The University of the State of New York

The State Education Department
State Review Officer
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No. 23-028

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

Appearances:
The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Erin McCormack-Herbert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which found that respondent (the district) failed to offer or provide the student with an appropriate educational program and services for the 2019-20, 2020-21, and 2021-22 school years but denied, in part, her request for reimbursement for tuition and private services, compensatory education, and independent educational evaluations, 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 was evaluated through the Early Intervention Program (EIP) at 18 months old, received a diagnosis of speech delay, and began receiving three sessions per week of speech-language therapy (Tr. pp. 461-62; see Parent Ex. F at p. 1). The student has also received diagnoses of apraxia of speech, language disorder, attention deficit hyperactivity disorder (ADHD), autism spectrum disorder (with language

impairment and without intellectual impairment), and behavior disturbance (Parent Exs. F at p. 3; V at p. 11).

On April 2, 2019, a Committee on Preschool Special Education (CPSE) convened and found the student eligible for special education as a preschool student with a disability (Parent Ex. W at pp. 6-7). For the 2019-20 school year, the CPSE recommended a 12:1+2 special class placement and related services of speech-language therapy and occupational therapy (OT) (id. at p. 6).

In summer 2019, the student was enrolled in a self-contained classroom at a State-approved preschool program, and in September 2019 was moved to an integrated class and received speech-language therapy, OT, and counseling (Tr. pp. 465-68; Parent Exs. A at p. 3; V at p. 2). In March 2020, when schools closed due to the COVID-19 pandemic, the student shifted to remote instruction (Tr. pp. 469-73; Parent Exs. A at p. 4; V at p. 2). According to the parent, at the end of March 2020 the student began receiving physical therapy (PT) remotely (Tr. pp. 469-70).

In July 2020, the student was evaluated for developmental delay by a nurse practitioner and a neurologist who confirmed the diagnosis of apraxia of speech and diagnosed the student as having an autism spectrum disorder and behavior disturbance (Tr. pp. 474-75; Parent Ex. F). In fall 2020, the student continued to attend the State-approved preschool in a "hybrid" model, that included both in-person and remote instruction (Tr. pp. 477-78). In December 2020, the parents moved the student to another preschool where he received full-time in-person instruction in a center-based 12:1+2 program with related services of speech-language therapy, PT, OT, and counseling (Tr. pp. 480-83; Parent Exs. A at p. 5; G at p. 1; V at p. 2). [1]

On May 4, 2021, a CSE convened to develop a program for the student's kindergarten year (Parent Exs. A at p. 5; W at pp. 8-33). The CSE found the student eligible for special education as a student with a speech or language impairment and, for the 10-month portion of the 2021-22 school year, recommended a 12:1+1 special class for math, English Language Arts (ELA), social studies, and sciences, and related services of counseling, OT, PT, and speech-language therapy (id. at pp. 26-28).

On July 16, 2021, a CPSE meeting convened to recommend the student's summer program (Parent Ex. B).[2] Finding the student remained eligible for special education as a preschool student with a disability, the CPSE recommended 12-month services for summer 2021 consisting of 10 hours per week of 1:1 special education itinerant teacher (SEIT) services, with three 30-minute sessions of individual speech-language therapy per week, two 30-minute sessions of individual PT per week, two 30-minute sessions of individual OT per week, and one 30-minute session of counseling (id. at pp. 1, 3, 16-17).

[1] An additional CPSE IEP from December 2020 was included in the parent's motion exhibits (Jan. 2022 Parent Mem. of Law., Ex. C at pp. 146-165).

[2] As a preschool student with a disability, the student was entitled to continue to receive special education and related services under the CPSE through summer 2021 (Educ. Law §§ 3202[1]; 4410[1][i]; 8 NYCRR 200.1[mm][2]).

On August 11, 2021, the district conducted a psychoeducational evaluation in response to the parent's request for a reevaluation and a CSE convened on August 26, 2021 (Parent Ex. G; Jan. 2022 Parent Mem. of Law., Ex. C at pp. 90-122). Also in August 2021, the student began attending a parochial nonpublic school in a general education setting (Tr. pp. 502, 506-07).

A. Due Process Complaint Notice

In a due process complaint notice dated September 1, 2021, the parent asserted that the district denied the student a free appropriate public education (FAPE) for the 2019-20, 2020-21, and 2021-22 school years (Parent Ex. A). Initially, the parent alleged pendency violations and requested immediate implementation of the student's pendency/last agreed-upon placement pursuant to services recommended in the July 2021 IEP (id. at p. 14). The parent argued, among other things, that the district failed to conduct timely and appropriate evaluations and reevaluations of the student; failed to create substantively and procedurally appropriate IEPs and placements for the student; failed to fully implement the student's IEPs during the school years at issue and ensure that certified, licensed, and qualified staff were delivering the student's services; failed to provide in-person services due to CPSE policy during COVID-19-related school closures and the student was unable to meaningfully engage in remote instruction; failed to provide the parent with her due process rights, including prior written notices and legally sufficient procedural safeguards which denied the parent meaningful access to the special education process; failed to provide the parent with educational records; predetermined the outcome of meetings based on availability of resources and blanket policies and practices; and violated section 504 (id. at p. 2). In addition to the above, related to the CPSE IEPs, the parent raised allegations related to the evaluation of the student, the CPSE process, the descriptions of the student's needs, and the annual goals included in the IEPs and, more specifically, asserted that the IEPs failed to address the student's diagnoses of autism and apraxia, that the district did not conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) for the student, that the student was not recommended for PROMPT therapy, applied behavior analysis (ABA) services, or sufficient SEIT services, that the student's educational programs did not include sufficient related services or 1:1 instruction, that the CPSE did not consider assistive technology, and that the student was not recommended for home-based services (id. at pp. 9-10).[3] With respect to the CSE's recommendation for the 2021-22 school year, the parent repeated many of the allegations related to the CPSE and further asserted that in determining the student's recommended program for the transition from preschool to school-age services, the CSE improperly removed SEIT services and failed to recommend 12-month services (id. at pp. 10-12).

The parent further asserted that "[d]ue to the denial of FAPE, the [p]arent [wa]s going to place her child in a private school program with three teachers and invoke her pendency. In addition, she is requesting that the [district] fund (and/or satisfy her debt for) a full-day, 1:1 program using ABA strategies and ABA supervision" (Parent Ex. A at p. 8). The parent further asserted that the district should fund independent educational evaluations (IEEs) alleging disagreement with the evaluations and reevaluations conducted (id. at p. 9).

[3] "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).

As relief, the parent requested: a finding that the district denied the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years; transportation; funding of independent evaluations on an interim basis or final basis including a neuropsychological evaluation, an autism/ABA assessment, a speech-language evaluation, an auditory processing evaluation, an assistive technology evaluation, an OT evaluation, a PT evaluation, a vision processing evaluation, and an observation of the student by an expert in autism; funding of a private FBA and BIP for home and school; compensatory education to include any of the following—1:1 instruction, SEIT services, 1:1 instruction with a research-based strategy such as ABA or ABA supervision, executive functioning support, tutoring, behavior therapy, assistive technology and assistive technology training, vision services, related services (such as OT, PT, speech-language therapy, counseling, and social skills training), PROMPT therapy, or other IEE recommended services; funding or reimbursement to the parent for debt or expenses related to the student's special education needs; and services ordered to be delivered by providers of the parent's choice at market rates (Parent Ex. A at pp. 14-15).

B. Impartial Hearing and Subsequent Events

The parties appeared for a pendency hearing on November 30, 2021, and December 7, 2021, under a prior IHO (IHO I) (Tr. pp. 1-23). In an interim Order on Pendency dated December 10, 2021, IHO I granted the parent's request, finding that the July 2021 IEP was the basis of the student's program for the pendency of this proceeding (Parent Ex. D).[4]

IHO II (hereinafter IHO) was appointed on January 4, 2021, following recusal of IHO I (IHO Decision p. 4). The parties appeared before the IHO for a prehearing conference on January 14, 2021 (Tr. pp. 24-63).

