



# The University of the State of New York

## The State Education Department

State Review Officer

[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 23-059

**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:**

Gutman Vasiliou, LLP, attorneys for petitioner, by Mark Gutman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nathaniel Luken, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request for changes to the individualized education program (IEP) that respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2022-23 school year, compensatory education, and other relief. The district cross-appeals from that portion of the IHO's decision which ordered the district to fund a placement of the parent's choosing if the district failed to develop an IEP and identify a placement for the student. The appeal must be sustained in part. The cross-appeal must be sustained in part.

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

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

The student has received diagnoses of global developmental delay, autism spectrum disorder, other developmental disorder of speech and language, feeding difficulties, and unspecified eating disorder, among others (Parent Ex. C at p. 2; see Parent Exs. K at p. 2; L at p. 1; P at p. 2). He received services through the Early Intervention Program from age 18 months to three years old including occupational therapy (OT) and a "brief period" of applied behavior analysis (ABA) therapy (Parent Ex. P at p. 2).

For the 2020-21 school year, the student attended Quality Services for the Autism Community (QSAC), a private State-approved preschool, remotely (Parent Exs. C at p. 3; I at p. 1). The student was enrolled in a 6:1+3 special class and received related services of three 30-minute sessions of individual speech language therapy per week, two 30-minute sessions of individual OT sessions per week, and two 30-minute sessions of individual physical therapy (PT) per week (Parent Ex. I at p. 5).

For the 2021-22 school year, the student attended feeding therapy services from September 1 through October 15, 2021, after which he reenrolled at QSAC (Parent Exs. C at p. 3; I at p. 1). However, due to difficulties obtaining a 1:1 paraprofessional for the student, he did not attend school until January 2022 (Parent Ex. C at p. 3). The student began in-person attendance at QSAC on January 26, 2022 in a 6:1+3 class with the support of a fulltime 1:1 paraprofessional and related services of three 30-minute sessions of individual speech language therapy per week, three 30-minute sessions of individual OT per week and two 30-minute sessions of individual PT per week (Parent Ex. I at p. 1). In addition, the student used a speech generating device at home and school for communication (*id.*). Soon after, the student stopped attending QSAC in February 2022 because the 1:1 paraprofessional was no longer available, and the program was again unable to obtain a replacement paraprofessional (Parent Exs. C at p. 3; P at p. 1). As a result of these difficulties, the student received special education services for a total of six days during the 2021-22 school year (Parent Exs. C at p 3; P at p. 1).

The student was the subject of a prior impartial hearing concerning the 2021-22 school year (2021-22 proceeding), which resulted in a decision, dated April 20, 2022, in which an IHO found that the district denied the student a free appropriate public education (FAPE) and ordered relief for that school year (*see* Parent Ex. B at pp. 1-15).<sup>1</sup> The IHO in that matter ordered the district "to fund/provide" a home-based program for the student for the 2021-22 school year through August 2022 to include 40 hours per week of ABA and two hours per week of services from a Board Certified Behavior Analyst (BCBA), as well as weekly related services with providers selected by the parent consisting of five 30-minute individual speech language therapy sessions, three 30-minute individual OT sessions, and two 30-minute individual PT sessions (*id.* at pp. 14-15). The IHO further ordered compensatory education to be used within one year consisting of home-based ABA services (to be computed based on 20 hours per week for the period of time the student was not provided ABA during the 2021-22 school year) and related services to be delivered by providers of the parent's choosing consisting of 75 hours of home-based speech-language therapy, 40 hours of home-based OT, and 25 hours of home-based PT (*id.* at p. 15).

In a letter dated May 16, 2022, the parent stated her disagreement with a district psychological evaluation of the student and requested that the district fund an independent educational evaluation (IEE), specifically a neuropsychological evaluation (Parent Ex. D).

On May 20, 2022, the parent informed the district that neither she nor the student's father was able to attend the student's initial CSE meeting, which was scheduled for May 24, 2022, and requested it be rescheduled to a later date (Parent Ex. J). The hearing record indicates that on May

---

<sup>1</sup> The hearing record contains duplicative exhibits (*compare* Parent Exs. A; B; IHO. Ex. 2, *with* Dist. Exs. 1; 2; 3). For purposes of this decision, only parent or IHO exhibits are cited in instances where both a parent or IHO and district exhibit are identical in content.

24, 2022 the district proceeded with the CSE meeting and developed the student's IEP without the parents' presence (see Parent Exs. C at pp. 27, 29-30; R ¶ 13). Finding the student eligible for special education services as a student with autism, the CSE recommended, for the 12-month school year, that the student attend a 6:1+1 special class in a district specialized school with related services of three 30-minute individual sessions of OT per week, two 30-minute sessions of individual PT per week, three 30-minute sessions of individual speech language therapy per week, and two one-hour sessions of group or individual parent counseling and training per year (Parent Ex. C at pp. 1, 22-23, 27).<sup>2</sup> In addition, the CSE recommended a full-time 1:1 paraprofessional to monitor the student's health and safety and to assist him with feeding, following routines, and packing and unpacking of his personal items (*id.* at p. 22). The CSE also recommended a speech generating device to be used individually by the student daily at school and home (*id.* at p. 23). Lastly, the CSE recommended specialized transportation for the student from the "closest safe curb to school" (*id.* at p. 26).

On May 25, 2022, the student was seen by a pediatric neurologist for the stated purpose of "consultation for initial neurological evaluation of autism" (Parent Ex. K at p. 1). The pediatric neurologist described the student as "a 4 year old male with autism spectrum disorder" who lacked spontaneous speech, was mostly echolalic, and exhibited worsening behavior since starting school in January 2022 (*id.* at p. 5). He recommended that the student attend a "small[,] structured setting" with "a 1:1 class ratio" and receive approximately 20 hours of ABA along with the support of a 1:1 paraprofessional, speech-language therapy, OT, and feeding therapy (*id.*).

A June 7, 2022 letter from the student's physician detailed the student's history, health and safety needs, including needs for transportation, and recommended specific interventions and services to address the student's communication needs (Parent Ex. L).

On June 21, 2022, the parent contacted the district to schedule a tour of the public school site to which the district had assigned the student to attend and the district responded that it would be offering tours in early July (Parent Ex. M at pp. 1-2). According to the parent, she toured the assigned public school site and had various concerns about staffing and the conditions of the school building (Parent Ex. R ¶¶ 22-23).

### **A. Due Process Complaint Notice and Subsequent Events**

In a due process complaint notice dated August 1, 2022, the parent alleged that the district failed to provide the student with a FAPE for the 2022-23 school year (Parent Ex. A at pp. 1-4). Initially, the parent invoked pendency, asserting that the student's stay put placement lay in the April 2022 unappealed IHO decision arising from the 2021-22 proceeding (*id.* at pp. 2, 4-5).

Turning to the May 2022 CSE, the parent alleged that the district denied her the right to meaningfully participate in the development of the student's educational program, failed to comprehensively evaluate the student, and failed to appropriately respond to the parent's request for an IEE (Parent Ex. A at pp. 3-4). The parent also contended that the CSE failed to develop appropriate present levels of performance or meaningful and measurable annual goals that

---

<sup>2</sup> The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

addressed all areas of need for the student (*id.* at p. 4). The parent next alleged that the May 2022 CSE failed to recommend an appropriate program for the student, in that the CSE had ignored the findings contained within the April 2022 IHO decision, which determined that the student required ABA and additional related services (*id.* at pp. 2-3, 4). Lastly, the parent alleged that the CSE failed to recommend appropriate transportation accommodations for the student (*id.* at p. 4).

The parent requested a finding that the district denied the student a FAPE for the 2022-23 school year (Parent Ex. A at p. 4). In addition, the parent sought district funding of an IEE to include several specified assessments (*id.* at pp. 4-5). Next, the parent requested an order for the district to reconvene a CSE to place the student in a State-approved nonpublic school, or alternatively, if the parent located an appropriate nonpublic school prior to the impartial hearing, that the district be required to fund tuition at such school (*id.* at p. 5). The parent also requested an order for compensatory education including ABA, speech-language therapy, OT, and academic tutoring to be delivered outside of the regular school day by private providers of the parent's choosing (*id.* at p. 6). Lastly, the parent requested the district be required to fund an assistive technology device as well as payment and reimbursement for transportation costs (*id.*).

In e-mail messages between the parent's attorney and the assistant principal of the assigned public school site, dated between August 25, 2022 and September 12, 2022, the parent's attorney requested numerous times for the district to convene a CSE meeting; however, in response, the district declined to schedule a meeting indicating that the student had not yet attended the district public school and the district "need[ed] to meet him and conduct assessments" (Parent Ex. N). The parent's attorney asked that the requested CSE meeting occur so that the CSE could consider the orders of the April 2022 IHO decision and further requested assurances that the student would have a 1:1 paraprofessional assigned to him for the entire school day if he attended the program proposed in the May 2022 IEP (*id.* at pp. 6-7, 9-10, 12). According to the district, the student had not started school as of September 12, 2022 and the parent was not responding to the district's phone calls (*id.* at p. 8). The parent's attorney indicated that the student would attend once he recovered from an illness so long as the student's pendency services were in place (*id.* at p. 13).

### **C. Impartial Hearing, Impartial Hearing Officer Decisions, and Intervening Events**

The parties proceeded to an impartial hearing on September 7, 2022, which concluded on December 22, 2022 after five days of proceedings (Sept. 2022 Tr. pp. 1-58; Tr. pp. 1-101).<sup>3</sup>

The parties appeared for hearing dates devoted to addressing the student's pendency placement on September 7 and September 16, 2022, before IHO I (Sept. 2022 Tr. pp. 1-32). In an interim decision, dated September 20, 2022, IHO I found the student's stay put placement lay in the April 2022 unappealed IHO decision (IHO Ex. IV; *see* Parent Ex. B at pp. 14-15). IHO I's interim decision directed the district to "provide and fund" the following as the student's pendency

---

<sup>3</sup> The transcripts of proceedings that took place before the first IHO assigned to this matter (IHO I) in September 2022 are paginated separately from the proceedings that took place in December 2022 before the IHO who presided over the merits portion of the impartial hearing (IHO II). For purposes of this decision, the transcripts of proceedings before IHO I will be cited preceded by the month and year (September 2022) in which the proceedings took place; cites to a transcript without a month/date identifier are to those proceedings held before IHO II.

placement: a 12-month program consisting of 40 hours per week of ABA, two hours per week of BCBA supervision, five 30-minute individual sessions of speech language therapy per week, "three periods" of individual OT per week, and two periods of individual PT per week (IHO Ex. IV).<sup>4</sup>

The parties appeared for consideration of the parent's request for an IEE on September 22, 2022, before IHO I (Sept. 2022 Tr. pp. 33-58). In an interim decision dated September 22, 2022, IHO I ordered the district to fund a neuropsychological IEE (IHO Ex. III).

In an amended due process complaint notice dated October 6, 2022, the parent added claims concerning the student's need for a transportation paraprofessional and the district's failure to reconvene a CSE after the parent requested a new meeting (see Parent Ex. O).

Following recusal of IHO I, the matter was assigned to the Office of Administrative Trials and Hearings (OATH) and IHO II (hereinafter "the IHO") was appointed on October 25, 2022 (IHO Decision at p. 3).

On November 11, 2022, an independent evaluator conducted a neuropsychological evaluation of the student as ordered by IHO I and "to clarify the nature of [the student's] cognitive, academic, and social difficulties, identify his learning and cognitive strengths and weaknesses, and provide educational and treatment recommendations" (Parent Ex. P at p. 1; see IHO Ex. III). Based on parental, teacher and therapist reports, neuropsychological testing, review of records, student observation, and educational assessments, the neuropsychologist found that the student met the criteria for a diagnoses of autism spectrum disorder, level 3, with accompanying intellectual and language impairment "(requiring very substantial support)," intellectual disability and unspecified attention deficit hyperactivity disorder (ADHD) (Parent Ex. P at pp. 1, 11). The neuropsychologist stated that, academically, the student warranted a small supportive class, 12-month instruction, and numerous therapies and listed numerous program recommendations and interventions to address the student's specific needs (id. at pp.11-13).

The IHO conducted a prehearing conference on December 1, 2022 and the matter proceeded to the merits on December 22, 2022 (Tr. pp. 1-101; see IHO Ex. V). The district did not appear at either of the December 2022 hearing dates (Tr. pp. 4, 15-16).

In a final decision dated March 2, 2023, the IHO found that the district failed to meet its burden to prove that it provided the student with a FAPE during the 2022-23 school year, having failed to present a case on the merits of the appropriateness of the recommended program during the impartial hearing (IHO Decision at pp. 11-12). With respect to the implementation of the student's pendency services, the IHO found that the pendency agreements and IHO I's interim decision specified that the pendency services were to be delivered by providers selected by the

---

<sup>4</sup> The hearing record also includes two "Pendency Implementation Form[s]" dated September 7, 2022 and September 13, 2022, respectively, reflecting the district's agreement that the May 2022 IHO decision represented the student's pendency placement (IHO Exs. I-II). According to the forms, the district understood the pendency placement to consist of the home-based services identified in the May 2022 IHO decision to be delivered by private providers (IHO Exs. I-II). During the proceedings held on September 16, 2022, IHO I indicated that she would not find that the pendency services had to be delivered in the student's home (Sept. 2022 Tr. pp. 28-29).

parent and that the parent had "elected" not to obtain providers for the student (*id.* at pp. 9-10). Further, the IHO found that, because the parent had been given authority to select the providers and did not do so, any missed pendency services during the pendency of the impartial hearing were not eligible for make-up services as compensatory education (*id.* at p. 14). The IHO also found that, to the extent that the parent was seeking to enforce the pendency order as part of the requested relief, the IHO did not have the authority to enforce such an order and that, instead, the parent would need to pursue a State complaint or a court order (*id.* at p. 12).

The IHO also denied the parent's request for compensatory education to remedy the denial of a FAPE, finding that it was unclear if the student was receiving compensatory education through the prior IHO decision concerning the 2021-22 school year during the 2022-23 school year and further that it was unclear how the large number of requested compensatory services hours could be implemented without overwhelming the student (IHO Decision at pp. 12-15).

The IHO turned next to the parent's request for an order requiring changes to the student's IEP and for the CSE to reconvene and develop a specified program for the student (IHO Decision at pp. 15-16). The IHO noted that awarding prospective relief in the form of placing the student in a particular type of program and placement could have the effect of circumventing the CSE's statutory process of periodically assessing the student's needs and developing a recommended program (*id.* at p. 15). In order to afford the CSE an opportunity to fulfill this task, the IHO ordered the CSE to convene within 14 days of the date of the decision to develop a new IEP for the student, taking into consideration the student's need for "an ABA based educational program" as addressed in the November 2022 neuropsychological assessment (*id.* at pp. 15-16). The IHO further provided that, if the CSE failed to reconvene or the central based support team (CBST) "fail[ed] to make a recommendation for an educational placement that takes into consideration the . . . neuropsychological report[,] than the [district] shall fund Parent's unilateral placement," and provide or fund transportation thereto, through summer 2023 or until the CSE convenes to recommend a new program and identifies a new program (*id.* at pp. 16, 17). The IHO indicated, however, that the district would not be required to fund such a unilateral placement if it successfully challenged the appropriateness of a unilateral placement or the reasonableness of its cost (*id.* at p. 16).

Finally, the IHO denied the parent's request for additional assessments of the student as part of an IEE, finding that the parent had not offered any evidence of the need for further evaluations and further that the request for a feeding therapy evaluation had been raised only after the impartial hearing in the parent's post-hearing brief (IHO Decision at p. 16).

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

The parent appeals, asserting that the IHO correctly determined that the district failed to offer a FAPE to the student for the 2022-23 school year, but erred in failing to order modifications to the student's IEP or compensatory education. Additionally, the parent asserts that the IHO erred in finding that the district was not required to provide services to the student under pendency and erred in finding that the parent was attempting to enforce the pendency orders because the parent's compensatory education request was to remedy the denial of FAPE. The parent also asserts that the IHO erred in failing to order a feeding therapy IEE. The parent submits three exhibits with

their request for review as additional evidence, two consisting of emails and the third a copy of an IEP for the student developed in March 2023.

For relief, the parent requests an order for ten hours per week of home-based ABA and 30 hours of school-based ABA until the end of the 2022-23 school year, an order to modify the student's current IEP to include specified related services and assignment of a 1:1 paraprofessional to the student. The parent also requests an order for compensatory education in the form of 1840 hours of ABA, 138 hours of OT, 230 hours of speech-language therapy, 92 hours of PT, 92 hours of parent counseling and training, and 92 hours of BCBA supervision. Lastly the parent requests an order for a feeding therapy IEE.

In an answer with cross-appeal the district responds to the parent's material allegations and asserts that the IHO's decision should be upheld in all but one respect. The district contends that the parent's additional evidence in the form of emails and the March 2023 IEP for the student should not be considered because the emails could have been offered as evidence during the impartial hearing and the IEP is not relevant to the school year in question. In a cross-appeal, the district contends that the IHO erred in ordering the district to fund a placement of the parent's choosing if the district fails to develop a new IEP and identify a placement. The district contends that the IHO must base his or her decision on the record and that there was no evidence that the district would fail to find a placement after a future CSE meeting and no evidence that the parent's chosen private school would be appropriate. The district asserts that the IHO's order allows the parent to be "sole arbiter" of where student would be placed.

## **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" (Andrew 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 Andrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>5</sup>

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Additional Evidence**

The parent submits copies of emails sent between the parent's attorney and the district in October and November 2022, emails sent to the district from Manhattan Psychology Group, a private agency identified by the parent to deliver ABA services to the student, and from the parent's attorney between October and December 2022, and an IEP for the student developed by a CSE on March 13, 2023 (see Req. for Rev. Exs 1; 2; 3).

Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at \*2-\*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at \*2-\*4 [N.D.N.Y. Apr. 9, 2015]). On the other hand, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

---

<sup>5</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

While the additional evidence in the form of emails that the parents offer in the present matter was available at the time of the impartial hearing, I find that it is necessary in order to render a decision in this matter (Req. for Rev. Exs. 1; 2). Additionally, the March 2023 IEP developed for the student's 2023-24 school year was unavailable at the time of the impartial hearing and is relevant in rendering a decision herein for the reasons set forth below. Accordingly, as a matter in my discretion, the additional evidence is considered on the question of the parent's requested relief for the district's failure to provide the student a FAPE during the 2022-23 school year.

## **2. Scope of Review**

Initially, before turning to the merits of the parties' respective arguments on appeal, it is necessary to discuss which issues are properly before me on appeal. Neither party has appealed IHO's I interim decisions setting forth the student's pendency placement and ordering the district to fund the neuropsychological IEE (IHO Exs. III; IV). In addition, neither party has appealed the IHO's determination that the district failed to meet its burden to prove that it offered the student a FAPE for the 2022-23 school year (IHO Decision at pp. 11-12). While the parent appeals the IHO's failure to order the CSE to recommend a specific program and the district appeals the IHO's order for alternative relief in the form of district funding of a unilateral placement in the event the district fails to convene and identify an appropriate program for the student, neither party appeals the IHO's directive that the CSE convene and consider the student's need for ABA programming (*id.* at pp. 14-16). Finally, except with respect to the feeding therapy evaluation, the parent does not appeal the IHO's denial of the parent's request for other independent assessments of the student (*id.* at p. 16). Accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]). The appeal is limited to aspects of the IHO's order for relief and it is to those questions that I now turn.

