



# **The University of the State of New York**

## **The State Education Department**

**State Review Officer**

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**No. 23-080**

**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:**

Cuddy Law Firm, PLLC, attorneys for petitioner, by Simone James, 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 ordered compensatory education services at hourly rates lower than those requested by the parent to remedy respondent's (the district's) Committee on Special Education's (CSE's) failure to recommend or provide appropriate educational and related services to her son for the 2022-23 school year. The district cross-appeals from that portion of the IHO's decision which awarded the parent compensatory applied behavior analysis (ABA) services. The appeal must be sustained. The cross-appeal must be dismissed.

### **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 been the subject of prior administrative hearings. As relief in a prior administrative hearing, an IHO awarded an independent educational evaluation (IEE) consisting of six assessments (Parent Exs. A at pp. 2-3; D-H).<sup>1</sup> An independent occupational therapy (OT)

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<sup>1</sup> The independent physical therapy (PT) evaluation referenced in the due process complaint notice was not offered

evaluation was conducted on March 14, 2021, and an evaluation report was completed on March 25, 2021 (Parent Ex. E at pp. 1, 8). An independent speech-language therapy evaluation was conducted on March 14, 2021 (Parent Ex. F at p. 1). An independent neuropsychological evaluation was completed on March 31, 2021 (Parent Ex. G at p. 1). An independent ABA skills assessment was completed on April 8, 2021 (Parent Ex. H at p. 1). An independent functional behavioral assessment (FBA) and behavioral intervention plan (BIP) was completed on April 8, 2021 (Parent Ex. D at p. 1).

A CSE convened on June 17, 2022 to develop the student's IEP and recommend a program and placement for the student to be implemented on June 17, 2022 (Parent Ex. B at pp. 1, 19-20, 25). Finding the student continued to be eligible for special education and related services as a student with autism, the June 2022 CSE recommended a 12-month school year program consisting of an 8:1+1 special class in a State-approved nonpublic school (NPS) day program with counseling, OT, ABA services, parent counseling and training, PT, and speech-language therapy (id. at pp. 19-20, 25, 26-27).<sup>2</sup> The June 2022 CSE also recommended supplementary aids and services consisting of daily, full time 1:1 paraprofessional services to assist the student with behavior support (id. at p. 20).

By prior written notice dated June 30, 2022, the district summarized the recommendations of the June 2022 CSE (Parent Ex. J at pp. 1-3). The June 30, 2022 prior written notice reflected that the June 2022 CSE considered a March 14, 2021 OT assessment, a March 14, 2021 PT assessment, a March 14, 2021 speech-language therapy assessment, a March 31, 2021 neuropsychological evaluation, an April 8, 2021 ABA skills assessment, and an April 8, 2021 FBA (id. at p. 2). The prior written notice also included notes indicating that, during an April 8, 2022 CSE meeting, the parent requested that the student remain in an 8:1+1 special class in a community school until an NPS placement was located (id.). Notes attributed to the June 2022 CSE meeting reflected that an NPS placement was still pending (id.).

By letter dated October 13, 2022, the parent wrote to the district CSE chairperson and asserted that the June 2022 IEP had not been implemented and that the student continued to attend a community school (Parent Ex. K at p. 1). The parent further stated that the June 2022 IEP had recommended two hours per week of parent counseling and training, 25 hours per week of ABA services, and the services of a daily, full time 1:1 paraprofessional (id.). The parent reported that the student had not been provided with a "consistent paraprofessional" and that it was "a different paraprofessional most days" (id.). In addition, the parent stated that the student had not received any ABA services (id.). The parent advised the district that if the student did not receive 25 hours per week of ABA services and if the parent did not receive two hours per week of parent counseling and training, she would obtain an independent provider and seek district funding (id.). Lastly, the parent stated that she had not been contacted by an NPS for the 2022-23 school year and requested a list of the schools to which the district had applied and the status of each application (id.).

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into evidence. The hearing record shows that the independent PT evaluation was conducted on March 14, 2021 (Parent Exs. A at p. 2; J at p. 2).

