendations included in the ABA skills assessment (compare Parent Ex. DD at pp. 17-20, with Parent Ex. CC at pp. 23-26).

In weighing this evidence, the IHO summarized, by way of contrast, descriptions of the student's needs in the March 2020 neuropsychological IEE, highlighting that, according to the evaluation, the student exhibited good attention and perseverance on tasks, and, according to parental report, the ability to control and maintain his behavior, but demonstrated low receptive language skills, marked delays in reading and writing, and signs of an auditory processing disorder (see IHO Decision at pp. 12-13, citing Parent Ex. G). The IHO noted that the psychologist who conducted the March 2020 neuropsychological IEE recommended that the student receive 10 hours per week of SETSS to address reading difficulties and two hours to address math difficulties, as well as counseling (IHO Decision at pp. 13-14, 15; see Parent Ex. G at pp. 22-23). The IHO observed that the psychologist "did not use the term maladaptive behavior once in his thirty-one page report" (IHO Decision at p. 15). Next, the IHO summarized points from the June 2021 independent ABA skills assessment, noting observations of the BCBA that the student did not comply with first requests, characterizations of the student's need for redirection and repetition and noncompliance as due to maladaptive behaviors, and the limits of the standardized testing used by the BCBA (IHO Decision at p. 14, citing Parent Ex. CC). The IHO found that the assessment was problematic because it did not describe any reports of maladaptive behaviors from teachers or the parent "beyond a student who does not understand the English language sufficiently while sitting in a classroom where the entire learning process is in English" (IHO Decision at p. 14). In comparison to the ABA skills assessment, the IHO found no reports that the student engaged in maladaptive behaviors in any other documentation included in the hearing record and noted testimony of the parent that the student did not have behavior needs (id. at pp. 15-17). The IHO opined that "[a] student who may have an auditory processing disability[] may not have responded the first time when a request [wa]s made by the that BCBA evaluator" (id. at p. 15). The IHO further indicated that he did not agree that the student's expressions of frustration were maladaptive behaviors given the student's inability to complete work due to his limited English (id.). In sum, the IHO found that the BCBA's view of the student's need was "contradicted by all the other evidence presented" (id. at p. 16). Accordingly, the IHO denied the parent's request for compensatory ABA and parent counseling and training recommended by the BCBA and, instead, ordered 200 hours of compensatory SETSS with a bilingual reading specialist (id. at pp. 17, 19).

On appeal, the parent does not point to a convincing reason to depart from the IHO's determinations on these points. Other than citing the district's failure to present evidence during the impartial hearing and her disagreement with the IHO's credibility determination, the parent takes issue with the IHO's statement that there were no documents in the hearing record indicating that the student was supposed to receive 10 hours per week of behavioral therapy (see Parent Mem. of Law at p. 17; IHO Decision at p. 5). To counter this finding, the parent points to the recommendations of the BCBA who conducted the June 2021 independent ABA skills assessment and FBA (see Parent Mem. of Law at p. 17, citing Tr. p. 115; Parent Exs. CC at p. 24; DD at p. 18). However, the IHO was commenting on the BCBA's testimony that "[n]ormally, [the student] was supposed to receive ten hours per week behavioral therapy, which he ha[d]n't received in the past two years" (Tr. p. 115). The testimony does appear to reference some mandate for the student that predated the June 2021 independent assessments and the recommendations contained therein. Accordingly, the IHO did not err in noting the lack of other evidence reflecting such a mandate.

Ultimately, there is no dispute that the BCBA recommended that the student receive 920 hour of ABA representing 10 hours per week over two years (see Tr. p. 115; Parent Exs. CC at p. 24; DD at p. 18); however, the IHO found that the hearing record overall did not support an award of compensatory education based on these recommendations.

The parent also takes issue with the IHO's decision to the extent it relied on the March 2020 independent psychological evaluation over the June 2021 independent ABA skills assessment and FBA, arguing that the IHO should have accorded more weight to the more recent evaluations and taken into account the impact of remote learning on the student (see Parent Mem. of Law at p. 17; IHO Decision at p. 15). However, the March 2020 independent neuropsychological evaluation was a broader assessment of the student's needs and remained timely, having been conducted towards the latter part of the first year for which the district failed to offer the student a FAPE (see Parent Ex. Y). While the parent testified that the student received instruction and services remotely toward the end of the 2019-20 school year (see Tr. p. 179), there is no allegation in this matter that the remote delivery of instruction resulted in a loss of skill or caused a change in the student's behavioral needs, which is the area of need about which the IHO found the ABA skills assessment and FBA to report such a divergent view of the student. Moreover, the IHO relied on evidence other than the March 2020 independent neuropsychological evaluation. It was appropriate for the IHO to rely on the several sources of information about the student's needs in the hearing record and there is insufficient basis to modify his conclusions regarding the relative weight to accord the different descriptions of the student's needs.

Based on the foregoing, the parent has not pointed to a convincing reason to disturb the IHO's decision to deny her requests for compensatory ABA and parent counseling and training and district funding for an independent BIP.

2. Assistive Technology Training

The parent notes that the district did not dispute the parent's request for 50 hours of compensatory assistive technology training and only expressed disagreement with the rate. Therefore, the parent argues that the IHO arbitrarily ordered only 28 hours of assistive technology training services.

The May 2021 assistive technology IEE recommended 50 hours of assistive technology training "to ensure [the student's] confident access to the[] tools" recommended in the evaluation (Parent Ex. BB at p. 8). The evaluation report did not further explain the rationale for the number of hours recommended. Generally speaking, the IHO was not required to adopt the speech-language pathologist's recommendation. However, in this instance, the testimony of the speech-language pathologist who conducted the May 2020 assistive technology IEE was cut short due to a scheduling conflict, as described above (see Tr. p. 215). Had she returned, it was anticipated that she would testify regarding her evaluation and the recommendations therein (see Tr. pp. 215-16); thus, the speech-language pathologist may have further articulated her rationale for 50 hours of assistive technology training. In deciding not to re-call the witness to continue her testimony on another date, the parent likely relied upon the statement of the district's representative that the district did not object to the evaluator's recommendations (Tr. p. 216). To be sure, the IHO was not required to rely on the district's lack of objection in the face of contrary evidence in the hearing

record; however, here, there was nothing to rebut or call into question the recommendation for 50 hours of assistive technology training.

Thus, given the lack of contrary evidence, the district's apparent consent to the number of hours of compensatory assistive technology training recommended in the assistive technology IEE, and the circumstances surrounding the speech-language pathologist not continuing her testimony, the IHO abused his discretion in awarding 28 hours of compensatory assistive technology training, rather than the 50 hours requested by the parent.

3. Rates for Compensatory Education Services

The parent argues that her evidence regarding rates for compensatory services was uncontested and that the IHO erred in refusing to consider an agency's administrative costs in calculating an appropriate rate and in inappropriately relying on extrinsic evidence of rates. The parent also argues that the IHO inappropriately limited the parent's attorney's direct examination of the witnesses on the issue of rates.

Although the district argued during the impartial hearing that the rates proposed for delivery of the compensatory education services by the parent's preferred providers were not appropriate (Tr. p. 76), it did not dispute that it would be appropriate for the parent to select a private provider to deliver a compensatory award (as opposed to it being the district's responsibility to implement the award) or that any particular rate should apply. Indeed, if the district wished to argue that a particular rate should apply to the compensatory award, it was incumbent on the district to develop the hearing record as to a market rate. The district had ample opportunity to present alternative arguments on these points as the district was the party that carried the burden of production and persuasion at the impartial hearing (Educ. Law § 4404[1][c]; see M.M., 2017 WL 1194685, at *4 [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]). Here, the district failed to address its burdens, as required under the due process procedures set forth in New York State law, by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524). If the district disagreed with the rates proposed by the parent's preferred providers, it was incumbent on the district to come forward with evidence demonstrating that the rates were not reasonable.

Given the district's failure to meet its burden of production or persuasion on the issue of the providers' rates, the evidence introduced by the parent is unrebutted. According to a rate sheet included in the hearing record, Manhattan Psychology Group charged $300 per hour for ABA and parent counseling and training services, $250 per hour for SETSS by an ABA-trained teacher, $200 per hour of SETSS by a teacher certified in Orton-Gillingham, and $175 per hour for SETSS/tutoring (Parent Ex. W). The director from New York Therapy Placement testified that the agency would charge $300 per hour for delivery of ABA and parent counseling and training services to the student (Tr. p. 164). The director indicated that the providers who worked for the agency were "licensed . . . in whatever area they need[ed] to be licensed in" and had "three to five years of experience with the population" (Tr. p. 161).

A rate sheet included in the hearing record reflected that Rachel Bouvin Speech Services charged $250 per hour for speech-language therapy, OT, and assistive technology training services (Parent Ex. V). Another agency, Making Milestones, reportedly charged $210 per hour for 60-minute sessions of speech-language therapy and OT (Parent Ex. X). Similarly, the director of services at New York Therapy Placement testified that the agency oversaw the delivery of special education and related services to students and charged $210 per hour for OT and speech-language therapy services from providers who held State certifications and were Spanish speaking (Tr. pp. 145-46, 150).

The IHO declined to rely on the rate sheets because they were not signed or notarized (see IHO Decision at pp. 18, 19); however, the totality of the evidence, including the testimonial evidence in conjunction with the rate sheets, sufficiently describes a range of rates for the services sought by the parent and the district failed to offer any evidence of a different range of rates, let alone more reliable evidence.

In light of the fact that the district did not present any evidence to challenge or otherwise rebut the hourly rate requested by the parents, the IHO, nonetheless, limited the hourly rate awarded for the compensatory education services. With respect to assistive technology training, the IHO stated that the parent could obtain the compensatory services at a rate commensurate to providers "in the community, when an agency is not involved and the entire free goes to the related service provider," which the IHO indicated was $130 per hour (IHO Decision at pp. 19, 20). The IHO did not detail his rationale for the remaining rates but ordered SETSS with a reading specialist at a rate not to exceed $130 an hour and speech-language therapy and OT at a rate not to exceed $150 an hour (id. at pp. 19-20).

To the extent the IHO relied upon rates in the community when an agency is not involved, there was no evidence of such rates in the hearing record, so it appears that the IHO relied on his own knowledge and experience (i.e., judicial notice) (see IHO Decision at p. 19). Generally, an adjudicative fact may be judicially noticed when that fact "is not subject to reasonable dispute because it" is either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" (Fed. R. Evid. 201[a], [b][1]-[b][2]). While a court is empowered with the discretion to "take judicial notice on its own," a court "must take judicial notice if a party requests it and the court is supplied with the necessary information" (Fed. R. Evid. 201[c][1]-[2]). In addition, while a court "may take judicial notice at any stage of the proceeding," a party—upon request—must be provided with the opportunity to be heard "on the propriety of taking judicial notice and the nature of the fact to be noticed" (Fed. R. Evid. 201[d]-[e]). However, if a court "takes judicial notice before notifying a party, the party, on request, is still entitled to be heard" (Fed. R. Evid. 201[e]).

Here, the IHO's use of judicial notice to determine the hourly rate to be paid for compensatory education services offends several factors listed above, including that the IHO took judicial notice of an issue disputed in this matter: to wit, the hourly rate to be paid for compensatory education services. The IHO's use of judicial notice in this case also offends State regulation, which requires, in part, that an IHO's decision "shall be based solely upon the record of the proceeding before the [IHO]" (8 NYCRR 200.5[j][5][v]). The IHO is reminded that, while not prohibited, the use of judicial notice to establish facts in an impartial hearing cannot be used to sidestep a party's failure to present sufficient evidence or the failure to fully develop the hearing

record in order to reach a determination on a particular issue, as IHO's have the authority under State regulation to "ask questions of counsel or witnesses for the purpose of clarification or completeness of the [hearing] record" (8 NYCRR 200.5[j][3][vii]). Moreover, "[j]udicial notice is not to be extended to personal observations of the judge or juror" (Town of Nantucket v. Beinecke, 379 Mass. 345, 352 [1979] [internal citations omitted]). As a result, the hourly rate for compensatory education services cannot fall within the facts amenable to being judicially noticed because the rate is—and has been—subject to reasonable dispute and the rates for services, while perhaps falling within a predictable range, are not "generally known within the trial court's territorial jurisdiction" and must be determined on a case-by-case basis, which depends, in part, upon the student's needs.

Consequently, given that the IHO improperly relied upon facts outside the record to determine the hourly rates for compensatory education services and that the only evidence in the hearing record as to the hourly rate was produced by the parent, and this was evidence which the district made no effort whatsoever to dispute despite having the responsibility to carry the burden of production and persuasion, I must reverse the IHO's determination and the district is ordered to fund the student's compensatory education services at the rates evidenced by the parent during the impartial hearing.[9] Specifically, the district is ordered to pay for: 200 hours of compensatory SETSS with a reading specialist at a rate not to exceed $200 per hour;[10] 200 hours of compensatory speech-language therapy at a rate not to exceed $210 per hour; 140 hours of compensatory OT at a rate not to exceed $210 per hour; and 28 hours of assistive technology training at a rate not to exceed $250 per hour. This bank of compensatory education services should be utilized within four years.[11]

VII. Conclusion

Based on the foregoing, there is insufficient basis to modify the IHO's determinations to deny the parent's requests for compensatory behavioral therapy and parent counseling and training or the request for an independent BIP at district expense. However, the hearing record does not support the IHO's award of compensatory assistive technology training services or the maximum rates set by the IHO for the independent ABA skills assessment and FBA or the maximum hourly rates set by the IHO for the compensatory education services. The parent is awarded a bank of compensatory education services hours at specified maximum rates to be utilized within four years.

[9] Had there been any further evidence, it may well have been shown that the parents requested rates were excessive, but the matter cannot rest on the arbitrary predilections of an IHO alone.

[10] As the SETSS award was not pursued by the parents at the impartial hearing, the evidence is not as developed with regard to an appropriate rate; however, Manhattan Psychologist Group's rate sheet indicated that the agency charged $200 per hour for SETSS by a teacher certified in Orton-Gillingham and $175 per hour for SETSS/tutoring (Parent Ex. W). Based on this evidence, I will order $200 as the maximum rate.

[11] Although neither party requested a time limitation on the compensatory education award, this award is to make the student whole due to the district's failure to provide a FAPE for two years and an award related thereto should not exist into perpetuity; therefore, I will limit the time period in which the student is able to obtain these services to four years, which represents twice the timeframe during which the student was denied a FAPE.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated July 25, 2021, is modified by vacating those portions which awarded 28 hours of compensatory assistive technology training services, set maximum rates for the independent ABA skills assessment and FBA, and which set maximum hourly rates for the compensatory education services; and,

IT IS FURTHER ORDERED that the district is directed to fund up to 3,525 for the June 2021 independent ABA skills assessment and up to 3,525 for the June 2021 independent FBA;

IT IS FURTHER ORDERED that the district is directed to pay for 200 hours of compensatory SETSS by a bilingual reading specialist at a rate not to exceed $200 per hour;

IT IS FURTHER ORDERED that the district is directed to pay for 200 hours of compensatory speech-language therapy to be provided by bilingual provider at a rate not to exceed $210 per hour;

IT IS FURTHER ORDERED that the district is directed to pay for 140 hours of compensatory OT to be provided by a bilingual provider at a rate not to exceed $210 per hour;

IT IS FURTHER ORDERED that the district is directed to pay for 50 hours of compensatory assistive technology training services to be provided by a bilingual provider at a rate not to exceed $250 per hour.

IT IS FURTHER ORDERED that the awarded compensatory education services shall expire four years from the date of this decision if the student has not used them by such date.

Dated: **Albany, New York**
October 29, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER