



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-019

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

### **Appearances:**

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

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which found that respondent (the district) failed to offer or provide the student an appropriate educational program and services for the 2021-22 and 2022-23 school years but denied, in part, their request for compensatory education and placed certain restrictions on the award. The appeal must be sustained in part.

### **II. Overview—Administrative Procedures**

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

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

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

### **III. Facts and Procedural History**

Review of the student's educational history shows that the student has received diagnoses of autism spectrum disorder, without language impairment, attention deficit hyperactivity disorder (ADHD), and auditory processing disorder (Parent Exs. L at p. 12; R at p. 11; IHO Ex. IV at pp. 2, 3). For the 2020-21 school year (kindergarten) the student received integrated co-teaching (ICT) services in a district elementary school (Parent Exs. H at p. 2; S at p. 3). In addition, the student received speech-language therapy, occupational therapy (OT), and special education itinerant teacher (SEIT) services (Parent Ex. H at p. 2).

The student has been the subject of a prior administrative proceeding which resulted in an unappealed IHO decision dated September 18, 2022 finding the student was denied a free

appropriate public education (FAPE) for the 2018-19, 2019-20, and 2020-21 school years (Parent Ex. S). In an interim order prior to the findings of fact and decision, dated May 18, 2021, the prior IHO ordered that the district fund the following independent educational evaluations (IEEs): a neuropsychological evaluation, a speech-language evaluation, a physical therapy (PT) evaluation, an OT evaluation, an auditory processing evaluation, and an assistive technology evaluation (Parent Ex. T at pp. 3-4). In the final September 18, 2022 decision, the IHO also ordered that the district fund the following IEEs: a speech language reevaluation, an auditory processing evaluation, a functional behavioral assessment (FBA), a behavioral intervention plan (BIP) if warranted, and a neuropsychological reevaluation (Parent Ex S at p. 12). The prior IHO also awarded a bank of compensatory education to be delivered by providers "of the Parents' choosing at market rate" to include: 138 hours of OT; 90 hours of speech-language therapy; 276 hours of home-based applied behavior analysis (ABA) services and parent counseling; and 5,520 hours of 1:1 special education tutoring (*id.* at pp. 11-12).

Turning to the 2021-22 school year, on April 28, 2021, a CSE convened to develop an IEP for the student (IHO Ex. III). The CSE determined the student remained eligible for special education as a student with a speech or language impairment and for the 10-month school year recommended that he receive ICT services in his core academic classes, along with two 30-minute group sessions of OT per week and one 30-minute individual session and one 30-minute group session of speech-language therapy per week (*id.* at pp. 17-18). A prior written notice dated April 30, 2021 summarized the April 28, 2021 CSE's recommendations (Parent Ex. BB).

Between July 2021 and March 2022, the student participated in a number of IEEs (Parent Exs. H-I; K-M).

An auditory processing evaluation, conducted on July 3, 2021, indicated that the student presented with an auditory processing disorder as well as "significant" auditory comprehension and phonological processing deficits (Parent Ex. L at p. 12). The evaluator recommended that the student receive speech-language therapy, an FM system, and classroom accommodations (*id.* at p. 14).

An assistive technology evaluation, conducted on July 29, 2021, indicated that the student was not a candidate for assistive technology and noted that it was imperative that the student receive foundational instruction to address his academic weaknesses so that he "w[ould] not be stifled by the integration of technology that may detract from the efficacy of more traditional intervention" (Parent Ex. H at pp. 9-10).

In August 2021, the student underwent both OT and PT evaluations (Parent Exs. I; M). The standardized testing administered as part of the OT evaluation revealed student deficits in sensory processing, visual motor coordination, fine motor precision, and bilateral coordination (Parent Ex. I at p. 15). In addition, clinical observation revealed that the student exhibited "retained primitive reflexes (ATNR), decreased attention, difficulty self regulating, difficulty muscle grading, and decreased oculomotor control" (*id.*). The evaluating occupational therapist recommended that the student receive OT and be provided with a sensory diet (*id.* at p. 17). The evaluating OT also recommended that the student be provided with 138 hours of compensatory OT (*id.*). The August 2021 PT evaluation showed that, based on formal testing and informal observation, the student demonstrated average skills in all areas of gross motor function including

posture, ambulation, balance, strength, and endurance and that PT services were not warranted at that time (Parent Ex. M at p. 7).

A November 8, 2021 neuropsychological evaluation yielded diagnoses of autism spectrum disorder and ADHD, combined type (Parent Ex. K at pp. 13-14). The examiner reported that the student's "cognitive profile [wa]s one of solidly average abilities to reason, solve problems, and learn useful information" and indicated that the student was "performing at or above age expectation in all academic areas" (*id.* at p. 12). The examiner noted, however, that the student's "challenges in attention, self-regulation, communication and social behavior" significantly interfered with his day-to-day functioning (*id.*). The examiner made numerous recommendations including that the student receive special education in "a small, structured classroom with a low student-to-teacher ratio" where "teachers and specialists work with students on a one-to-one, dyad, and small group basis using multi-sensory and direct instruction methods" (*id.* at pp. 14-15). The examiner stated that the student "urgently require[d]" an FBA and BIP and that he and his family required a minimum of ten hours per week of intensive home-based behavioral interventions (*id.* at p. 16). The examiner also recommended that the student continue to receive speech-language therapy and OT (*id.*). Lastly, based on what the examiner characterized as the district's failure to provide the student with "an appropriate and sufficient educational program" for the 2018-19, 2019-20, and 2020-21 school years, the examiner opined that the student should receive 5,520 hours of compensatory remediation hours for one-to-one special education tutoring, social skills training, home-based ABA, and parent counseling and training (*id.*). In addition, she opined the student and his family should receive 276 hours for compensatory home-based services (*id.*).

In March 2022, the district conducted a social history assessment of the student as part of the reevaluation process (Parent Ex. O). Also in March 2022, the district conducted a classroom observation of the student during reading and his OT session (Parent Ex. N).

On March 22, 2022, a CSE met to develop the student's IEP with an implementation date of March 28, 2022 (IHO Ex. IV). The CSE determined the student remained eligible for special education as a student with a speech or language impairment and, for the 10-month school year, recommended ICT services (*id.* at pp. 24-25, 29). In addition, the March 2022 IEP included the following recommended related services: one 30-minute group session of counseling per week, one 30-minute individual session and one 30-minute group session of OT per week, one 30-minute individual session and one 30-minute group session of speech-language services per week (*id.* at pp. 24-25).

On April 28, 2022, the CSE amended the previous IEP to change the student's category of eligibility to autism; the CSE also added four 45-minute parent counseling and training sessions per year, as well as the support of a full-time 1:1 paraprofessional for behavioral support (compare IHO Ex. IV at pp. 1, 24-25, with IHO Ex. V at pp. 1, 26-27).

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

In a 26-page due process complaint notice dated June 22, 2022, the parents asserted that the district failed to offer or provide the student a FAPE for the 2021-22 and 2022-23 school years based on numerous procedural and substantive allegations (*see generally* Parent Ex. A). Generally, for the years at issue, the parents asserted that the district failed to: (a) thoroughly and appropriately

evaluate the student on a timely basis; (b) develop a timely, substantively and procedurally valid IEP; (c) offer the student a timely and appropriate placement and services; (d) provide the student with a FAPE under the IDEA and section 504 of the Rehabilitation Act of 1973 (section 504), and (e) afford the parents' their procedural rights under the IDEA and section 504 ("section 504"), 29 U.S.C. § 794(a) (*id.* at pp. 1, 13-21). The parents also asserted that the district failed to timely and appropriately implement the student's IEPs and pendency services or provide adequate procedural safeguards and prior written notice to the parents and made claims concerning various district policies, including systemic violations of the IDEA and section 504 affecting the CSE's ability to offer specific programming and services, and alleging that the district violated 42 U.S.C. § 1983 by adopting policies and customs that deprived the student of his right to special education under state and federal law (*see id.* at pp. 2, 22-24).

As relief, the parent requested: a declaration that the district violated the IDEA, section 504, and the State Education Law, among other laws, and that the student was denied a FAPE for the 2021-22 and 2022-23 school years; pendency consisting of the services in the student's last agreed-upon placement; district funding of IEEs including speech-language, auditory processing, and assistive technology evaluations, as well as an independent FBA and BIP, autism testing including the administration of the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2); compensatory education; and an increase in 1:1 instruction and related services (Parent Ex. A at p. 24). Regarding compensatory education, the parent requested: 1:1 instruction, ABA services, PROMPT,<sup>1</sup> additional SEIT services, tutoring, behavior therapy, services to improve executive functioning, assistive technology, assistive technology training, related services such as OT, PT, speech-language therapy, counseling, social skills training, and/or feeding therapy, and any other services recommended as a result of the requested IEEs (*id.* at pp. 24-25). In addition, the parent requested a "legally valid" IEP to contain the program and placement recommended by the independent evaluators, including, among other things, a 12-month school year placement in a classroom with ICT services and "a push-in program of full-time (40 hours per week) of 1:1 special education instruction with [ABA] training for academic remediation and social-emotional support," 10-hours per week of home-based special education instruction with ABA, related services, and use of a sensory diet (*id.* at p. 25). The parent also requested, reimbursement or funding for private school tuition and/or compensatory relief, if applicable, that any services awarded be delivered by providers of the parents' choice at "enhanced market rates," and out-of-pocket expenses including but not limited to payment for transportation, evaluations, and any purchased services (*id.*).

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

An IHO from the New York City Office of Administrative Trials and Hearings (OATH) was appointed to hear the matter (Parent Ex. E at p. 1). In an email dated August 22, 2022, the IHO denied the parents' request that the IHO recuse himself from the matter based on allegations that IHOs employed by OATH had a conflict of interest and did not hold sufficient qualifications

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<sup>1</sup> "PROMPT" is typically used as an acronym for "prompts for restructuring oral muscular phonetic targets"—a method of instruction used by speech-language pathologists (*see, e.g.*, Application of a Student with a Disability, Appeal No. 20-002).

(SRO Ex. B).<sup>2</sup> In denying the parents' motion for recusal, the IHO noted that he was "a State-certified impartial hearing officer" and that "OATH [wa]s an independent adjudicatory agency and the [IHOs] employed by OATH [we]re appointed pursuant to multiple sources of authority, including authorization by the Mayor and the New York City Department of Education, to hear the claims brought in this case" (*id.* at p. 3).

The IHO conducted a prehearing conference on August 25, 2022,<sup>3</sup> held status conferences on November 1, 2022 and November 15, 2022, and continued with four impartial hearing dates devoted to addressing the merits of the parents' claims, which took place between November 17, 2022 and December 16, 2022 (Nov. 1, 2022 Tr. pp. 1-55; Nov. 15, 2022 Tr. pp. 1-14; Nov. 17, 2022 Tr. pp. 1-20; Nov. 21, 2022 Tr. pp. 1-44; Dec. 9, 2022 Tr. pp. 1-42; Dec. 16, 2022 Tr. pp. 1-39; Parent Ex. E).<sup>4,5</sup>

In a decision dated December 29, 2022, initially, the IHO summarized the parents claims to be addressed as, among other things, that the district denied the student a FAPE for the 2021-22 and 2022-23 school years by failing to: (1) thoroughly and appropriately evaluate the student on a timely basis; (2) develop a timely, substantively and procedurally valid IEP; and (3) offer the student a timely and appropriate placement and services (IHO Decision at p. 1). The IHO also summarized the parents requests for relief as: (1) compensatory education for the denial of a FAPE to restore the student to the position the student would have been in had a FAPE not been denied; (2) an increase in 1:1 instruction and related services; and (3) an appropriate program and placement for the remainder of the 2022-23 school year (*id.*). Next, the IHO found that, because the district did not present a case—in that it did not present any witness testimony or place any documents in evidence—and, in fact, conceded that it failed to offer the student a FAPE for both school years at issue, the district failed to meet its burden to prove that it provided the student with a FAPE for the 2021-22 and 2022-23 school years (*id.* at pp. 3, 6).

With respect to compensatory relief to address the district's failure to provide the student with a FAPE for the school years at issue, the IHO summarized the parents' request for: (1) 92 hours of OT; (2) 207 hours of speech-language therapy; (3) 3,680 hours of 1:1 special instruction

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<sup>2</sup> The parents include the email correspondence containing their request for the IHO's recusal and the IHO's determination thereon as an exhibit to their request for review, marked as SRO Exhibit "B." State regulation provides that the hearing record includes copies of "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer," as well as "all written orders, rulings, or decisions issued in the case" (8 NYCRR 200.5[j][5][vi]; 279.9[a]). Therefore, the email correspondence submitted by the parents with their request for review should have been included as a part of the hearing record and will be considered as part of the hearing record on appeal.

<sup>3</sup>A prehearing conference summary and order dated August 26, 2022 was issued in lieu of a transcript for the August 25, 2022 prehearing conference (Parent Ex. E).

<sup>4</sup> A pendency implementation form dated August 29, 2022 stated that the student's pendency program arose from an IEP dated August 8, 2019 and consisted of a 10-month program with 9 hours per week of SEIT services provided by a private agency, Special Edge, Inc., and two 30-minute 1:1 sessions per week of both speech-language therapy and OT (Pendency Implementation Form).

<sup>5</sup> On October 21, 2022 an ABA observation of the student was conducted due to "ongoing concerns regarding a number of behaviors and social deficits negatively impacting him academically and in the classroom setting" (Parent Ex. J).

with ABA in school; (4) 920 hours of 1:1 special instruction with ABA at home, and (5) 92 hours of Board-Certified Behavior Analyst (BCBA)/Licensed Behavior Analyst (LBA) supervision (IHO Decision at p. 6). Additionally, the IHO summarized the parents' request for relief for the remainder of the 2022-23 school year of: (1) 40 hours of push-in 1:1 special education services with ABA per week, (2) two 30-minute sessions of 1:1 OT per week, (3) multisensory reading instruction provided by a reading specialist, (4) classroom accommodations, (5) an FM system, (6) a sensory diet, (7) two 45-minute sessions of 1:1 speech-language therapy and one 45-minute session of 3:1 speech-language therapy per week, (8) 10 hours of home-based ABA per week with supervision by an LBA and/or BCBA; (9) access to auditory processing applications, and (10) 12-month school year services (id. at p. 7).

First, with respect to the ABA and BCBA/LBA instruction and services, the IHO found the parents' request—both for the compensatory relief of 3,680 hours of in-school ABA, 920 hours of at-home ABA, and 92 hours of BCBA or LBA supervision and the relief for the remainder of the 2022-23 school year of 40 hours per week of push-in 1:1 ABA at school and 10 hours per week of home-based ABA with BCBA/LBA supervision—to be excessive and inappropriate (IHO Decision at pp. 9-12). Specifically, the IHO found that the parents requested an IEP program for the remainder of the 2022-23 school year but also included this period in their calculation for compensatory education (id. at pp. 11-12). The IHO indicated that once the issue of FAPE had been addressed, a party would no longer be entitled to compensatory education moving forward (id. at p. 12). Therefore, the IHO found that an award of compensatory education for the remainder of 2022-23 would be inappropriate (id. at p. 12). Moreover, the IHO found the parent calculated the request for a bank of 3,680 hours of 1:1 ABA services based on a 40-hour school week but that the student's class schedule showed his school day from 8:00 a.m. to 2:44 p.m., resulting in a total of approximately 33 hours and 45 minutes of time the student was in school each week, and concluded that any award beyond the time the student spent in school would be excessive (id.). In addition, the IHO found that the parents' calculation based on an extended school year of 46 weeks was not supported as there was insufficient evidence in the hearing record that the student suffered from substantial regression; thus, the IHO found that an award of compensatory education would be calculated based on "a standard school year consisting of 38 weeks" (id.).

Next, the IHO stated that the student made academic progress during the 2021-22 school year with services of a 1:1 paraprofessional for behavioral support, as reflected in his final report card and the 2021 neuropsychological evaluation report, and found that 1:1 ABA services were not required or appropriate for the entire school day, including for example, during recess and lunch, but the IHO found that an appropriate program for the student included 1:1 ABA services during the core academic classes totaling 18 hours per week, as well as the support of a 1:1 paraprofessional for the remaining 16 hours of the school week, for the remainder of the 2022-23 school year (IHO Decision at pp. 12-13). Therefore, the IHO found that the student was entitled to a bank of 1,026 hours of compensatory 1:1 ABA services (684 hours for the 2021-22 school year and 342 hours for the 2022-23 school year to date) for the denial of a FAPE during the 2021-22 and 2022-23 school years (id. at p. 13). However, the IHO limited the award as the student had been awarded 5,520 hours of compensatory 1:1 special education tutoring services as part of a prior proceeding (id. at pp. 13-14). The IHO stated that it was "unclear how such a tremendous number of compensatory hours (a total of 6,546 hours) c[ould] be properly implemented without overwhelming [the] Student, allowing time for the normal activities of life, and providing an educational benefit" (id.). Therefore, the IHO held that the compensatory award of 1,026 hours of

1:1 ABA services could not be used until the previous award of 5,520 hours was "completely depleted" and had to "be used within three years" of the date of the decision (*id.*). Finally, the IHO denied home-based ABA instruction finding the hearing record failed to show the student required it for generalizing skills in order to make progress and the IHO also found BCBA/LBA supervision was unwarranted (*id.* at p. 14).

With respect to OT and speech-language therapy services, in considering the parents' request—both for the compensatory relief of 92 hours of OT and 207 hours of speech-language therapy and for the prospective relief for the remainder of the 2022-23 school year of two 30-minute sessions of 1:1 OT, two 45-minute sessions of 1:1 speech-language therapy, and one 45-minute session of 3:1 speech-language therapy per week—initially, the IHO again noted that the parents requested an educational program for the remainder of the 2022-23 school year but also included this period in their calculation for compensatory education and, therefore, found that compensatory education for the remainder of 2022-23 was not warranted (IHO Decision at pp. 14-15). Likewise, the IHO again found that the parents' calculation based on an extended school year of 46 weeks was not supported as there was insufficient evidence in the hearing record that the student suffered from substantial regression; thus, the IHO found that an award of compensatory education would be based on a 38-week school year (*id.*). For OT, the IHO found that, based on the evidence in the hearing record including the August 2021 OT evaluation that showed significant delays and un rebutted testimony, the student required two 30-minute sessions of 1:1 OT per week for the remainder of the 2022-23 school year and a bank of 57 compensatory hours of 1:1 OT (38 hours for the 2021-22 school year and 19 hours for the 2022-23 school year to date) to make up for the district's failure to provide the student with appropriate OT services during the school years at issue (*id.*). For speech-language therapy, the IHO found that, based on the hearing record including a July 2021 auditory and language processing evaluation which indicated the presence of an auditory processing disorder, the student required three 45-minute sessions of speech-language therapy per week, consisting of two 1:1 sessions and one 3:1 session, for the remainder of the 2022-23 school year and a bank of 128.25 compensatory hours of speech-language therapy (85.5 hours for the 2021-22 school year and 42.75 hours for the 2022-23 school year) to make up for the DOE's failure to provide the student with appropriate speech-language therapy services during the school years at issue (*id.* at p. 16).

Next, the IHO denied the parents' request to provide the student with multisensory reading instruction, classroom accommodations, and a sensory diet, finding insufficient evidence to show that student required these services to make meaningful progress (IHO Decision at pp. 16-17). In his reasoning, the IHO referenced the 2021 neuropsychological evaluation report, which stated, among other things, that the student was "highly proficient" in learning and retaining material and, while he still required support, he was "functioning at a high level in many respects" (*id.* at p. 17). The IHO also relied on the report of the July 2021 assistive technology evaluation, which stated that the student's language skills were "as good or better" than his peers, and the report of an October 2021 ABA observation, which stated that, academically, the student was "performing at grade level" (*id.*). The IHO found that the relief granted, including the 1:1 ABA services and the supports for management needs set forth in the 2022 IEP provided the appropriate supports and services for the student to make meaningful progress during the 2022-23 school year (*id.* at p. 18).

In awarding the requested assistive technology to the student for the remainder of the 2022-23 school year, the IHO found that the hearing record established that the student required an FM



system and an auditory processing application for use throughout the school day, as well as the need for staff training; the IHO referenced the July 2021 auditory and language processing evaluation report, which indicated the presence of an auditory processing disorder, as well as the district's failure to offer rebuttal testimony or documentation (IHO Decision at pp. 18-20).

Finally, in considering the parents' request for compensatory relief in the form of an education program and services for the student consistent with the program and services recommended in the IEEs (i.e., the independent assistive technology evaluation, OT evaluation, ABA observation, neuropsychological evaluation, and auditory and language processing evaluation), the IHO noted that the district had failed to provide the student a FAPE for the last five years (the 2018-19 through 2022-23 school years), that the evaluations recommended, among other things, evidence-based, multi-sensory approaches to literacy and numeracy instruction, 1:1 ABA support in the classroom, a small structured classroom with low student-to-teacher ratio, and that the district failed to offer rebuttal testimony or documentation (IHO Decision at pp. 21-22). In citing to law that, generally, prospective placement was disfavored, the IHO directed the CSE to convene within 60 days to consider a possible deferral to the district's central based support team (CBST) to locate an appropriate State-approved nonpublic school program for the student that offers ABA instruction and an evidence-based, multi-sensory approach to literacy and numeracy instruction (e.g. Orton- Gillingham, Lindamood-Bell or a comparable method) (*id.* at p. 22). The IHO further directed that, in deciding whether a deferral to the CBST is appropriate, the CSE should consider the recommendations contained in the student's evaluations and whether it is in the student's best interests to receive the supports and services ordered in a class with ICT services, or if he should be placed in a State-approved nonpublic school (*id.*).

As relief, the IHO ordered compensatory services for the student consisting of: (1) 1,026 hours of compensatory 1:1 ABA services to be provided by an independent qualified BCBA selected by parent, paid at reasonable market rates consistent with the rates paid by the district, to be used within three years, provided, however, that the award could not be used until the bank of 5,520 hours of compensatory 1:1 special education tutoring awarded in the prior September 18, 2022 IHO decision had been completely depleted; (2) 57 hours of compensatory 1:1 OT services to be provided by an independent qualified occupational therapist selected by parent, paid at reasonable market rates consistent with the rates paid by the district, to be used within three years; (3) 128.25 hours of compensatory speech-language therapy services to be provided by an independent qualified speech-language therapist selected by the parent, paid at reasonable market rates consistent with the rates paid by the district, to be used within three years (IHO Decision at pp. 22-23).

On a going-forward basis for the remainder of the 2022-23 school year, the IHO ordered the district to fund 18 hours of push-in 1:1 ABA services per week to be provided by an independent qualified BCBA selected by the parents and paid at reasonable market rates consistent with rates paid by the district (IHO Decision at p. 22). In addition, for the remainder of the 2022-23 school year, the IHO ordered the district to provide the student with: 16 hours of 1:1 paraprofessional (behavioral support) services per week; two 30-minute sessions of 1:1 OT services per week; and two 45-minute sessions of 1:1 speech-language therapy services and one 45-minute session of 3:1 speech-language therapy services per week (*id.* at p. 23). Other ordered relief included an FM system, an auditory processing application and services, and staff training (*id.* at pp. 23-24). Finally, the IHO ordered the district to convene a meeting of the CSE, within

60 days, to consider a possible deferral to the CBST to locate an appropriate State-approved nonpublic school program that offers ABA instruction and an evidence-based, multi-sensory approach to literacy and numeracy instruction (e.g., Orton- Gillingham, Lindamood-Bell) as described above (*id.* at p. 24).