On January 25, 2022, the parent submitted motions to compel the production of records and for an interim order for IEEs (IHO Exs. II, V).[5] The district responded to the parent's motion on January 25, 2022 (IHO Ex. III). On January 28, 2022, the parties appeared for a hearing on the motions for the IEEs and to compel the production of records (Tr. pp. 64-133). In an interim decision dated January 30, 2022, the IHO ordered the district to fund an independent neuropsychological evaluation of the student, "to be conducted by a licensed psychologist, at prevailing market rates comparable to independent neuropsychological evaluations funded by the DOE Impartial Hearing Implementation in the past 12 months" (IHO Ex. VI).

[4] IHO I ordered services "effective September 1, 2021" and during pendency of the proceedings: "1. SEIT ten hours per week, direct, individually; 2. SLT [speech-language therapy], three times per week for 30 minute sessions, individually; 3. OT, two times per week for 30 minute sessions, individually; 4. PT two times per week for 30 minute sessions, individually; 5. Counseling[], once per week for 30 minutes, (2:1)" (Parent Ex. D at p. 3).

[5] The parent included five exhibits referenced in the January 2022 memoranda of law in support of the parent's motions, which were included as part of the hearing record and are referenced herein by identifying the date of the memoranda of law and the letter assigned to the exhibit in the parent's memoranda (January 2022 Parent Mem. of Law., Ex. A-D; G).

The parties proceeded to an impartial hearing on the merits beginning on February 11, 2022, in which the district was to present its case-in-chief, however, the district stated that it was "resting its case" and "not presenting any witnesses or evidence" (Tr. pp. 134-42).

Status conferences were held on March 2, 2022, April 1, 2022, May 16, 2022, May 24, 2022, and June 1, 2022 (Tr. pp. 143-209).[6] In May 2022, an independent neuropsychological evaluation of the student was conducted as ordered by the IHO in an interim order (Parent Ex. V; IHO Ex. VI).

In June 2022, the student's speech-language pathologist provided a report identifying the student's progress utilizing PROMPT therapy in addressing his expressive and receptive language delay and motor planning disorder (Parent Ex. M). A June 2022 progress report completed by a board-certified behavior analyst (BCBA) noted the student's apraxia and autism spectrum disorder diagnoses, maladaptive behaviors at home, and listed "[t]argets mastered" during the reporting period from September 2021 to June 2022 (Parent Ex. Q). The BCBA also prepared a June 2022 FBA report, indicating that the assessment began in September 2021 (Parent Ex. R at pp. 1-19). Subsequently, a BIP was developed for the student (id. at pp. 20-21).

The parent signed a contract with Special Edge on June 15, 2022 (Parent Ex. CC).

Progress reports from Special Edge noted that the student's SEIT services were implemented using ABA methodology in the classroom setting at the student's parochial nonpublic school (Parent Ex. N). The parties continued the impartial hearing; the parent presented her case on June 24, 2022, July 15, 2022, July 19, 2022, August 10, 2022, August 18, 2022, September 13, 2022, September 21, 2022, October 12, 2022, and November 9, 2022, at which point the hearing concluded (Tr. pp. 210-671).[7]

In a final decision dated January 10, 2023, the IHO found that the district failed to provide the student with a FAPE for the 2019-20, 2020-21, and 2021-22 school years (IHO Decision at pp. 33-34, 43). The IHO stated that while the district cross-examined the parent's witnesses and made arguments during motion practice and at the hearing, it did not submit documentary evidence nor call witnesses and thus failed to carry its burden of proof (id. at p. 33). Next, the IHO found that the student's unilateral placement was not appropriate as it was "in no way tailored or designed for the student," there was no evidence of individualization, and the school program and location failed to meet the "test of appropriateness" (id. at pp. 33-34). The IHO stated that the unilateral program coupled with the pendency services "created an impressive, immersive 1:1, and yes costly, special education construct devoted only to the [s]tudent and his progress," including 1:1 ABA support services with BCBA supervision, which "enabled the student to attend a private general education kindergarten"; the IHO found it was "certainly not the kind of self-help the Courts envisioned" especially when the district made efforts to develop an appropriate program only to be "stymied" by the "pandemic and procedural issues" (id. at p. 34). The IHO further found that while it was

[6] At the May 24, 2022 status conference the district indicated that it would produce evidence; however, at the next hearing the district clarified that it was not defending its offer of a FAPE to the student but was objecting to the remedy proposed by the parent for the 2021-22 school year (Tr. pp. 173-174).

[7] The parent submitted a closing statement dated December 12, 2022 (IHO Ex. VIII).

not necessary to address equitable considerations, they would have weighed against an award of all or a portion of the costs of services and/or tuition noting, among other things, that the parent failed to inform the district that she was planning to or already had "contracted to implement a fulltime 1:1 ABA program with BCBA" prior to the filing of the due process compliant notice (id. at p. 35).

Regarding reimbursement and direct pay issues, the IHO found there was: "no contemporaneous contract in the record for the provision of SEIT, ABA provider and BCBA supervision by the agency for the 2021-2022 school year"; the IHO determined that instead, the parent requested the district pay in full a "debt" that had been "ratified" as part of the 2022-23 school year agreement between the parent and the agency, that the statement of hours and cost of services was verified solely through testimony, and that no documentation was provided to show any individual dates of service, descriptions of service, the names of the providers, the time spent, or the signature of the provider (IHO Decision at p. 35). Next, the IHO granted the parent's request for IEEs in the areas of neuropsychological, OT, and PT and noted that the parent withdrew her request for a speech-language IEE and an FBA; the IHO denied the parent's request for IEEs in assistive technology, auditory processing, autism/ABA assessment, vision processing, and an observation by an expert in autism (id. at p. 36). Regarding the parent's record request, the IHO noted that the district responded by producing the entire SESIS log and any documents concerning the school location pursuant to the final 2021-22 IEP on January 28, 2022, and the remaining documents on June 24, 2022 (id.). The IHO also found that the hearing record did not support an award of the parent's requested relief under section 504 (id.).

Next, regarding compensatory education, the IHO found that the hearing record supported an award of compensatory education for the 2019-20, 2020-21, and 2021-22 school years noting that the district conceded FAPE by failing to submit documentary evidence or present witnesses (IHO Decision at p. 37). Regarding the 2019-20 and 2020-21 school years, the IHO found that full implementation of the student's IEPs was "impossible" due to the COVID-19 pandemic resulting in the mid-March 2020 shutdown of all State school buildings and remote and hybrid instruction which persisted through the 2020-21 school year (id.). The IHO found that after the student transferred from the EIP to the CPSE in 2019 he had many delays and difficulties; however, by December 2019 he had made some progress (id. at p. 38). The IHO further found that the COVID-19 school shutdown in mid-March 2020 and concurrent switch to remote education and services led to additional difficulties, including maladaptive behavior in the home and regression (id.). The IHO noted that the student's mother testified that the student "did poorly in the hybrid program" and located a fulltime in-person special education preschool where the student transferred in mid-December 2020 and made some progress (id.). The IHO found that the student, who in mid-March 2020 was three years and eight months old, was at a critical educational juncture and missed significant amounts of in-person special education, as well as the in-person related services of speech-language therapy, PT, OT, and counseling from mid-March 2020 through August 2020 and that the student "surely" would have made more progress if he had in-person access to his recommended IEP program (id.). For the 2021-22 school year, the IHO found no compensatory award was warranted as the 2019-20 and 2020-21 extended school year awards would serve to place the student where he would have been but for the denial of FAPE, and as the parent chose to enroll the student in an inappropriate unilateral program, any educational deficits that arose were not caused by the district's failure to provide a FAPE and could not be considered

an appropriate compensatory award for the denials of FAPE in the prior two years (IHO Decision at p. 39).

Finally, the IHO disagreed with the parent's assertion that the 1:1 ABA support services with BCBA supervision from the student's unilateral program were appropriate compensatory education awards and denied such relief (IHO Decision at pp. 39-41). The IHO noted that the independent neuropsychologist's report stated that the student did not meet the criteria for a diagnosis of autism spectrum disorder and that "deficits in his language skills, communication and social interactions, [were] largely due to his language difficulties" (id. at p. 40). The IHO stated that an "award of compensatory education in the form of 1:1 ABA behavioral support services would not remedy any educational deficit," but could help the student in his home environment; however, the IHO noted that the purpose of compensatory education is not to assist the student at home but to "help him catch up" to where he would have been but for the failure to provide a FAPE (id. at p. 41). The IHO addressed the BCBA's testimony that the student's ABA program was necessary, by noting that the BCBA designed the program, received significant hourly compensation for her services, and was a consultant to the agency (id.).

The IHO stated that as the student missed a significant amount of instruction and related services due to the interruptions caused by the COVID-19 pandemic, the IHO ordered compensatory education including SEIT services, PT, OT, speech-language therapy, PROMPT speech therapy, and counseling (IHO Decision at p. 41). Regarding the calculation, the IHO stated that as there were 56 school weeks between mid-March 2020 and the end of June 2021, the SEIT services were calculated using 10 1:1 hours per week to provide the student with a "significant bump" in early childhood education to make up for the progress he failed to make due to the district's failure to fully implement the IEPs; related services were awarded based on the number of hours recommended in the May 2021 CSE IEP, and the IHO found additional PROMPT speech therapy services would "amplify" the progress the student could make in all areas of education that rely on speech and communication (id.). Therefore, the IHO ordered PROMPT speech therapy as part of the student's compensatory education, to enhance the progress he would be able to make with the compensatory SEIT and related services as well as reimbursement to the parent for the cost of the PROMPT services she obtained for the student from February 1, 2022 through October 2022 separate from the rest of the unilateral program (id.). The IHO declined to order compensatory ABA services or BCBA supervision (id.).

The IHO found that the district failed to provide a FAPE to the student for the 2019-2020, 2020-2021 and 2021-2022 extended school years (IHO Decision at p. 42). As relief, the IHO ordered reimbursement to the parent of $2,960 for PROMPT speech therapy services provided from February 1, 2022 through October 2022, upon receipt of signed invoices with documentation of the dates of service, time spent, and description of services rendered to the student, as well as proof of payment by the parent (id.). The IHO ordered banks of compensatory services for the student consisting of: (1) 56 hours of 1:1 PROMPT speech-language therapy; (2) 84 hours of 1:1 speech-language therapy; (3) 56 hours of 1:1 OT (4) 112 hours of 1:1 PT; (5) 28 hours of 1:1 counseling; and (6) 560 hours of 1:1 special education instruction—each of which "shall not expire until January 15, 2025" (id. at pp. 42-43). The IHO further directed that the services be provided by the student's provider or other provider of the parent's choice in the case of the PROMPT hours, and at reasonable market rate by a licensed or certified provider of the parent's choice for the other compensatory services (id.). The IHO also ordered the district to pay for up to 400 hours of SEIT

services, to the extent not already paid under pendency, at the hourly rate of $195 per hour, for 10 hours per week from September 1, 2021 through January 10, 2023 (id. at p. 43). Finally, the IHO ordered IEEs for OT and PT at a rate not to exceed $1,500 (id.).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in declining to find that the parent's placement of the student for the 2021-22 school year was appropriate and by concluding that the nonpublic school itself, apart from the SEIT services, related services, ABA and BCBA services, did not provide the student with specialized instruction tailored to his unique individual needs and payment was not permitted if the provision of related services allowed a student to attend a nonpublic general education school. The parent argues that she presented evidence of the appropriateness of the program that was unrebutted by the district. In addition, she asserts that the appropriateness of the program and services must be assessed as a whole, not in isolation and that the combined program of the nonpublic school with SEIT services, related services, and ABA/BCBA services provided an amply individualized program for the student, resulted in progress, and was appropriate. Further, the parent argues that placement of the student in a general education nonpublic school with the support services provided achieved the goal of education in the least restrictive environment (LRE). The parent further asserts that the IHO erred in raising equitable concerns sua sponte and then finding they weighed against the parent. Next, the parent asserts that the IHO erred to the extent that she identified "Reimbursement/Direct-Pay Issues" weighing against an award of payment for the student's 2021-22 program. The parent further asserts that, to the extent the IHO's sua sponte finding that the 2021-22 program was "costly" was a basis to deny relief, the SRO should reverse. The parent argues that she should receive payment for the unilaterally obtained services for the 2021-22 school year, whether all or part of it is considered a unilateral placement and/or partial compensatory education, with reimbursement for up to $9,000 for the nonpublic school tuition, together with direct payment for 664 hours of 1:1 ABA services at $180 per hour, 75 hours of BCBA supervision at $350 per hour, and up to 400 hours of SEIT services at $195 per hour (to the extent not already funded under pendency), as well as the related services that were part of pendency.

Next, the parent argues that the IHO's award of 560 hours of 1:1 special education teacher services was insufficient compensatory education and the IHO should have awarded 3,010 hours to be used for ABA or 1:1 teacher services, calculated at 1,400 hours for the 2019-20 school year (35 hours x 40 weeks) and 1,610 hours for the 2020-21 school year (35 hours x 46 weeks); 172 hours of BCBA supervision (2 hours/week x 86 weeks); and at least 48 hours of parent counseling and training (2 hours/month x 24 months).

Additionally, the parent argues that the IHO should have but failed to award full compensatory relief for pendency services the student did not receive from the date of the due process complaint notice date forward to the end of this proceeding. Specifically, the parent asserts that the IHO ordered up to only 400 SEIT hours for September 1, 2021 to January 10, 2023, to the extent not already paid under pendency; however, according to the parent, the student should have received 400 SEIT hours from September 2021 to June 2022 and 10 hours per week thereafter, continuing to the conclusion of this proceeding, and the IHO should have awarded compensatory speech-language, OT, PT, and counseling not provided under pendency. Next, the parent asserts the IHO sua sponte ordered an inappropriate expiration date of January 15, 2025 on the awards

and requests that the IHO's order be modified so that the compensatory award remains available to the student until the end of the school year in which the student turns 21. The parent argues the IHO erred in declining to award the assistive technology and auditory processing IEEs sought as the district failed to defend its evaluations, the IHO wrongly shifted the burden to the parent, and the IEEs are appropriate due to the student's deficits in writing, academics, and language. The parent also argues that the IHO erred in placing a rate cap of $1,500 on the OT and PT IEEs as there was no evidence to support the cap and the IHO's order should be modified in favor of awarding the evaluations at market rate. Finally, the parent contends the IHO erred in summarily dismissing the student's section 504 claim.[8] As relief, the parent requests reversal of the IHO's decision as indicated and granting of the relief sought.

The district answers and asserts the IHO decision should be affirmed, and that it is not appealing the IHO's determination that the district failed to offer the student a FAPE for the school years at issue; however, the district contends that the parent is not entitled to a default judgment or declaratory relief. The district further argues that the SRO should not disturb the IHO's denial of the parent's request for funding for the unilateral program— including tuition and the provision of SEIT services, 1:1 behavior support with ABA strategies, and BCBA supervision—during the 2021-22 school year, as the hearing record does not include evidence that the parent is legally obligated to pay for the services, such as contracts and invoices for services. Further, the district argues the parent failed to provide the district with notice of her intention to unilaterally place the student for the 2021-22 school year, that the parent's argument that the due process complaint notice should be considered as proof that the parent satisfied her notice obligation should be rejected, and that reimbursement for the 2021-22 program should be denied on equitable grounds. The district contends that the IHO properly denied any award of compensatory services for the 2021-22 school year; the district argues that, as the parent decided to unilaterally obtain the private services and placement for the student for the 2021-22 school year, she cannot also seek compensatory education as an alternative remedy. The district also contends that the IHO's ordered time frame of two years to utilize the student's bank of compensatory education services is reasonable and should be affirmed. Further the district asserts there is no basis in the hearing record to disturb the IHO's decision to deny the parent's request for 3,010 hours of ABA services. Regarding the parent's claims concerning compensatory pendency relief, the district argues the parent failed to provide any evidence of missed pendency services, accordingly, the SRO should affirm the award of 400 hours of SEIT services to the extent not already paid under pendency. The district further argues the IHO properly declined to award assistive technology and auditory processing IEEs as the hearing record does not support the need for IEEs in these areas. Also, the district contends that there is no evidence in the hearing record to support disturbing the IHO's

[8] With respect to the parent's argument that the IHO erred in dismissing her claim that the district violated section 504, an SRO lacks jurisdiction to consider the parent's 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 parent's arguments regarding section 504 will not be further addressed.

limit on provider rates to $1,500 for the IEEs awarded in OT and PT as the parent failed to submit any evidence opposing the rate ordered.