### **B. Relief—Educational Placement**

Turning to the parties disputes over appropriate relief, in order to craft an appropriate remedy for the district's failure to develop an appropriate program for the student during the 2022-23 school year, and especially so in this context where the district failed to put forth any argument in defense of the program it provided, consideration of the student's needs as can be gleaned from the hearing record is warranted.

#### **1. Student's Needs**

As noted above, information for the November 2, 2022 independent neuropsychological evaluation was obtained through interviews with "[the student's] mother, teacher, speech therapist, occupational therapist, physical therapist, a review of past educational and medical records, and parent- and teacher-questionnaires/rating forms" (Parent Ex. P at p. 1). By way of background information, the evaluating neuropsychologist reported that the student had significant delays, "to the extent that he require[d] prompting to engage in almost any activity," and noted that in the past the student ha[d] received interventions inconsistently and his "severe feeding problems," had interfered with his ability to attend all of his therapies (*id.*). The neuropsychologist noted that, according to the parent [the student's] abilities regressed significantly during the COVID-19 pandemic" (*id.*). In addition, for the 2021-22 school year, the student was unable to attend school

until January 2022 "because a paraprofessional was unavailable" (*id.*). With regard to the student's family and social history, the neuropsychologist reported that the student had a "history of fleeting eye contact, inability to interpret gestures and facial expressions, lack of initiation of social interactions, no responsiveness to his name, inability to carry on a conversation, poor response to joint attention, and echolalia" (*id.* at pp. 1-2). The neuropsychologist indicated that the student was not able to greet others without prompts or play functionally with toys all the time and he tended to play by himself rather than associatively with others (*id.* at p. 2). The neuropsychologist also noted that the student exhibited stereotypical behaviors such as pulling his hair and looking at objects out of the corners of his eyes, lacked safety awareness, and "rigidly adhere[d] to daily routines" (*id.* at p. 2).

Turning to the student's developmental and medical history, the neuropsychologist reviewed the circumstances of the student's birth, along with his early development and the results of prior evaluations (Parent Ex. P at pp. 2-3). Notably, the neuropsychologist indicated that the student was "largely nonverbal and unable to communicate his needs," "was dependent on others for all activities of daily living," and had sensory processing issues (*id.* at p. 2). According to the neuropsychologist, the results of prior evaluations indicated that the student was "distractible and disengaged," exhibited upper and lower extremity weaknesses, had delayed graphomotor and fine motor skills, demonstrated gait and postural abnormalities, had "extreme deficits in language and communication," lacked social skills, and "exhibited severe feeding difficulties and remained at risk for malnutrition and dehydration" (*id.*). The student engaged self-stimulating behaviors, which when redirected could become more intense and self-injurious (*id.* at p. 4).

As part of the 2022 neuropsychological evaluation the neuropsychologist administered the following assessments: Stanford Binet Intelligence Scales-Fifth Edition (SB-5); Peabody Picture Vocabulary Test-Fifth Edition (PPVT-5); Expressive Vocabulary Test-Third Edition (EVT-3); Clinical Evaluation of Language Functioning-Fifth Edition (CELF-5; Recalling Sentences, Following Directions); Conners Kiddie Continuous Performance Test-Second Edition (K-CPT 2); Beery-Buktenika Developmental Test of Visual-Motor Integration, Sixth Edition (Beery VMI, 6th Edition); NEPSY- Second Edition (NEPSY-II: Word Generation, Fingertip Tapping, Memory for Designs); California Verbal Learning Test-Child (CVLT-C); Wechsler Individual Achievement Test- Fourth Edition (WIAT-IV: select subtests); Vineland Adaptive Behavior Scales-Third Edition (Vineland-3 Parent, Teacher); Childhood Autism Rating Scale Second Edition-Standard (CARS2-ST); Social Communication Questionnaire (SCQ); Behavior Assessment System for Children-Third Edition (BASC-3, Parent & Teacher Report) (Parent Ex. P at pp. 5-6). The neuropsychologist stated that the student was unable to "comprehend the instructions during the majority of tests" though "he appeared to try to put forth his best effort and therefore, the . . . findings [we]re considered valid estimates of his . . . functioning" at the time (*id.* at p. 10).

With regard to the student's intellectual functioning, administration of the SB-5 yielded a full scale score of 44 which fell in the "[m]oderately [i]mpaired range" and below the first percentile (Parent Ex. P at p. 6). In terms of the student's attention and executive functioning, the neuropsychologist indicated that parent responses on the Connors-EC parent questionnaire indicated the student had an "[a]verage number of problems with inattention and hyperactivity" and parent completion of the BASC-3 questionnaire suggested that the student was "[a]t-[r]isk for attention problems but revealed no significant problems with hyperactivity" (*id.* at p. 7). According to the neuropsychologist, the parent indicated that the student "almost always act[ed] without

thinking, almost always ha[d] a short attention span, almost always need[ed] too much supervision, sometimes pa[id] attention, sometimes listen[ed] to directions, sometimes act[ed] out of control, and sometimes pa[id] attention when being spoken to" (*id.*). The neuropsychologist reported that the student's teacher also completed a BASC-3 questionnaire and rated the student as having significant difficulty with attention and "an [a]t-[r]isk level" of difficulty with hyperactivity (*id.*). Further, the teacher indicated that the student "never listen[ed] carefully, [wa]s almost always easily distracted, never listen[ed] to directions, often ha[d] poor self-control, almost always c[ould]not wait to take his turn, often [wa]s overly active, and sometimes pa[id] attention" (*id.*).

With regard to academics, the neuropsychologist reported that the student was not able to answer any questions on a standardized measure of academic achievement (Parent Ex. P at p. 7). However, the neuropsychologist included a description of the student's classroom performance, provided by his then-current kindergarten teacher in the educational history section of the neuropsychological evaluation report (*id.* at pp. 4-5). According to the neuropsychologist, the student's teacher indicated that the student had difficulty concentrating and initiating tasks independently, and his behavior was inconsistent in that at times as he could put some puzzles together with assistance but not complete ones that were similar (*id.* at p. 4). The student struggled with matching activities and lost focus easily, had difficulty following directions, and needed prompting to complete tasks, and frequently engaged in scripted speech (*id.*). The student's teacher indicated that the student engaged in self-stimulatory behaviors such as biting and flapping when sitting at a table but also noted that he could stay in his seat for two to three minutes before wandering around (*id.* at p. 5). The student's teacher reported that the student enjoyed praise and appeared happy but did not interact with peers (*id.*).

