



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-246

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Liz Vladeck, General Counsel, attorneys for petitioner, by Jared B. Arader, Esq.

Law Office of Olga Vlasova, PLLC, attorneys for respondent, by Olga Vlasova, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son for the 2022-23 and 2023-24 school years and ordered compensatory relief. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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 parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here.

Briefly, the student received a diagnosis of moderate to severe autism spectrum disorder (ASD) and received early intervention services (Parent Ex. M at pp. 1-2). At the time of a November 2021 psychoeducational evaluation, the student also presented with severe delays in articulation initiation and range, he exhibited symptoms of childhood apraxia, and was non-verbal (id.; Tr. p. 30).

The student was the subject of a prior administrative hearing relating to the 2020-21 school year (see Parent Ex. D). In a final IHO decision related to the prior proceeding dated June 18, 2021, the IHO in that matter noted that the district failed to appear for the substantive portion of proceeding and presented no evidence or argument and, therefore, found that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year and ordered the district to reimburse the parent for the costs of the student's tuition at Gersh Academy, which was described as "a private applied behavior analysis ('ABA') school" (id. at pp. 2, 17). In addition, the IHO in that proceeding ordered the district to continue to fund after-school services consisting of ten hours per week of 1:1 special education itinerant teacher (SEIT) services, or special education instruction, ten hours per week of 1:1 ABA services, and three 30-minute sessions per week of Prompts for Restructuring Oral Muscular Phonetic Targets (PROMPT) therapy until the district reconvened to develop an appropriate IEP for the student (id. at pp. 17-18). The IHO also ordered the district to add those three after-school services to the student's IEP unless the CSE could provide an "evidence-based reason not to do so" (id. at p. 18).

The CSE convened on April 27, 2022 to formulate an IEP for the student with an implementation date of May 11, 2022 (Parent Ex. C).¹ The April 2022 CSE recommended the student attend a 12-month program in a 6:1+1 special class for math, English language arts (ELA), social studies, and sciences, with the following weekly related services: three 30-minutes sessions of individual occupational therapy (OT); three 30-minute sessions of individual physical therapy (PT); and five thirty-minute sessions of individual speech-language therapy; along with one 60-minute session of group parent counseling and training per month (id. at pp. 32-34). Additionally, noting that they were included in the IEP pursuant to the directives in the June 2021 IHO order, the April 2022 IEP included the following related services to take place after-school: ten hours per week of 1:1 special education instruction; ten hours per week 1:1 ABA services; and three individual 30-minute sessions of PROMPT therapy per week (id. at pp. 32-33; see Parent Ex. D at p. 18).² The April 2022 CSE also recommended additional supports for the student including assistive technology in the form of an iPad mini with the support of dynamic display speech generation; supplementary aids and services in the form of a 1:1 paraprofessional for behavior support; and testing accommodations (Parent Ex. C at pp. 33-34). Further, the April 2022 CSE indicated that the student required a behavioral intervention plan (BIP) (id. at p. 12). In a prior written notice dated April 29, 2022, the district summarized the recommendations made by the April 2022 CSE and in a letter, sent the same day, the district identified the particular public school site in a specialized school that would implement the student's IEP (Parent Ex. B). According to the parent, the student began attending the public school in July 2022 (Parent Ex. E at p. 3).

On April 3, 2023, the district created a BIP based on a functional behavioral assessment (FBA) dated March 13, 2023 (see generally Parent Exs. K-L).

¹ 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]).

² According to the parent, the district funded the student's after-school services first pursuant to a prior IHO order and then based on a stipulation of a settlement agreement between the parties (Parent Ex. R ¶ 8). The parent indicated that another due process complaint had been withdrawn (Parent Ex. at p. 1).

The CSE convened on April 26, 2023 for the student's annual review and to formulate an IEP for the student with an implementation date of May 10, 2023 (Parent Ex. H). The April 2023 CSE recommended the student attend a 12-month program in a 6:1+1 special class for math, ELA, social studies, and sciences, and receive three sessions per week of adapted physical education with the following weekly related services: three 30-minute sessions of individual OT; three 30-minute sessions of individual PT; four 30-minute sessions of individual speech-language therapy; and one 30-minute session of group (2:1) speech-language therapy; as well as four 60-minute sessions of group parent counseling and training per year (id. at pp. 30-31). Additionally, the April 2023 IEP continued to recommend a BIP for the student and the same additional supports, supplementary aids, and services as were recommended in the previous April 2022 IEP (compare Parent Ex. H at pp. 14, 31, with Parent Ex. C at pp. 12, 33-34). The CSE did not continue to recommend after-school services (compare Parent Ex. H at pp. 30-31, with Parent Ex. C at pp. 32-33). In a prior written notice dated May 10, 2023, the district summarized the recommendations made by the April 2023 CSE (Parent Ex. G).

A. Amended Due Process Complaint Notice

In an amended due process complaint notice, dated June 21, 2023, the parent alleged that the district failed to provide the student with services during the 2022-23 school year and failed to offer him a FAPE for the 2022-23 and 2023-24 school years (Parent Ex. E).³ Generally, the parent claimed that the April 2023 CSE did not recommended an appropriate program for the student (id. at pp. 3-5). In addition, the parent claimed that the district significantly impeded her ability to meaningfully participate in the decision-making process regarding the student's special education, especially as to the April 2023 CSE's failure to discuss after-school special education instruction, ABA, and PROMPT services or compensatory services related to the COVID-19 pandemic (id. at p. 5).⁴

For the 2022-23 school year, the parent alleged that the district failed to provide the student with any parent counseling and training (Parent Ex. E at p. 7). In addition, the parent asserted that, as of March 3, 2023, the student stopped receiving after school services (id. at p. 3). Turning to the April 2023 IEP, the parent claimed that the CSE failed to recommend the student's after-school special education instruction, ABA, and PROMPT therapy services (id. at p. 4). The parent further claimed that the April 2023 CSE did not develop appropriate, measurable, and achievable annual goals (id.). The parent also asserted that the 2023 CSE did not consider a nonpublic school ABA-based placement for the student (id. at pp. 4-5). The parent also alleged that the March 2023 FBA and subsequent April 2023 BIP developed by the district were inadequate to address the student's needs (id. at p. 5).

As relief, the parent requested an order: finding that the district deprived the student a FAPE for the 2022-23 and 2023-24 school years; directing the district to fund after-school services consisting of 10 hours per week of 1:1 special education instruction, 10 hours per week of 1:1

³ The original due process complaint was dated May 3, 2023 (see Parent Ex. A).

⁴ The parent's due process complaint notice included alleged violations of section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. § 794[a]), and the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.).

ABA services, and three 30-minute sessions per week of PROMPT therapy for the 2022-23 and 2023-24 school years by providers of the parent's choosing; directing the district to provide additional special education services and therapies to compensate the student for the denial of FAPE during the 2022-2023 and 2023-2024 school years; directing the district to provide compensatory parent counseling and training due to the district's failure to provide it; directing the district to complete a new FBA or fund an independent FBA by a provider of the parent's choosing at the provider's rate; and directing the CSE to reconvene and defer the student's case for placement in an appropriate ABA program at a nonpublic school (Parent Ex. E at pp. 6-7).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 7, 2023 and concluded on the same day (Tr. pp. 35-56).^{5, 6} During the impartial hearing, the district did not introduce any testimony or documentary evidence and indicated it would not be presenting a case in this matter (Tr. p. 25). The parent submitted nineteen documents into the hearing record which included three direct testimony affidavits and the district representative chose not to cross-examine the witnesses (Tr. pp. 26-28).⁷

In a decision dated October 4, 2023, the IHO determined that the district failed to meet its burden that it provided the student a FAPE for the 2022-23 and 2023-24 school years (IHO Decision at p. 10).

At the outset of his decision, the IHO noted that the district did not introduce any documentary evidence or witness testimony to defend its case during the impartial hearing (IHO Decision at p. 3). For the 2022-23 school year, the IHO credited the testimony of the parent that the student regressed behaviorally when the student's after-school ABA and special education instruction services were discontinued in March 2023, and thus the district's failure to ensure the continuation of such services deprived the student a FAPE (*id.* at p. 11). Additionally, the IHO credited the direct affidavit testimony of the Board Certified Behavior Analyst (BCBA) who testified that the recommended "District 75 program [wa]s inappropriate" in both the April 2022

⁵ The parties also convened for a combined prehearing conference and pendency hearing on June 7, 2023, and two status conferences on July 25, 2023 and August 16, 2023 (June 7, 2023 Tr. pp. 1-15; Tr. pp. 1-19). The transcript of the June 7, 2023 combined prehearing conference and pendency hearing was not consecutively paginated with the remaining transcripts and, therefore, any citations thereto will be preceded by the date (see June, 7, 2023 Tr. pp. 1-15).

⁶ During the June 7, 2023 combined prehearing conference and pendency hearing, the parties agreed that the student's pendency program was based on the April 2022 IEP (June 7, 2023 Tr. pp. 6-10). On June 14, 2023, the IHO issued an interim order on pendency based on the April 2022 IEP (IHO Interim Order at p. 4). The parties also entered into a partial resolution agreement, for issues raised in the parent's June 2023 amended due process complaint notice regarding the 2023-24 school year, which was signed by the parent on July 21, 2023 and a district representative on July 24, 2023, and indicated that the district agreed to fund both an independent FBA at a rate not to exceed \$2,000 and a BIP at a rate not to exceed \$1,000 within 60 days of the date the agreement was signed by both parties (Parent Ex. F).

⁷ Both parties submitted written closing summations to the IHO for consideration on September 28, 2023 (see IHO Exs. III at p. 15; IV at p. 26).

and April 2023 IEPs, and denied the student a FAPE (*id.* at pp. 11-12). The IHO also credited her testimony that the FBA and BIP in effect for the 2022-23 and 2023-24 school years "were entirely deficient and ineffective in addressing the [s]tudent's maladaptive behaviors" (*id.* at p. 11).

Additionally, the IHO determined that the April 2023 IEP was substantively flawed due to the CSE's determination to remove the student's after-school special education instruction, ABA and PROMPT therapy services without any evaluative material or justification (IHO Decision at p. 11). The IHO found that the continued recommendation in the April 2023 IEP for a 6:1+1 special class with related services was not likely to produce progress given the student's lack of progress in the same program for the 2022-23 school year and thus the April 2023 IEP failed to provide the student with educational instruction specially designed to meet his unique needs (*id.*).

As relief, the IHO ordered the district to provide the student with a bank of compensatory education in the form of 570 hours of 1:1 ABA services (computed as 15 hours per week for a 38 week denial of FAPE), 114 hours of BCBA supervision (computed at 3 hours per week for a 38 week denial of FAPE), and 76 hours of parent counseling and training (computed at 2 hours per week for a 38 week denial of FAPE) (IHO Decision at pp. 13-14). In addition to the compensatory education, the IHO ordered the district to immediately convene the CSE to develop an IEP and appropriate program for the student that included at a minimum: (1) 15 hours per week of after-school 1:1 ABA services provided by a licensed behavior analyst of the parent's choosing at a rate of \$150 per hour in addition to three hours per week of BCBA supervision and two hours per week of parent counseling and training, both at an enhanced market rate of \$225 per hour, to be provided by the BCBA, or another qualified provider of the parent's choosing; and (2) three 30-minute sessions per week of 1:1 PROMPT therapy in addition to the student's speech-language therapy, either provided by the district in school, or funded by the district after school at an enhanced market rate of \$175 per hour, to be provided by the private speech pathology clinic, or another qualified provider of the parent's choosing (*id.*). The IHO also ordered the CSE to reconvene once it was transmitted the student's independent FBA and BIP to incorporate the results of the FBA and BIP, followed by immediate deferral of the student's case to secure a placement for the student in a 12-month State-approved nonpublic school that provided a program of 1:1 instruction for students with ASD utilizing an appropriate evidence-based methodology such as ABA (*id.*).

IV. Appeal for State-Level Review

The district appeals from some aspects of the adverse findings of the IHO, in particular the nature or extent of the directives for relief, and the parent responds in an answer seeking to uphold the IHO's decision. The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parent's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The following issues presented on appeal must be resolved in order to render a decision in this matter:

1. Whether the IHO erred by ordering the CSE to reconvene and provide the student with a specific program for the 2023-24 school year which included a deferment to secure a placement for the student at a State-approved nonpublic school that provides 1:1 instruction to students utilizing ABA methodology; and

2. Whether the IHO awarded excessive compensatory education relief in relation to the district's denial of a FAPE to the student for the 2022-23 and 2023-24 school years.

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]).⁸ 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

Initially, I note that the district does not appeal the IHO's determination that it denied the student a FAPE for the 2022-23 and 2023-24 school years; as such, the IHO's determination is final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The appeal is limited to aspects of the IHO's order for relief and it is to those questions that I now turn.

A. Relief —Educational Placement

⁸ 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).

Turning to the district's argument regarding relief, in order to craft an appropriate remedy for the district's failure to provide the student with a FAPE for the 2022-23 and 2023-24 school years, a review of the student's needs is warranted.

1. Student's Needs

A psychoeducational evaluation of the student was conducted in November 2021, the results of which were reviewed at the April 2022 CSE meeting (see Parent Exs. C at pp. 1-3; M). At the time of the evaluation, the student was enrolled in a unilateral placement selected by the parent which consisted of a 6:1+1 special class with 1:1 paraprofessional services at Gersh and, in addition, received two hours of special education instruction and two hours of ABA instruction per day, five days per week, and three 30-minute sessions per week of PROMPT speech therapy in the student's home (Parent Ex. M at p. 2). The evaluation included a brief overview of the student's educational history, behavioral observations made by the evaluator during testing and a classroom observation, results of the cognitive and academic achievement testing administered to the student, results of teacher questionnaires/rating forms, and interviews with the parent and then current school personnel (id. at pp. 1-13).

With regard to the student's intellectual functioning, administration of the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition (WPPSI-IV) yielded a full scale intelligence quotient (FSIQ) of 42 which fell in the impaired range of intellectual functioning (Parent Ex. M at p. 4). The student's performance on indices measuring verbal comprehension, visual spatial, fluid reasoning, working memory, and processing speed also fell in the impaired range (id. at pp. 4-6). The psychologist also administered the Wechsler Individual Achievement Test, Fourth Edition (WIAT-4) to assess the student's academic functioning and reported that the student's test scores from the oral language, reading, writing, and mathematics subtests each fell in the impaired range and noted that the student exhibited poor responses and general awareness of the demands during testing (id. at pp. 7-8). Further, she indicated that, during testing, the student "exhibited a combination of avoidant eye contact, distractibility, and walk[ed] away at times" (id. at p. 7).

The student's mother completed the Autism Symptom Rating Scale (ASRS) questionnaire yielding a score in the "[v]ery [e]levated range" (Parent Ex. M at p. 8). The evaluator opined that data from the ASRS rating was consistent with the student's "previous diagnosis of moderate to severe ASD and indicate[d] a significant level of ongoing need for educational and developmental support" (id.).

To assess the student's social development and adaptive functioning, the student's teacher completed the Adaptive Behavior Assessment System, Third Edition (ABAS-III), which yielded a general adaptive composite standard score of 52, in the impaired range (Parent Ex. M at p. 6). The evaluator indicated that this test score, consistent with the "overall WPPSI-IV results," . . . "broadly suggest[ed] that [the student's] overall abilities and skills for daily living and interpersonal communication require[d] significant assistance as he [could not] safely function independently" (id.).

In addition to formal test administration, during the November 2021 psychoeducational evaluation, school personnel and a classroom observation provided the evaluator with information

about the student's then-current educational functioning (Parent Ex. M at pp. 2-4). The student's speech-language pathologist at Gersh indicated that, as of November 2021, the student had recently begun using an augmentative and alternative communication (AAC) device and was "reportedly successful 80 [percent] of the time for visual item discrimination when maximal hand-on-hand scaffolding [wa]s provided" (*id.* at p. 3). The student's classroom teacher at Gersh reported that the student was nonverbal, frequently "present[ed] as happy and content," responded well to staff and "often require[d] hand-over-hand discrete trial scaffolding" (*id.* at pp. 2-3). The paraprofessional assigned to the student reported that with "active scaffolding, [the student] [could] discriminate between some stimuli when given two choices" and that the student "[could be] effective using gestures and selecting items that he prefer[red]" (*id.*). The student's physical therapist at Gersh described him as "generally self-directed" but stated that he made progress in developing muscle tone with gross motor activities and increased his compliance during PT sessions (*id.*). The student's occupational therapist reported that the student was making progress in fine motor skills for bilateral coordination activities and had improved focus during OT sessions when his sensory input needs were met but indicated that the student's "persistent lack of visual attention fundamentally interfere[d] with his fine motor skill development" (*id.*). The evaluator observed the student in his then-current 6:1+1 classroom at Gersh with support from his paraprofessional and noted that the student was generally compliant and responded well to staff redirection, his interactions with peers were minimal and he did not show any "signs opposition or resistance" (*id.* at pp. 3-4).

The evidence also includes information after the student began attending the public school offered by the district during the 2022-23 school year. In terms of conducting an annual review and revising the student's IEP for the 2023-24 school year, the April 2023 IEP reflected teacher and staff observations, which characterized the student as a multi-sensory learner, who was easily distracted and needed 1:1 assistance "to participate in all class activities," and required "visual, gestural and verbal prompts to complete his class work," but responded well to consistent redirection and verbal praise (Parent Ex. H at p. 9). The IEP indicated that the student was motivated by his sensory toys, favorite foods, picture books (alphabet or animal), alphabet puzzles, breaks, and running in the gym and "work[ed] best in a 1:1 or 1:2" instructional setting with redirection and support from his paraprofessional (*id.* at p. 6). The student required picture symbols to answer questions during lessons and communicated by using his preferred method of communication (PMC) or gesturing and pointing to indicate his wants and needs and he required assistance to follow "simple one-step requests" (*id.*).

The IEP included results of an October 2022 administration of the Student Annual Needs Determination Inventory (SANDI), which yielded scores that fell in the prekindergarten range for both reading and math (Parent Ex. H at pp. 1-2). The student's performance on the SANDI reading subtest indicated that he had difficulty matching five objects to an identical object in an array of three, identifying letter sounds A-F, and receptively identifying letters G-O individually in an array of two (*id.* at p. 1). The IEP reflected that the student frequently needed adult support and verbal cues for redirection to identify key details from a story or to identify community safety signs from an array of three (*id.*). On the SANDI math subtest the IEP indicated that while the student had made some progress with matching up to four objects with the corresponding numerals, he continued to need support to receptively identify numbers six through twenty, and with rote counting numbers one through ten (*id.*). On the SANDI writing subtest, the student had shown progress in tracing shapes with "a partial physical prompt" but continued to exhibit difficulty

imitating horizontal and vertical lines, requiring verbal and gestural cues from staff (*id.* at pp. 1-2).

Turning to the student's speech-language development, the April 2023 IEP indicated that he had "demonstrated progress in his ability to use his device to label and request and follow directions, however [he] still need[ed] support to imitate [five] sounds in isolation and use his preferred method of communication to request, label and answer simple 'wh' questions and yes/no questions" (Parent Ex. H at p. 2). The IEP noted that the student continued to require support to take turns, greet, make eye contact with, or pass items to peers (*id.*). The communication present levels of performance of the April 2023 IEP described the student as "primarily nonverbal," and indicated that he communicated "by using a communication device, reaching for desired items and combining gestures with vocalizations" (*id.* at pp. 8-9). The student was working on imitating sounds but was inconsistent, his vocalizations consisted of "vowel sounds in isolation and 't' or 'b' sounds," and he used his device to produce single word utterances consisting primarily of requests for desired activities, and to label items and answer simple "wh" questions with modeling and tactile prompts (*id.* at p. 9). Further, the IEP reflected that the student required "maximum tactile prompts to facilitate sound production," he could follow directions to structured activities, matched pictures, and identified common items from a field of two with prompts (*id.*). The IEP also indicated that the student had "made gains in his ability to tolerate touch to his face" during activities that "require[d] tactile prompting needed for the imitation of speech sounds" (*id.*).

In terms of the student's social development, the April 2023 IEP indicated that the student was motivated when activities included his preferred activities of picture books, puzzles, movement, or sensory items and while he had a communication device, he required full support and adult assistance to use it (Parent Ex. H at p. 7). In addition, the student responded well to verbal praise and individual attention, interacted "mostly with adults," did not initiate interactions with peers, and "sometimes put out his open hand to greet people" (*id.* at pp. 7-8). The IEP reflected that the student exhibited aggressive behavior such as hitting, scratching, pinching, punching, kicking, and elopement and required support from a full time 1:1 behavioral support paraprofessional (*id.* at pp. 5, 7, 8). The hearing record includes an FBA and resulting BIP which listed that such behaviors occurred most when a nonpreferred activity was introduced, the 1:1 paraprofessional changed focus or was on break, and during transitions to and from the classroom (Parent Exs. K at pp. 2-3; L at pp. 1-3). The student sometimes engaged in self-injurious or noncompliant behaviors to avoid a task, when frustrated, or to gain a preferred item (Parent Ex. H at p. 8). The IEP indicated that the student followed a picture schedule in the classroom and used a first/then board at his desk to assist him with upcoming activities and transitions (*id.*). In addition, the student used a token system to complete tasks and he was given opportunities to work for a sensory break or a preferred activity when behaviors occurred (*id.*).

With regard to the student's physical development, the student participated in adapted physical education during the 2022-23 school year (Parent Ex. H at pp. 10-11). The PT summary from the April 2023 IEP indicated that the student presented with "low muscle tone throughout his trunk and lower extremities," and "walked with a normal stride gait pattern and [was] able to maintain pace with his classmates" (*id.* at p. 11). In addition, the student was reported to run on his toes with his arms loose out to the side and he required "stand by supervision or hand-held support to prevent elopement" (*id.*). The PT summary noted that the student could jump in various environments (independently on a trampoline, broad jump, from a higher surface) but benefited

from verbal prompts or hand-held guidance (*id.*). The OT summary on the April 2023 IEP reflected that the student was working on goals to improve visual attention and bilateral hand coordination by donning and doffing Velcro shoes, and visual motor skills and finger strength by cutting straight lines with partial assistance and visual and verbal cues (*id.*). The OT summary also noted that the student worked on sensory processing activities, which included "perceptual processing, motor coordination, cognitive integration and activities of daily living in order to improve independence within the school environment" (*id.*).

The student had no known medical needs at the time of the April 2023 CSE meeting, though the parent indicated he had seasonal allergies (Parent Ex. H at p. 10). Regarding daily living skills, the IEP indicated that the student was unable to unzip his coat, but he could take it off and pack, and unpack his belongings with verbal and gestural prompts (*id.*). The April 2023 IEP reflected that the student was not yet toilet trained, could not indicate when he needed to use the bathroom at school and was on a toileting schedule, but he was cooperative during diaper changes, able to use the toilet, and could wash and dry his hands (*id.* at pp. 5, 10). The IEP also indicated that the student could use a fork when eating meat but preferred to scoop dry cereal with his hands and that he had made little progress with cleaning up after a meal (*id.*).

2. Prospective Placement

Taking the foregoing evidence about the student's needs into account, I turn to address the district's appeal from the IHO's decision which ordered the CSE to convene and develop an IEP for that student that includes specific recommendations for after-school ABA services and BCBA supervision, PROMPT therapy, parent counseling and training, and placement at a State-approved nonpublic school that provides 1:1 instruction to students utilizing ABA methodology. The district contends the IHO erred by awarding a specific program without allowing the CSE to reconvene and consider if there were more appropriate, less restrictive program options for the student.

An award of prospective relief in the form of IEP amendments, including prospective placement in a nonpublic school, 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"]).

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 sought by the parents, such relief could be treated as an election of remedies by the parents, 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. 20-123; Application of a Student with a Disability, Appeal No. 19-018).

As noted above the student has received a diagnosis of moderate to severe ASD and exhibits global developmental delays in all areas, such as language, communication, activities of daily living, and fine motor, attention and focusing skills (Parent Ex. R ¶ 6). In determining his decision, the IHO stated that he credited the BCBA's "clinical opinion" regarding her recommendation that the student required placement in a nonpublic school, specifically for students with ASD that "provid[ed] 1:1 instruction utilizing an appropriate evidence-based methodology such as ABA" (IHO Decision pp. 11-12). The IHO's determination is problematic as the BCBA's clinical opinion is not the only evidence that should have been considered for such a recommendation.

According to the parent, the student had received services through the Early Intervention program, then attended a preschool program where he received services through the CPSE, but made no progress there; as a result, the CPSE added 10 hours per week of special education itinerant teacher (SEIT) services in the home, which the student began receiving in January 2019 (Parent Ex. R ¶ 7). Further, the parent indicated that the SEIT used ABA methodology and "once this service was added," the student "started to make some progress" (*id.*).

The student attended Gersh Academy for the 2021-22 school year, in a 6:1+1 classroom with a fulltime 1:1 paraprofessional for behavioral support (Parent Exs. C; M at pp. 2-4). The student's then-current teacher reported that the student presented as happy and content "during a majority of the time" and often required hand-over-hand discrete trial scaffolding (Parent Ex. M at pp. 2-3). A November 2021 interview with the student's behavioral paraprofessional indicated that she "observed slow but steady recent progress with discrimination" when working with the student (*id.* at pp. 1, 3). The April 2022 IEP present levels of performance noted that the student displayed "splintered skills across all domains," he worked best with 1:1 instruction and, and he acquired "skills best with consistent exposure and numerous repetitions of work programs daily" (Parent Ex. C at p. 4). The IEP also indicated that while the student "struggle[d] with maintaining attention and focus" he had made progress (*id.*). The speech-language present levels of performance included in the April 2022 IEP indicated that the student used nonverbal communication methods of gesturing, vocalizing, and pointing; he used his communication device with direct modeling, partial tactile prompts, verbal support and gestural support, he demonstrated difficulty identifying pictures of common objects, body parts or animals, and was unable to respond to yes/no questions to indicate preferred items (*id.* at p. 5). The 2022 speech update also indicated that the student was given "maximal support" to follow one-step directions, he sometimes engaged in avoidance behaviors during oral motor exercises and had made gradual progress toward his speech-language goals (*id.* at pp. 5-6). The April 2022 IEP noted that "it was important" for the student to have his paraprofessional assist him with all activities of daily living including toileting, feeding and hygiene (*id.* at p. 7). The student's physical therapist reported that the student had made progress in developing muscle tone and compliance with activities, and "decreased opposition" (Parent Ex. M at p. 3). The student's occupational therapist indicated that the student was making some progress in his bilateral coordination as demonstrated by putting on socks, lacing beads, and threading (*id.*).

Turning to the student's placement at the public school for the 2022-23 school year, the student attended a 6:1+1 classroom, with a focus in life skills, functional academics, and vocational training with a full-time 1:1 paraprofessional for behavioral support (Parent Ex. H at pp. 4, 5). In reviewing the April 2023 IEP present levels of performance, the student had made little progress in reading but had made progress in math and writing, had demonstrated progress using his device, improved his ability to follow one-step directions with physical, visual, and verbal cues, and had made little progress with cleaning up after meals and was not yet toilet trained (id. at pp. 1-2). The 2023 IEP noted that given the student's cognitive ability, he needed constant repetition and multiple opportunities to demonstrate acquisition of skills and he learned best from a multisensory approach (id. at pp. 5-6). The 2023 IEP also indicated that the student was most successful in 1:1 instruction with the assistance of his paraprofessional (id. at p. 6).

At the April 2023 CSE meeting the parent expressed concerns regarding the student's lack of progress but the evidence in the hearing record discussed above shows that the student made some progress, albeit slow, at both Gersh Academy and in the public school setting (compare Parent Ex. H at pp. 1-7, with Parent Ex. M at pp. 2-3). In support of the reinstatement of the student's after school services, the parent's amended due process complaint notice indicated that the student's "developmental delays [wer]e so severe and his progress so slow" that he would not make progress without these services (Parent Ex. E at p. 4). Given the testimony of the BCBA, her observations of the student's behaviors in the home contrasted with how the student presented in class, though credible, and supportive of the parent's assertion that the student needed support at home.

Accordingly, the evidence in the hearing record leads me to the conclusion that, absent the after-school services, the student is not likely to make steady progress in his educational goals and the evidence is equivocal as to the likelihood of regression in the classroom due to his significant level of ongoing need for educational and developmental support (see generally Parent Exs. E at p. 4; R ¶¶ 10, 19-20, 24; S ¶ 29).⁹ In light of the IHO's finding that the district failed to offer the student a FAPE for the entire 2022-23 and 2023-24 school years, the lack of a cross-appeal by the district as to FAPE, and the district's failure to present any argument that the after-school services were not appropriate to address the student's needs, there is insufficient basis to overturn the IHO's directive that the district shall provide the student with prospective after-school services consisting of the BCBA's recommendations of fifteen hours per week of 1:1 ABA services, three hours per week of BCBA supervision, and two hours per week of parent counseling and training during the 2023-24 school year from the date of this decision until the end of the school year.

Nevertheless, for the reasons set forth below, the IHO erred by ordering the CSE to reconvene after receiving the FBA and BIP from the BCBA and to defer the student for placement in a State-approved nonpublic school program, specifically for students with ASD utilizing an appropriate evidence-based methodology such as ABA. The BCBA testified that she began working directly with the student in August 2023, when she began the process of gathering data for the student's FBA and BIP (Parent Ex. S ¶ 25). Although the FBA and BIP were not complete

⁹ One of the problems with the district's arguments in this appeal is that from one due process proceeding to the next with respect to this student, the district is not participating in the proceedings before the IHOs in any meaningful way or even attempting to offer its own factual evidence that would better support its arguments, and it is leaving some factual evidence offered by the parents rebutted.

at the time of the due process hearing, the IHO relied on the BCBA's recommendations of what constituted an appropriate program for the student (IHO Decision at pp. 11-12). However, the hearing record does not include sufficient information to support finding that an approved nonpublic school program, as recommended by the BCBA, was required to address the student's needs or that such a school existed within the State. In particular, weighing against directing a nonpublic school placement is that such a placement would have been recommended to address the student's behavioral needs; however, the BCBA only observed the student in his home and offered her clinical opinion based upon the student's behaviors in the home, which were different than the student's presentation at either Gersh or in the public school setting (compare Parent Ex. S ¶¶ 12, 17, 27-31 with Parent Ex. L). Furthermore, as noted previously, the evidence showed that the student made slow progress in a special class setting regardless of whether he was placed in a classroom located in a public school district or a nonpublic school and it is not consistent with the principles of the IDEA to order a CSE to remove of a student from a public school setting unnecessarily and instead should be done with extreme care so as not to violate the requirement that the student be educated in the least restrictive environment.¹⁰

Moreover, the IHO's order to place the student at an approved nonpublic school has the effect of requiring the nonpublic school to provide the student his entire program as recommended in the new IEP, which would include, based on the IHO's order, an ABA program and after-school services (see IHO Decision at p. 14). As noted in State guidance, State regulation provides that "no contract for the placement of a student with a disability shall be approved for purposes of State reimbursement unless the proposed placement offers the instruction and services recommended on the student's IEP" (8 NYCRR §200.6[j][2] see "Provision of Related Services to Students with Disabilities Placed in Approved Private Schools in New York City," Office of Special Educ. [Sept. 2016], available at <https://www.p12.nysed.gov/specialed/dueprocess/NYC-IHO-RSA-912.pdf>). State regulation further requires that the length of a school day for a State-approved private school must include instructional and related services (8 NYCRR §200.7[b][4]). State guidance reflects that State-approved private schools have been directed by the New York State Education Department to hire staff necessary to provide related services and to accept only those students for whom they can provide the special education program and services recommended in students' IEPs ("Provision of Related Services to Students with Disabilities Placed in Approved Private Schools in New York City," Office of Special Educ. [Sept. 2016], available at <https://www.p12.nysed.gov/specialed/dueprocess/NYC-IHO-RSA-912.pdf>). State guidance further indicates that NYSED has directed the New York City Department of Education to ensure that it refers students to schools that are approved to meet the needs of the student, without having to receive related services beyond the school day through the use of related services authorizations (RSAs) (id.). Here, the IHO's directive to include a specific methodology and a home-based program on the student's IEP has the potential for making placement of the student at an approved nonpublic school problematic due to the need to follow the requirements set forth in State regulations and State issued guidance documentation.

¹⁰ The BCBA was not required to adhere to the LRE mandate when making recommendations in the same way that the CSE would be required to when formulating an IEP, she did not explain why the more restrictive setting in a nonpublic school was required, and her "clinical opinion" alone that it may be a better or superior approach is not sufficient to override the IDEA's mandates (Parent Ex. S ¶ 30).

Accordingly, as discussed above, the district will be directed to provide the student with the recommended after school services through the end of the current school year; however, the IHO's order directing placement in a nonpublic school placement will be reversed.

Finally, as correctly argued by the district in its request for review, it is the CSE who has the proper authority to create and implement an appropriate educational program for the student for a future school year. The CSE is required to create an appropriate program for the student in consideration of new evaluative material before the CSE, such as the independent FBA and BIP directed by the IHO. Once the BCBA is finished with the FBA and subsequent BIP and they are submitted to the district, the CSE should reconvene to create an appropriate IEP for the student taking into consideration the new information contained in the FBA and BIP. However, as directed above, regardless of any future CSE determinations, the district shall continue to provide the student with the ordered home-based services through the end of the 2023-24 school year.

B. Compensatory Education

I next turn to the parties' arguments related to an award of compensatory education for the period of time the student did not receive home-based services, March 2022 through the date of this decision. The district does not challenge the IHO's finding that it failed to ensure the continuation of the student's after-school ABA and special education instruction services as recommended in the April 2022 IEP for the 2022-23 school year; however, the district appeals from the IHO's decision directing it to provide a bank of compensatory education. The district seeks to reduce the amount of compensatory education to 420 hours of ABA services, 84 hours of BCBA supervision, and 56 hours of parenting counseling and training, or in the alternative, 120 hours of ABA services and 24 hours of parent counseling and training (Req. for Rev. at ¶¶ 13, 16).¹¹

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & n.12 [2d Cir. 2014]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [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

¹¹ In this matter, the IHO erred in his awarded compensatory education calculations and thus his award shall be modified as discussed further below. The IHO miscalculated the compensatory education award by using 38 weeks in his calculation, rather than 28 weeks. In his decision, the IHO determined that for the 2022-23 school year, from March 3, 2023 to June 30, 2023, the student was entitled to 16 weeks of services, and for the 12-month 2023-24 school year, for the time from the start of the school year through the date of the IHO decision, the student was entitled to 12 weeks of services (IHO Decision at p. 13). In review of the IHO decision, the total number of weeks awarded should have been 28 weeks, not 38 as calculated by the IHO. However, as time has passed since the IHO decision, and I have modified the IHO's prospective relief, I will compute an award of compensatory education for the period of the denial of FAPE through the date of this decision.

must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"])).

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

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

There is no dispute that from March 3, 2023 to June 30, 2023, the district failed to continue the student's after-school ABA and special education instruction services according to the student's April 2022 IEP.¹²

According to the hearing record, the district authorized the student to receive after-school ABA and special education instruction services from an outside provider for the 2022-23 school year until April 27, 2023 (see generally, Parent Exs. A at p. 2; P at p. 1). Once the parent became aware the provider was no longer able to provide the after-school ABA and special education instruction services, the parent notified the district via email on March 17, 2023 and requested new authorizations for another agency she already located (Parent Ex. P at p. 2). The district did not initially respond, nor did it send the authorization for the new provider (id. at pp. 1-2).

Then, on May 4, 2023, the school psychologist who was a member of the April 2023 CSE emailed the parent regarding the after-school services, indicating that such after-school services

¹² The parent does not put forth any claims indicating that the student missed any of his after-school PROMPT therapy or a request for compensatory relief related to PROMPT therapy (see Parent Ex. E; Answer ¶ 13).

could not be added to the student's IEP because, in order for the CSE to consider such after-school services, the parent would need to request an impartial hearing; the hearing record further shows that the parent filed a due process complaint notice the day prior, on May 3, 2023, alleging that the April 2023 CSE failed to recommend the after-school ABA, special education instruction, and PROMPT therapy services (Parent Exs. A at p. 2; O at p. 1). Accordingly, related to this appeal, as of May 3, 2023, the student was entitled to 10 hours per week of 1:1 ABA services and 10 hours per week of 1:1 special education instruction after school pursuant to pendency (see IHO Ex. I).¹³

Thus, from March 3, 2023 to May 3, 2023, the student is entitled to compensatory education for the district's failure to implement the student's after-school services pursuant to the April 2022 IEP and after May 3, 2023, the student is entitled to compensatory education for the district's failure to implement the same program pursuant to pendency.

However, the parent, through the course of this matter, has not continued the argument that the student was entitled to ten hours of after-school special education instruction per week for the weeks the district failed to implement the April 2022 IEP (see Tr. pp. 35-36; IHO Ex. IV; Answer). It appears that the parent based her request for compensatory education on the BCBA's recommendations for the student (compare Parent Ex. S ¶¶ 32, 36, 39, 40, with IHO Ex. IV at pp. 21, 25-26). The IHO also based his awarded compensatory education for both school years on the BCBA's recommendations, which was in error, as the BCBA's recommendation was not finalized until after the start of the impartial hearing on September 5, 2023 (see Parent Ex. S).

Turning to the compensatory education awarded for the district's denial of FAPE for the 2023-24 school year, as identified above, the student has made slow, albeit steady progress commensurate with his abilities due to his special education needs. In shaping his awarded compensatory education, the IHO considered the direct affidavit testimony of the BCBA who recommended the student receive 15 hours of after-school ABA services per week and 3 hours of BCBA supervision per week, in addition to two hours per week of parent counseling and training.

The district alleges it was improper of the IHO to award more than what the student missed as the parent only challenged the district's failure to implement the services recommended in the April 2022 IEP and the BCBA did not testify that her recommendations for services should be applied retroactively (Req. for Rev. at ¶ 15). However, this argument only holds for the period up until the BCBA made her recommendation for differing relief, as of September 4, 2023 (see Parent

¹³ The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]). In this instance, the parent alleges that district has not yet authorized the providers for the student's after-school services pursuant to the IHO's interim order (Answer ¶ 14). The parent has not alleged the student is missing his in-school program pursuant to pendency and it seems that the crux of this whole matter revolves around what after-school services should be provided in order for the student to continue to make steady progress.

Ex. S). At that point, the parent was challenging the student's programming as designed and not just the failure to implement services.

The BCBA indicated that she has not formally completed her FBA and subsequent BIP for the student, but based on the information collected so far, the student's district program as recommended by the April 2022 and April 2023 CSE were not appropriate for the student (Parent Ex. S ¶¶ 25, 27, 29). The district did not defend its programming, nor did it put forth an argument that the program recommend by the BCBA was not appropriate for the student (see Req. for Rev. ¶¶ 17-19). Contrary to the district's argument that the IHO did not engage in a "fact-specific" inquiry on the appropriate amount of compensatory education for its denial of FAPE, the IHO fully credited the BCBA and found that the recommended after-school services of fifteen hours of after-school ABA services per week, three hours of BCBA supervision per week and two hours of parent counseling and training per week was needed to provide the student an appropriate program for the 2023-24 school year. The burden is on the district during an impartial hearing to defend its recommended program, which it did not do in this matter, and so the IHO looked to other evidence provided by the parent or in this case, a BCBA who observed the student and was in the process of completing an FBA and creating a BIP for the student, to determine what is an appropriate program for the student (see Educ. Law § 4404[1][c]; see *R.E.*, 694 F.3d at 184-85).

Without evidence to the contrary of the BCBA's recommendation, it is proper in this matter to award compensatory education for the district's failure to provide the student a FAPE for the 2023-24 school year based on the BCBA's recommendations. The BCBA made such recommendation on September 5, 2023 (see Parent Ex. S). Thus, from September 5, 2023 through the date of this decision (15 weeks), the student is entitled to compensatory education consisting of fifteen hours of after-school 1:1 ABA services per week and three hours of BCBA supervision per week, while the parent is entitled to two hours of parent counseling and training per week.

Accordingly, putting the periods together the student is entitled to 10 hours per week of 1:1 ABA services and 10 hours per week of 1:1 special education instruction from March 3, 2023 through September 5, 2023, or, more specifically, 220 hours of each based on 22 weeks of missed services.¹⁴ For the period from September through the date of this decision, the student is entitled to compensatory education for approximately 15 weeks of the 2023-24 school year, computed as 225 hours of after-school 1:1 ABA services, 45 hours of BCBA supervision and 30 hours of parent counseling and training.

However, as the student is entitled to pendency services pursuant to the IHO's interim order on pendency, any services the student received through pendency should be subtracted from the total award (see IHO Ex. I). As such I would like to remind the district that it is obligated to provide the student his pendency services as ordered from the date of the May 3, 2023 due process complaint notice through the date of this decision, and it is suggested for it to determine if any services were provided under pendency, which then may be subtracted from the compensatory

¹⁴ This portion of the award is calculated using the IHO's computation of 16 weeks for the period from March 3, 2023 through June 30, 2023 plus six-weeks for July and August. The 10-month school year consists of 36 weeks (180 school days divided by 5 days per week); if a student attends 12-month programming, then the school year would consist of 42 weeks (i.e., 36 weeks plus 6 weeks during summer) (see Educ. Law § 3604[7]; 8 NYCRR 175.5 [a], [c]; 200.1[eee]).

award. As a final note, related to pendency, the pendency program as ordered contains different after-school services that the ones sought by the parent as compensatory education. The IHO ordered ten hours per week of 1:1 special education instruction, ten hours a week of 1:1 ABA services and three 30-minute sessions per week of PROMPT therapy 1:1 to be provided after school as the student's pendency program (IHO Ex. I at p. 4). As such, in light of the award for compensatory education for the district's denial of FAPE for the entire 2023-24 school year, which is currently taking place, and to avoid unnecessary duplicative awards for after-school services, the district should only have to provide after-school services pursuant to pendency up to the date of the BCBA's September 5, 2023 recommendations. The student's in-school pendency program shall not be disturbed. Further, despite the parent having located providers for the after-school services, the district should employ its own district employees to implement the student's pendency placement, unless the parties agree otherwise (see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 532 [2d Cir. 2020]).

VII. Conclusion

For all of the reasons outlined above, the IHO exceeded his authority in determining a prospective placement for the student; however, the hearing record supports the finding that, without the after-school services, the student would not be able to continue to make progress in either a district program or a nonpublic school program, and thus the district is directed to fund 15 hours of after-school ABA services per week, three hours of after-school BCBA supervision per week, three 30-minute sessions of PROMPT therapy, and two hours per week of parent counseling and training for the remainder of the 2023-24 school year. Further, although the IHO erred in his calculations as to an appropriate compensatory award, the hearing record supports an award of compensatory education for the district's denial of FAPE for the 2022-23 and 2023-24 school year and thus the IHO's awarded compensatory education shall be modified as indicated above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated October 4, 2023, is modified by reversing those ordering clauses delineated as paragraphs 1 and 2, including the respective subparagraphs, which ordered the district to provide prospective placement for the student for the 2023-24 school year; and

IT IS FURTHER ORDERED that IHO's decision dated October 4, 2023, is modified by reversing those portions which ordered the district to fund 570 hours of 1:1 ABA services, 114 hours of BCBA supervision, and 76 hours of parent training and counseling to be provided by a provider of the parent's choosing at enhanced market rates; and

IT IS FURTHER ORDERED that unless the parties shall otherwise agree, the district shall provide, using district employees, 445 hours of compensatory after-school 1:1 ABA services; 220 hours of 1:1 special education instruction; 45 hours of compensatory after-school BCBA supervision; and 30 hours of compensatory parent counseling and training; and

IT IS FURTHER ORDERED that unless the parties shall otherwise agree, the district shall, using district employees, provide the student with 15 hours of after-school ABA services per week, three hours of after-school BCBA supervision per week, and three 30-minute sessions of

PROMPT therapy per week, and to deliver to the parent, two hours per week of parent counseling and training, beginning 14 days after the date of this decision through the end of the 2023-24 school year; and

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

Dated: **Albany, New York**
 December 14, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER