



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 22-123

**Application of a STUDENT WITH A DISABILITY, by his parent, for a review of a determination of a hearing officer relating to the provision of educational services by the Saugerties Central School District**

### **Appearances:**

Lorraine McGrane, Esq., attorney for petitioner

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, by David H. Strong, 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 determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2020-21 and 2021-22 school years were appropriate and had been implemented by the district. The appeal must be sustained.

### **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 first received a diagnosis of "[a]utism spectrum disorder requiring very substantial support (level 3)" on or about September 9, 2019 (Dist. Ex. 10 at pp. 1, 2, 5). At that time, the student was five years old and "ha[d] never been to school nor received interventional services" (id. at p. 1).

For the 2019-20 school year (the student's kindergarten year), the student was enrolled in a different school district which convened a CSE meeting on November 15, 2019 and created an IEP for the student (Dist. Ex. 1; see Dist. Ex. 25). At the time of the November 2019 CSE meeting, the student was receiving homebound instruction (Dist. Ex. 1 at p. 1).

The original district's CSE recommended the student attend a 6:1+3 special class noting that "[c]lass size will be determined upon school" and receive related services of three 30-minute sessions per week of occupational therapy (OT), four 30-minute sessions per week of speech-language therapy, and one hour per month of parent counseling and training (Dist. Ex. 1 at p. 10). Additionally, a small bus or vehicle with an aide was recommended for special transportation (id. at p. 12). Although the November 2019 IEP included a recommendation for a special class, the IEP also indicated that the student's placement recommendation was for "[h]ome [i]nstruction" (id. at p. 13).

On or around October 13, 2020, the student transferred to the respondent school district (the district) (Dist. Exs. 6 at p. 1; 15 at p. 2). At the time of his transfer, the student was receiving home instruction pending an out-of-district placement by the original school district (Dist. Ex. 6 at p. 1; see Dist. Ex. 25).<sup>1</sup> On October 19, 2020, the district held a CSE meeting and created an IEP that adopted the present levels of performance and annual goals from the November 2019 IEP (compare Dist. Ex. 1 at pp. 3-9 with Dist. Ex. 2 at pp. 3-9). The October 2020 CSE recommended that the student attend an 8:1+2 special class as an alternative to home instruction, as he needed intensive, in-person support (Dist. Ex. 2 at pp. 1, 10; 6 at p. 1). Additionally, the CSE recommended a decrease in the student's related services to one 30-minute session per week of individual OT and one 30-minute session per week of individual speech/language therapy and added one 30-minute session per week of individual psychological counseling to the student's IEP (Dist. Ex. 2 at p. 10).<sup>2</sup> The October 2020 IEP included the same language from the November 2019 IEP noting that "[c]lass size will be determined upon school"; however, the October 2020 IEP identified the student's recommended placement as the home public school district (id. at p. 12).

In an October 2020 prior written notice, the district indicated that "referrals for [o]ut of district placement[s] to support [the student's] current level of need w[ould] be sent out" (Dist. Ex. 2 at p. 1). The district subsequently emailed fourteen referral packets to out-of-district placements; however, the student was not accepted at any of the placements to which the district applied (Dist. Exs. 16 at pp. 1-13, 20; 17 at pp. 1-10, 22; 18).<sup>3</sup>

On October 27, 2020, the student's mother brought the student to an elementary school within the district for an observation by a district special education teacher and school psychologist (Dist. Ex. 22 at pp. 1-2). Following the observation, district staff noted the student's tendency to

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<sup>1</sup> The district uses the term "home instruction" to refer to educational services provided by the district outside of the classroom setting; however, that term as used in State regulation for "parents who exercise their right to provide required instruction at home" rather than for instruction provided by a school district to students in a home, hospital, or institutional setting other than a school, which is referred to in State regulation as "homebound instruction" (see 8 NYCRR 100.10, 100.22, 175.21[a], 200.6[i]).

<sup>2</sup> The district CSE removed the recommendations from the prior school for parent counseling and training and special transportation services (Dist. Ex. 2 at pp. 10, 12).

<sup>3</sup> The referral tracking sheet indicated that the reasons for rejection were "program full," "not appropriate," and "parent rejected" (Dist. Ex. 18 at p. 1). Several programs did not respond (id.).

elope and determined that the classroom placement was not appropriate for the student (id. at pp. 4-5).

By email dated October 29, 2020, the district director of special education (director) advised the parent that all the district could offer the student at that time was remote learning while she sought an outside placement that could best meet the student's needs (Dist. Ex. 24 pp. 1-3). In response, the parent inquired as to what accommodations could be made, as she had already informed the district that the student did not have the skills to interact via computer (id. at p. 2). The director replied that the district was not offering any in-person instruction or therapies at home during the pandemic and explained that any supports offered to the student would be virtual with a device (id.). The parent asked whether there were any options applicable to her son and the director indicated that she would continue to explore out-of-district placements for the student (id.).<sup>4</sup>

At the parent's request, in March, 2021, the district arranged for the student to receive related services, of speech-language and OT, at a public school (Dist. Ex. 22 at pp. 8-9,12; see Parent Ex. M at p. 8).

A CSE convened on April 6, 2021 for a program review and to amend the student's IEP to reflect that he had been accepted to an out-of-district placement (see Dist. Exs. 3; 7). The CSE recommended that the student attend a 6:1+3 special class and receive related services of three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of individual counseling services (Dist. Ex. 3 at pp. 10).<sup>5</sup> The need for extended school year services was deferred pending review and special transportation services were not recommended (Dist. Ex. 3 at pp. 11-12). The April 6, 2021 IEP identified the student's placement as an approved private day school (id. at p. 12). The meeting information summary identified the out-of-district placement the student was assigned to attend and indicated the student was expected to start on April 15, 2021 (Dist. Ex. 7 at p. 1). Following the April 6, 2021 CSE meeting, in order to address the parent's concerns, the parent and district arranged for the parent to tour the out-of-district placement on April 14, 2021 before the student's expected April 15, 2021 start date (Dist. Ex. 24 at pp. 20-27). In an April 13, 2021 email to the district director of special education and the vice principal at the out-of-district placement, the parent laid out her concerns in writing; she indicated that she had previously visited the school in March and expressed concern that the student was not going to be placed in the class that she had previously visited and that the class the student would attend only had two aides (id. at pp. 28-30, 32-35). Email correspondence between the parent and the director indicated that the parent

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<sup>4</sup> On or about December 8, 2020, a confidential informant contacted the Office of Children and Family Services (OCFS) and reported the parent for educational neglect (Parent Ex. M at p. 5). According to documentation from OCFS, a caseworker made contact with the family and the parent reported that the district was unable to provide an adequate school plan for the student and the student was unable to participate in remote instruction (id. at p. 6).

<sup>5</sup> Although the April 2021 IEP included a recommendation for a 6:1+3 special class and the meeting information summary identified the school the student would be attending, the IEP continued to include language stating that the class size would be "determined upon school" (Dist. Exs. 3 at p. 10; 7 at p. 1).

met with staff at the out-of-district placement but the parent felt the staff did not have solutions to her questions (id. at p. 31).

On April 15, 2021, the district was notified that the student's acceptance at the out-of-district placement was rescinded because the program could not meet the student's needs (Dist. Ex. 8 at p. 1).

The CSE reconvened on April 19, 2021 to discuss additional out-of-district placement options and the student's then-current placement (Dist. Ex. 8 at p. 1). The CSE modified the student's IEP and recommended that he attend a 1:1 60-minute special class daily and receive three 30-minute sessions per week of individual OT, five 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of individual counseling services, and one 60-minute session per month of parent counseling and training (Dist. Ex. 4 at p. 10). The services were to be implemented beginning on April 19, 2021 (id. at pp. 1, 10). The IEP identified the student's placement recommendation as home instruction (id. at p. 12).<sup>6,7</sup>

In May of 2021, the student returned to the district's special education classroom to receive instruction and services (Dist. Ex. 24 pp. 42-44). The student received some 1:1 instruction, speech-language therapy and OT services between the months of May and June 2021 (id. at pp. 47-48). The district emailed staff and the parent on July 2, 2021 requesting that staff reach out to the parent to schedule related services and home instruction pursuant to the student's IEP needs (id. at p. 53).<sup>8</sup>

In a prior written notice dated August 10, 2021, the district indicated that, at parent request, the student's IEP had been amended without a CSE meeting in that individual counseling was removed as a related service (Dist. Ex. 19). On September 9, 2021, the parent and her advocate met with district representatives to discuss the start of the student's 2021-22 school year (Parent Ex. T at pp. 1-3).

On September 10, 2021, the district mailed out referrals to four out-of-district placements (Dist. Exs. 18 at p. 1; 24 at p. 65). Also on September 10, 2021, the district mailed the parent a prior written notice in which it proposed to conduct an assessment of the student's adaptive behavior along with a request for the parent's written consent to conduct the evaluation (Dist. Ex. 20).

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<sup>6</sup> The district offered to hire a tutor to provide services to the student after school hours, but the parent declined, stating that she and the student were not available after school (Tr. pp. 177-79).

<sup>7</sup> There are two prior written notices for the April 19, 2021 CSE meeting (Dist. Exs. 4; 5). The first prior written notice does not specify a time period for the recommended special education services to be delivered, however, the IEP submitted with the prior written notice includes a projected start date of April 19, 2021 (Dist. Ex. 1 at pp. 2, 10). The second prior written notice indicates that the special education services were being recommended for the 2021-22 school year and the IEP included a projected start date of September 8, 2021 for the 1:1 special class and September 20, 2021 for related services (Dist. Ex. 5 at pp. 1, 10).

<sup>8</sup> The email indicated that the parent did not want parent counseling and training or individual counseling for the student, as was recommended in his IEP (Dist. Ex. 24 at p. 53).

On October 12, 2021, the parent mailed the district a letter requesting an independent educational evaluation (IEE) because she disagreed with the evaluation the district was using to develop the student's educational program (Parent Ex. K at p. 1).<sup>9</sup> The parent did not indicate the specific type of IEE that she was requesting, but rather stated that she was "looking to obtain a valid and reliable evaluation that [wa]s needed to plan [her] child's educational program" (id.).

By prior written notice dated October 25, 2021, the district proposed to conduct a reevaluation of the student consisting of a neuropsychological evaluation, OT testing, speech-language testing, and a social history (Dist. Ex. 21 at p. 1).<sup>10</sup> Included with the prior written notice was a request for the parent's written consent to conduct the reevaluation (id. at p. 3).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated January 5, 2022, the parent alleged that the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years (see Parent Ex. J).

The parent alleged that from the date that the student was enrolled in the district, the district failed to implement the student's IEPs and therefore the district denied the student a FAPE (Parent Ex. J at p. 11). The parent further alleged that the CSE placed the student in the most restrictive placement, home-based instruction, without undergoing a least restrictive environment (LRE) analysis or conducting proper evaluations of the student (id. at pp. 10-11).

In connection to the 2020-21 school year, the parent claimed that during the October 2020 CSE meeting, the district used the November 2019 IEP from the student's former district to craft the student's October 2020 IEP and did not change any of the student's present levels of performance from the earlier IEP (Parent Ex. J at p. 3). The parent further alleged that the CSE increased the student's class size to 8:1+2, decreased the student's related services, eliminated parent counseling and training, determined that the student did not need special transportation accommodations, and delayed the decision regarding an extended school year for the student (id.).

According to the parent, during the October 2020 CSE meeting she requested that the district evaluate her son and but the director "told her no" (Parent Ex. J at p. 4). The parent claimed that she informed the district during the October 2020 CSE meeting that the student was unable to participate in virtual learning because of his diagnosis of autism and had special transportation needs (id.).

The parent then summarized the events surrounding the district's attempt to place the student in an 8:1+3 special class in the district (Parent Ex. J at pp. 4-6). According to the parent, the classroom teacher had attended the October 2020 CSE meeting and shared her concerns that the class would not be safe for the student (id. at p. 4). The parent asserted that, on October 27,

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<sup>9</sup> The parent, in a different letter dated October 12, 2021, requested a copy of the student's educational records (Parent Ex. K at p. 2).

<sup>10</sup> Email correspondence between the director and the parent from October 19, 2021 through November 23, 2021 shows that the district responded to the parent's request for an IEE, but believed that an IEE was not permissible because the district had not yet evaluated the student; instead, the district proposed that it be allowed to conduct a reevaluation of the student (Dist. Ex 24 at pp. 79-93).

2020, she took the student to the district public school but did not see any safety accommodations or an educational plan for the student (*id.* At p. 5). The parent asserted that, on October 27, 2020 and October 29, 2020, she emailed the district to request how to proceed with the classroom plan and that the district emailed her back informing her that the district was only offering the student remote learning (*id.* at pp. 5-6). The parent contended that on October 30, 2020, the district informed her that home instruction was the only option available to the student pending placement in an out-of-district school (*id.* at p. 6). According to the parent, the district was aware that the student could not handle remote learning and that by only offering remote learning, the district was offering an inappropriate program (*id.* at p. 6).

Turning to the April 6, 2021 CSE meeting, the parent claimed that the April 6, 2021 IEP had identical goals and present levels of performance to the November 2019 IEP (Parent Ex. J at p. 7). The parent asserted that the CSE changed the student's special class size from 8:1+2 to 6:1+3 and increased the student's speech-language and OT services (*id.*). However, the parent stated that another CSE meeting was held on April 19, 2021, which resulted in an IEP that changed the student's placement recommendation to home instruction for one hour a day but kept the identical present levels of performance and goals from the last two IEPs and the out-of-district kindergarten IEP (*id.*). The parent alleged that the district's prior written notice was silent as to the change in placement for the 2020-21 school year (*id.* at p. 8). According to the parent, after the April 19, 2021 CSE meeting, the district mailed placement packets to four state-approved schools, but none accepted the student (*id.*).

The parent asserted that the student's entire education for the 2020-21 school year consisted of one 45-minute session per week of joint OT and speech-language therapy from March 18, 2021 through June 10, 2021 and three 45-minute sessions with a classroom teacher (Parent Ex. J at p. 8).

The parent asserted that the district did not provide a summer school placement for the student and that in August 2021, the parent's advocate repeatedly asked the district why the student could not attend a public school in the district with a 1:1 aide, but the district never responded with an answer (Parent Ex. J at pp. 6, 8).

According to the parent, for the 2021-22 school year, the student did not have a placement and was not receiving services (Parent Ex. J at p. 8). The parent alleged that the district sent out a packet to a State-approved school at the parent's request in the fall of 2021, but that the student was not accepted for safety reasons (*id.*). The parent claimed that she requested an IEE on October 12, 2021, but that, as of January 5, 2022, the student did not receive his IEE (*id.*).<sup>11</sup> Finally, the parent alleged that she requested all of the student's school records, but the district had not fully complied with her request (*id.*).

For relief, the parent requested a finding that the student was denied a FAPE for the 2020-21 and 2021-22 school years; that the district be directed to provide the student with an appropriate IEP in the student's LRE; a proper interim placement while the district creates and implements an

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<sup>11</sup> Subsequent to the due process complaint notice being filed, on January 7, 2022 and January 12, 2022, the student was evaluated by an independent evaluator which resulted in a report of an independent educational neuropsychological evaluation dated January 25, 2022 (*see* Parent Ex. I).

appropriate IEP for the student; reimbursement for any services the parent assembled for the student; that the district be directed to develop and implement a school reentry plan for the student; that the student be recommended for an out-of-district placement in an approved or nonapproved school appropriate for the student; that the district pay for school match services if the district is unable to locate an appropriate program for the student; compensatory educational services; district staff training; and district funding for parent counseling and training by a provider of the parent's choosing (Parent Ex. J at pp. 13-14).

## **B. Impartial Hearing Officer Decision**

An impartial hearing convened on March 2, 2022, and concluded on July 21, 2022, after nine days of proceedings (see Tr. pp. 1-787). In a decision dated August 15, 2022, the IHO found that the district provided the student with a FAPE for the 2020-21 and the 2021-22 school years, that the district did not fail to comprehensively evaluate the student, that the record supported the district's claim "that the student[']s[] needs were too great to be placed within the classroom even with a 1:1 aide," that the present levels of performance used in the district's three IEPs were appropriate; that the parent had meaningful input in the development of the student's educational program; that the district's contention that it was premature to conduct a functional behavioral assessment (FBA) and implement a behavioral intervention plan (BIP) was correct; that the hearing record supports the district's assertion that it attempted to implement an IEP, but its attempts were undermined by the parent, and that equitable considerations did not favor the parent (see IHO Decision at pp. 11-24).

With respect to the parent's allegation that the district failed to provide a FAPE for the 2020-21 and the 2021-22 school years, the IHO noted that the school years in question were during the COVID-19 pandemic and that the "District was not open on a full-time basis and due to the pandemic was not sending providers into homes" (IHO decision at p. 11). The IHO reiterated that the "[r]ecord support[ed] that the student[']s level of need was too great to be placed within a District class even with a 1:1 aide" (*id.*). Furthermore, the IHO found that "there [wa]s ample evidence to support the student being rejected from certain programs due to the Parent not following through for intake due to her belief the program was too far" (*id.*). The IHO determined that the district provided a FAPE for the years in question and noted that it was the parent who "thwarted" the district's attempts to provide instruction and related services to the student (*id.* at p. 12).

Turning to the parent's allegation that the district failed to provide a placement in the LRE, the IHO repeated that "[t]he Record support[ed] the District[']s belief that the student[']s[] needs were too great to be placed within [the assigned] classroom even with a 1:1 aide" (IHO Decision at p. 12). Addressing the district's claim that certain services were unavailable because of the COVID-19 pandemic, the IHO noted "the reduction in Speech and Language and OT to once a week due to 'staffing' issues although not appropriate d[id] not rise to a denial of FAPE" (*id.* at p. 16).

In response to the parent's allegation that the district failed to comprehensively evaluate the student, the IHO determined that the district's evaluative data was appropriate because the IHO believed the district's evaluative data was "an accurate description of the students' abilities" (IHO



Decision at p. 13). The IHO reviewed the January 25, 2022 IEE and found that it "yield[ed] similar findings to the [2019] evaluations" (id. at p. 14).

With respect to the parent's allegation that the continuous use of the present levels of performance written by the student's former district for his kindergarten year during his first grade and second grade years deprived the student of a FAPE, the IHO found that the present levels of performance in the district's IEPs were appropriate (IHO Decision at p. 18). This finding was based on a district teacher's testimony and the January 25, 2022 IEE report (id.). In regard to whether the district failed to conduct an FBA and develop a BIP for the student, the IHO determined that the student's risk of elopement was well established (IHO Decision at p. 19). However, the IHO concurred with the district "that it was premature to conduct an FBA and implement a BIP prior to the student being placed in an out of district program" and that the district had not had the opportunity to gather enough data to create a behavioral program (id. at p. 20).

The IHO found that the parent was not denied meaningful input (IHO Decision at pp. 18-19). In making this finding, the IHO noted references included in the IEPs as to parental input, the parent's testimony that she shared her concerns regarding evaluations, and the volume of emails between the parent and the district (id. at p. 18).

Addressing the parent's allegation that the district failed to implement the IEPs created for the 2020-21 and 2021-22 school years, the IHO noted that the COVID-19 pandemic prevented the district from offering the student anything other than remote instruction and that the pandemic further prevented the district from sending providers into the homes of students (IHO Decision at p. 20). The IHO focused on the efforts made by the district to secure an out-of-district placement for the student and determined that the parent refused training on how to deliver remote learning to the student, refused home instruction services, and failed to sign a consent to evaluate form (id. at pp. 20-21).

Although the IHO found that the district offered the student a FAPE, the IHO went on to address equitable considerations and determined that they did not support the parent (IHO Decision at p. 21). The IHO then reviewed the testimony regarding the April 14, 2021 out-of-district placement visit and an "AngelSense" device (id. at pp. 22-23). The IHO found the director's testimony that the school rescinded its acceptance of the student because the parent "was asked to disable the listening/recording portion of the device and she refused to do so" more logical than the parent's testimony that she only offered to make the teacher "feel more comfortable" by offering the device and that it was not a problem not sending it with the student (id. at pp. 22-23). In addition, the IHO considered the parent's failure to comply with intakes for multiple schools that she thought were too far for the student to travel, despite the district's offer to have someone accompany the student to and from school "[a]lthough this offer was not in the students' IEP's" (id. at pp. 23-24). The IHO credited the testimony of the director, that many of the programs the parent refused intake interviews for were within 30 minutes, or 10-15 further, from the student's home (id. at p. 22). The IHO noted that there were many inconsistencies with the parent's testimony with respect to the "AngelSense" device as well as with the information she provided to the neuropsychologist regarding the student's elopement (id. at p. 24). Furthermore, the IHO noted that the parent should have signed consent for a reevaluation and failed to do so (id. at p. 24). Ultimately, the IHO determined that the record "support[ed] the Parent's actions as being uncooperative" (id.).

#### IV. Appeal for State-Level Review

The parent appeals raising nine enumerated issues for review. The parent asserts that:

1. The IHO erred in finding the district provided the student with a FAPE for the 2020-21 and the 2021-22 school years;
2. The IHO erroneously found that the district was not required to write updated present levels of performance and that the IHO was incorrect in determining that the student's annual goals and objectives in the student's 2020 and 2021 IEPs were reasonably calculated;
3. The IHO wrongly determined that the district placed the student in the least restrictive environment (LRE);
4. The IHO erred in finding that the district comprehensively evaluated the student;
5. The IHO was incorrect in determining that the district did not have to conduct an FBA and develop a BIP for the student;
6. The IHO incorrectly found that the district implemented the student's 2020-2021 and 2021-22 IEPs;
7. The IHO erroneously decided that the student's parent was afforded meaningful participation;
8. The IHO wrongly decided that equitable considerations weighed in favor of the district; and
9. The IHO erred in finding the student was not entitled to compensatory education because the student's education and related services did not occur due to the COVID-19 pandemic.<sup>12</sup>

For relief, the parent requests an IEP in the student's LRE and compensatory education for the denial of FAPE for the 2020-21 and 2021-22 school years. More particularly, the parent requests one year of a post-high school program after the student's graduation or after the student reaches the age of 21, 55 hours of speech and language therapy, 22 hours of OT, and 110 hours of special education tutoring. Additionally, the parent requests training for the district staff to work with children with autism, parent training and counseling, and attorney's fees and expenses.

In its answer, the district responds to the parent's material allegations with admissions and denials. The district contends that the IHO's decision should be upheld in its entirety. The district argues that the IHO correctly ruled that: the district did not fail to comprehensively evaluate the student; that the district used appropriate present levels of performance and annual goals; that the district adhered to LRE requirements; that the parent was not denied meaningful input; that the

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<sup>12</sup> The parent's arguments were developed further in the parent's memorandum of law. The parent addresses each of the nine claims in the memorandum of law.

district was not required to conduct an FBA; and that there was no failure to implement the IEPs at issue. Additionally, the district requests that even if it is found that the district denied the student a FAPE, the parent should not be awarded any relief because she allegedly failed to produce any evidence regarding the need for compensatory services and because equitable considerations do not favor the parent.

## 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" (Andrew 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 Andrew 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]).<sup>13</sup>

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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<sup>13</sup> 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" (Andrew F., 137 S. Ct. at 1000).

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

## **VI. Discussion**

As noted above, the IHO found that the district offered the student a FAPE for the 2020-21 and 2021-22 school years, making specific findings related to parent participation, the sufficiency of the evaluative information available to the district, that there was not a need for an FBA or a BIP, and that the district attempted to implement the student's educational program, but the parent was not cooperative (IHO Decision at pp. 11-21). In her request for review, the parent raises general objections to the IHO's findings on these points. However, as the parent's objections are not specific enough to directly address the IHO's findings, a review of the student's programming will be made as to the October 2020 IEP and the April 2021 IEPs as well as a review of the district's attempts to implement those IEPs.

### **A. October 19, 2020 IEP**

The student transferred to the district on or around October 13, 2020 from another school district in the State (Dist. Exs. 6 at p. 1; 15 at p. 2). When the student transferred into the district, the student had an IEP from the prior school district, which recommended that the student attend a 6:1+3 special class noting that "[c]lass size will be determined upon school" and that the student receive three 30-minute sessions per week of OT, four 30-minute sessions per week of speech-language therapy, and one hour per month of parent counseling and training (Dist. Ex. 1 at p. 10). Additionally, a small bus or vehicle with an aide was recommended for special transportation (id. at p. 12).

The district then convened a CSE in October 2020 and in an October 2020 IEP recommended that the student receive instruction in an 8:1+2 special class with a notation that "[c]lass size will be determined upon school," that was to be delivered daily beginning on October 19, 2020, along with one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of individual OT, and one 30-minute session per week of individual counseling services (Dist. Ex. 2 at p. 10). According to the October 2020 IEP, the CSE considered the parent's report (as of the date of the CSE meeting) and the prior school's IEP (id. at p. 3).

As an initial matter, both the IEP from the prior school district and the October 2020 IEP noted that "[c]lass size will be determined upon school" (Dist. Exs. 1 at p. 10; 2 at p. 10); the district director of special education testified that although the 8:1+2 special class was the CSE's recommendation at the time, the notation was included because when referring a student out for a placement, the out-of-district placements may have different class sizes depending on how the programs are run (Tr. p. 108). The district's director of special education also testified that in conversation at the October 2020 CSE meeting the student was recommended for home instruction while out-of-district referrals were being made (Tr. pp. 211-12). The director testified that the reason the student was recommended for an out-of-district placement was because there was no program for him to attend in-district (Tr. p. 212). However, it is not clear from the October 2020 IEP itself that the student was being referred for an out-of-district placement (see Dist. Ex. 2). In fact, while the October 2020 CSE meeting information summary indicated that the CSE would be seeking an out-of-district placement for the student, the October 2020 prior written notice omitted

that recommendation (Dist. Exs. 2 at p. 1; 6 at p. 1). In addition, the October 2020 IEP itself specifically indicated that the student's placement was his home public school district (Dist. Ex. 2 at p. 12).

The district director of special education also testified that the district's decision in October 2020 to reduce the frequency of the student's speech-language therapy and OT to one session per week was appropriate because the district was struggling to hire staff at that time (Tr. pp. 218-19). She noted that the district was going to increase the student's therapy "once we were able to provide services to the student and had more staff to provide the service" (Tr. pp. 218-19, 258-59). In an email dated September 10, 2021, the director informed the parent "[a]s we discussed yesterday, we do not have staff immediately available to provide services. I am working with staff to see if there is room in their schedule to provide a modified day for [the student]" (Dist. Ex. 24 at p. 66).

In an October 21, 2020 email addressed to the district school psychologist speech-language pathologist, and special education teacher of the primary autism class, the director of special education indicated that the student would have to remain on home instruction until she could find a program that would meet the student's needs and that had an opening (Dist. Ex. 22 at p. 1; see Tr. pp. 113, 213-14). She asked staff if their "offer still st[ood] and if they could bring the student in for some in-person learning at the elementary school (id.). The district's special education teacher replied that she did "not have students in the classroom Tues[day] or Friday which then I was thinking this student could attend" and asked "would it be possible to have this student begin coming in just mornings or afternoons on Tues/Friday until we have a better idea on his management needs?" (id. at pp. 1-2). The district's school psychologist replied, "if in-person at [the district school] is offered, it should begin as just a trial one morning or afternoon, to see if he can be kept safe in this environment" (id. at p. 2). The district scheduled for the student and the parent to come into the school on October 27, 2020 for an hour-long classroom session with the special education teacher (id.). The director of special education testified that the purpose of the student's visit was to garner information to provide to a home tutor (should they move forward with that recommendation), to gain more information on his functioning levels, and to see how he functioned in a classroom setting and to acclimate him to the school building (Tr. pp. 114-16).

According to the hearing record, the student visited the district school on October 27, 2020 (Tr. p. 307; Dist. Ex. 23 at pp. 1-2). Initially, the special education teacher had indicated that she did not feel her classroom was appropriate for the student due to his inability to engage in remote learning, safety concerns and the lack of a bathroom in the classroom (Tr. pp. 309-10). She explained that the district was using a hybrid model at that time where the students attended in person two days per week and participated in remote learning for the other three days (Tr. p. 308). The day the student attended was a remote learning day and there were no other students in the classroom (Tr. p. 307). The teacher reported that the student seemed excited to be in the classroom and quickly moved from one activity to another "led by his interests" (Tr. p. 308). She further reported that the student appeared to have limited language, attempted to sit on the windowsill, and "made many attempts to try to get out of the classroom" (Tr. pp. 308, 339). She stated that the student "definitely was exploring the classroom" and described the exploration as "student-led" (Tr. pp. 308-09). The teacher characterized the October 2020 meeting as "just a general observational meeting, again, student-led to do some baselining, building that rapport between him and myself" (Tr. p. 319). The teacher testified that in order to be in the classroom, the student required more support such as a 1:1 aide due to elopement risks (Tr. pp. 343-44).

Following the student attending the district public school on October 27, 2020, the district's director of special education emailed the special education staff indicating that the student was "not appropriate at the present time for placement in [the special education teacher's] classroom... If mom is willing to bring him in for related services, are you open to this?" (Dist. Ex. 22 at p. 4). The district's licensed clinical social worker replied on November 2, 2020 "Yes, of course I will meet with him" (*id.*). While, on November 3, 2020, the district's speech-language pathologist emailed "I'm hesitant to offer to provide services if his mom brings him in because I don't know how successful it will be" (*id.* at pp. 4-5). She continued, "[b]ased on his needs, coming in on a weekly basis for a 30-minute session just doesn't seem like it would be enough for him and progress would be minimal" (*id.*). She further suggested that "[t]herapy would look more like behavior management and trying to stay in the room to establish joint attention than traditional school-based speech therapy" (*id.*). The district's speech-language pathologist testified that she did not provide any of the services requested in the October 21, 2020 email, although she did provide some services in the spring of 2021 (Tr. p. 372).

On October 27, 2020, the parent emailed the director and explained that she understood why the teacher's class was not a good fit for the student and agreed that the "safety issue with him and running out is a big problem" and requested to know what the next steps were in finding him an appropriate placement (Dist. Ex. 24 at p. 1). According to an October 29, 2020 email from the director of special education to the parent, the only program the district could offer the student was remote learning while the district sought an out-of-district placement for the student (*id.*). The parent responded and seemed open to the idea at first, asking what accommodations could be provided to the student as the student did not "have the skills to interact through a computer" (*id.* at p. 2). The director responded by clarifying that the district was "not offering any in person instruction or therapies during the pandemic" (*id.*). After a few further responses, the parent expressed her concern that "it was "hard for [her] to understand how it is okay, to just say there's no option for [the student] because he's so disabled" (*id.* at pp. 2-3).

Other than the 30-40 minutes of instruction the student received in October, 2020, the only other services the student received as part of the October 2020 IEP were a few sessions of related services provided beginning on March 18, 2021.

With respect to special education services the student received during the 2020-21 school year, the parent reported that the student attended two or three sessions with the occupational therapist and speech-language pathologist between October 20, 2020 and April 15, 2021 (Tr. p. 611-12). However, the parent indicated that there was no safety plan in place for the student's elopement and safety concerns so she was asked to stay with the student during the sessions (Tr. pp. 612-14). According to the parent, a day or two after the October 2020 CSE meeting the director contacted her and told her that the student was going to be enrolled in the district classroom she had visited with the student (Tr. pp. 617-18). When she reminded the director that the teacher had said that the student was not a good fit for her class, the director responded that it was the "only option [she] h[ad]" and assured the parent that there would be a safety plan in place by the time the student started school (Tr. pp. 618-19). A safety plan was not developed to address the student's behaviors during the student's October 2020 visit (Tr. pp. 619-22). There is no evidence in the hearing record indicating that a safety plan was developed for any of the sessions the student attended between October 2020 and April 2021.

On March 18, 2021, the student attended a joint speech-language and OT therapy session at an in-district classroom without any other students present for approximately 45 minutes (Tr. pp. 356-59; Dist. Ex. 24 at p. 15). According to the occupational therapist, she first met the student at a March 2021 meeting (Tr. pp. 558-59). She explained that she and the speech-language pathologist provided cotreatment sessions by providing sensory activities along with language and speech activities (Tr. p. 558-59). She explained that the student was a "sensory seeker" and had difficulty attending to tasks and following directions (Tr. p. 560). She further explained that "[b]ased on the very little bit I saw of needs in the area of fine motor and visual motor skills" he demonstrated needs in all of the underlying skills he needed to be a successful student (*id.*). The district speech language pathologist testified that she and the district occupational therapist met with the student on March 18, 2021 (Tr. pp. 356-57, 559-61; *see* Tr. pp. 353, 557-58). She described that the parent had expressed safety concerns regarding the student's elopement, so the meeting was held in the OT room, with the occupational therapist also present (Tr. pp. 357-58; *see* Tr. p. 174). The speech-language pathologist described the student as "very sweet, very gentle, curious" and noted that he explored the environment and the room, and that they "got to know him a little bit" (Tr. p. 357). She further explained that this meeting was "just to get to know each other" therefore it was mostly child-led and allowed them to see what he was drawn to (Tr. pp. 358-59). According to the hearing record, the joint OT and speech-language therapy sessions continued once a week for approximately 45 minutes for approximately a total of five or six additional sessions (Tr. p. 359; Dist. Ex. 24 at p. 15).

Based on the above, the district failed to implement material and substantial aspects of the October 2020 IEP.

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; *see* 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (*Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 at 349 [5th Cir. 2000]; *see also Fisher v. Stafford Township Bd. of Educ.*, 2008 WL 3523992, at \*3 [3d Cir. Aug. 14, 2008]; *Couture v. Bd. of Educ. of Albuquerque Pub. Schs.*, 535 F.3d 1243 [10th Cir. 2008]; *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (*A.P. v. Woodstock Bd. of Educ.*, 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; *see Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; *see also Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

Although the student had been receiving home instruction prior to transferring to the district, the October 2020 CSE recommended that the student attend an 8:1+2 special class in the



district's elementary school, as an alternative to home instruction, because he required intensive in-person support (Dist. Ex. 6 at p. 1). Additionally, although there is some support in the hearing record for the district's position that the student's needs may have been too great for him to be successful in the district's 8:1+2 special class, as determined by the IHO (IHO Decision at p. 11), the appropriate course of action would have been to reconvene the CSE to address those concerns or get the parent to agree to a change in the student's programming (see 8 NYCRR 200.4[g][2]), rather than unilaterally change the program recommendation from an 8:1+2 special class to home instruction.

The record reflects that the student only attended an in-district special classroom one day (October 27, 2020), for 30-40 minutes when the rest of the students in the class were not in attendance (Tr. pp. 112-16). The director reported that the student's visit served a few purposes (Tr. p. 115). She indicated that "first and foremost" since the district would be offering home instruction it allowed the student to be "attached to a classroom" and for the special class teacher to provide the home tutor with information regarding instruction, should the district move forward with the home instruction agreement with the parent (Tr. p. 115). In addition, it allowed the district to get a feel for the student's functional levels, who he was as a student, and how he functioned in a classroom setting (Tr. p. 115). However, the director acknowledged that any determination to place the student on home instruction was not included in the October 2020 IEP (Tr. p. 212). Accordingly, the hearing record supports finding that the student did not receive his recommended educational programming or the related services identified in the October 2020 IEP. Additionally, to the extent that the district contends that it offered the student remote programming, this offer was premised on a recommendation for home instruction as the district was operating the recommended 8:1+2 special class in-person at the district public school on at least a part-time basis.

The district's failure to place the student in the recommended special class with related services was a material deviation from the October 2020 IEP and the district's failure to implement the October 2020 IEP as written constitutes a denial of FAPE.

#### **B. April 6, 2021 & April 19, 2021 IEPs**

As the student was denied a FAPE due to the failure to implement the October 2020 IEP, the question next turns to whether the district offered the student a FAPE when the CSE reconvened two times in April 2021.

Beginning on October 20, 2020, the district sent out referral packets to approximately 13 out-of-district programs, none of which accepted the student into their program (Tr. pp. 131-32; Dist. Exs. 16-18). Several of the out-of-district placements indicated that they did not have an appropriate program for the student at that time (Tr. pp. 134-35, 143; Dist. Exs. 17 at pp. 1, 3; 18 at p. 1). The director of special education testified that one program indicated the student's level of need with regard to his cognitive, academic, speech and language, and ADL abilities was too severe for their program (Tr. p. 236).

The April 2021 CSE recommended that the student attend a 6:1+3 special class beginning on April 15, 2021 at an approved day-school where the student was accepted ( Dist. Ex. 3 at pp. 1, 10, 12). In addition to the special class, the CSE recommended that the student receive three 30-minute sessions per week of individual OT; three 30-minute sessions per week of individual

speech-language therapy; and one 30-minute session per week of individual counseling services (Dist. Ex. 3 at p. 10).<sup>14</sup> The student's present levels of performance and annual goals remained the same as in his prior IEPs, developed in 2019 and October 2020 (*id.* at pp. 3-9; see also Dist. Exs. 1 at pp. 3-9; 2 at pp. 3-9).

On April 14, 2021, the student and the parent toured the out-of-district placement in anticipation of the student's April 15, 2021 start date (Tr. pp. 163-69, 646-51, 719-24). It is uncontroverted that the out-of-district placement rescinded their acceptance of the student on April 15, 2021. The district reported that the reason given by the out-of-district school for rescinding the student's placement was because the school could not meet his needs (Dist. Ex. 8 at p. 1).<sup>15</sup> As a result of the out-of-district placement rescinding its acceptance of the student, the CSE reconvened on April 19, 2021 for a program/annual review (Tr. p. 170).<sup>16</sup>

The district's director testified that the CSE "continued [its] discussion about finding an out-of-district placement for [the student] and continuation of home instruction pending placement" (Tr. p. 170). She explained that the district "created an IEP for the [2021-22] school year based on the information that was shared at that meeting" (*id.*). The parent testified that she was present at the April 19, 2021 CSE meeting, along with her advocate, the director of special education and the teachers who had seen the student "a handful of times" (Tr. p. 659). The parent described the meeting as "very quick and quiet" where everyone there "seemed to be kind of surprised" (*id.*).

The parent's advocate testified that during the April 2021 CSE meeting, she requested the school district consider placing the student in a district elementary school with a one-to-one aide (Tr. pp. 529-30).<sup>17</sup> The advocate further testified that the director's response to that idea was that they did not have a placement in the district at that time (Tr. p. 530). The director testified that the CSE discussed providing a one-to-one paraprofessional to support the student in a district

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<sup>14</sup> The speech-language pathologist testified that the April 6, 2021 speech-language progress summary was presented verbally at the CSE meeting (Tr. p. 364). The speech-language therapist testified that she had worked with the student "no more than three" times prior to the April 6, 2021 CSE meeting, but opined that the description of the student's speech needs in the present levels of performance as written in the IEP was accurate (Tr. pp. 364-65, 366). Additionally, she testified that at the April 6, 2021 CSE meeting, she had sufficient information about the student to recommend an increase in the frequency of speech-language therapy services, and she maintained that recommendation at the April 19, 2021 CSE meeting (Tr. pp. 365-67).

<sup>15</sup> In an April 21, 2021 letter, the out-of-district placement indicated that it withdrew the student's acceptance based on new information learned in meeting with the parent and that based on this new information the school did not feel that it could meet the student's needs (Dist. Ex. 17 at p. 12). The letter did not indicate what the new information was (*id.*).

<sup>16</sup> In the request for review the parent alleges that the April 19, 2021 CSE meeting was reconvened without the requisite five days' notice (Req. for Rev. at p. 11). Although the parent makes this objection on appeal, the hearing record shows that she attended and participated in the April 19, 2021 CSE meeting (Dist. Exs. 8 at p. 1; 9 at p. 1; see Dist. Exs. 4; 5).

<sup>17</sup> The parent began working with the special education advocate in January 2021 (Tr. pp. 517-19).

classroom, but they decided that his needs were too severe, and it would cause constant disruption to the classroom (Tr. pp. 257-58).

The April 19, 2021 CSE modified the student's special education programs and services recommendations from a 6:1+3 special class in an approved private day school to a 1:1 special class once daily for 60 minutes at home (home instruction) (compare Dist. Ex. 3 at pp. 10, 12 with Dist. Exs. 4 at pp. 10, 12; 5 at pp. 10, 12). In addition, the April 19, 2021 CSE changed the student's related services recommendations to three 30-minute sessions per week of individual OT, five 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of counseling services, and one 60-minute session per month of parent counseling and training (Dist. Exs. 4 at p. 10; 5 at p. 10). The CSE noted that the determination as to whether special education services and programs would be provided during July and August was deferred pending review (id. at pp. 10-11). Again, it is noted that the April 19, 2021 CSE did not change the student's present levels of performance or annual goals, nor did it rely on any new evaluations, reports or test results when developing the student's IEP (Dist. Ex. 4 at pp. 3-9).

Email correspondence shows that the district attempted to arrange for home instruction and related services following the April 19, 2021 CSE meeting (Dist. Exs. 24 at pp. 38-39, 41-44, 46-47). On April 26, 2021, the district found a teacher to work with the student; however, the teacher was only available after school hours (id. at pp. 38-39). The parent informed the district that services provided after school hours were "not an option because of [her] work schedule and the schedule with [her] other son" (id. at p. 38). The director informed the parent that she would continue to advertise for a teacher to provide the recommended home instruction (id. at p. 42). The director reported that during the 2021-21 school year the district attempted to hire a teacher from the student's prior school district to tutor the student after school hours (Tr. p. 178). The parent informed the district that she and the student were not available for tutoring between the hours of 3:30 p.m. and 5:30 p.m. (Tr. pp. 178-179).

On May 17, 2021, the student attended an in-district classroom with a special education teacher for a 45-minute session to get a baseline on the student and his needs (Tr. pp. 318-19; Dist. Ex. 23 at p. 3). Following that session, the student had approximately two more classroom meetings to assess his skills and needs (Tr. p. 320). The teacher who met with the student during those sessions testified that the student did not make any progress toward his IEP goals during the 2020-21 school year (Tr. p. 348).

Although the student was not recommended for a summer program, emails between the parent and the district show that there was an attempt to arrange for OT services for the student at that time (see Parent Exhibit G). On August 10, 2021, the district mailed the parent a prior written notice that proposed to amend the student's IEP without a meeting by removing counseling services from the IEP (Dist. Ex. 19). On August 25, 2021, the parent's advocate asked the district "why is it that [the student] can not be in the class at [the district school] with a 1:1 aide? Furthermore, if the staff in that particular class need assistance or training to work with [the student] why can't that be done?" (Parent Ex. T at p. 3). In an email response dated August 26, 2021, the director thanked the advocate for her email and asked whether it was possible to meet in person with the parent and advocate to discuss the advocate's concerns (id.). The advocate continued to seek an answer via email and the director replied on August 27, 2021 that "[h]ome instruction pending placement [wa]s the current recommended program for [the student]" and on August 31, 2021 indicated that

it was not appropriate for her to discuss placement recommendations in email and that she was happy to schedule a CSE meeting to review the recommendations (id. at p. 2).

Email communications between the parent and the district director of special education seeking to arrange for the delivery of special education and related services to the student continued into September 2021 (Dist. Ex. 24 at pp. 65-66). It appears that the district was offering daily 1:1 instruction after school for the student; however, the parent was unable to accept the offered times due to a conflict with her work schedule (id. at pp. 65-66, 74-75). As of September 30, 2021, the district indicated that it did not have a program available for the student during the school day; however, on October 8, 2021, the district indicated it was prepared to deliver one hour per day of home instruction and asked the parent to provide the district with her availability during the school day to schedule the service (id. at pp. 75, 77). It does not appear from the hearing record that the student received any services during the 2021-22 school year.

In addition, the district continued to send out additional packets after the April 2021 CSE meetings, including to the same out-of-district placement that the student had been accepted to in April 2021 (Dist. Ex. 16 at pp. 16-20; see Dist. Ex. 18). The out-of-district placement that the student had been accepted to in April 2021 continued to indicate that the student was not appropriate for the program due to safety concerns, while the other schools declined due to not feeling the program was appropriate, not having space, and one program indicated it had offered to screen the student but was unable to contact the parent (Dist. Ex. 17 at pp. 14-22; see Dist. Ex. 18).

While a district might find itself in an unenviable position of having to locate and secure a placement for a student without the parents' full engagement, "participating educational agencies cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents" (Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1055 [9th Cir. 2012]). On the other hand, the district's contention that it should not be found responsible for a denial of a FAPE to the student is not entirely unreasonable but is more properly framed as a potential argument that the relief sought by the parents is unwarranted because there are equitable considerations concerning the parents' cooperation with the CSE process that should bar relief, and, therefore, that issue will be examined more fully below.

Considering the above, while the parent's actions in refusing intake interviews or with respect to what happened with the out-of-district placement rescinding its acceptance will weigh on equitable considerations as discussed below, the hearing record supports finding that the district did not arrange for the student to receive the educational program recommended in the April 2021 IEPs, as there is no indication in the hearing record that the district has found a placement for the student or that it has been providing home instruction consistently while it attempts to find a placement for the student. Accordingly, under the circumstances presented, the district's failure to implement the April 2021 IEPs resulted in a denial of FAPE.

### **C. Evaluative Information**

Having already determined that the district denied the student a FAPE for the 2020-21 and 2021-22 school years due to a failure to implement the educational programs recommended for the student, there are a couple of findings by the IHO that need to be addressed prior to getting to the issue of relief. The IHO concluded that the evaluative data in the student's present levels of

performance had not changed, as "[t]he findings in [the neuropsychologist's] report [we]re consistent with that of the initial evaluation conducted 2 years earlier" (IHO Decision at p. 18). Additionally, the IHO found that "[i]t [wa]s uncontroverted that the student demonstrated behaviors that threatened his safety in that he was constantly moving and was an elopement risk"; however, the IHO found that it was premature to conduct an FBA of the student and that the time for conducting an FBA would be when he was placed in an out-of-district placement (*id.* at pp. 19-20).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see *Letter to Clarke*, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

In connection with the parent's argument that the student was not appropriately assessed in all areas related to his suspected disabilities, the parent asserts that the district should have conducted an FBA with respect to the student's elopement issues.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also *E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist.*, 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; *A.C.*, 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i]; 200.22[a], [b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]).

State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student's record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (R.E., 694 F.3d at 190).

As noted above, the October 2020 CSE adopted the November 2019 IEP present levels of performance and annual goals from the student's prior school district (Tr. pp. 99-100; compare Dist. Ex. 1 at pp. 1-9 with Dist. Ex. 2 at pp. 3-9). The information contained in the November 2019 IEP was taken from an August 2019 private developmental/behavioral evaluation and October 2019 OT, speech-language, and psychological evaluations conducted by the original school district (compare Dist. Ex. 1 at pp. 1-9 with Dist. Exs. 10; 11; 12; 13).

The October 2020 IEP present levels of performance indicated that the student primarily used gestures and nonverbal language to communicate his wants and needs and noted that he exhibited diminished eye contact and did not consistently respond to his name (Dist. Ex. 2 at p. 4). Additionally, the IEP reflected that during the district's psychological evaluation the student was observed to move around the room and enjoyed playing with trains (id.). The October 2020 IEP noted that the student was observed to put his face on the table and line his eyes up with the edge of the table, which his mother reported he did frequently (id.). Additionally, the student did not initiate conversation or use single word utterances, was unable to follow directions consistently,

and did not show independence in age-appropriate activities of daily living (ADLs) and required a lot of adult assistance for eating, toileting, and dressing (id. at pp. 3-4).

With regard to the student's speech-language development, the October 2020 IEP indicated that the student had difficulty following one-step directives; however, he was observed to understand single step directions within the context of a familiar routine when given some support (Dist. Ex. 2 at p. 4). The IEP stated that according to the student's mother, the student would respond to basic routine directions when not over focused on a preferred activity (id.). Additionally, the student was observed to look at his mother's face as he reached for something he knew might result in her objection and tried to mimic adults during the evaluation (id.). The student demonstrated awareness of cause and effect and indicated his wants and needs by pointing or pulling an adult toward his preference (id.). The October 2020 IEP indicated that the student engaged in some "self talk" vocalizations and was observed to be very environmentally aware (id.). The October 2020 IEP indicated that the student would benefit from a PECS system and discrete trials (id.).

In the area of social development, the October 2020 IEP stated that the student's social interaction was "lacking consistency and uneven," social connections were not persistent, social reciprocity was underdeveloped, and the ability to develop, maintain and foster a relationship was a challenge (Dist. Ex. 2 at p. 4). The IEP indicated that the student appeared to notice changes in facial expressions or body language but did not know how to respond to these changes (id.). Additionally, the October 2020 IEP indicated that the student engaged in repetitive patterns of behavior as well as tended to over focus, his play was poorly developed, he did not engage in imaginary play and did not use toys for their symbolic intent (id.). The student did not imitate behaviors (id.). The IEP described the student as having "less fear than others his age," and indicated that transitions were not as difficult for him (id.). Additionally, the October 2020 IEP indicated that the student exhibited significantly diminished eye contact and repetitive activities, he had a tendency to fixate, persistently climbed on furniture, and had difficulty understanding personal space (id.). The October 2020 IEP present levels of performance noted that the student attempted to copy with a marker, was attentive to bubbles, was close to following the direction "pop the bubble," smiled and laughed when he was tickled by his mom, demonstrated a fleeting attention span, and was noted to be in constant motion (id.). The IEP further noted that the student's strengths in social development were that he had a connection with his older sibling and was described as a "sweet boy who ha[d] the potential to learn with discrete teaching" (id.).

With regard to physical development, the October 2020 IEP indicated that the student's gross motor skills were judged to be a strength (Dist. Ex. 2 at p. 4). The IEP further stated that the student required help for ADLs such as bathing, dressing, and eating; he preferred to eat with his hands but would use utensils for short periods of time; enjoyed bath time but did not like his hair brushed or washed; would eat a variety of foods except meat; inconsistently sat through meal times; would visually stimulate on wheels and objects; liked to line up objects but did not yet have functional play skills; and was self-directed at all times (id. at pp. 4-5). Further, the October 2020 IEP reported that the student did not engage when presented with a puzzle; however, he did scribble with a marker and copied a vertical line and circle and made multiple strokes after positive praise was provided (id. at p. 5). The IEP indicated that the student used a fist grasp, and he was observed to be looking around the room while he scribbled (id.). The student's fine motor skills were determined to be limited for his age (id.). The October 2020 IEP indicated that there were

"significant concerns regarding the student's sensory processing skills," but the Sensory Profile was not attempted due to his limited communication (id.). According to the IEP the student needed to be continually monitored due to his lack of safety awareness (id.).

According to the parent, the student was evaluated in September or October 2019 by a prior school district (Tr. p. 600). She explained that the prior district conducted three evaluations (speech-language, OT and psychological) simultaneously, and that she had expressed that the student was not showing the evaluators what he could actually do (Tr. pp. 601-04). The parent testified that she expressed her concerns during the October 2020 CSE meeting because she felt the evaluations did not accurately show the student's abilities and that she was told the evaluations would be redone once the student was in a stable program; however, the evaluations were never administered again (Tr. pp. 610-11). She testified that she had hoped the district would complete more accurate evaluations; however, the district's response was to use the prior district's evaluations and IEP (Tr. p. 611).

The evaluators for the October 2019 OT, speech-language, and psychological assessments had difficulty using standardized assessments with the student due to the severity of his deficits; therefore, the evaluations were completed together, and the reported results were primarily based on observation and parent report (Tr. pp. 601-04; Dist. Exs. 11-13).

The October 2019 OT evaluation indicated that the student "always need[ed] to be monitored by an adult due to poor safety awareness" and further indicated that he was non-verbal and had "no consistent form of communication" and was very self-directed and did not respond to oral directions (Dist. Ex. 11 at p. 2). The occupational therapist explained that the student "needed to be carried or physically moved to an area to attempt work tasks" but also indicated that "after some time" he scribbled with a marker and copied a vertical line and circle (id. at pp. 1-2). She indicated that the student would maintain visual attention to his drawings for a few seconds, but then would look around the room as he continued to scribble (id. at p. 2). The occupational therapist reported that the student's fine motor skills were limited for his age and he was unable to complete any ADLs independently (id.). Finally, the occupational therapist described the student as a "sweet young boy who [wa]s a pleasure to work with" and opined that his lack of communication, impulsivity and inability to follow directions significantly impacted his functional skills development (id.).

The October 2019 psychological evaluation report indicated that the student was "observed to be a very happy and sweet boy" and noted that he "moved about the room, touched many things and attempted to leave the room on a few occasions" (Dist. Ex. 12 at p. 1). The psychologist noted that the student demonstrated fleeting attention and constant movement and observed that "[e]ven when settled it was obvious that he was taking in all aspects of his environment" (id. at p. 2). Administration of the Vineland Adaptive Behavior Scales – Third Edition yielded an adaptive behavior composite (standard score) of 59, which was in the low range (id. at p. 2). The psychologist explained that, based on her behavioral observations, the student was a nonverbal child who required intensive support for learning and opined that he was a sweet boy who appeared to have potential to learn with discrete teaching (id. at pp. 2-3).

According to the October 2019 speech-language evaluation, the student was "an adorable, happy child of five years, two months who communicate[d] using non-verbal means" and



demonstrated significant delays in receptive and expressive communication (Dist. Ex. 13 at p. 2). The evaluator explained that the student clearly understood cause and effect relationships and was able to problem-solve when motivated, he demonstrated an interest and ability to figure out locks, or the mechanics of novel items, and he responded with interest to certain music even when in a public space with unfamiliar music (id. at p. 1). The evaluator indicated that based on teacher, parent and clinician report as well as her observations, the student understood single-step directions within the context of familiar routines and environments given mild support (id.). Further, the evaluator observed that the student often looked to his parent's face as he reached for something he knew might result in an objection and that his parent reported that he appeared to notice changes in tone of voice and facial expression but did not always respond appropriately (id.). The evaluator reported that the student used mainly jargon and vocalizations during interactions and used simple gestures to gain attention and request (id. at pp. 1-2). Additionally, the evaluator noted that during the evaluation the student exhibited the control needed to approximate single syllable words in imitation (with final consonants deleted) (id. at p. 2). She noted that the student demonstrated "several positive signs of readiness to expand his communication skills at this time (including responsiveness to certain non-verbal cues, interest in certain symbols, ability to request an action using associated items, emerging ability to imitate single syllable words)" (id.).

The pediatric nurse practitioner who conducted the August 2019 developmental/behavioral evaluation reported that the student "seem[ed] to notice changes in facial expression or body language, but d[id] not know how to respond to these changes" and noted that "some cooperative play [wa]s emerging" (Dist. Ex. 10 at p. 1). Additionally, with regard to behavior reported by the parent, the pediatric nurse practitioner indicated that the student was described as having "less fear than other children his age" and noted that he was a "climber and a runner"; however, there were "no challenges to handling transitions or change reported" (id.). The pediatric nurse practitioner observed that the student persistently climbed on furniture, had a tendency to fixate, and repetitive activities were seen during the evaluation; however, she did not report any attempts to elope during the evaluation (id. at p. 2).

The information discussed in detail above shows a student who had significant needs across all areas of development; however, it also shows that the student was aware of and interested in his environment and the people in his environment and had exhibited some readiness towards learning and communicating. The hearing record also includes some information showing that the concerns regarding the student's behaviors, particularly with respect to elopement, were causing the district to keep the student from attending class or receiving services in the district. For example, the speech-language pathologist explained that she was concerned about elopement and noted that there were several occasions where the student attempted to leave the combined speech-language and OT sessions (Tr. pp. 374-75). She continued to explain that there was no written safety plan in place, so she worked together with the OT and the parent to prevent the student from leaving the room during the sessions (id.). As noted above, the parent testified that due to safety concerns she stayed with the student during the related services sessions (Tr. pp. 612-14). She further testified that she raised the concern about the student's eloping as soon as the October 2020 CSE meeting began, she explained the risk and how the student liked to wander if given the opportunity, and how he would dart even if he seemed engaged in an activity (Tr. pp. 615-16). In an April 13, 2021 email, the parent indicated that the school district specialists never contacted her to in order to assess the student's needs or to address her safety and learning concerns (Dist. Ex.

24 at pp. 28, 32). In a May 5, 2021 email to the parent, the director of special education offered a consultation with the district's board certified behavioral analyst (BCBA) in order to determine how to support the student's needs, including educational needs and ADLs (*id.* at p. 43). However, it is not clear why it took six months for the district to offer to have a BCBA meet with the student. At that point, the only services provided to the student, during the 2020-21 school year, consisted of a classroom visit in October 2020, approximately five to six sessions of joint speech-language and OT therapy, and some sessions of 1:1 instruction in school towards the end of the school year; there was not enough time for the providers to develop a true picture of the student's strengths, needs, and behaviors and gain an understanding of the type of support he would require in order to be successful.

Overall, if the district had made more of an effort to understand the student, it may have been possible to find a solution that might have allowed the student to receive an education during the 2020-21 and 2021-22 school years. In fact, a lack of evaluative information regarding the student, particularly regarding the student's behavior, may have also contributed to the district's inability to find a school placement for the student. Feedback from several of the out-of-district placements indicated that they could not accept the student due to the severity of his needs and/or his safety issues, yet the district did not attempt to evaluate or assess the student to gain additional information to provide these programs when it resubmitted referral packets. As the district continued to be unable to place the student either within a district placement or at an out-of-district program, the CSE should have realized that more information would have been pertinent to recommending and finding an appropriate placement for the student.

#### **D. Relief – Compensatory Education Services**

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 may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (*see* 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];<sup>18</sup> 8 NYCRR 100.9[e], 200.1[zz]; *see* 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (*see Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 456 n.15 [2d Cir. 2015]; *French v. New York State Dep't of Educ.*, 476 Fed. App'x 468, 471 [2d Cir. 2011]; *Somoza v. New York City Dep't of Educ.*, 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; *Mrs. C. v. Wheaton*, 916 F.2d 69, 75-76 [2d Cir. 1990]; *Burr v. Ambach*, 863 F.2d 1071, 1078-79 [2d Cir. 1988], *aff'd on reconsideration sub nom. Burr v. Sobol*, 888 F.2d

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<sup>18</sup> If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student is entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever first occurs (Educ. Law § 4402[5][a]).

258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

Compensatory education relief may also 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 E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

In her request for review, the parent expressly requests compensatory education of 55 hours of speech-language therapy, 22 hours of OT and 110 hours of special education tutoring, along with parent counseling and training for a denial of FAPE for the 2020-21 and 2021-22 school years.<sup>19</sup> In addition, the parent requested "1 year of a post-high school program after graduation or after [the student] reaches 21." In response to the parent's request for compensatory education,

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<sup>19</sup> In the parent's post hearing brief she clarified that she was seeking compensatory education for the 2020-21 school year and the July 2021 through January 2022 portion of the 2021-22 school year (Post Hr'g. Br. at pp. 14, 28). As the denial of FAPE is based on a failure to implement, it is reasonable for the compensatory award to end as of the filing of the due process complaint notice in this matter—January 5, 2022 (see Parent Ex. J).

the district asserts that such relief is not warranted because the parent failed to present any evidence regarding the request and there is no evidentiary basis for the request.

As discussed in detail above, the student did not receive consistent educational programming from the time he entered the district in October 2020 through the 2020-21 and 2021-22 school years. Additionally, by excluding the student from a school program, the district wasted an opportunity to gather evaluative information about the student, particularly about the student's behavior; information that could have been used to design a more appropriate program for the student or that could have been provided to out-of-district placements so that they could have had a more complete picture of the student in making their determinations on admission. Unfortunately, as compensatory education should aim to place the student in the same position he would have been in but for the lack of services, the same evaluative information that was missed would be relevant, if not necessary, in determining an appropriate award for the student. Considering this, it is understandable why the parent asked for a year of educational services to be added on to the student's eligibility after he graduates or ages out. However, the student is only eight years of age and potentially has years of eligibility remaining. Accordingly, relief of a post-graduate program is without justification as it is too far removed from the denial of FAPE in this instance. Awarding compensatory relief so far into the future will do nothing to address the issues created by the student being without an educational program now. Therefore, rather than attempt to determine a qualitative award, I will assume that the student should have, at the very least, received five hours per week of 1:1 instruction as part of the student's educational program while he awaited placement in an out-of-district program (see 8 NYCRR [e][2][i][a][setting a minimum of five hours per week of instruction for students placed on home, hospital, or institutional instruction]). Having considered the information included in the hearing record, it appears the student missed approximately 44 weeks of instruction; accordingly, the student should be awarded 220 hours of 1:1 instruction provided by a special education teacher.

With respect to the missed related services of OT and speech-language therapy, the October 2020 IEP recommended that the student receive one 30-minute session of each per week, the April 6, 2021 IEP increased the recommendations to three 30-minute sessions of each per week, and the April 19, 2021 IEP increased the recommendation for speech-language therapy to five 30-minute sessions per week (Dist. Exs. 2-5). However, it appears that the October 2020 IEP related services recommendations were reduced due to staffing issues, rather than due to the student's needs (Tr. pp. 218-19, 258-59). Accordingly, the recommendations included in the April 2021 IEPs were likely more appropriate for the student for the entirety of the 2020-21 school year. Considering the recommendations and the services delivered, as can be ascertained from the hearing record, it appears that the student missed approximately 60 hours of OT and 100 hours of speech-language therapy.

However, rather than outright awarding these services, compensatory educational is an equitable remedy and the district has raised a number of equitable arguments as to why relief should be reduced.

### **1. Equitable Considerations**

In a tuition reimbursement case, equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd.

of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations in the tuition reimbursement context, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M., 758 F.3d at 461 [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

As noted above, compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger, 979 F. Supp. at 151). As such, it may be similarly appropriate to consider the conduct of both parties in fashioning equitable compensatory education relief (see Reid 401 F.3d at 524; Puyallup Sch. Dist., 31 F.3d at 1496-97; Application of a Student with a Disability, Appeal No. 19-120; Application of a Student with a Disability, Appeal No. 18-002).

Looking at the IHO's decision, the IHO weighed the parent's actions including her refusal to attempt remote instruction, the conflicting accounts of the events leading up to the April 15, 2021 rescission of the out-of-district placement's acceptance of the student, the parent's refusal to produce the student for intake interviews at different programs based on distance, and that the parent refused to sign consent for a reevaluation (IHO Decision at pp. 20-24).

The student's acceptance to the out-of-district placement was rescinded on the date that the student was scheduled to start (Dist. Ex. 8 at p. 1). The IHO found that the parent's testimony regarding the circumstances of the rescission of acceptance were not credible and held that the district's explanation was credible (IHO Decision at pp. 22-23).

During the impartial hearing, the district director of special education testified that the reason given by the out-of-district school for rescinding its acceptance was that the parent revealed she used a device called "AngelSense" and use of the device was not acceptable to the out-of-district placement (Tr. p. 166). The director explained that AngelSense was a tracking device that had a GPS locator on it as well as a recording or listening device (Tr. p. 166). According to the director, the out-of-district placement was concerned about the ability to turn off the listening device due to student and staff confidentiality (Tr. p. 167). The director reported that the out-of-district placement requested that the parent disable the listening device while the student participated in school, but the parent refused (Tr. p. 168). The director further reported that " given the conversation [the out-of-district placement] had with [the parent] about the AngelSense device . . . they felt that she would be a difficult parent and that it would not be in [the student's] best

interests to be in that program" (Tr. pp. 168-69). The parent affirmed that during her April 14, 2021 tour of the out-of-district placement she met with the new teacher and a school social worker and that they discussed AngelSense, with the parent telling the teacher that she " had it if the school wanted it, [she] could send him with it" (Tr. pp. 648-649). The parent further testified that the teacher "said she didn't think the school – that it was allowed in the school because it was – it's a GPS device" (Tr. p. 650). The parent attested that she replied indicating that part of why she purchased it was because she was told that schools liked it, but she did not have a problem with not sending it because she did not use it herself (*id.*).

A thorough review of the non-testimonial record reveals that the parent discussed AngelSense in an April 15, 2021 email to the district's director of special education stating "I was told he can't wear his AngelSense or one of the teachers will 'take it off of him'... is this accurate?" (Dist. Ex. 24 at p. 31). Once the parent was informed that the out-of-district placement had been rescinded, she emailed the district "I also need to know the reason [the student] was accepted into the [out-of-district] school and then the acceptance was recanted. I have to know this reason. So looking forward into a new school I know why and how to make sure this [doesn't] happen again" (*id.* at p. 38). The director replied "I'm sorry I do not have any more information to offer about [the out-of-district placement's] decision. I was told [the student] was not a good fit. The letter I received earlier this week simply states 'unable to meet student needs'" (*id.* at p. 39). The letter sent by the out-of-district placement stated: "[w]e are withdrawing our offer based on the new information learned within our meetings with [the parent]. Our school feels that we would not be able to meet the needs of [the student] based on this information" (Dist. Ex. 17 at p. 11).

There is conflicting testimony regarding what was said at the April 14, 2021 meeting about AngelSense and whether AngelSense was the reason why the out-of-district placement rescinded its offer of acceptance. In her decision, the IHO gives much weight to the testimony of the district director of special education that the April 14, 2021 out-of-district placement was rescinded because the parent insisted that the student wear an AngelSense GPS device (IHO Decision at pp. 22-23). Specifically, the IHO "[fou]nd it inconceivable that the school would abruptly rescind their acceptance based upon the circumstances described by the parent" (*id.* at p. 23).<sup>20</sup> 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]). Accordingly, the IHO's view of the events leading up to the April 2015 rescission and, considering these events, the parent's actions weigh in favor of a slight reduction in an award of compensatory education.

Additionally, the IHO found that "[d]ue to the COVID 19 pandemic, the District only offered remote instruction as they were not sending providers to homes" (IHO Decision at p. 20).

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<sup>20</sup> In another credibility finding, the IHO found that the parent's testimony regarding the prior district's evaluations was not credible (IHO Decision at p. 14). However, it is noted that despite the IHO's finding on this issue, the actual evaluations in the hearing record do support the parent's explanation of the evaluations (see Dist. Exs. 11-13).

The IHO determined "[i]t is well noted in the Record the parent voicing the fact that remote would not work for the student however the district did offer to train the parent as to how to deliver the instruction and the offer was declined" (id. at p. 21). Further, the IHO determined that "the District attempted to implement the IEP however the Parent was not cooperative in their attempts" (id.).

The director explained that in October 2020 she offered remote instruction to the parent as an alternative to home instruction because, due to the COVID-19 pandemic, the district was not sending out home instructors at that time (Tr. pp. 111-12). In response, the parent indicated that remote instruction would not work for the student due to his needs (Tr. p. 111). The director reported that the district offered support to assist the student with accessing remote instruction, specifically that it offered "[the] opportunity to sign on to the Google Meet very similarly to what we are doing and offer instruction in the way that it would be delivered from the home tutor with the parent support with the student. We offered information about participating in a remote platform for all of our families if they were having trouble accessing or connecting to the devices" (Tr. pp. 111-12). The district confirmed that the parent declined the district's offer of remote instruction for the student (Tr. p. 112).

When the district determined that it would not place the student in an 8:1+2 special class and offered the student remote learning instead, the record reflects that the parent responded:

As I mentioned, I would love to be able to do remote [learning] for [the student]. Sounds like a great plan for in the mean time. So what are the accommodations that can be made so he can do this, [since] I have already explained that he doesn'[t] have the skills to interact through a computer, given the fact that he can'[t] speak or communicate in person let alone, through a device. Like I had said in detail, we tried that and he could not interact at all, not at all. It's just way more then he'[s] capable of doing given his disabilities. You suggested it again so I'm ready to try It. Just let me know how to proceed, so that it will work for him, given his limitations that are clear. (Dist. Ex. 24 at p. 2).

The district replied, "Unfortunately, we are not offering any in person instruction or therapies at home during the pandemic" and that "[a]ny supports offered for [the student] would be virtual with a device" (Dist. Ex. 24 at p. 2).

All of the student's IEPs reflect a short-term goal of having the "student sit in a chair for thirty seconds" (Dist. Exs. 1 at p. 7; 2 at p. 6; 3 at p. 7; 4 at p. 7; 5 at p. 7). The director reported that during the 2021-21 school year the district attempted to hire a teacher from the student's prior school district to tutor the student after school hours (Tr. p. 178). The parent informed the district that she and the student were not available for tutoring between the hours of 3:30 p.m. and 5:30 p.m. (Tr. pp. 178-179). The parent informed the district that services provided after school hours were "not an option because of [her] work schedule and the schedule with [her] other son" (Dist. Ex. 24 at p. 38).

Considering the above, the only action that would weigh against the parent in terms of implementing home instruction would be her refusal to arrange for services outside of the school day. However, the parent offered a valid reason for being unable to produce the student for instruction at the time offered by the district, in that it would impact her work schedule. The parent's reasoning behind this should be given added weight as when the student did attend school

in the district for joint related services sessions, it appears as though school staff asked the parent to stay with the student during the sessions (see Tr. pp. 374-75, 612-14). Additionally, email correspondence indicates that both the parent and district were attempting to work together to try to find a solution to the scheduling issues (Dist. Ex. 24 at pp. 38-39, 41-44, 46-47).

Additionally, the IHO determined that "there [wa]s ample evidence to support the student being rejected from certain programs due to the parent not following through for intake due to her belief the program was too far" (IHO Decision at p. 11). The IHO noted that the parent testified that the student could not travel more than 30 minutes and credited the district director of special education's testimony that many of the programs the parent refused intakes for "were within 30 minutes or were 10-15 minutes further (id. at p. 22).

Review of the district's application list shows that the parent rejected one program due to distance and refused an intake at three other programs (Dist. Ex. 18). According to the director's testimony for the four programs that indicated the parent refused an intake, one was approximately 30 minutes away, one was 30 to 50 minutes away depending on traffic, and the other two were 50 miles away—an hour or less (Tr. pp. 133, 147, 150-51; Dist. Ex. 18).

Finally, the IHO determined that the parent did not sign a request for consent to evaluate the student that was sent in September 2021 (IHO Decision at p. 24). The director of special education testified that she met with the parent and her advocate and a representative of the district on September 9, 2021, at which time the need for additional testing of the student was discussed (Tr. pp. 183-85). The district sent the parent a prior written notice dated September 10, 2021 requesting consent to evaluate the student in the area of adaptive behavior to determine his educational needs; the prior written notice included a consent for requesting that the parent complete, sign and return the form to the district (Dist. Ex. 20). The director of special education followed up with the parent by email on October 8, 2021 (Dist. Ex. 24 at p. 78). On October 25, 2021, the district sent a second prior written notice, this time requesting consent for a reevaluation of the student consisting of a neuropsychological evaluation, OT testing, speech-language testing, and a social history (Dist. Ex. 21). The director of special education followed up with emails to the parent on November 8, 2021 and November 23, 2021 (Dist. Ex. 24 at pp. 90, 94). According to the director, the parent never signed the consent for the evaluations (Tr. pp. 186-87).

The IHO found that, as a whole, the parent's actions were uncooperative and warranted finding that equitable considerations did not favor the parent. As discussed above, some of the IHO's findings do show a level of uncooperativeness on the part of the parent; however, many of the parent's actions were justified. Additionally, it cannot be overlooked that there is a child at the center of this education dispute, a student who has been without a consistent educational program for well over one school year. Under these circumstances, a small reduction in the total award of compensatory education is warranted and I will reduce the total amount of compensatory education awarded by ten percent resulting in an award of 198 hours of 1:1 instruction provided by a special education teacher, 54 hours of OT, and 90 hours of speech-language therapy.

## **VII. Conclusion**

Having found that the student was denied a FAPE as of October 2020 through the filing of the due process complaint notice, it is unnecessary to address the other claims raised by the parent in the request for review.



**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated August 15, 2022, is modified by reversing that portion which found that the district offered the student a FAPE for the 2020-21 and 2021-22 school years;

**IT IS FURTHER ORDERED** that the district shall provide the student with compensatory education services in the form of 198 hours of 1:1 instruction by a special education teacher selected by the parent, 54 hours of OT by a provider selected by the parent, and 90 hours of speech-language therapy by a provider selected by the parent to be used within three years of the date of this decision.

**Dated:**           **Albany, New York**  
                      **November 16, 2022**

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**