Turning to communication, the neuropsychologist indicated that the student was "largely nonverbal and unable to communicate his needs" and during the evaluation, the student was unable to respond to "most questions asked of him" (Parent Ex. P at pp. 2, 5, 8). The neuropsychologist noted that, during the evaluation, the student's speech was difficult to understand, abnormally loud at times, and he exhibited echolalia and some babbling to himself (*id.* at p. 5). The neuropsychologist indicated that the student's receptive language skills were "extremely low across all tasks" and that he showed difficulty comprehending task directions to the level that the tasks could not be completed (*id.* at p. 6). He also indicated that the student's expressive language abilities fell below the first percentile on tasks that involved naming pictures and recalling sentences (*id.* at p. 5).

To assess the student's social development, the neuropsychologist who conducted the 2022 neuropsychological evaluation administered the Vineland-3 which yielded an adaptive behavior composite score and domain scores within the low range and below the first percentile (Parent Ex. P at pp. 8, 9). Turning to the student's behavior, the neuropsychologist reported that within the Vineland-3 maladaptive behavior domain the parent endorsed responses that indicate the student had "problems with eating, sleeping, and going to/staying at school for emotional causes" (*id.* at p. 9). Ratings by the student's teacher suggested that the student "has[d] problems with being overly needy or dependent, eating, avoiding interactions with others, lacking interest in doing things, being extremely shy, being much more active than peers, harming himself, using strange or repetitive speech, repeating physical movements over and over, and wandering away without regard for safety" (*id.*). Parent and teacher completion of the BASC-3 revealed additional behavioral difficulties with the parent reporting that the student was preoccupied with physical

complaints and had difficulty with adaptability and the teacher reporting that the student exhibited atypical behaviors, seemed out of touch with reality and required constant prompts and cues to initiate, attend, and respond (*id.* at pp. 9-10).

In terms of the student's physical development, the neuropsychologist indicated that the student "ha[d] a history of hypotonia, gait issues, sensory integration dysfunction, fine and gross motor delays, generalized muscle weakness, plantar fasciitis, astigmatism, and feeding difficulties" (Parent Ex. P. at p 3). The neuropsychologist reported that administration of the Vineland-3 yielded a motor domain score of 44 which fell in the low range and below the first percentile (*id.* at p. 8). According to the parent, the student required a feeding protocol and ate only pureed food (Tr. pp. 147-50).

## **2. Applied Behavioral Analysis**

Turning to the parent's request for ABA programming for the student, the hearing record shows that the student initially received ABA instruction "for a brief period of time" during Early Intervention and the parent believed the student made progress with that approach (Parent Ex. P at p. 1; *see* Parent Ex. G at p. 2). The student subsequently attended an ABA-based preschool (QSAC) for the 2020-21 and 2021-22 school years (Parent Ex. I; *see* Parent Ex. B at p. 8). A July 2021 annual progress note from QSAC indicated that the student, attending remotely, had made slow but steady progress across all domains during the 2020-21 school year in the ABA-based program (Parent Ex. I at pp. 5-15). The student was again recommended to attend QSAC for the 2021-22 school year but due to his enrollment in a six-week feeding program and QSAC being unable to obtain a 1:1 paraprofessional, the student only attended school for six days (Parent Ex. P at p. 1).

In addition to reports that the student made progress when provided with ABA instruction, the hearing record contains reports from several professionals who evaluated the student and determined that he required ABA services. In July 2021 an autism and behavioral therapy assessment was conducted in the student's home by a BCBA using the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) (Parent Ex. G at pp. 1, 6). Based on his observation and assessment of the student, the BCBA identified current problem areas (communication, socialization, restrictive and repetitive patterns of behavior, maladaptive behavior, and self-care) and provided a detailed description of the student's performance in those areas (*id.* at pp. 3-8). The BCBA characterized the student's level of severity in each of the areas as "severe" (*id.* at pp. 3-7). With regard to communication, the BCBA noted that the student had severe deficits in verbal and non-verbal communication and little to no intelligible speech (*id.* at p. 4). For socialization, the BCBA stated that the student "respond[ed] only to direct social approaches" and only interacted to meet his needs (*id.* at pp. 4-5). Turning to restrictive and repetitive patterns of behavior, the BCBA indicated that the student was inflexible and his difficulty coping with change interfered significantly in all contexts (*id.*). With regard to maladaptive behavior, the BCBA noted that the student's behaviors interfered in multiple contexts and were severe and frequently damaging (*id.*). Lastly, in terms of self-care, the BCBA reported that the student "need[ed] assistance to complete all daily adaptive living tasks such as dressing, washing hands, brushing teeth, eating drinking, toileting, showering/bathing and bed-time routines" (*id.* at p. 6). To address the student's needs, the BCBA recommended that the student receive at least 20 hours weekly of "direct treatment [of ABA] due to the severity of [his] inability

to communicate, lack of social and adaptive living skills, and lack of awareness of danger" (*id.* at p. 1).<sup>6</sup> The BCBA recommended the services of a BCBA for two hours per week to monitor the implementation of ABA services and also recommended family training for two hours monthly to explain and model procedures implemented to the student (*id.*). The BCBA reported that "the hours recommended were specifically requested based on empirical data on the duration and intensity of ABA Therapy needed to receive maximum benefit" and cited numerous articles in research journals to substantiate his recommendation (*id.* at p. 2). He opined that the student had "many pre-requisites which ma[de] him an excellent candidate to have a significant response that would have a lasting effect on his overall skill development and ability to learn in a group setting" (*id.*). The BCBA hypothesized that intensive, early ABA instruction would greatly reduce the student's need for intensive services throughout his scholastic years (*id.*).

In the April 2022 IHO decision arising from the 2021-22 proceeding, the IHO in that matter considered the BCBA's evaluation, among others, determined that the student had been denied a FAPE for the 2021-22 school year and ordered the district to fund/provide the following home-based services for the student for the 2021-22 school year through August 2022 on a weekly basis: 40 hours of ABA instruction, two hours of BCBA services, and five 30-minute individual speech language therapy sessions, three 30-minute individual OT sessions and two 30-minute individual PT sessions (Parent Ex. B at pp. 8, 14-15).

Following the April 2022 IHO decision, on May 25, 2022, the student was evaluated by a pediatric neurologist who reviewed the student's medical history and the results of previous diagnostic tests, examined the student, and discussed the student's needs with the parent (Parent Ex. K). According to the neurologist, the parent reported that the student had had a recent change in behavior, with worsening behavior in school, was unable to follow directions, had few words and demonstrated no functional or spontaneous speech, did not interact with peers, was fidgety and hyperactive and unable to sit still, and was self-directed and in his own world (*id.* at p. 1). In addition, the student did not want to eat, refused food, was hitting himself and crying excessively, and would throw himself to the ground (*id.*). The neurologist noted that that the student exhibited stereotypies (*id.*). Included in the neurologist's report was a "problem list" which noted that the student had global developmental delay, autism spectrum disorder requiring substantial support (level 2), speech and language deficits, and feeding difficulties (*id.* at p. 2). Based on his evaluation of the student, the neurologist recommended that the student undergo a neuropsychological evaluation "in order to evaluate appropriate school setting," and that he be referred to "CARD" (*id.* at p. 5). The neurologist recommended that the student receive approximately 20 hours of ABA, and stated that the student required a "small, structured setting" with a 1:1 paraprofessional, speech-language therapy, OT, and feeding therapy (*id.*). The neurologist opined that the student should be in a class with a 1:1 ratio as he "need[ed] constant and close supervision for his severe pervasive, restrictive and self-directed behavior" (*id.*).