The parent replies to address two claims raised in the district's answer, arguing that the district misstates the burden of proof—first, in arguing the student should be denied compensatory pendency services beyond those awarded by the IHO because the "[p]arent failed to provide any evidence of missed pendency services," and second, in arguing that the $1,500 rate cap imposed by the IHO on awarded OT and PT IEEs should be upheld because "[p]etitioners failed to submit any evidence at hearing from any providers identified to perform the OT or PT evaluations to support the argument opposing the rate ordered by the IHO."

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]).[9]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427

[9] 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).

F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Scope

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

On appeal, neither party is challenging the IHO's findings that the district failed to offer the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years. Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal.

Additionally, with respect to the legal framework appropriate to the issues related to relief that are asserted on appeal, the parent specifically seeks an award of payment for the cost of the student's tuition and unilaterally obtained services for the 2021-22 school year, whether all or part of it is considered a unilateral placement and/or partial compensatory education, with reimbursement for up to $9,000 for the nonpublic school tuition, together with direct payment for 664 hours of 1:1 ABA services at $180 per hour, 75 hours of BCBA supervision at $350 per hour, and up to 400 hours of SEIT services at $195 per hour (to the extent not already funded under pendency), as well as the related services that were part of pendency. Accordingly, the nature of the parent's claims on appeal compel an analysis using the Burlington/Carter unilateral placement framework as discussed below.

B. Unilateral Placement

The parent asserts that the IHO erred by declining to find that the student's unilateral placement for the 2021-22 school year was appropriate. Specifically, the parent argues that the placement—consisting of a general education nonpublic school class; pendency services of 10 hours per week of SEIT services, 90 minutes per week of speech-language therapy, 60 minutes per week of both OT and PT, and 30 minutes per week of counseling; 23 hours per week of privately obtained in-school ABA services and supervision; and privately obtained PROMPT speech-language therapy—resulted in an appropriate program in the student's LRE. The district counters that the parent failed to sustain her burden to show that the student's general education program at the nonpublic school was individualized to meet his unique needs and that the IHO's denial of relief with respect to tuition reimbursement was warranted.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

Although not in dispute, a discussion of the student's needs is relevant to determining whether the unilateral placement was appropriate. As discussed above, the student has received a diagnosis of apraxia of speech for which he began receiving speech-language therapy at a young age (Parent Ex. V at p. 1). A neurologist and nurse practitioner assessed the student in July 2020 at approximately four years of age due to concerns regarding developmental delay, "sensory issues," and "significant behavior issues" including biting, not following directions, and fighting with siblings at home (Tr. p. 474; Parent Ex. F at p. 1). The evaluators concluded that the student met the criteria for diagnoses including autism spectrum disorder and behavior disturbance, and recommended that he receive "ABA therapy" (id. at p. 3).

Review of the student's July 2021 IEP summary reflects that, for the 12-month portion of the 2021-22 school year, the CPSE recommended that the student receive 10 hours per week of direct 1:1 SEIT services with OT, PT, speech-language therapy, and counseling services (Parent Ex. B at pp. 1, 16). In July 2021, a developmental pediatrician indicated that the student had received a diagnosis of ADHD, combined type and had "multiple developmental concerns" (Parent Ex. J at pp. 106, 108). In August 2021 the district conducted a psychoeducational evaluation (Parent Ex. G). While cooperative, the evaluator reported that the student was "quite fidgety," easily distracted, and his attention and concentration were variable (id. at p. 1). At that time, the student's cognitive and academic achievement test results fell in the below average range (id. at p. 3).

The September 1, 2021 due process complaint notice indicated that the parent was "going to place [the student] in a private school program with three teachers" and requested pendency services, in addition to a request that the district fund or reimburse her for "a full-day, 1:1 program using ABA strategies and ABA supervision" (Parent Ex. A at p. 1, ¶ 71). During the 2021-22 school year, the student attended a nonpublic school general education kindergarten classroom with approximately 27 students, one teacher, and two assistants (Tr. pp. 276, 286-87, 292; Parent Exs. Q at p. 1; R at pp. 1, 2). The student began the school year receiving 10 hours per week of 1:1 SEIT services, three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, and one 30-minute session per week of counseling pursuant to pendency (Parent Exs. B at p. 16; V at p. 2; see Parent Ex. D at p. 3).[10]

At the start of the school year, the student's providers reported that he had "difficulty acclimating to the classroom environment" in that he did not follow what was going on, he did not engage with peers in part due to his communication difficulties, and he "require[d] 1:1 support for everything done in the classroom" (Parent Ex. R at pp. 1-2). Further, the providers reported that the student engaged in behaviors described as aggressive within the first two weeks of school, as well as escape and self-directed behaviors (id. at p. 2).

On September 9, and 14, 2021 a BCBA conducted a parent interview and formal classroom observation of the student with data collection (Tr. pp. 276, 311-12; Parent Ex. R). Following administration of the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) to the student and an assessment identified as the ATEC to the parent, as well as review of data collected during observations, the BCBA developed a BIP to address the student's

[10] By report, the student did not receive pendency PT services during the 2021-22 school year, as a provider could not be located (Tr. pp. 503-04; Parent Ex. V at p. 2).

behaviors that were described as self-directed and non-compliant, and his inability to follow instruction and interact in a social situation with peers (Tr. pp. 327-29; Parent Ex. R at pp. 2-21). The BCBA recommended, among other things, implementation of the BIP together with 25 hours per week of 1:1 push in ABA support in the classroom with two hours per week of BCBA supervision (Parent Ex. R at p. 22).

On October 20, 2021, the student "began receiving 23 hours of push in 1:1 ABA services to address his behavioral, social and communication deficits" (Tr. pp. 543-44; Parent Ex. R at p. 1). The student's ABA services were provided by a "behavioral support provider" on a "full time" basis, outside of the 10 hours per week of SEIT services (Tr. pp. 327-28; Parent Exs. R at p. 4; V at p. 2). A report prepared by the SEIT provider indicated that the student's 1:1 SEIT services were "implemented using ABA methodology in the classroom setting" (Tr. pp. 337-38; Parent Ex. N at p. 1). Instruction was provided on a 1:1 basis both in the classroom and as a pull-out service "for academic needs" (Tr. pp. 288, 340-41, 397). The BCBA testified that the services the student received were "a collaborative program between a SEIT provider and a one-to-one behavioral support provider" and that "both providers implemented the same program under BCBA supervision" (Tr. p. 288).[11] According to the BCBA, the SEIT provider's role in the classroom was to support the student based on what the class was doing, and the behavioral support professional "really had the same role as the SEIT" (Tr. p. 340; see Tr. p. 395). The BCBA further testified that she met with the "team" that provided the student's services "about every two weeks" and that her "team" had a lot of coordination with the teachers at the student's nonpublic school such as sharing targets, progress, and concerns (Tr. pp. 335, 339).