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

By letter dated December 5, 2022, the parent advised the district that the June 17, 2022 IEP had not been implemented and further provided the district with ten-day written notice of her intention to unilaterally enroll the student at the Gersh Academy (Gersh) for the remainder of the 2022-23 school year and seek public funding for the cost of the student's attendance (Parent Ex. L at pp. 1-2).<sup>3</sup>

On December 16, 2022, the parent executed an enrollment contract with Gersh for the 2022-23 school year, which indicated that the student would begin attending on December 19, 2022 (Parent Ex. N at pp. 1-2).

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

By due process complaint notice dated December 21, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A at pp. 1, 4). Specifically, the parent asserted that the district failed to provide the student with an appropriate class placement, failed to develop an appropriate program for the student, failed to provide the student with appropriate related services, failed to recommend individualized, meaningful, and measurable goals, failed to recommend research-based methodologies for the student, denied the parent meaningful participation in the student's education, and failed to provide the student with appropriate transportation services (*id.* at pp. 5-7). The parent also contended that Gersh was an appropriate unilateral placement for the 2022-23 school year and that equitable considerations favored full reimbursement (*id.* at p. 7). As relief, the parent requested findings that the district denied the student a FAPE for the 2022-23 school year, that Gersh was an appropriate placement, and that equitable considerations favored an award of direct funding of the cost of the student's attendance at Gersh (*id.* at p. 8).<sup>4</sup> The parent also requested reimbursement for all out-of-pocket costs related to providing the student with an appropriate program and for the district to provide the student with appropriate transportation services to and from his placement (*id.*). In addition, the parent requested that if the district failed to timely and appropriately implement the student's transportation, that the district be required to reimburse or directly fund the private transportation services obtained by the parent (*id.*). Next the parent requested that the district fund compensatory services for any missed related services as indicated by the student's attendance records; and in the amounts recommended by the IEEs, in the areas including, but not limited to speech-language therapy, OT, PT, ABA services, parent counseling and training, and counseling services (*id.* at pp. 8-9). The parent further requested that all compensatory services be provided by independent providers of the parent's choosing at the providers' normal and customary rates and delivered outside of school hours (*id.* at p. 9). The parent also requested that the district fund transportation to and from any compensatory education services in the form of metro cards (*id.*).

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<sup>3</sup> Gersh has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

<sup>4</sup> The parent also requested that the district provide the student's related service encounter attendance records for the 2022-23 school year at least five days prior to the resolution meeting, and requested that the district provide a certified, independent, Spanish language translator for any resolution meeting and for the impartial hearing (Parent Ex. A at p. 8).

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

A prehearing conference was held on February 17, 2023, and the parties reconvened for an impartial hearing on March 9, 2023 (Tr. pp. 1-52). During the prehearing conference, the district stated that it would not present evidence that the student was offered a FAPE for the 2022-23 school year and would reserve the right to argue the inappropriateness of the parent's unilateral placement at the impartial hearing (Tr. p. 9). At the beginning of the impartial hearing, the district reiterated that it did not intend to present any evidence that it offered the student a FAPE and that it did not intend to cross-examine the parent's witnesses (Tr. p. 37). In the parent's opening statement, the parent's attorney indicated the requested relief, which included the number of hours of compensatory education services sought for each requested service, as well as the requested rate per hour for each of the parent's chosen service providers (Tr. pp. 46-47).<sup>5</sup> Following the parent's opening statement, the district addressed a specific claim in the parent's due process complaint notice but did not object to or refute any part of the parent's request for compensatory education services or the parent's requested rates (Tr. pp. 48-49).

By decision dated April 5, 2023, the IHO found that the district did not demonstrate that the June 2022 IEP offered the student a FAPE and the IHO determined that the IEP did not offer a FAPE (IHO Decision at p. 8). The IHO also found that the district failed to dispute the parent's claim that it did not provide the parent with a school location to implement the services mandated by the IEP and determined that the district failed to offer the student a FAPE for the 12-month 2022-23 school year (id.). Next, the IHO determined that the parent's unilateral placement was appropriate and that equitable considerations favored full funding of the cost of student's attendance at the unilateral placement (id. at pp. 8-10).

With regard to the parent's request for compensatory education services, the IHO awarded the number of hours sought by the parent for compensatory counseling, PT, speech-language therapy, OT, parent counseling and training, and ABA services, but denied the parent's request for compensatory paraprofessional services (IHO Decision at pp. 11-12). The IHO then determined that the parent's requested rate for each compensatory service was "excessive, exceptional, and unwarranted" (id. at p. 12). The IHO found that the parent's providers "offer[ed] no special qualifications, educational backgrounds, certifications, accreditations, or any other unusual identifiers that might justify these extremely high rates" and that "general statements that these prices reflect 'market rate'" similarly did not provide an adequate rationale for the excessive rates charged by the parent's chosen providers (id. at p. 12). The IHO also stated that the parent did not provide any evidence that the student required "an unusual type of counseling or therapy, which might justify the expense" (id.). In denying the parent's request for a compensatory, full time, 1:1 paraprofessional, the IHO found that the parent's unilateral placement provided the student with paraprofessional services and that awarding duplicative services would not serve to compensate the student, rather it would punish the district (id.). As relief, the IHO awarded direct funding of the cost of the student's attendance at the unilateral placement for the 10-month, 2022-23 school year, and district provision of transportation to and from the student's home to the unilateral placement with limited travel time for the 2022-23 school year (id. at p. 13). In addition, the IHO

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<sup>5</sup> The parent's attorney referenced the independent PT evaluation in her opening statement, however, as noted above, the evaluation was not offered into evidence (Tr. p. 40).

awarded 15.5 hours of compensatory individual counseling at a rate not to exceed \$150 per hour, two hours of group (2:1) PT at a rate not to exceed \$175 per hour, 47 hours of individual speech-language therapy at a rate not to exceed \$175 per hour, 14.5 hours of individual OT at a rate not to exceed \$175 per hour, 42 hours of parent counseling and training at a rate not to exceed \$150 per hour, and 525 hours of ABA services at a rate not to exceed \$250 per hour (*id.*). The IHO further awarded metro cards "or their equivalent" to allow the student to travel to and from the compensatory education services (*id.*). The IHO also determined that the student's bank of compensatory services would expire one year from the date of her decision (*id.*).

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

The parent appeals and argues that the IHO erred in failing to award the requested rates for compensatory education services. The parent asserts that the IHO relied on extrinsic evidence of rates and did not rely on the hearing record, that the IHO erred in arbitrarily reducing the rates of the compensatory education services, and erred in arbitrarily ordering a one-year expiration date for the bank of compensatory education services.

The parent contends that the district did not present any evidence indicating that the parent's requested rates were unreasonable and did not provide any evidence of alternative rates for compensatory services. The parent alleges that the IHO ordered lower rates for each of the compensatory services requested without citing any substantive evidence from the record that supported such a reduction. The parent further argues that rate sheets setting forth the providers' rates—which represented market rates—were submitted into evidence. The parent also alleges that the IHO relied solely on her own opinion when setting a one-year expiration date for the bank of compensatory services. The parent contends that the IHO's reduction in the rates would make it difficult for the parent to secure providers and the student's distractibility would make it difficult for the student to utilize all of the compensatory education services in one year. As relief, the parent requests 15.5 hours of compensatory counseling to be provided by the parent's chosen provider at a rate not to exceed \$480 per hour, two hours of compensatory PT to be provided by the parent's chosen provider at a rate not to exceed \$300 per hour, 47 hours of compensatory speech-language therapy to be provided by the parent's chosen provider at a rate not to exceed \$300 per hour, 14.5 hours of compensatory OT to be provided by the parent's chosen provider at a rate not to exceed \$300 per hour, 42 hours of compensatory parent counseling and training to be provided by the parent's chosen provider at a rate not to exceed \$330 per hour, and 525 hours of compensatory ABA services to be provided by the parent's chosen provider at a rate not to exceed \$330 per hour. Lastly, the parent requested that the bank of compensatory education services have no expiration date.

In an answer with cross-appeal, the district argues that the IHO's award of 525 hours of ABA services should be reduced and that the IHO's decision should be upheld in all other respects. The district asserts that the IHO's award was excessive, given that the due process complaint notice challenged one school year. Further, the district asserts that the amount of the award should be limited to the portion of the 2022-23 school year before the student was unilaterally enrolled, which was a period of 26 weeks. The district further contends that the student was recommended to receive ten hours per week of ABA instruction, and therefore, the district requests that the award of ABA services be reduced to 260 hours. The district also alleges that the student's current full time ABA program should be considered in determining the amount of the award and argues that

it is unclear whether the student could utilize 525 hours of ABA services for a denial of a FAPE for a single school year. The district also argues that an award of ABA services for the entire 2022-23 school year would only amount to 460 hours.

The district further asserts that the IHO did not arbitrarily limit the rate and expiration date of the compensatory services as the only evidence of the rates were vague statements set forth in the providers' own rate sheets. As relief, the district requests that the award of compensatory ABA services be reduced to 260 hours, or in the alternative, 460 hours.

In an answer to the district's cross-appeal, the parent argues that the district has misconstrued the recommendation for ABA services. The parent alleges that the student was recommended to receive 25 hours per week of school-based ABA and ten hours per week of home-based ABA. The parent contends that the district's assertion omits that the student was not provided with any ABA services while enrolled in the district during the 2022-23 school year. The parent contends that the requested award represented 25 hours per week for a 26-week period. The parent further argues that the district failed to challenge the providers' rate sheets during the impartial hearing and reiterates her requested relief.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist.,

346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>6</sup>

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<sup>6</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).



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

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. Compensatory Education**

Neither party has appealed from those portions of the IHO's decision which found that the district failed to offer the student a FAPE for the 2022-23 school year, found that Gersh was an appropriate unilateral placement, found that equitable considerations favored the parent's requested funding, and ordered the district to fund 15.5 hours of compensatory individual counseling, two hours of group (2:1) PT, 47 hours of individual speech-language therapy, 14.5 hours of individual OT, and 42 hours of parent counseling and training, and which ordered the district to fund the cost of the student's transportation to and from compensatory education services (see IHO Decision at p. 13). In addition, the parent has not appealed from that portion of the IHO's decision which denied her request for compensatory 1:1 paraprofessional services (see id. at p. 12). As such, those orders for relief are final and binding on the parties and will not be reviewed herein (34 CFR 300.514; 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]).

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"]).

## **1. ABA Services**

The district cross-appeals the IHO's award of 525 hours of ABA services and argues that the number of hours should be reduced. The district alleges that the student was recommended to receive ten hours per week of ABA services and should have received 26 weeks of compensatory education services totaling 260 hours. In the alternative, the district argues that the student is entitled to no more compensatory education services than a 46-week school year totaling 460 hours. The parent contends that the district's calculation is based on a misreading of the recommendation in the June 2022 IEP. The parent further alleges that the student was recommended to receive 25 hours per week of school-based ABA and ten hours per week of home-based ABA. The parent contends that the student was never provided with any ABA services from the time the June 2022 IEP was implemented on June 17, 2022 through the student's enrollment at Gersh on December 19, 2022.

The parent's position is supported by the hearing record and the IHO correctly awarded 525 hours of compensatory ABA services. According to the April 8, 2021 independent ABA skills assessment, the student was evaluated and observed from March 18, 2021 through April 5, 2021 by an independent Board Certified Behavior Analyst (BCBA) (Parent Ex. H at pp. 1, 23). Among the areas of need identified by the BCBA in the ABA skills assessment report were a list of barriers to treatment which included: negative behaviors; poor instructional control; absent, weak, or defective mand repertoire; absent, weak, or defective tact repertoire; absent, weak, or defective motor imitation; absent, weak, or defective echoic repertoire; absent, weak, or defective listener repertoire; absent, weak, or defective intraverbal repertoire; absent, weak, or defective social skills; prompt dependence; failure to make conditional discriminations; failure to generalize; weak or atypical motivating operations; response requirement weakening motivating operations; self-stimulation; hyperactivity; and failure to make eye contact or attend to people (*id.* at pp. 13-14). The BCBA noted that, while the student had a lengthy history of challenging behaviors, it was difficult to distinguish when the student was not capable of completing a demand from when the student was refusing (*id.* at p. 14). The BCBA opined that "[t]he nuances with such an early learner are subtle and require a highly trained behavior specialist (BCBA) to parse" (*id.*).

The student's results on a measure of adaptive behavior skills indicated that the student functioned within the extremely low to low range of same age peers (Parent Ex. H at p. 18). Within the communication domain, the BCBA noted that the student was not able to use expressive language to get his basic wants and needs met and was not observed to appropriately greet the examiner upon arrival (*id.* at p. 19). The BCBA reported that the student only looked briefly before turning his attention to preferred tangibles and that he had poor receptive skills (*id.*). If the

student did not know how to respond, he would reportedly resort to maladaptive behaviors, and if he did know how to respond, he was observed to answer quickly without difficulty (id.). The BCBA further indicated that the student's form of task refusal appeared to be displaying out-of-seat behavior, elopement behavior, and stereotypy behavior (id.). The student reportedly did not imitate upon request and relied heavily on prompts to keep him on task (id.). The BCBA also indicated that the student had difficulty staying on topic during conversations and assignments for more than one exchange, particularly with nonpreferred topics, and that the student frequently ignored topics (id.).

The BCBA also identified deficits within the social domain that impeded the student's "ability to integrate and function independently in society" (Parent Ex. H at p. 19). The student was reportedly observed to have fixed interests and preferred to be alone (id.). The student had "very fixed play schemes that all revolve[d] around blocks, Legos, games, and arts" (id.). The student also had difficulty expanding imaginative play with visual prompts and was observed to point to concrete answers (id.). According to the BCBA, when the student did not like the suggested play theme he refused to attempt to answer and reverted to preferred activities (id.). The student was also noted to be self-directed and liked isolation to play by himself (id.). The student reportedly did not play with the same items for long, his attention span was short, and he displayed maladaptive behaviors when he was ready to move on to the next activity (id.). The student was also described as self-directed in play, and he had difficulty letting others participate freely (id.). The BCBA opined that the student's lack of social play skills kept him secluded from peers of his age (id.).

With regard to activities of daily living/self-help, the BCBA reported that the student was able to toilet independently according to his mother but required reminders and prompts to clean up after using the bathroom (Parent Ex. H at pp. 19-20). According to school reports, the student was a picky eater who sometimes did not eat (id. at p. 20). School reports also indicated that the student could not toilet by himself, which required him to wear a diaper throughout the day (id.). The student reportedly required 1:1 assistance for some but not all aspects of dressing and undressing and with hygiene routines (id.). The BCBA indicated that the student could not tie his laces and could not manipulate buttons (id.). The parent reported that the student could eat at home using a fork independently (id.).

According to the BCBA, the student's wandering, out-of-seat, and noncompliant behaviors could interfere with his safety or the safety of those around him (Parent Ex. H at p. 20). These behaviors were observed and reported to occur when the student was presented with nonpreferred tasks and denied access to fixed interests (id.). The student reportedly also displayed maladaptive behaviors as a result of not being able to express his basic wants and needs (id.). The BCBA further noted that the student's maladaptive behaviors interfered with his ability to make meaningful connections with others and impeded the student from living a more independent life (id.).

The BCBA recommended that the student enroll in a specialized school with a BCBA on staff and a 1:1 instructional format (Parent Ex. H at p. 20). According to the BCBA, the student's public school placement did not meet his educational needs and had not been able to provide proper behavioral intervention to identify or reduce his maladaptive behaviors in his academic environment (id.). The BCBA indicated that the student required ongoing oversight by a BCBA

who collected behavioral data, used data to assess the functions of the student's behaviors, and designed and implemented a BIP to facilitate a reliable reduction of interfering behaviors (id.). The BCBA further recommended that the program target specific skills that the student needed to develop, including communication, visual perceptual skills, expressive language, receptive language, social, and imitation skills (id.). In addition, the BCBA opined that it was crucial for the student's program to focus heavily on developing his language skills (id.). According to the BCBA, the student had not had consistent instruction or implementation of an alternative communication system and would not be able to develop functional replacement behaviors for his target behaviors until he could communicate (id. at pp. 20-21).

The BCBA recommended that the student receive ABA interventions to produce meaningful and reliable behavioral change that generalized across settings and across providers (Parent Ex. H at p. 21). The BCBA also recommended a behaviorally trained 1:1 provider to "deliver attention at appropriate moments to keep him on task and reduce his avoidant behaviors, which will only grow more severe" (id.). The BCBA indicated that the student's "lack of numerous prerequisite skills (sitting for periods of time, attending to any form of group instruction, following directions, matching images) mean[t] he need[ed] an intensive instructional format as a precursor to developing higher-level skills" (id.). The BCBA opined that the student could not currently benefit from group instruction because his foundational skills were still developing, and that his current public school placement did not adhere to these recommendations (id.). The BCBA recommended a full-time ABA program that provided about 25 hours of direct ABA instruction per week (id.).

In addition, the BCBA recommended that the student receive ten hours per week of home-based ABA services to address the student's avoidant behaviors, which had been reinforced for years by the student's placement in inappropriate learning environments that failed to recognize his behavioral and communication needs (Parent Ex. H at p. 21). According to the BCBA, these behaviors "now pervaded every aspect of his life and prevent[ed] him from developing the foundational skills he need[ed] to cultivate higher-level skills that w[ould] afford him independence" (id. at pp. 21-22). The BCBA opined that ten hours per week of home-based ABA services would lead to a reduction in the student's maladaptive behaviors and allow him to make adequate progress (id. at p. 22). The BCBA further recommended two hours per week of parent counseling and individualized training which should occur across the home, school, and community environments (id.). The BCBA opined that the student's parents must receive training in how to promote the student's skills and functional communication in order to promote skill generalization and to also ensure that the student acquired the skills he needed to become a full and active participant across all learning environments (id.). According to the BCBA, the parents required intensive, ongoing training and support to implement ABA-based strategies that were known to change behavior in positive, meaningful, and long-lasting ways (id.). The BCBA indicated that the home ABA provider should be the primary individual responsible for ongoing parent training at a rate of two hours per week (id.).<sup>7</sup>

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<sup>7</sup> The ABA skills assessment report also included a recommendation for compensatory ABA services and parent counseling and training, however this recommendation related to a different school year (Parent Ex. C at p. 10; see Parent Ex. H at p. 22).

By decision dated February 25, 2022, a prior IHO ordered the district to convene a CSE to modify the student's IEP to include an 8:1+1 special class placement and 25 hours per week of ABA services, three 30-minute sessions per week of OT, five 45-minute sessions per week of speech-language therapy, and two hours per week of parent counseling and training within 15 days of the prior IHO's decision (Parent Ex. C at p. 13). The prior IHO also ordered the support of a 1:1 paraprofessional (id.).

A CSE convened on June 17, 2022 and developed an IEP to be implemented on June 17, 2022, which recommended 12-month school year program consisting of an 8:1+1 special class in a State-approved NPS day program with counseling, OT, ABA services, parent counseling and training, PT, and speech-language therapy as indicated above (Parent Ex. B at pp. 19-20, 25, 26-27). The June 2022 CSE also recommended supplementary aids and services consisting of daily, full time 1:1 paraprofessional services to assist the student with behavior support (id. at p. 20).

During the impartial hearing, the parent subpoenaed the student's related services attendance records from the district and received records for the student's related services of counseling, OT, PT, speech-language therapy and the provision of a 1:1 paraprofessional from June 23, 2022 through January 31, 2023 (Parent Ex. R at pp. 1-9). The parent asserts that the student was never provided ABA services or parent counseling and training in accordance with the June 2022 IEP and argues that the lack of attendance records provided by the district in response to the subpoena supports her claim. The district did not refute the parent's claims at the impartial hearing or in its cross-appeal.

The hearing record supports the IHO's award of 525 hours of ABA. The student was recommended to receive 25 hours per week of school-based ABA services beginning on June 17, 2022 through December 16, 2022, at which time the parent entered into a contract with Gersh (see Parent Ex. N). As the parent has only sought relief for that portion of missed services which occurred during the 12-month, 2022-23 school year, the IHO's award of 25 hours per week for 21 weeks of missed services was appropriate. The district's claim that the student was recommended to receive ten hours per week of ABA services is not supported by the hearing record and the district's cross-appeal is without merit.<sup>8</sup>

## **2. Rates for Compensatory Education Services**

The parent alleges that the IHO erred by reducing the requested rates for the parent's chosen compensatory education providers and erred by imposing a one-year expiration date on the compensatory education services award. The parent asserts that the district did not object during the impartial hearing or provide evidence of alternative rates during the impartial hearing. In addition, the parent alleges that the IHO relied on extrinsic evidence and not the hearing record in reducing the providers' hourly rates. The parent further asserts that the IHO's reduced rates would impact the parent's ability to obtain providers and her ability to use her compensatory award. As relief, the parent requests that compensatory education services be funded at the rates she requested during the impartial hearing as set forth on the providers' rate schedules admitted into evidence.

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<sup>8</sup> The district conceded in its answer with cross-appeal that the student was entitled to at least 26 weeks of compensatory ABA for missed services, which would equal 650 hours. However, the parent did not appeal the IHO's award of 525 hours of compensatory ABA services.

The parent also requests that there be no expiration date imposed on the bank of hours of compensatory education services awarded by the IHO. The district argues that the IHO did not arbitrarily limit the rate and expiration date of the compensatory services as the only evidence of the rates were vague statements set forth in the providers' own rate sheets.

During the impartial hearing, the parent offered into evidence rate schedules for her chosen providers and included the amount of each requested rate in her opening statement (Tr. pp. 46-47; Parent Exs. S; T). Here, the district did not present any evidence to challenge or otherwise rebut the parent's requested relief; however, the IHO, nonetheless, placed limitations on the rates and a one-year time period for the parent to obtain her compensatory education services award.

In her decision, the IHO "reject[ed] the suggested rates as excessive, exceptional, and unwarranted" (IHO Decision at p. 12). The IHO found that the parent's providers "offer[ed] no special qualifications, educational backgrounds, certifications, accreditations, or any other unusual identifiers that might justify these extremely high rates" and that "general statements that these prices reflect[ed] 'market rate'" were similarly insufficient to support the excessive rates sought. The IHO also noted that the parent failed to provide any evidence that the [s]tudent require[d] an unusual type of counseling or therapy, which might justify the expense" (*id.*). While it was within the IHO's authority to inquire of the parent about her requested hourly rates, she did not do so during the impartial hearing. The IHO was not constrained to merely accept the relief proffered by the parent. The IHO could have directed the parties to develop the record with the rate schedules of other providers if she found the parent's rates sheets did not establish reasonable market rates. The parent correctly asserts that the district did not object to her requested hourly rates, nor did the district provide evidence of alternate hourly rates. Further, the parent requested that all compensatory services be provided at her chosen providers' normal and customary rates in her December 21, 2022 due process complaint notice, in her opening statement, and again when she offered the providers' rate sheets into evidence (Tr. pp. 46-47; Parent Exs. A at p. 8; S at p. 1; T at p. 1).

In the absence of any documentary or testimonial evidence to counter the parent's requested rates, there was no basis for the IHO to reduce the providers' rates to an amount also unsupported by the hearing record. The IHO improperly reduced the hourly rates for each of the awarded compensatory education services based upon her own knowledge and experience of similar cases (i.e., judicial notice).<sup>9</sup> Indeed, if the district wished to argue that a particular rate should apply to the compensatory award, it was incumbent on the district to develop the hearing record as to a market rate. The district had ample opportunity to present alternative arguments on these points

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<sup>9</sup> Generally, an adjudicative fact may be judicially noticed when that fact "is not subject to reasonable dispute because it" is either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" (Fed. R. Evid. 201[a], [b][1]-[b][2]). While a court is empowered with the discretion to "take judicial notice on its own," a court "must take judicial notice if a party requests it and the court is supplied with the necessary information" (Fed. R. Evid. 201[c][1]-[2]). In addition, while a court "may take judicial notice at any stage of the proceeding," a party—upon request—must be provided with the opportunity to be heard "on the propriety of taking judicial notice and the nature of the fact to be noticed" (Fed. R. Evid. 201[d]-[e]). However, if a court "takes judicial notice before notifying a party, the party, on request, is still entitled to be heard" (Fed. R. Evid. 201[e]). The IHO's use of judicial notice in this case also offends State regulation, which requires, in part, that an IHO's decision "shall be based solely upon the record of the proceeding before the [IHO]" (8 NYCRR 200.5[j][5][v]).

as the district was the party that carried the burden of production and persuasion at the impartial hearing (Educ. Law § 4404[1][c]; see M.M., 2017 WL 1194685, at \*4 [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]). Here, the district failed to address its burdens, as required under the due process procedures set forth in New York State law, by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524). If the district disagreed with the rates proposed by the parent's preferred providers, it was incumbent on the district to come forward with evidence demonstrating that the rates were not reasonable.

Given the district's failure to meet its burden of production or persuasion on the issue of the providers' rates, the evidence introduced by the parent is un rebutted. According to a rate sheet included in the hearing record, Manhattan Psychology Group charged \$330 per hour for ABA and parent counseling and training services and \$480 per hour for compensatory counseling services (Parent Ex. S at p. 1). A rate sheet for Rachel Bouvin Speech Services reflected that compensatory speech-language therapy services were provided at a rate of \$300 per hour, compensatory OT services were provided at a rate of \$300 per hour, and compensatory PT services were provided at a rate of \$300 per hour (Parent Ex. T at p. 1).

The hearing record indicates that the student has received awards of compensatory education in prior administrative hearings (Parent Ex. C at p. 10). The hearing record also reflects that a previous award of a bank of hours was due to expire at the end of the 2023-24 school year (id.). There is no further information in the hearing record as to how many hours of the original award remain for the student to use. In light of the independent BCBA's description of the student, which detailed the student's limited availability for learning without sufficient supports and interfering maladaptive behaviors, a one-year expiration date is overly ambitious at this juncture (Parent Ex. H at pp. 13-14). Therefore, the student's bank of compensatory education services should be utilized within two years.<sup>10</sup>

## **VII. Conclusion**

Based on the foregoing, there is insufficient basis to modify the IHO's award of 525 hours of compensatory ABA services. However, the hearing record does not support the IHO's reduction in the amounts of the parent's requested hourly rates for the provision of compensatory education services. The parent's bank of compensatory education services hours may be utilized at the maximum rates specified in the rate schedules submitted into the hearing record and may be utilized for up to two years.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

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<sup>10</sup> This award is to make the student whole due to the district's failure to provide a FAPE for the 12-month 2022-23 school year and an award related thereto should not exist into perpetuity. The length of time represents twice the timeframe during which the student was denied a FAPE.

**IT IS ORDERED** that the IHO's decision, dated April 5, 2023, is modified by vacating those portions which set maximum hourly rates for the compensatory education services; and

**IT IS FURTHER ORDERED** that the district is directed to pay for 15.5 hours of compensatory counseling to be provided by the parent's chosen provider at a rate not to exceed \$480 per hour; and

**IT IS FURTHER ORDERED** that the district is directed to pay for two hours of compensatory PT to be provided by the parent's chosen provider at a rate not to exceed \$300 per hour; and

**IT IS FURTHER ORDERED** that the district is directed to pay for 47 hours of compensatory speech-language therapy to be provided by the parent's chosen provider at a rate not to exceed \$300 per hour; and

**IT IS FURTHER ORDERED** that the district is directed to pay for 14.5 hours of compensatory OT to be provided by the parent's chosen provider at a rate not to exceed \$300 per hour; and

**IT IS FURTHER ORDERED** that the district is directed to pay for 42 hours of compensatory parent counseling and training to be provided by the parent's chosen provider at a rate not to exceed \$330 per hour; and

**IT IS FURTHER ORDERED** that the district is directed to pay for 525 hours of compensatory ABA to be provided by the parent's chosen provider at a rate not to exceed \$330 per hour; and

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

**Dated:**            **Albany, New York**  
                      **June 9, 2023**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**