In addition to the above, the neuropsychologist who evaluated the student in November 2022 made numerous recommendations for the student's educational program (Parent Ex. P at pp.

---

<sup>6</sup> The BCBA recommended that the ABA instruction be provided afterschool and included a recommended schedule which proposed that the student receive three hours of 1:1 ABA instruction in the home from 6:00 p.m. to 9:00 p.m. Monday through Friday and five hours of ABA instruction from 9:00 a.m. to 2:00 p.m. on Saturdays (Parent Ex. G at pp. 1, 2).

11-14). The neuropsychologist found that the student's needs warranted diagnoses of autism spectrum disorder, level 3, with accompanying intellectual and language impairment; intellectual disability, severe; and unspecified ADHD (Parent Ex. P at p. 11). He recommended the student be placed in a special education program that "utilizes ABA methodology throughout the day" and "[d]aily 1:1 instruction infused with ABA principles is needed, as ABA has a robust research foundation that supports its use in children with autism" (Parent Exs. P at p. 11; Q at ¶ 10). Further, the neuropsychologist testified that he recommended such a placement because the student has "severe autism spectrum disorder, and ABA therapy is one of the most researched and there's the most evidence behind ABA therapy being an effective intervention for children with autism spectrum disorder" (Tr. pp. 91-92). The neuropsychologist also recommended the student be placed in a class of no more than six students and that the student have a 1:1 paraprofessional assigned to him "due to his distractibility, need for redirection and hand-over-hand assistance, support with transitions and to model appropriate behavior" (Parent Ex. P at p. 11). The neuropsychologist further stated that "the paraprofessional must also provide mealtime support using ABA methodology" (*id.*). The neuropsychologist opined that "due to the magnitude of [the student's] deficits involving adaptive, social, communication, and repetitive behaviors" the student required "a greater number of hours of ABA therapy than he [wa]s currently receiving" (*id.* at p. 12).<sup>7</sup>

### 3. Prospective Placement

Taking the foregoing information about the student's needs into account, I turn to address the IHO's order requiring the CSE to reconvene and consider the recommendations of the November 2022 neuropsychological evaluation for an ABA program (*see* IHO Decision at pp. 15-16). The parent argues the IHO should have ordered explicit amendments to the student's IEP required ABA programming.

Generally, as the IHO noted (IHO Decision at p. 15), an award of prospective relief in the form of IEP amendments and the prospective placement of a student in a particular type of program and placement, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (*see Adams v. Dist. of Columbia*, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; *see also Student X v. New York City Dep't of Educ.*, 2008 WL 4890440, at \*16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). However, concerns about circumventing the CSE process arise most prominently in matters where the school year challenged has ended and, in accordance with its obligation to review a student's IEP at least

---

<sup>7</sup> In his report, the neuropsychologist recommended the following compensatory education programming for the student: 1:1 ABA for 40 hours per week (30 hours school-based and ten hours home-based), 1,380 hours school-based and 460 hours home-based per year; OT for three hours per week, 138 hours per year; speech language therapy for five hours per week, 230 hours per year; PT for 2 hours per week, 92 hours per year; social skills training for two hours per week, 92 hours per year; parent counseling and training for two hours per week, 92 hours per year; and, BCBA supervision for two hours per week, 92 hours per year (Parent Ex. P at p. 13).



annually, the CSE would have already convened to produce an IEP for the following school year (see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at \*7 [S.D.N.Y. Aug. 17, 2022] [acknowledging that "orders of prospective services are disfavored as a matter of law" and, in the matter at hand, indicating that "the CSE should have already convened for subsequent school years]; M.F. v. N. Syracuse Cent. Sch. Dist., 2019 WL 1432768, at \*8 [N.D.N.Y. Mar. 29, 2019] [declining to speculate as to the likelihood that the district would offer the student a FAPE "in the future" and, therefore, denying prospective relief]; Eley v. Dist. of Columbia, 2012 WL 3656471, at \*11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current school year]).

Additionally, while prospective placement might be appropriate in rare cases (see Connors v. Mills, 34 F.Supp.2d 795, 799, 804-06 [N.D.N.Y. Sept. 24, 1998] [noting a prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate"]), the pitfalls of awarding a prospective placement have been noted in multiple State-level administrative review decisions, including that where a prospective placement is obtained by the parents through the impartial hearing, such relief could be treated as an election of remedies, where the parents assume the risk that future unforeseen events could cause the relief to be undesirable (see, e.g., Application of a Student with a Disability, Appeal No. 19-018).

Here, I find that this matter presents one of the rare instances where prospective placement is warranted because despite passage of two impartial hearing proceedings, I am not convinced by the district's conduct that the district's administrative processes are sufficiently intact to effectuate the changes needed to remediate the student's situation on its own. Several factors in this case lead me to conclude that more extraordinary measures are appropriate. First, as of the date of this decision, the 2022-23 school year has not ended. Second, despite having access to the several sources of information indicating that the student had benefited from ABA in the past and recommending a full-time ABA program for the student going forward (Parent Exs. G; K; I; P), the unappealed April 2022 IHO decision directing the district to provide the student with ABA (Parent Ex. B), as well as the unappealed portion of the March 2, 2023 IHO decision under review herein that directed the district to convene a CSE and develop a program taking into consideration the student's need for an ABA-based educational program (IHO Decision at pp. 15-17), the district's CSE convened weeks ago and again did not recommend ABA programming for the student (Req. for Rev. Ex. 3). According to the March 2023 IEP, the CSE considered ABA for the student in order to comply with the IHO's March 2, 2023 decision but concluded that a 6:1+1 special class in a specialized school with paraprofessional and related services but without a specific recommendation for ABA would be appropriate to meet the student's needs (*id.* at pp. 29-30, 35). Because the district presented no evidence in this matter, it is not clear that the district can provide ABA programming for this particular student in an in-district program.

Furthermore, while the district may have relied on its own evaluations to make recommendations for the student for the 2022-23 school year that did not include ABA, the district utterly failed to participate in the impartial hearing to present its view of the student's needs or defend its recommendations, or even update the IHO regarding its view of the student's current needs. Thus, the district did not rebut or contest the evidence supporting the student's need for

ABA, and, based on the evidence in the hearing record, there is a clear "consensus" among those who evaluated the student regarding his needs that should be followed by the CSE (see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 543–46 [2d Cir. 2017] [referencing and following the proposition that when the reports and evaluative materials present at the CSE meeting yield a clear consensus, an IEP formulated for the child that fails to provide services consistent with that consensus is not reasonably calculated to enable the child to receive educational benefits]).

After April 2022 IHO decision ordering ABA programming, there is no indication that the CSE meaningfully engaged with that unappealed order and, quite shockingly, proceeded to meet and develop IEP programming without the parent's participation at all which prompted the parent to go to due process all over again. It is apparent from the evidence that the same pattern is occurring repeatedly with little to no change. Absent some articulation from the district about its rationale for declining to recommend ABA for the student, the IHO's order for the CSE to consider the student's need for ABA is insufficient relief in this instance. Instead, I will order the district to convene the CSE and develop an IEP places the student in a State-approved nonpublic school that provides ABA programming, which the district must identify as soon as possible. Moreover, due to the nearness of the end of the 2022-23 school year and the extent of the district's denial of FAPE to the student for its protracted failure to recommend providing ABA to the student, an appropriate remedy for the student calls for prospective placement of the student in the State-approved nonpublic school for the duration of the 2023-24 school year unless the parties otherwise agree to a different placement as set forth below.<sup>8</sup>

In the request for review, the parent indicates that she has already filed a new due process complaint notice to challenge the March 2023 IEP (Req. for Rev. at p. 8). To avoid any duplication or conflict in orders arising from that proceeding, I will order the district to provide a copy of this decision to the IHO assigned to any pending matter involving the student so that said IHO is familiar with the terms of what has been ordered by the undersigned.

Finally, as related to the prospective placement, in its cross-appeal, the district contends that the IHO erred in ordering the district to fund a placement of the parent's choosing if the district fails to develop a new IEP and identify a placement. The parent agrees, arguing in the request for review that the order "inappropriately put a burden on the Parent to locate a private school" (Req. for Rev. at p. 8). Consistent with the parties views, the IHO's order for the district to fund a unilateral placement of the parent's choosing based upon some future contingency was unduly speculative and insufficiently defined. If the district fails to locate a State-approved nonpublic school as ordered herein, the parent's recourse in that instance would be to seek enforcement, which she could do by filing a State complaint against the district through the State complaint process or by seeking enforcement through the judicial system (see 34 CFR 300.152[c][3]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at \*4-\*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005]). Accordingly,

---

<sup>8</sup> This order of prospective placement does not preclude the CSE from convening periodically to discuss the student's needs and develop annual goals or management needs for the student based upon evaluative information and the student's progress.

the speculative portion of the IHO's order for a unilateral placement of the student in a private school to be located by the parent is vacated.

### **C. Implementation of Pendency—Compensatory Pendency Services**

The parties agree that IHO I's interim decision dated September 20, 2022 sets forth the student's pendency placement, and, as noted above, neither party has appealed that order (IHO Ex. IV; see Req. for Rev. ¶ 1; Answer ¶ 14). During the pendency of any proceedings relating to the identification, evaluation or placement of the student, 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 (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 v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], 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, 2008 WL 4890440, at \*20; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).

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 (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015] [directing 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 [ordering 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]).

Initially, as to the IHO's finding that she did not have authority to enforce a pendency determination, it is true that, generally, neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R., 407 F.3d at 76, 78 n.13 [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at \*7, \*9-\*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]). However, here, the IHO did retain jurisdiction as the orders which the parent alleged were violated by the district were issued as interim decisions in this proceeding and were not final decisions (see IHO Ex. IV). Thus, the parent did not seek relief for the district's failure to implement previous orders issued in a separate matter; rather, the district was obligated to provide the student with a pendency placement in the first instance, despite the order by IHO I (see Zvi D., 694 F.2d at 906). For this reason, the parent's allegation that the district was not implementing pendency services is distinguishable from a request for enforcement.

Turning to the question of implementation, the parent does not assert that the district failed to provide any of the related services called for in the September 2022 interim order on pendency, and submits additional evidence indicating that, as of November 3, 2022, the assistant principal of the district public school the student attended confirmed that the school was delivering related services to the student pursuant to pendency (Req. for Rev. Ex. 1). Rather, the parent contends that the district failed to implement only the ABA services called for in the order (see Req. for Rev. ¶ 1; IHO Ex. IV). For its part, the district asserts that it has funded all of the services that were scheduled during pendency (Answer ¶ 14).

There is a dispute about whether the parent or district was responsible to implement the student's pendency services. This is so, despite the language in IHO I's interim decision on pendency which clearly required the district to "provide and fund" the services, which in turn was language that was derived from the unappealed April 2022 IHO decision upon which the student's pendency placement was based (IHO Ex. IV; see Parent Ex. B at p. 14 [directing the district to "fund/provide" listed services]). Further, the student was enrolled in the district public school during the pendency of the proceedings, making implementation through private providers potentially problematic to the extent that requiring the district school to allow providers who are neither employed nor contracted by the district to simply enter school buildings and classrooms and begin interacting with whomever they find there, a proposition that I find bewildering at best. If there is a misunderstanding of the district's viewpoints, that is because the district did not appear at the impartial hearing to argue or present evidence that the parent had elected to obtain the services from private providers and had relieved the district of any obligation to provide the services. The additional evidence submitted by the parent also tends to show that the parent was attempting to arrange for the services but had to go through a process to obtain authorization from the district before the private provider could deliver the services. In an email from the parent's attorney to the district, dated September 12, 2022, the parent's attorney noted that the school would have to give Manhattan Psychology Group, the agency identified by the parent to deliver the pendency ABA services, access to the school building (Parent Ex. N at p. 13). The hearing record does not include a response to this email from the district. According to email correspondence submitted by the parent as additional evidence, the parent's attorney contacted the district on several occasions between October 6, 2022 and December 16, 2022 to obtain authorization for the parent's chosen private ABA providers to deliver services to the student in school (Req. for Rev. Ex. 2). The additional evidence does not include a response from the district and, in its answer, the district does not argue that it provided authorization. Accordingly, I find that this is not an instance where pendency consisted of private services and the parent elected not to schedule the services. Rather, the interim decision on pendency did not relieve the district of its obligation to provide services and, to the extent it permitted the services to be delivered by private providers and the parent attempted to arrange services, the district's own authorization process appears to have impeded the parent's efforts and, therefore, interrupted the status quo. The magnitude of dysfunction in its administrative processes that the district has shown in this case is virtually unparalleled.

In light of the above, I will order the district to provide a bank of compensatory pendency services in the amount of 40 hours per week of ABA services, minus the number of hours, if any, that the district can demonstrate were delivered from the August 1, 2022 date of the due process complaint notice until the date of this decision (see Parent Ex. A; IHO Ex. IV). These compensatory pendency ABA services may be implemented in the home or in school as the parties

may agree. The district is not precluded from using providers of its own choosing to implement these services. The student must use the services within four years of the date of this decision.

#### **D. Other Relief**

##### **1. Compensatory Education**

I have considered the parent's request for a large amount of compensatory education in the form of ABA and related services to remedy the denial of FAPE for the 2022-23 school year and find that such an order would not be appropriate in this instance.

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] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). 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"]).

As noted above, the hearing record indicates that related services are being delivered as part of the student's pendency program and the parent does not allege that those services were not provided, calling into question the student's need for compensatory related services to further make-up for a denial of FAPE. In the same vein, I have already ordered compensatory ABA pendency services, and it does not appear that the student's pendency program would provide less than a FAPE to the student. Taking the pendency program into account, both delivered and ordered in the form of make-up services, a further award of compensatory education is not warranted (N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at \*9 [D.R.I. Jun. 27, 2014] [finding that a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated"], adopted, 2015 WL 1137588 [D.R.I. Mar. 12, 2015]; 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]). Also, significantly, I have ordered that the student must be placed in a State approved nonpublic school that provides ABA for the remainder of the 2022-23 school year as well as the entire 2023-24 school year, and such a prospective placement is akin to, and may obviate the need for, compensatory education in the future (see Demarcus L. v. Bd. of Educ. of the City of Chicago, 2014 WL 948883, at \*8 [N.D. Ill. Mar. 11, 2014] [denying compensatory education partially due to the prospective revisions to the student's IEP]).

In light of the above, I will deny the parent's request for further compensatory education above and beyond the relief ordered to remedy the lapse in pendency services.

## **2. Feeding Therapy IEE**

Turning to the parent's request for an independent feeding therapy evaluation at district expense, 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]).<sup>9</sup> 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 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 the district will not be required to provide it 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 parent's written request to the district seeking an IEE stated the parent's disagreement with an August 2021 psychological evaluation and specifically sought a neuropsychological assessment to evaluate the student's "academic, speech-language, cognitive, sensory and

---

<sup>9</sup> 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]).

social/emotional needs" but did not mention a feeding evaluation (Parent Ex. D). In the due process complaint notice, the parent request that an IHO order district funding of an IEE, including neuropsychological, speech-language, assistive technology, OT, ABA skills, and functional behavioral assessments (Parent Ex. A at p. 5). IHO I granted the parent's request for a neuropsychological IEE (see IHO Ex. III). In the final decision, the IHO denied the parent's request for other independent evaluations listed in the due process complaint notice and the parent has not challenged the IHO's denial of that request (IHO Decision at p. 16).

Thus, as noted by the IHO, the parent did not request a feeding therapy IEE in the due process complaint notices or during the impartial hearing (IHO Decision at pp. 16-17; see Parent Exs. A; O). While the parent's request for an independent feeding evaluation is denied, the parent may request that the district conduct a "comprehensive evaluation" (see D.S. v. Trumbull Board of Education, 975 F.3d 152, 162-68 [2d Cir. 2020]). Upon receipt of such request, the district would be required to consider whether it would be appropriate to conduct the evaluation including the feeding assessment and, after due consideration, provide the parent with prior written notice describing, if applicable, its reasons for concluding that additional evaluative data of the student was unnecessary, including, in particular, the reasons why the CSE believes a feeding evaluation is unnecessary (8 NYCRR 200.5[a]; see 34 CFR 300.503, 300.305[d]). If the parent is dissatisfied with the district's response or evaluation, the parent may then submit a request to the district that it fund an IEE, including an independent feeding evaluation, in the manner contemplated by the IDEA, as discussed above.

### **3. Related Requested Relief**

The parent also requests an order for the district to defer placement of the student to the CBST, an order that the district must provide ten hours of home-based ABA for the remainder of the 2022-23 school year, and an order that the district must provide 30 hours of in-school ABA until an appropriate nonpublic school is located. However, given the relief ordered herein for compensatory pendency ABA services and for prospective placement of the student in a State-approved nonpublic school with an ABA program for the remainder of the 2022-23 school year and the duration of the 2023-24 school year, these additional requests by the parent are either duplicative or superfluous and I deny them for that reason.

## **VII. Conclusion**

In sum, the IHO's finding that the district failed to provide a FAPE to the student is final and binding. With respect to relief, the IHO's decision is modified to provide that the district shall convene the CSE, recommend a State-approved nonpublic school with an ABA program, and locate such a school for the student. To the extent the IHO's order provided for conditional funding of an unidentified unilateral placement in the event of a future failure on the part of the district, that portion of the award is vacated. The student is entitled to compensatory ABA services to remedy the lapse in pendency, as discussed above. In light of these awards of relief, further compensatory education is not warranted. Finally, the IHO did not err in declining to order district funding of an independent feeding evaluation. I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

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

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated March 2, 2023, is modified by vacating those portions that ordered the CSE to reconvene and develop an IEP with consideration to the student's need for ABA therapy and ordered that, in the event the district fails to develop an IEP and identify a placement, the district would be required to fund a private school placement of the parent's choosing through the summer of 2023;

**IT IS FURTHER ORDERED** that the IHO's decision, dated March 2, 2023, is modified by reversing that portion which denied the parent's request for compensatory education in full;

**IT IS FURTHER ORDERED** that, within 14 days of the date of this decision, the district shall convene the CSE that provides that the student attend a State-approved nonpublic school that provides an ABA program, and within 45 days of the date of this decision, the district shall locate and place the student in such a non-public school program continuing for the duration of the 12-month 2023-24 school year unless the parties otherwise agree to a different placement;

**IT IS FURTHER ORDERED** that the district shall provide a copy of this decision to any IHO assigned to a currently pending due process proceeding involving the student;

**IT IS FURTHER ORDERED** that the district shall fund and provide the student with compensatory education due to a lapse in pendency services in the form of 40 hours per week of ABA services to have been delivered during the pendency of this matter, minus the number of hours that the district can demonstrate were implemented from the August 1, 2022 date of the due process complaint notice until the date of this decision;

**IT IS FURTHER ORDERED** that the district shall, within 10 days of the date of this decision, provide the parent with a copy of district records showing the number of hours of ABA services that were delivered to the student between August 1, 2022 and the date of this decision; and

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

**Dated:** Albany, New York  
May 11, 2023

\_\_\_\_\_  
**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**