In a January/February 2022 report, the SEIT provider indicated that the student "learn[ed] best when ABA methodology and techniques [were] included in his learning" and that "behavioral support [wa]s required for him to succeed in the classroom setting" (Tr. pp. 337-38; Parent Ex. N at p. 2). [12] According to the report, at that time the student's math and reading skills were at a pre-kindergarten level, and the SEIT provider described the student's specific reading, math, and writing skills, the impact of his language delay on his academic development, and his need for 1:1 instruction (see id. at pp. 1-2). In the report the SEIT provider explained the student's social skills and needs, and how the SEIT and counseling services were addressing those needs (id. at p. 3). The SEIT provider described the student's graphomotor and gross motor skills, noting deficits in both areas (id. at p. 4). Regarding the student's management needs, the SEIT provider opined that it was "imperative" that the student continue to receive 10 hours per week of 1:1 SEIT services in the classroom, as well as 1:1 behavioral support in order to "access the curriculum, his peers and learning" (id. at p. 4). Further, the SEIT provider indicated that two hours per week of supervision by a BCBA was "necessary to oversee the behavioral support program and coordinate care with the providers" (id.). Additionally, the SEIT provider recommended that the student continue to receive OT, PT, speech-language therapy, and counseling to address delays in those areas (id.).

[11] The student's SEIT provider was a certified special education teacher, and the behavioral support provider's resume shows that she had experience as an assistant teacher (Tr. pp. 288-90; Parent Exs. O; S at p. 1).

[12] The report is undated; however, the SEIT provider testified that "[i]t was started at the end of January and submitted February 24th" [2022] (Tr. p. 413; Parent Ex. N at p. 1).

Lastly, the report included goals for the student in the areas of communication, behavior management, socialization, and academic skills (id. at pp. 4-5).

According to a May 2022 neuropsychological assessment the student demonstrated average fluid reasoning and visual spatial skills, and low average verbal skills (Parent Ex. V at p. 9). Related to his diagnosis of apraxia of speech and expressive language deficits, the student's phonological awareness was impaired, he demonstrated difficulty quickly naming letters and objects, and he struggled to produce verbal language with appropriate syntax and structure (id. at pp. 1, 9-10). However, the student's receptive language skills were "intact," and he was able to "adequately process information presented verbally" (id. at p. 10). Academically, the student exhibited difficulty with written expression (spelling, grammar, and mechanical skills) and some weakness in basic reading skills (id.). [13] The student struggled with distractibility, following adult directives, and completing daily routines, which combined with difficulty expressing himself, at times led to frustration and subsequently physical aggression towards family members (id.). Additionally, the student demonstrated sensory sensitivities and sensory-seeking behavior, and often engaged in socially atypical ways and avoidant behaviors consistent with autism spectrum disorder (Parent Exs. F at p. 3; V at p. 10). The neuropsychologist concluded that the student required 1:1 teacher support to access the curriculum and recommended that the student continue to receive full time, 1:1 special education teacher services or ABA support (Parent Ex. V at p. 11).

A June 2022 progress report prepared by the BCBA indicated that despite the number of adults in the classroom, the student "require[d] full time 1:1 behavioral support in order to access the mainstream setting and academic curriculum," noting that "[w]ith support [the student] [wa]s learning to manage his behaviors, maintain attention, engage with peers appropriately and manage in the classroom setting" (Parent Ex. Q at p. 1). With 1:1 support the student "ha[d] displayed significant progress," and the report reflected the academic, behavior, communication, play, and social targets that the student had mastered during the course of the 2021-22 school year (id. at pp. 1-2). The BCBA testified that the targets selected to work on were "based off of either an assessment that was done, or observations in the classroom, [or] teacher reports" (Tr. pp. 293-94). The remainder of the report reflected the task analysis of the target behaviors that the providers were working on at the time the report was prepared (Tr. pp. 291, 294-95; Parent Ex. Q at pp. 4-10). During the hearing, the BCBA testified at length about the targets the student was working on as of June 2022 and the progress he had made (see Tr. pp. 295-311). Additionally, the BCBA explained that the VB-MAPP administered to the student in September 2021 was "updated in June 2022 to note progress" (Tr. pp. 312-13; Parent Ex. R at p. 11). According to the SEIT provider, by June 2022 the student had demonstrated progress in the areas of attention, socialization, eye contact with prompting, early reading skills, listening comprehension, writing, and socialization (see Tr. pp. 395-409, 423-24). The SEIT provider testified that the student "made a lot of progress" during the 2021-22 school year (Tr. pp. 422-23).

As such, the evidence described above supports a finding that the privately obtained ABA services and supervision and the SEIT services the student received through pendency were

[13] In May 2022 the neuropsychologist determined that diagnoses of a specific learning disorder in the areas of reading and writing were "withheld . . . until adequate interventions to address his literacy difficulties ha[d] been implemented" (Parent Ex. V at p. 10).

appropriate to meet the student's needs and that he demonstrated progress during the 2021-22 school year.

Further, review of the hearing record shows that the privately obtained PROMPT speech-language therapy was appropriate to address the student's articulation and speech intelligibility difficulties, and the parties do not appeal the IHO's award of reimbursement for those services for the 2021-22 school year (Tr. pp. 568-69, 572-76, 582; Parent Exs. M; V at p. 2; IHO Decision at p. 42; Req. for Rev. ¶3 fn. 1; see Answer).

In addition to the SEIT and ABA services and supervision, and PROMPT speech-language therapy, the student's unilateral programming also consisted of related services provided pursuant to pendency. Review of the student's May 2021 CSE and July 2021 CPSE IEPs reflect that the student exhibited needs in areas addressed by OT, speech-language therapy, and counseling, and that those related services were recommended for the student for the 2021-22 school year (Parent Ex. B at pp. 3-6, 16; W at pp. 9-12, 26-27, 31-32). Although the hearing record contains little, if any, information about the implementation of the pendency related services the student received during the 2021-22 school year (see Parent Exs. A-CC; Parent Mot. Exs. A-G; IHO Exs. I-VII), the parent implied that the student's related services were "taken care of" by a "student advocate" at the nonpublic school who appeared to arrange services for students at the nonpublic school with various agencies (see Tr. p. 504).

On appeal, the district's only argument regarding the appropriateness of the unilateral placement is that the student was in a general education class at the nonpublic school and therefore the program was not individualized to the student. That argument, however, does not take into account the special education services the student received either through pendency or privately obtained, as described above, services that the evidence shows were tailored to and appropriate for the student. Therefore, although the district asserts in its answer that the parent failed to sustain her burden to show that the unilateral placement was appropriate, under the totality of the circumstances, the student's unilateral programming consisting of placement in a general education class at the nonpublic school with the support of the pendency and privately obtained services, when viewed in its totality, was appropriate to meet the student's special education needs.

C. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to

equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The district argues that the parent failed to provide the district with the required notice of her intention to unilaterally place the student for the 2021-22 school year. The parent argues that the due process complaint notice be considered as proof that the parent satisfied her notice obligation.

Here, although the parent did not provide notice of the unilateral placement either at the most recent CSE meeting in August 2021 prior to removal of the student from public school, or by written notice ten business days before such removal, the hearing record shows that the parent was in frequent contact with the district (primarily June through August 2021) prior to the time period leading up to enrolling the student in the parochial nonpublic school in August 2021 and filing the due process complaint notice on September 1, 2021 (see Tr. pp. 502-509; Parent Ex. J).

Specifically, the parent testified that that she "communicate[d], either verbally or in writing, that [she] might take that step to enroll [her] son in a private school" stating that everything was "in the email" (Tr. p. 505). The parent had sent an email to the district dated June 21, 2021 stating that she would "be removing him from [the preschool program] because he [wa]s not progressing [] socially, emotionally or behaviorally, in addition to being very reluctant to attend. I will be sending him to day camp, where he thrived last summer. Thus, I am hoping that you will give him the support of SEIT hours so I can finalize a decision in regard[] to an appropriate placement for him to attend kindergarten in the fall" (Tr. pp. 505-07; Parent J at pp. 6-8). In reviewing the correspondence between the parent and district staff, it appears that, at the time, the parent indicated that she might privately place the student at her own expense and seek special education from the district through the State's dual-enrollment statute, rather than that the parent indicated that she intended to seek funding for a unilateral placement of the student (see Parent

Exs. J at pp. 30-33, 66-67; K at p. 18). The parent further testified that she enrolled the student in the parochial nonpublic school, and the student "went there for kindergarten, in a gen ed class with a lot of support" and his first day of school was "in August" 2021 (Tr. pp. 502-03).

At no point prior to the due process complaint notice did the parent indicate that she intended to seek district funding for the cost of the student's enrollment at the nonpublic school. The due process complaint notice indicated that the parent would request funding for the student's entire program (Parent Ex. A at p. 8). The parent also indicated that she was aware that she had not provided the district with a proper notice and asserted that one was not required because the parent had not received notice from the district that she had to provide the district with notice and because she was not removing the student from a public school (id.). On appeal, the parent continues to assert that the district did not provide her with the State's procedural safeguards notice which outlines the 10-day notice requirements (see 34 CFR 300.148 [e][1][ii]). However, the March 2021 social history update indicates that the parent was provided with a copy of the procedural safeguards notice via email (Parent Ex. H at p. 2), the hearing record includes other instances where the procedural safeguards notice was provided to the parent (Par. January 2022 Mem. of Law. Ex. C at pp. 64, 118-19), and multiple prior written notices advised the parent that she could obtain a copy of the procedural safeguards notice through the district's website (id. at pp. 18, 20, 152).

Considering the above, I will exercise my discretion to reduce reimbursement for the student's unilateral placement for the parent's failure to comply with the statutory notice provision by ten percent of the tuition at the nonpublic school. The parent's requested reimbursement for up to $9,000 for the nonpublic school tuition will be reduced by ten percent ($900) to $8,100.

D. Additional Relief

1. Compensatory Education

The parent asserts that the IHO erred in awarding an insufficient amount of compensatory education. According to the parent, the awarded 560 hours of 1:1 special education teacher services was insufficient and the IHO should have awarded 3,010 hours to be used for ABA or 1:1 teacher services, consisting of 1,400 hours for the denial of FAPE for the 2019-20 school year and 1,610 hours for the denial of FAPE for the 2020-21 school year, along with 172 hours of BCBA supervision and at least 48 hours of parent counseling and training.

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, the parent argues that although the IHO found the evidence in the hearing record supported an award of compensatory education for denials of FAPE related to the 2019-20, 2020-21, and 2021-22 school years, the IHO failed to hold the district to its burden of proving an appropriate remedy and raised sua sponte arguments for the district. According to the parent, as the district submitted no evidence to support its burden, the IHO erred by shifting the district's burden to the parent to prove the appropriateness of the requested remedy. Here, the IHO found that the district conceded FAPE by failing to submit documentary evidence or present witnesses (see IHO Decision at p. 37; Tr. pp. 134-142).

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 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).

However, the IHO was by no means required to merely adopt the relief proposed by the parent. 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]).[14] 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 could potentially 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."]).

In this instance, the IHO acknowledged the district's burden of proof on the question of relief and stated that the "IHO has the responsibility to craft an appropriate compensatory education award based on the record and . . . the record is dense" and the "IHO has reviewed every page of the record" (IHO Decision at p. 37). The IHO also acknowledged that the parent had identified the specific remedy sought and provided evidence in support thereof (id. at pp. 8, 33).

Thus, rather than relying solely on the district's failure to present an argument or evidence regarding a compensatory award, this decision will review the IHO's findings regarding compensatory education to determine if the award was sufficient and appropriate based on the evidence in the hearing record.

a. 2019-20 and 2020-21 School Years

In her decision, the IHO stated that the student missed a significant amount of instruction and related services due to the interruptions caused by the COVID-19 pandemic, therefore, the IHO ordered compensatory education including SEIT services, PT, OT, speech-language therapy, PROMPT speech therapy, and counseling (IHO Decision at pp. 42-43). The IHO ordered banks of compensatory service hours for the student consisting of: (1) 56 hours of 1:1 PROMPT speech-language therapy; (2) 84 hours of 1:1 speech-language therapy; (3) 56 hours of 1:1 OT; (4) 112 hours of 1:1 PT; (5) 28 hours of 1:1 counseling; and (6) 560 hours of 1:1 special education instruction (id.).

[14] 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.

Regarding the calculation and her reasoning, the IHO stated that there were 56 school weeks between mid-March 2020 and the end of June 2021; the SEIT services were calculated using 10 hours of 1:1 instruction per week to provide the student with a "significant bump" in early childhood education to make up for the progress he failed to make due to the failure to fully implement the IEPs; the related services were awarded based on the number of hours recommended in the May 2021 IEP; and the IHO, in her discretion, ordered additional PROMPT speech therapy as part of the student's compensatory education, to "amplify the progress the [s]tudent c[ould] make in all areas of his education that rel[ied] upon speech and communication" (IHO Decision at p. 41). The IHO decided not to award compensatory ABA services or BCBA supervision (id.).

As an initial matter, the compensatory education awarded by the IHO was specifically designed to make up for services missed due to a lack of instruction stemming from the COVID-19 pandemic; pertinently, the IHO found that the student "would have made more progress if he had in-person access to his recommended IEP" (IHO Decision at pp. 37-38).[15] Both the USDOE and SED's Office of Special Education have issued guidance acknowledging that the global pandemic and the resulting closure of schools resulted in "an inevitable delay" in districts providing services to students with disabilities or engaging in the decision-making process regarding such services ("Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104 [OCR & OSERS 2020]; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 1, Office of Special Educ. Mem. [June 2021], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/documents/compensatory-services-for-students-with-disabilities-result-covid-19-pandemic.pdf). In addition, the USDOE has noted reports from some local educational agencies that they were "having difficulty consistently providing the services determined necessary to meet [each] child's needs" and that, as a result, "some children may not have received appropriate services to allow them to make progress anticipated in their IEP goals" ("Return To School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act," 79 IDELR 232 [OSERS 2021]).

To address these delays and other delivery-related issues that occurred as a result of the pandemic, OSEP and NYSED's Office of Special Education have indicated that, when school resumes, a CSE should convene and "make individualized decisions about each child's present levels of academic achievement and functional performance and determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child's receipt of appropriate services" ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 1, 3; see also "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104; "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak," 76 IDELR 77 [OCR & OSERS 2020]; "Supplement #2 -

[15] This finding was in line with the allegations raised in the parent's closing statement, which focused on the student's education during the period after schools were closed due to the COVID-19 pandemic (IHO Ex. VIII at pp. 2-7. 14-15).

Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at pp. 2-5, Office of Special Educ. Mem. [June 2020], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf). The CSE's review might include a discussion of whether the student has new or different needs compared to before the pandemic, whether the student experienced a loss of skill or a lack of expected progress towards annual goals and in the general education curriculum, whether evaluations of the student or implementation of an IEP was delayed, and whether some of the student's IEP services could not be implemented due to the available methods of service delivery or whether such methods of service delivery were not appropriate to meet the student's needs ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 3-4; see "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 1).

If the parent disagrees with a CSE's determination regarding the student's entitlement to compensatory services, State guidance notes that:

> Parents of students with disabilities may resolve disputes with school districts regarding the provision of FAPE by pursuing one of the dispute resolution options provided for in the IDEA. A parent may file a State complaint directly with NYSED in accordance with Commissioner's Regulation section 200.5(l), request mediation in accordance with Commissioner's Regulation section 200.5(h), or file a due process complaint and proceed to hearing in accordance with Commissioner's Regulation section 200.5(j).

("Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 5; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 6).

Here, there is no indication that a CSE has conducted such a review. It does not appear that a CSE discussed or considered if compensatory education was appropriate to make-up for any loss of skill attendant to the school closure. The USDOE and NYSED's Office of Special Education have indicated that, under these unique circumstances, a CSE should have the first opportunity to consider the student's needs and whether any additional services may be warranted as a result of the pandemic. There is no indication that this has yet occurred for this student.

However, as the IHO already awarded compensatory education, and the district has not appealed from the IHO's finding, there is no basis for overturning the award. Additionally, in review of the IHO's award of 560 hours of 1:1 special education instruction, the IHO stated her rationale for ordering compensatory education in the areas of SEIT services, PT, OT, speech-language therapy, PROMPT speech therapy, and counseling, noting the student missed a significant amount of instruction and related services due to the interruptions caused by the COVID-19 pandemic. The IHO reviewed the recommendations made in the neuropsychological evaluation report and concluded that they did not support a finding that compensatory ABA services were required to remedy the district's denial of FAPE to the student (IHO Decision at pp.

39-41). Review of the neuropsychologist's report shows that the neuropsychologist recommended that the student continue to receive the 10 hours of SEIT services along with the individual ABA support during the rest of the day the student was receiving during the 2021-22 school year and that for the prior school years, when the ABA program was not in place, the student should receive "compensatory service hours to make up for any of that lost time" (Parent Ex. V at p. 11). During the hearing, the neuropsychologist opined that the student should have received six hours per day of ABA for each day that he did not have a 1:1 ABA program in place (Tr. p. 349). However, as noted above the student was already receiving a full-day ABA program, so, in explaining how a bank of compensatory services would be implemented, the neuropsychologist testified that in addition to full coverage for the student's time in-school, the student could receive "full coverage at home, as well, to address the behaviors and social communication issues that are coming up at home, both, you know, in the evenings, weekends, time off, vacation time, you know, time off from school" (Tr. pp. 349-50). She further testified that the SEIT provider was the best person to address the student's academic delays, but ABA services could address whatever delays were coming up and at-home services could help with homework and on bridging the gap with schoolwork (Tr. p. 350). Considering this testimony, the IHO did not err in finding that an award of 1:1 ABA services as compensatory education was not needed to remedy the any educational deficits caused by the district's denial of FAPE to the student for the years in question and that home-based services were not required for the student to make educational progress (IHO Decision at p. 41).

Further, the calculation offered by the neuropsychologist and the parent appears to encompass a rote hour-for-hour award for the entirety of the 2019-20 and 2020-21 school years, as if the student received no program or services at all.[16] 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]).

Accordingly, the IHO was reasonable in deciding not to award compensatory ABA services and in utilizing a qualitative calculation for the period of time she found that the student did not make progress, due to services lost due to the COVID-19 school closures from mid-March 2020 to the end of June 2021, or 56 school weeks.

[16] The parent actually appears to request compensatory education for more than a full school year, requesting make-up services for 40 weeks of missed instruction during the 2019-20 school year and 46 weeks of missed instruction for the 2020-21 school year. Pursuant to State regulation, a 10-month school year from September through June consists of at least 36 weeks, and a 12-month school year from June through July would generally consist of 42 weeks. 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]).

b. Missed Services Under Pendency

The parent argues that the IHO should have but failed to award full compensatory relief for the pendency services the student did not receive from the due process complaint notice date forward. Specifically, the parent asserts that the IHO ordered up to "only" 400 SEIT services hours for September 1, 2021 to January 10, 2023 (the date of the IHO's decision), to the extent not already paid under pendency; however, the student should have received 400 hours of SEIT services from September 2021 to June 2022 and 10 hours per week thereafter, continuing to the present time, and the IHO should have awarded compensatory speech-language therapy, OT, PT, and counseling not provided under pendency.

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey, 386 F.3d at 163, citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171).

In addition, the Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

In light of IHO I's December 2021 interim pendency order which granted, in relevant part, ten hours per week of SEIT services, retroactive to September 1, 2021 and continuing during pendency of these proceedings, I find that the parent is entitled to all missed pendency services

during this period. Accordingly, I will reverse that portion of the IHO's order to the extent it capped SEIT services "up to 400 hours" to the extent not already paid under pendency, for the period "from September 1, 2021 through January 10, 2023." However, I will uphold the IHO's order that payment is to be made by the district "upon receipt of signed invoices from the provider, with documentation of dates of service, time spent and description of services provided to the [s]tudent." I further find that the student is entitled to compensatory speech-language therapy, OT, PT, and counseling awarded as part of IHO I's interim pendency order for any missed sessions of these services which occurred during the pendency of these proceedings. Accordingly, to the extent any sessions of these related services were missed during the pendency period, in the district is obligated to provide make-up services or otherwise provide payment for such services upon receipt of signed invoices from the provider(s), with documentation of dates of service, time spent, and description of services provided to the student.

c. Limitations on the Award

The parent asserts that the IHO sua sponte ordered an inappropriate expiration date of January 15, 2025 on the compensatory services awards, and requests services be available until the end of the school year in which the student turns 21 years of age. The district contends the IHO's time frame of two years to utilize the student's bank of compensatory education services reflects a reasonable timeframe and should be affirmed.

Here, I find no reason in the hearing record to disturb the IHO's determination that the compensatory awards "shall not expire until January 15, 2025." As noted above, the purpose of compensatory services is to place the student in the position he 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. Also, an IHO generally has broad authority to fashion relief. The parent argues that additional time should be afforded, "particularly if the award is increased, given the amount of services needed to remedy the FAPE denial, the nature of [the student's] disability," and that the awarded services "should not supplant his FAPE entitlement." While I acknowledge the parent's concerns regarding the student's ability to utilize the compensatory education award within the allotted timeframe, the IHO's award was not increased herein and, to the extent any missed pendency services for the 2021-22 school year are ultimately added to the "bank" of hours awarded, there is no indication that the addition of such hours would render the January 2025 deadline untenable. Accordingly, I find the January 15, 2025 expiration date for the delivery of the awarded services to be reasonable.

2. Independent Educational Evaluations

Initially, in the parent's due process complaint notice, an IEEs was requested including evaluations in nine areas: a neuropsychological evaluation, an autism/ABA assessment, a speech-language evaluation, an auditory processing evaluation, an assistive technology evaluation, an OT evaluation, a PT evaluation, a vision processing evaluation, and an observation with an expert in autism, as well as an FBA and BIP (Parent Ex. A at pp. 14-15). The IHO "agreed" with the parent's request for an independent neuropsychological evaluation, ordered the evaluation in the interim order dated January 30, 2022, and the neuropsychological evaluation of the student was conducted on May 26, 2022 (Parent Exs. V; X at p. 2; IHO Decision at p. 36; IHO Ex. VI). The IHO also granted the parent's request for OT and PT IEEs at a rate not to exceed $1,500 (IHO Decision at

pp. 36, 43).[17] The IHO denied the parent's request for the autism/ABA assessment, the vision processing evaluation, and the observation of the student by an expert in autism, and the parent does not request an IEE in those areas on appeal (IHO Decision at p. 36; see Req. for Rev.).[18] The IHO noted that the parent stated in her closing brief that the student "does not currently need a new [speech-language] evaluation" and the FBA that was "already conducted" in fall 2021 could "be updated," concluding that the parent was not requesting those evaluations at that time (IHO Decision at p. 36; IHO Ex. VIII at p. 26).

At the conclusion of the hearing, the parent requested an IEE in the areas of assistive technology and auditory processing (IHO Ex. VIII at p. 26). In her final decision, the IHO denied the parent's request for an IEE in the areas of assistive technology and auditory processing the IHO found "the record d[id] not reflect the need for IEEs in these two areas at the current time" (IHO Decision at p. 36). On appeal, the parent requests an IEE in the areas of assistive technology and auditory processing (Req. for Rev. ¶ 21). The parent argues that the IHO erred as the district failed to defend its evaluations and the IHO wrongly shifted the burden to the parent and denied the IEE in the requested areas because the parent failed to prove it was needed. The parent argues that an IEE in the requested areas is appropriate due to the student's deficits in writing, academics, and language and it should be awarded.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).[19]

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not

[17] The parent's appeal of the monetary cap for the OT and PT IEEs is discussed below.

[18] Accordingly, the IHO's denial of the parent's request for an IEE in these areas is final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[19] Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that, if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

The parent's September 1, 2021 due process complaint notice alleged that the district did not adequately evaluate the student in every area of suspected disability and failed to conduct an appropriate reevaluation before making a significant change in the student's placement and program (Parent Ex. A at p. 9). The due process complaint notice stated that "[t]he [p]arents disagree[d] with the evaluations and reevaluations conducted" (id.). As noted above, the parent's due process complaint notice requested an IEE in nine identified areas including neuropsychological, assistive technology, and auditory processing evaluations (Parent Ex. A at pp. 14-15).