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

The parents appeal and assert that: (1) the assignment of an IHO from OATH violated applicable law and the IHO's denial of parents' recusal motion was erroneous; (2) the IHO failed to make a verbatim record of all proceedings before the IHO available to the parties; (3) the IHO failed to hold the district to its burden and erroneously shifted the burden to the parents concerning compensatory education relief; (4) the IHO's arbitrary limitations on the compensatory award amounted to a denial of the parents' requested relief; (5) the IHO erroneously required that the compensatory ABA services be provided by a BCBA, which was likely to result in the parents' inability to use the services; (6) the IHO erroneously placed rate limitations on the award; (7) the IHO erroneously denied access to the compensatory ABA services until the prior bank of compensatory education services was depleted; (8) the IHO erroneously placed a 3-year expiration on the compensatory award; (9) the IHO erroneously denied the parents full remediation of ABA, OT, and speech-language therapy for the two-year denial of FAPE; (10) the IHO erroneously denied the parents' request for 92 hours of compensatory ABA supervision by a BCBA; (11) the IHO arbitrarily and erroneously reduced the parents' request for declaratory relief; (12) the IHO erroneously denied the recommended home program; (13) the IHO erroneously denied the student a 12-month school year program; (14) the IHO's sua sponte order for the CSE to consider deferral to CBST should be overturned; (15) the IHO failed to rule on all claims raised in the due process complaint notice; and (16) the IHO erred in failing to determine that the district violated section 504.<sup>6</sup>

As relief, the parents request a finding that "OATH IHOs should recuse." In addition, the parents request that the IHO's limitations on the compensatory awards be reversed and vacated with respect to the requirement that the ABA services be provided by a BCBA, the limitation on the rate for the services, the requirement that the parents use the award from the prior matter before being allowed to use the present award, and the 3-year expiration of the compensatory award. With respect to the latter, the parents request that either the award not expire or alternatively that the award be available for six years. The parents seek the following compensatory relief—"less for the 22-23 SY for the time period of prospective, declaratory relief"—consisting of: (a) 4,600 hours of ABA services; (b) 92 hours of OT; (c) 207 hours of speech-language therapy; and (d) 92 hours of ABA supervision. The parents request a finding that an appropriate program for the student consists of the recommendations made by the independent evaluators on a 12-month basis,

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<sup>6</sup> With respect to the parents' argument that the IHO erred in failing to rule that the district violated section 504, an SRO lacks jurisdiction to consider the parents request, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], *aff'd*, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at \*11 [S.D.N.Y. Aug. 5, 2016]). Accordingly, the parents' arguments regarding section 504 will not be further addressed.

including: full-time 1:1 special education instruction using ABA; 10 hours per week of home-based ABA services; 1:1 OT for two 30-minute sessions per week; and 1:1 speech-language therapy for two 45-minute sessions and 3:1 speech-language therapy for one 45-minute session per week.

In an answer, the district argues that the IHO justifiably limited the relief awarded to the parents and that the parents' remaining claims of IHO error are unavailing.

## 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. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [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>7</sup>

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).

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<sup>7</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" (Endrew F., 580 U.S. at 402).

## VI. Discussion

### A. Preliminary Matters

#### 1. Request for Recusal

The parents assert that the assignment of an IHO from OATH violated applicable law and that the IHO's denial of the parents' recusal motion was erroneous. The district responds that an SRO lacks authority to address this systemic claim and that the merits of the parents' argument are "dubious at best."

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

Recently, in response to a significant increase in the number of due process complaint notices filed in the district, an agreement between the New York State Education Department (NYSED), the New York City Department of Education, and OATH, dated December 1, 2021, explained a transition of the handling of special education impartial due process hearings in the district to OATH and provided for a separate special education unit to be staffed by IHOs employed by OATH (see Memorandum of Agreement [Dec. 1, 2021], available at <http://www.nysed.gov/common/nysed/files/office-of-administrative-trials-and-hearings-memorandum-of-agreement.pdf>). The Mayor of the City of New York issued Executive Order No. 91 on December 27, 2021 to further implement the transfer (Executive Order [de Blasio] No. 91 [Dec. 27, 2021], available at <https://www.nyc.gov/assets/home/downloads/pdf/executive-orders/2021/eo-91.pdf>).

The parents argue that "the Mayor, who appoints both the Chancellor and OATH Commissioner, has been intimately involved in due process hearings and controls both special education policy and funding," and that these individuals and their agencies "are motivated to gain control of the hearings," "reduce special education costs, particularly those that arise due to IDEA hearings," and "reduce the costs of relief ordered." Therefore, the parents assert that "an employee of a city agency closely aligned with the Mayor has an inherent conflict of interest."

in review of the parents' claim and the above referenced authority regarding the transfer of special education due process hearings in New York City to OATH, I find the parents' claim to be a systemic one. An SRO lacks jurisdiction to consider a parent's claims with respect to alleged

systemic violations, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at \*9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]).

Moreover, the District Court of the Southern District of New York recently considered similar arguments regarding the neutrality and qualifications of OATH IHOs, and, in denying a motion for a preliminary injunction, noted the lack of "compelling" or "sufficient" evidence to support the broad allegations that "OATH would be beholden to the City or would otherwise be biased in adjudicating cases" or that the IHOs lack the requisite knowledge or expertise (see E.F. v. Adams, 2022 WL 601999 at \*10 [S.D.N.Y. Mar. 1, 2022]). With respect to the latter allegation, the court noted that "training and certification of OATH IHOs w[ould] continue to be led by the NYSED, that no IHO candidate [could] hear cases unless and until they [we]re certified by NYSED, and that NYSED reserve[d] authority to de-certify OATH IHOs which would prohibit them from hearing cases" (see E.F., 2022 WL 601999, at \*10).

Here, the parents' arguments in favor of recusal include no specific allegations against this IHO with respect to his impartiality or qualifications. Accordingly, there is no basis for a finding that the IHO lacked impartiality or qualifications or that he erred in denying the parents' request that he recuse himself from the matter.

## **2. Conduct of the Hearing**

The parents assert that the IHO failed to make a verbatim record of all proceedings available to the parties. More specifically, the parents indicate that they requested a summary of the prehearing conference but were only provided with a summary of the proceeding. The parents assert that this violated the parents' due process rights and that all proceedings with a hearing officer should be recorded, transcribed, and provided to all parties. The district responds that the hearing date for which the IHO did not make a verbatim record of the proceeding was the prehearing conference date which is permitted under State regulation.

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

While State regulation mandates that a written or, at the option of the parents, electronic verbatim record of the proceedings before the impartial hearing officer shall be maintained and made available to the parties (8 NYCRR 200.5[j][3][v]), specific to prehearing conferences, it allows for a "transcript or a written summary of the prehearing conference[s] [to] be entered into the record by the [IHO]" (8 NYCRR 200.5[j][3][xi] [emphasis added]). Therefore, as the hearing date at issue was the date of the prehearing conference, the IHO was permitted to issue either a transcript or a written summary of the proceedings, and did not err in issuing a prehearing conference summary and order in lieu of a transcript for the August 25, 2022 prehearing conference (see Parent Ex. E).

As to the parents' claim that the substitution of a written summary for a verbatim record of the prehearing conference violated due process, particularly with respect to the parents' motion for recusal, the hearing record, as a whole, does not support the parents' allegations. While the prehearing conference summary did not reflect that the parents made a motion for the IHO to recuse (and the email correspondence including the request for recusal and the IHO's determination thereon were not included in the hearing record on appeal except for the parents' provision of the email correspondence with the request for review) (see Parent Ex. E; SRO Ex. B), the prehearing conference summary did outline the IHO's expectations and requirements for formal motion practice, including for purposes of objecting to the IHO's assignment, and set forth the following:

If either party believes the undersigned Hearing Officer has overlooked or misstated any item, the party is directed to advise the undersigned Hearing Officer and all parties of the omission or misstatement within three (3) business days of the date of this Order. Any objection to anything contained within this Summary and Order shall be submitted in a written motion within three (3) business days of the date of this Order and the undersigned Hearing Officer will address the party's concerns accordingly. If either party fails to raise an objection within this mandated timeframe, such objection will be considered waived.

(Parent Ex. E at pp. 3-5). Here, there is no indication in the hearing record that the parents followed the IHO's directives with respect to submitting a written motion seeking recusal accompanied by case law and statutory authority (id. at p. 5). There is also no indication that the parents informed the IHO of any purported omission from the prehearing conference summary or made a written motion objecting to the summary order, and the parents do not allege that they proceeded otherwise. The parents did not take advantage of the opportunity to make a formal record regarding their request for the IHO to recuse, which was afforded to them by the IHO's reasonable directives. This does not amount to a denial of due process and the parents' arguments to the contrary are without merit.

## **B. Relief**

### **1. Compensatory Education—2021-22 and 2022-23 School Years**

The parents assert that the IHO erroneously denied the parents' full compensation in the form of ABA services, OT, and speech-language therapy for the two-year denial of FAPE. All

combined for the 2021-22 and 2022-23 school years, the parents request (a) 4,600 hours of ABA services (comprised of 3,680 hours of in-school ABA services and 920 hours of at-home ABA services); (b) 92 hours of ABA supervision by a BCBA, (c) 92 hours of OT; and (d) 207 hours of speech-language therapy.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Generally, compensatory services are not designed for the purpose of maximizing a student's potential or to guarantee that the student achieves a particular grade-level in the student's areas of need (see Application of a Student with a Disability, Appeal No. 16-033; cf. Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Rather, an award of compensatory education should place the student in the position that he would have been in had the district acted properly (see Parents of Student W., 31 F.3d at 1497 [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

Moreover, an IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]).

Initially, with respect to the parents' argument that the IHO failed to hold the district to its burden of proof and erroneously shifted the burden to the parents concerning compensatory relief for the district's denial of a FAPE to the student, the district conceded, or at least failed to meet its burden to prove, that it offered the student a FAPE for the 2021-22 and 2022-23 school years (see



IHO Decision at p. 6; Nov. 15, 2022 Tr. p. 4; Nov. 17, 2022 Tr. p. 15). Additionally, the district was required under the due process procedures set forth in New York State law to address its burdens by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at \*4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; see also E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524). Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district, it is not an SRO's responsibility to craft the district's position regarding the appropriate compensatory education remedy. During the impartial hearing, the district failed to offer any documentary evidence, witnesses, or a closing brief.

The IHO acknowledged the district's burden of proof on the question of relief but also noted that the parents had a "responsibility to identify the specific remedy [they were] seeking" (IHO Decision at pp. 8-9). The IHO also acknowledged that the parents had identified the specific remedy sought and provided evidence in support thereof (id. at p. 9).

However, the IHO was by no means required to merely adopt the relief proposed by the parents. An outright default judgment awarding compensatory education—or as in this case, any and all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005] [rejecting "lump sum" grant of tutoring as a compensatory remedy for a multi-year denial of FAPE]).<sup>8</sup> Indeed, an award ordered so blindly could ultimately do more harm than good for a student (see M.M., 2017 WL 1194685, at \*8 ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). Moreover, if the sum and total of the compensatory education relief requested by the parent was ordered, including the monetization thereof, it would amount to a punitive award (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] [noting that "[t]he purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]). Thus, rather than relying solely on the district's failure to present an argument or evidence regarding a compensatory award, this decision will review each of the IHO's findings regarding compensatory education to determine if they were a sufficient and appropriate award based on the evidence in the hearing record.

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<sup>8</sup> Authority specific to the issue of a parent's request for a default judgment due to a school district's failure to comply with provisions requiring a response to due process complaint notices tends to lean against entry of a default judgment in the absence of a substantive violation, and that the remedy is a due process hearing (G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 Fed. App'x 698, 699 [9th Cir. 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]). However, here, an impartial hearing, along with a full and fair opportunity to be heard, has been afforded to the district already, rendering such authority inapposite.

### a. Bases for Award Calculations

Before turning to the specific compensatory education awards at issue, I will address the IHO's calculations, which did not take into account 12-month services or home-based services, which he found the student did not require, and which did not award compensatory education for the remainder of the 2022-23 school year after issuance of the decision because he had ordered that the student receive specified services on a going-forward basis.

First, the parents argue that the calculation for compensatory education should have been based on a 12-month school year comprised of 46 weeks, rather than a 10-month school year comprised of 38 weeks as the IHO found.<sup>9</sup> The parents argue that the IHO erred in calculating the award based on a 10-month school year, noting that evaluations in the hearing record recommend that the student receive a 12-month school year (Parent Exs. I at p. 16; J at p. 6; K at p. 15; R ¶¶ 14, 96). The IHO found that the evidence in the hearing record did not support a finding that the student experienced substantial regression and, therefore, did not require 12-month services to receive an educational benefit (IHO Decision at pp. 12, 15). According to State regulation, the purpose of 12-month services is to prevent substantial regression" (8 NYCRR 200.6[k][1]; see 8 NYCRR 200.1[eee]). "Substantial regression" is defined as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]).

The November 2021 neuropsychological evaluation report, the August 2021 OT evaluation report, and the October 2022 ABA observation report included recommendations that the student receive services on a 12-month basis to prevent regression of skills, maintain mastered skills, and ensure carryover (Parent Exs. I at p. 16; J at p. 6; K at p. 15). In her affidavit testimony, the neuropsychologist who conducted the November 2021 evaluation opined that "[i]t [wa]s clear" that the student "require[d] 12-month services" and she continued her recommendation that the student receive 12-month services (Parent Ex. R ¶¶ 14, 96). However, while the reports of the evaluations recommend 12-month services, they do not detail the bases for their expectation that the student would experience regression (Parent Exs. I-K). The student's special education teacher for the 2018-19 through 2022-23 school years testified that, while the student tended to experience regression with behaviors and "could definitely benefit from a 12-month program" to "reinforce" skills and to continue related services, he did not show regression in the area of academics (Nov. 21, 2022 Tr. pp. 19-20; see Parent Ex. Q ¶¶ 7, 9). With respect to new material, she described that "once he knows it, . . . he tends to retain it" (Nov. 21, 2022 Tr. p. 19; see Parent Ex. Q ¶ 38).

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<sup>9</sup> Pursuant to State regulation, a 10-month school year from September through June consists of at least 36 weeks, not 38 weeks referenced by the IHO, and a 12-month school year from June through July would generally consist of 42 weeks, not the 46 weeks requested by the parents. This is based on the 180 instructional days in a 10-month school year, plus an additional 30 days during the 12-month portion of the school year that occurs over a summer, typically during a six week program (see Educ. Law § 3604[7]; 8 NYCRR 200.1[eee]) While the 10-month school year would generally be based on 36 weeks, absent a cross-appeal from the district on this point, I will not disturb the IHO's award to the extent it is based on 38 weeks.

Consistent with this description, the neuropsychologist also reported that the student scored in the high average range on tasks measuring the student's verbal and visual memory and described that he was "highly proficient in learning and retaining material" under certain conditions (Parent Ex. K at pp. 8, 12).

Based on this evidence, the information is not particularly detailed with respect to the student's need for 12-month services and, to some extent, the fault for this lies with the district. Nevertheless, based on the totality of the evidence, the IHO did not err in weighing the information and finding insufficient basis for a finding that the student required compensatory education calculated based on a 12-month school year in order to place him where he would have been but for the district's failure to offer him a FAPE.

The IHO also calculated the award of compensatory education taking into account the length of a school day, which over the course of a week he found to equal 33 hours and 45 minutes, as opposed to the 40 hours per week of services sought by the parents (IHO Decision at p. 12). The parents did not specifically appeal this finding, and there is no basis to disturb the IHO's calculation on this point.

As for home-based ABA services, the parents argue that the IHO erred in finding that the sole purpose of the recommendations for home-based services was to encourage generalization. Several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (*see, e.g., F.L. v. New York City Dep't of Educ.*, 2016 WL 3211969, at \*11 [S.D.N.Y. June 8, 2016]; *L.K. v. New York City Dep't of Educ.*, 2016 WL 899321, at \*8-\*10 [S.D.N.Y. Mar. 1, 2016], *aff'd in part*, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]; *P.S. v. New York City Dep't of Educ.*, 2014 WL 3673603, at \*13-\*14 [S.D.N.Y. Jul. 24, 2014]; *M.L. v. New York City Dep't of Educ.*, 2014 WL 1301957, at \*11 [S.D.N.Y. Mar. 31, 2014]; *K.L. v. New York City Dep't of Educ.*, 2012 WL 4017822, at \*14 [S.D.N.Y. Aug. 23, 2012], *aff'd*, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; *Student X*, 2008 WL 4890440, at \*17; *A.D. v. New York City Dep't of Educ.*, 2008 WL 8993558, at \*7 [S.D.N.Y. Apr. 21, 2008]; *see also Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1152-53 [10th Cir. 2008]; *Gonzalez v. Puerto Rico Dep't of Educ.*, 254 F.3d 350, 353 [1st Cir. 2001]; *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1293 [11th Cir. 2001]; *JSK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1573 [11th Cir 1991]).

The student's special education teacher recommended the services in order to "carry over skills, aid generalization and ensure maintenance" of skills (Parent Ex. J at pp. 5, 6). The independent neuropsychologist indicated that the student and his family would "require a minimum of 10-hours per week of intensive home-based individual and dyadic (parent/child) behavioral interventions" as well as compensatory services (Parent Ex. K at p. 16). The neuropsychologist repeated the recommendation in her affidavit testimony (Parent Ex. R ¶¶ 96, 98-99). During the impartial hearing, the neuropsychologist indicated that the student needed home-based services "due to the significant interfering behaviors that [we]re occurring in the home setting" (Dec. 9, 2022 Tr. p. 31). She elaborated that, for home-based services, one component would be parent training, in that the parents would learn ABA skills to reduce interfering behaviors, which would lead to "structure and consistency" for the student, which he required

(Dec. 9, 2022 Tr. pp. 32, 37). She further described that, in the home-based program, the student could work on goals in different contexts, activities of daily living, and preventing self-injurious behaviors (Dec. 9, 2022 Tr. pp. 37-39).

The IHO weighed the purposes stated for the home-based ABA recommendations made by the neuropsychologist and the student's special education teacher and found that the IDEA does not require generalization of skills and that, additional home-based services, while no doubt beneficial, were not necessary in order to place the student in the place he would have been but for the district's denial of a FAPE (IHO Decision at p. 14). While the neuropsychologist pointed to what the student could work on in a home-based ABA program and testified that a program without the home-based component "would not be sufficient" (Dec. 9, 2022 Tr. pp. 32, 37-40), she did not seem to consider the student's progress during the 2021-22 school year without the home-based program (see Parent Ex. AA) or how the home-based program would help the student receive educational benefit from his school program. Based on the evidence in the hearing record, the IHO did not err in finding that the home-based program was recommended predominantly for the purpose of generalizing the student's skills to the home or community setting and that the calculation of compensatory ABA, discussed below, was sufficient to remedy the denial of a FAPE without the inclusion of additional hours to make-up for the lack of a home-based program (see Y.D. v. New York City Dep't of Educ., 2017 WL 1051129, at \*8 [S.D.N.Y. Mar. 20, 2017] [finding out-of-school services were unnecessary to ensure the student made progress in the classroom and would, instead, be aimed at managing behaviors outside the school day]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*15 [S.D.N.Y. Sept. 27, 2013] ["While the record indicates that [the student] may have benefited from home-based services, it contains no indication that such services were necessary"], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]).

I also note here that the parents have based their requests for compensatory education on a full two-year calculation, but the IHO also awarded a prospective program for the remainder of the 2022-23 school year. Taking into account this other relief, the IHO did not err in limiting the compensatory education remedy to the period of time before the prospective placement would be put into place to avoid duplication (see Demarcus L. v. Bd. of Educ. of the City of Chicago, 2014 WL 948883, at \*8 [N.D. Ill. Mar. 11, 2014] [denying compensatory education partially due to the prospective revisions to the student's IEP]).

Turning to the parents' requests for compensatory speech-language therapy and OT, the parents appeal the IHO's failure to award all of the compensatory services requested; however, aside from the reductions from the parents' requested amounts for the 12-month services and for the period of time for which the IHO ordered a prospective program, the IHO awarded the parents the relief they sought. As the IHO did not err in his adjustments to the calculations for the 12-month school year and for the prospective program, there is no basis to disturb the compensatory speech-language therapy and OT awards. Accordingly, I will next address the IHO's award of compensatory ABA services and the other limitations that the IHO placed on the compensatory awards.

#### **b. ABA Services**

The IHO found that 1:1 in-school ABA services were not required or appropriate for the entire school day, including for example, recess and lunch, but found that an appropriate program

for the student required 1:1 ABA services during the core academic classes totaling 18 hours per week, as well as 1:1 paraprofessional for the remaining 16 hours of the school week, for the remainder of the 2022-23 school year (IHO Decision at pp. 12-13). Based on this, the IHO awarded compensatory education of: 1,026 hours of compensatory 1:1 ABA services consisting of 684 hours for the 2021-22 school year (calculated as 18 hours per week x 38 weeks x 1 full year) and 342 hours for the 2022-23 school year (calculated as 18 hours per week x 19 weeks or one-half year) (id. at pp. 12-13). The IHO directed that the awarded ABA services be provided by a BCBA, but denied the parents' request for BCBA supervision (id. at p. 14).

In arguing that the IHO did not award a sufficient number of hours of ABA services for the student to compensate for the denial of FAPE for the 2021-22 school year and the first half of the 2022-23 school year, the parents primarily rely on the November 2021 neuropsychological evaluation report and the testimony of the neuropsychologist who conducted the evaluation (Req. for Rev. ¶9; see Parent Exs. K; R).

A neuropsychological evaluation of the student was conducted on June 30, 2021, and July 14, 2021 and, the neuropsychologist who conducted the evaluation observed the student in his classroom, using livestream video, on October 6, 2021 (Parent Ex. K). Additionally, according to the neuropsychological evaluation report, dated November 8, 2021, the neuropsychologist who conducted the evaluation had interviews with the student, the parent, the student's teachers, and the student's SEIT provider and performed a record review, which consisted of review of the student's 2018 CPSE evaluations and classroom observation, the student's 2018, 2019, and 2020 IEPs, a 2021 interim decision on pendency, and evaluations conducted pursuant to the May 2021 interim order from the prior proceeding (including the July 2021 assistive technology evaluation, auditory and language processing evaluations, and the August 2021 OT and PT evaluations) (id. at pp. 1-2). The neuropsychologist also conducted cognitive, achievement, and behavioral assessments (id. at pp. 6-12). Based on the assessments, the evaluator found, and the IHO referenced, that, while the student's "current profile [wa]s quite uneven," the student "ha[d] some areas of considerable strength, and other areas where he w[ould] benefit from significant support" (id. at p. 12; see IHO Decision at p. 9). Further, the student's cognitive profile was found to be "one of solidly average abilities to reason, solve problems, and learn useful information" and the evaluator noted that the student "possesse[d] verbal and nonverbal reasoning in the average-to-high average range, and rapid processing of information f[ell] generally within age-expectation" (Parent Ex. K at p. 12). Regarding the student's strengths, the evaluator found "remarkable strength in quickly generating ideas" and "no difficulties in word retrieval or verbal fluency" (id.). Additionally, the evaluator found, and the IHO referenced, that the student "[wa]s highly proficient in learning and retaining material, as long as this information [wa]s presented in isolation rather than in a narrative or expository language context," and the evaluator noted that "[i]t d[id] appear that if he [wa]s paying attention, he c[ould] easily and quickly learn new information, hold it in his memory, and he c[ould] remember it for later repetition" and that the student "[wa]s also performing at or above age expectation in all academic areas" (id.; IHO Decision at p. 17). Further, the evaluator found that the student's "math computation and spelling reached the high average range, reflecting the gains he has made academically with individualized support" and the student's "average-to-high average scores in reading, writing and math [we]re encouraging" (Parent Ex. K at p. 12).

The neuropsychological evaluation report also noted the student's areas of weakness, which included "auditory processing and phonological awareness deficits that [we]re closely associated with literacy development," as well as "considerably more difficulty attending to and performing a mental operation on information he ha[d] been given, such as listening to a story and answering questions, a complex task requiring integration of language" (Parent Ex. K at p. 12). The neuropsychologist noted that the student "ha[d] longstanding difficulties in attention, executive functioning, and fine motor skills required for academic tasks" (*id.*). Further, the report of the evaluation identified deficits in social communication and social interaction (inconsistent social response, reduced reciprocity with peers), and restricted and/or repetitive behaviors (excessive resistance to change, insistence on sameness, perseverative interests), warranting a diagnosis of autism spectrum disorder without language impairment (*id.* at p. 13). The evaluator noted that the student was most successful with structured routines and when he was working one-on-one with an adult (*id.*). In addition, the evaluator reported that the student had significant difficulties with attention and behavior regulation and that his "hyperactivity, impulsivity, and distractibility all create[d] enough functional impairment that they warrant[ed] a diagnosis of [ADHD]" and that the student would "benefit from ongoing support for (1) his social skills, (2) his behavioral and social flexibility, (3) his executive functioning, and (4) his emotional development" (*id.* at p. 14). As noted by the IHO, however, the report concluded that, while the student "certainly require[d] support at th[at] time, it [wa]s essential to stress that he [wa]s functioning at a high level in many respects, with several remarkable strengths" (*id.*; *see* IHO Decision at p. 17).

The October 2022 ABA observation noted the student's need for "consistent prompting from his 1:1 para and teachers in order to follow along with the class routine and remain on task" (Parent Ex. J at p. 3). However, as referenced by the IHO, the hearing record indicates that the student "[wa]s performing at grade level" (*id.* at p. 2; *see* IHO Decision at p. 17). The ABA observation stated the student "appear[ed] to be able to keep up with his peers academically, however struggle[d] with attention to task, [wa]s self directed and easily distracted and ha[d] trouble with transition times" (Parent Ex. J at p. 4). In addition, according to the July 2021 assistive technology evaluation, and, as referenced by the IHO, "when compared to peers with similar backgrounds and language acquisition histories, [the student]'s language skills [we]re 'as good or better,' [and h]e sp[oke] clearly, use[d] full sentences, and [wa]s comfortable with public speaking" (Parent Ex. H at p. 3; IHO Decision at p. 17).

Finally, the student's 2021-22 school year report card showed that the student received final grades of "[p]roficient" in writing, listening and speaking language, mathematics, science, social studies, and history, and 'academic and personal behaviors," as well as in physical education and music, and a final grade of "[e]xcel[s] in standards" for theatre (Parent Ex. AA). However, the student received a grade of "[b]elow standards" for reading and social/emotional development (*id.*). The IHO noted that the student had achieved this progress with the support of a full-time paraprofessional for behavioral support (IHO Decision at p. 12).

The neuropsychological evaluation report included specific recommendations for compensatory education to remedy the district's failure to provide the student with a full-time ABA program for the 2018-19, 2019-20, and 2020-21 school years (Parent Ex. K at p. 16). In her affidavit testimony in the present matter, the neuropsychologist opined that it was her "understand[ing]" that the student "ha[d] not received sufficient intervention from the time of [her] evaluation through present" and she "believe[d] the findings and recommendations in [her]

evaluation remain[ed] accurate" (Parent Ex. R ¶ 13). To remedy the district's "failure to provide [the student] with a sufficient and consistent program and services over the 2021-2022 and 2022-2023 school years and his need to remediate his skills as a result," the neuropsychologist recommended the student receive "a flexible, non-expiring bank of 4,600 compensatory remediation hours of 1:1 special instruction with ABA (40 hours per week in school (3,680 hours) and 10 hours per week at home (920 hours), for 12 months/46 weeks over 2 years) to provide social skills training, home-based ABA, parent counseling/training and [to] work on [the student's] extensive delays and deficits" (*id.* ¶ 98). The neuropsychologist indicated that the "hours were calculated utilizing a qualitative approach by taking into account the missed opportunities for services over the last two school years when [the student] should have been receiving a full day 1:1 special instruction with ABA program and the level of intervention [the student] need[ed] to 'catch up.'" (*id.*). In addition, the neuropsychologist recommended the hours "to make up for the home services he should have received but did not, as well as to make up for lost opportunities and gain skills he needs and can achieve with intensive intervention" (*id.* ¶ 99).

The recommendations for compensatory ABA services did not take into account the student's instructional program consisting of ICT services and related services for the 2021-22 and 2022-23 school years, and a full-time paraprofessional for daily behavioral support for the 2022-23 school year (*see* Parent Ex. K; IHO Exs. 3; 4; 5). Additionally, the hearing record indicates that the student received nine hours of 1:1 instruction per week from a special education teacher pursuant to pendency (Parent Ex. Q ¶ 7). The parents do not dispute the IHO's finding that the student made some progress attending the district's recommended program during the 2021-22 school year (*see* Req. for Rev. ¶ 9), yet they would have the compensatory education award calculated as if the student received no program or services at all. It was appropriate for the IHO to take into account the student's progress when calculating the compensatory award (*N. Kingston Sch. Comm. v. Justine R.*, 2014 WL 8108411, at \*9 [D.R.I. Jun. 27, 2014], *adopted*, 2015 WL 1137588 [D.R.I. Mar. 12, 2015] [finding that a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated"]; *Phillips v. Dist. of Columbia*, 932 F. Supp. 2d 42, 50 [D.D.C. 2013] [finding even if there is a denial of a FAPE, it may be that no compensatory education is required for the denial either because it would not help or because the student has flourished in the student's current placement]).

There is also no basis to reverse the IHO's rationale for calculating the compensatory ABA services award by focusing on the support the student needed in academic classes (reading, writing, math, social studies, and science), which totaled 18 hours per week, and omitting from the calculations other times during the school day, such as recess and lunch, breakfast, routines, morning meeting, clubs, community circle, and school sounds (IHO Decision at pp. 12, 13; IHO Ex. II). As summarized above, while the student presented with deficits and struggled with behaviors, he also had many strengths and the IHO did not err in weighing those strengths, the student's progress during the 2021-22 school year, and the prospective program awarded for the remainder of the 2022-23 school year, and, based on all of the above, declining to award the entire amount of compensatory education sought by the parents. In light of the foregoing, there is an insufficient basis to modify the IHO's calculation of the award of compensatory ABA services.

### c. Limitations on the Award

The parents assert that the IHO's arbitrary limitations on the compensatory award would serve to deny the relief awarded.

First, the parents argue that the IHO erroneously required that the compensatory ABA services be provided by a BCBA, which, according to the parents, will likely result in the student not being able to use the services due to BCBA provider shortages. Therefore, the parents request that the services be "supervised by a BCBA" as the evaluators recommended. To facilitate this, the parents seek an additional 92 hours of compensatory ABA supervision by a BCBA. The IHO had denied the parents' request for BCBA supervision, in part, because the ABA services he awarded were directed to be provided by a BCBA. In New York, ABA, the practice of ABA, and the licensure of professionals who may permissibly hold themselves out as an LBA or a BCBA have been addressed by State statute (Educ. Law §§ 8801-8803). However, the practice of ABA is not limited to a "licensed behavior analyst" or "certified behavior analyst assistant," as State law provides a very broad exception allowing certified teachers and teaching assistants to continue providing ABA to students in the educational environment, an educational practice that long predates the State's statutory oversight of ABA (Educ. Law § 8807[2]-[3]). Presumably, the compensatory ABA will not be delivered in the student's educational environment; however, there does not appear to be a basis in the hearing record for requiring that all of the compensatory ABA services be delivered only by a BCBA and not by a BCBA assistant or an LBA, which is permissible under State law. Accordingly, I will modify the IHO's limitation in this regard to provide that the compensatory ABA services may be provided by any qualified and licensed professional. However, as I find the award of compensatory ABA services to be sufficient, I will not order more hours for BCBA supervision; the parents may use any hours from the bank of compensatory ABA services towards supervision by a BCBA, if preferred.

Second, the parents assert that the IHO erred by providing that the compensatory education services be obtained at "reasonable market rates consistent with the rates that have been paid by the [district's] Implementation Unit for independent 1:1 ABA services provided by a BCBA within the six (6) month period prior to the date hereof" (IHO Decision at p. 23). The IHO placed similar restrictions on the OT and speech-language therapy awards (*id.*). During the impartial hearing, there was no evidence presented by either party on the issue of rates for services. Absent some evidence in the hearing record about the rates paid by the district's implementation unit, I agree with the parents that the phrasing of the IHO's order injects an element of uncertainty which could potentially hinder the parents' ability to locate and secure providers. Therefore, I will modify the IHO's language and direct that compensatory services be paid at "reasonable market rates" as requested by the parents (see Parent Ex. EE at p. 5).

Third, the parents assert that the IHO erroneously limited the student's ability to receive the bank of 1,026 hours of compensatory ABA services until the previous award of 5,520 hours of compensatory 1:1 special education tutoring from the prior matter was depleted, arguing that there was no evidence that the prior award sufficiently remediated the student's FAPE deprivation, and each award was to remediate separate, significant, long-term FAPE deprivations. In review of the parents' arguments on this point, the awards were for different services—the prior matter awarded 1:1 compensatory tutoring services versus the ABA services awarded in the present matter (see IHO Decision at pp. 22-23; Parent Ex. S at p. 12). Additionally, the prior IHO decision made no



restrictions on the award (Parent Ex. S at p. 12). While the IHO expressed concern regarding the large combined amount of compensatory services awarded in the two proceedings—a concern that I share—generally, a prior award of compensatory education should not be factored into a determination of what constitutes a FAPE, or in this instance, what remedy might place the student in the place he should have been but for a denial of a FAPE (see M.T. v. Arlington Cent. Sch. Dist., 2022 WL 16857176, at \*9 n.12 [S.D.N.Y. Nov. 10, 2022] [noting that compensatory services should be considered "in addition to, rather than in lieu of, those services covered by the IEP"], quoting Doe v. E. Lyme Bd. of Educ., 2020 WL 7078727, at \*18 [D. Conn. Dec. 3, 2020]). Based on the above, with the understanding that the student might benefit from receiving the different services awarded in both receiving during the same time period, I will modify the IHO's limitation on the compensatory education award in this proceeding so that the awards can be used concurrently.

Fourth, the parents assert that the IHO erroneously placed a three-year expiration on the compensatory award arguing that it was unfair and arbitrary and requesting no expiration date or, alternatively, a six-year expiration. Here, I find no reason in the hearing record to disturb the IHO's determination that the compensatory award of 1,026 hours of 1:1 ABA services "must be used within three years" of the date of the decision. As noted above, the purpose of compensatory services is to 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, not to continuously carry forward a balance of compensatory services that remain unused. While I acknowledge the parent's concerns regarding the difficulties of finding and arranging for providers, given provider shortages, and the student's lengthy FAPE deprivation, I find that a three-year expiration date for the delivery of the awarded services is reasonable.

## **2. Prospective Relief—2022-23 School Year**

The parents assert that the IHO arbitrarily and erroneously reduced the parents' request for declaratory relief as the parents disagreed with the district program and sought a change in the educational program. On appeal, the parents seek prospective relief in the form of a requirement that the district provide specific IEP programming that is consistent with IEEs obtained as a part of the prior proceeding, including, full-time 1:1 special education instruction using ABA; 1:1 OT for two 30-minute sessions per week; 10 hours per week of home-based ABA; 1:1 speech-language therapy for two 45-minute sessions and 3:1 speech-language therapy for one 45-minute session per week; all on a 12-month basis.

The parents also assert that the SRO should reverse the IHO's sua sponte order for the CSE to consider deferral to the CBST. The parents assert that it is not appropriate to defer relief back to district, as the IDEA does not permit an IHO to delegate authority to the district to determine appropriate relief.

Initially, an award of prospective relief in the form of IEP amendments and the prospective placement of a student in a particular type of program and placement, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives

of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]. However, concerns about circumventing the CSE process arise most prominently in matters where the school year challenged has ended and, in accordance with its obligation to review a student's IEP at least annually, the CSE would have already convened to produce an IEP for the following school year (see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at \*7 [S.D.N.Y. Aug. 17, 2022] [acknowledging that "orders of prospective services are disfavored as a matter of law" and, in the matter at hand, indicating that "the CSE should have already convened for subsequent school years"]; M.F. v. N. Syracuse Cent. Sch. Dist., 2019 WL 1432768, at \*8 [N.D.N.Y. Mar. 29, 2019] [declining to speculate as to the likelihood that the district would offer the student a FAPE "in the future" and, therefore, denying prospective relief]; Eley v. Dist. of Columbia, 2012 WL 3656471, at \*11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current school year]).

Additionally, while prospective placement might be appropriate in rare cases (see Connors v. Mills, 34 F.Supp.2d 795, 799, 804-06 [N.D.N.Y. Sept. 24, 1998] [noting a prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate"]), the pitfalls of awarding a prospective placement have been noted in multiple State-level administrative review decisions, including that where a prospective placement is obtained by the parents through the impartial hearing, such relief could be treated as an election of remedies, where the parents assume the risk that future unforeseen events could cause the relief to be undesirable (see, e.g., Application of a Student with a Disability, Appeal No. 19-018). The parent cannot return to due process and fault the district for providing the very remedy sought by the parent and ordered by the IHO.

Here, the IHO partially ordered the prospective relief requested by the parents, and the parents are appealing from that determination. The IHO ordered that for the remainder of the 2022-23 school year, the district shall provide the student with—(1) funding for 18 hours of push-in 1:1 ABA services per week; (2) 16 hours of a 1:1 paraprofessional for behavioral support per week; (3) two 30-minute sessions of 1:1 OT services per week; and (4) two 45-minute sessions of 1:1 speech-language therapy services and one 45-minute session of 3:1 speech-language therapy services per week (IHO Decision at pp. 24-25).

The parents appeal from the IHO's award of 18 hours per week of ABA services and 16 hours per week of 1:1 paraprofessional support, asserting that the student should receive a full-time ABA program in school as well as home-based ABA services and 12-month services. However, as discussed above with respect to the compensatory award, the hearing record supports the IHO's determinations that the student did not require a home-based program or 12-month services and that the student made progress while receiving paraprofessional support for his behaviors such that it was reasonable for the ABA services to focus on the student's academic classes (reading, writing, math, social studies, and science). Accordingly, as with the compensatory award, the hearing record supports the IHO's determination as to the amount of

ABA services and paraprofessional support the student required as a prospective award for the remainder of the 2022-23 school year.

Finally, I find no reason to disturb the IHO's order that the district convene a meeting of the CSE, within 60 days, to consider a possible deferral to the CBST to recommend an appropriate State-approved nonpublic school program that offers ABA instruction and an evidence-based, multi-sensory approach to literacy and numeracy instruction, and, in determining whether such deferral is appropriate, to consider the recommendations contained in the student's evaluations and whether it is best for the student to receive the supports and services ordered in his ICT class or to be placed in a State-approved nonpublic school. I note that the IHO's order is solely to consider deferral to CBST and to consider the evaluations in this process and also that, where so much in 1:1 services are contemplated and/or provided, there may be a better option for the student's educational programming.

## **VII. Conclusion**

As set forth above, the IHO erred in placing limitations on the compensatory award by requiring that the compensatory ABA services be provided by a BCBA, by placing a rate limitation not discussed in the hearing record on the award, and by denying access to the awarded compensatory ABA services until a prior unrelated compensatory award is depleted. Additionally, there is an insufficient basis in the hearing record to disturb the remainder of the IHO's determinations regarding compensatory education. Finally, for the reasons set forth above, the IHO's order requiring that the district provide specified services during the 2022-23 school year to remedy the district's failure to offer the student a FAPE for the 2022-23 school year will not be disturbed, nor will the order that the district convene a meeting of the CSE to consider a possible deferral to the CBST.

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated December 29, 2022, is modified by reversing those portions requiring that the compensatory ABA services only be provided by a BCBA, that the compensatory services be provided at reasonable market rates consistent with the rates paid by the district's implementation unit for the same services within six months, and that the bank of compensatory ABA services be available only upon the depletion of a bank of compensatory services ordered in a prior matter;

**IT IS FURTHER ORDERED** that the compensatory ABA services ordered by the IHO may be provided by a qualified licensed professional; and

**IT IS FURTHER ORDERED** that the compensatory services ordered by the IHO shall be funded by the district at reasonable market rates.

**Dated:** Albany, New York  
March 10 2023

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