Initially, I have concerns with the parent's inclusion of the request for IEEs in the due process complaint notice in the first instance (see Parent Ex. A at p. 9). Although the parent asserted in her due process complaint notice that she had previously requested an independent neuropsychological evaluation during the 2021-22 school year, the hearing record does not support this contention. Specifically, the parent stated in the due process complaint notice that she requested a neuropsychological evaluation and a psychoeducational evaluation of the student at the July 2021 CSE meeting, that, in a July 2, 2021 email to the district, she requested that the district approve a neuropsychological evaluation for the student, and that the district denied her request (id. at pp. 6-7; see Ex. J at p. 1).[20] In the July 2021 email to the district, the parent requested "Neuropsych & PsychoEd evaluations" due to concerns over the student's inability to consistently carry over information; lack of attention and inability to recall, process and relay information; and negative effects in academic, social, and emotional areas of development as a result of inconsistent school and services during the COVID-19 pandemic (Parent Ex. J at p. 1). Review of the parent's correspondence further indicates that she disagreed with the district's "decision not [] allowing [the student] to have a full neuropsychological evaluation" (id. at p. 19). However, the parent acknowledged that the district conducted a psychoeducational evaluation of the student in August 2021 in response to her request (Parent Exs. A at p. 7; J at p. 111; see Parent Ex. G). In reviewing the correspondence, the evidence in the hearing record supports a finding that the parent did phrase her request in such a way that the district would have understood the parent was disagreeing with an evaluation conducted by the district, and was seeking an IEE at district expense, rather than requesting a district evaluation of the student in a specific area (see Application of a Student with

[20] The parent also argued that she requested an IEE as part of a letter seeking the student's educational records, which also stated the parent's disagreement with the district evaluations (Parent Ex. B; IHO Ex. II at p. 2). However, despite the date on the letter of September 20, 2021, the letter shows a FERPA release was not signed until September 27, 2021 and the document was not sent (via fax) until October 1, 2021 (Parent Ex. C).

a Disability, Appeal No. 19-018 [where the parent did not seek an evaluation by an independent evaluator, appropriate relief was to order the district to conduct the evaluation rather than award an IEE]). Accordingly, the hearing record indicates that the parent's first cognizable expression of disagreement with the district's evaluation including a request for an IEE was in the due process complaint notice. While in past decisions SROs have held that a parent may request a district funded IEE in a due process complaint notice in the first instance (see Application of a Student with a Disability, Appeal No. 19-094), this is not the process contemplated by the IDEA and its implementing regulations (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). Some past SRO decisions have warned parties, for example, where it is obvious that the parent is delaying the IEE request in favor of including it in their own due process complaint notice—perhaps as a means to obtain evidence to support other claims against the district rather than as a means to understand the student's needs—then trying to use the IEE request to allege that their complaint has actionable claims, that this is an improper use of the due process procedures (see Application of a Student with a Disability, Appeal No. 22-150; Application of the Dep't of Educ., Appeal No. 22-121; Application of a Student with a Disability, Appeal No. 21-170 at n. 11).

Here, although there is no question that the parent was seeking to obtain information about the student in order to plan for the student's educational programming (see Parent Ex. J at pp. 1-2, 10, 16-17, 31, 111), the parent failed to follow the process outlined in the IDEA and its implementing regulations for seeking an IEE. While the district did not initiate an impartial hearing to defend its evaluations, there is no evidence that the parent requested an IEE prior to seeking the IEE in the due process complaint notice.

However, it is generally within an IHO's authority to order an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. Roberts, 2016 WL 6831122, at *7 [E.D. Pa. Oct. 27, 2016] [noting that an IHO "is permitted, and in some cases required, to order an [IEE] at public expense"], on reconsideration in part, Luo v. Owen J. Roberts Sch. Dist., 2016 WL 6962547 [E.D. Pa. Nov. 28, 2016], aff'd, 2018 WL 2944340 [3d Cir. June 11, 2018]; Lyons v. Lower Merrion Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010] [noting that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process"]; see also S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at *9 n.9 [D.R.I. Jan. 14, 2014] [acknowledging opinion that the regulation empowers hearing officers to solicit independent expert opinions but disagreeing that the regulation gives an IHO "the inherent power to make up remedies out of whole cloth"], aff'd, 773 F.3d 344 [1st Cir. 2014]).

Here, an independent neuropsychological evaluation was ordered by the IHO in an interim decision and the evaluation was conducted in May 2022 (Parent Ex. V). Despite the parent's and district's arguments with respect to the correct process for requesting an IEE, the IHO acted within her broad authority, and correctly ordered the neuropsychological IEE to inform the hearing record. Further, although the parent has the right to request an IEE if a child was not assessed in a particular area,[21] here, the neuropsychologist did not recommend further assessment of the

[21] Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

student's auditory processing abilities (see Parent Ex. V). In particular, according to the neuropsychologist the student's receptive language skills were "intact," he was able to adequately process information presented verbally, and he earned scores in the high average range on measures of his selective auditory attention and ability to sustain it (id. at pp. 8, 10). With respect to assistive technology, the neuropsychological IEE does not specifically address or mention assistive technology, none of the evaluation/progress reports from the private neurologist, district school psychologist, private PROMPT speech therapy provider, or SEIT provider recommend an assistive technology assessment, and further none of the IEPs in the hearing record indicate a need for assistive technology devices or services (see Parent Exs. B; F; G; M; N; V; W; Parent Motion Ex. C). Accordingly, the hearing record does not support reversing the IHO's determination rejecting the parent's request for assistive technology and auditory processing IEEs.

The parent also argues that the IHO erred in placing a rate cap of $1,500 on the IEE in the areas of OT and PT as there was no evidence to support the cap and this determination should be reversed in favor of the assessments being conducted at market rate. I agree.

Regarding the issue of the maximum reimbursement rate, when a parent requests an IEE, the district must provide the parent with a list of independent evaluators from whom the parent can obtain an IEE, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the list (Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). Here, although the traditional process for obtaining an IEE was not followed, the IHO ordered the IEE as part of her discretion and the district had the opportunity to present a cost-containment policy if it wanted the cost of the IEE to be limited; however, the district did not offer its cost-containment policies into evidence and so there is no reason to limit the reimbursement rate for the OT and PT evaluations. Accordingly, I will reverse the IHO's rate cap of $1,500 on each of the evaluations and award reimbursement at a reasonable market rate.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations, except to the extent that the IHO found the parent's unilateral placement was inappropriate and equitable considerations weighed against reimbursement for the 2021-22 school year, capped the amount and period of missed pendency services to be awarded, and limited reimbursement for the OT and PT evaluations ordered as part of an IEE, thereby warranting modifications of those portions of the IHO decision, the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO decision, dated January 10, 2023, is modified by reversing that portion of the decision that found the parent's unilateral placement was not appropriate and equitable considerations weighed against reimbursement for the 2021-22 school year, and that upon presentation of proof of payment of the student's tuition for the unilateral placement the district shall pay at the parent a reduced amount of $8,100 as tuition at the private school for the 2021-22 school year, in addition, the district shall pay the cost of the unilaterally obtained ABA services provided to the student upon presentation of proof of services delivered and proof of payment;

IT IS FURTHER ORDERED that the IHO decision, dated January 10, 2023, is modified by reversing that portion of the decision which capped compensation for SEIT services "up to 400 hours" to the extent not already paid under pendency, for the period "from September 1, 2021 through January 10, 2023," and the district is instead directed to pay for any missed SEIT services which accrued during the entirety of the pendency period upon receipt of signed invoices from the provider, with documentation of dates of service, time spent and description of services provided to the student. In addition, the district is directed to provide any missed related services which accrued during the entirety of the pendency period, or payment for make-up services upon receipt of signed invoices from the provider, with documentation of dates of service, time spent and description of services provided to the student to the extent such make-up services are privately obtained by the parent, in the areas of speech-language, OT, PT and counseling; and

IT IS FURTHER ORDERED that the IHO decision, dated January 10, 2023, is modified by reversing that portion of the decision that limited the reimbursement rate for the OT and PT evaluations to $1,500 each, and such reimbursement shall be at reasonable market rates.

Dated: **Albany, New York**
April 13, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER