



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-265

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.

The Cuddy Law Firm, PLLC, attorneys for respondents, by Francesca Teresa Antorino, 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 respondents' (the parents') son for the 2023-24 school year and ordered the district to provide the student with a specific educational program. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

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

The parents had the student evaluated in January through March 2023 (see Parent Exs. D-K).

A CSE then convened on April 28, 2023, to determine the student's eligibility for school-age special education services (see Parent Ex. C at p. 1).¹ Finding the student eligible for special education as a student with autism the CSE recommended that he receive integrated co-teaching services (ICT) for English language arts (ELA), math, and social studies, as well as related services of one 30-minute session per week of group counseling services, one 30-minute session per week of individual occupational therapy (OT), two 30-minute sessions per week of group OT, two 30-minute sessions per week of individual physical therapy (PT), one 30-minute session per week of group speech-language therapy, two 30-minute sessions per week of individual speech-language therapy and the services of a fulltime paraprofessional for behavior support (id. at pp. 22-24).² In addition, the CSE recommended that the parents be provided with one hour per month of group parent counseling and training (id. at p. 23).

In a May 12, 2023 email, the parents notified the district that they "consent[ed] to the implementation of [the April 2023] IEP, however, [they] d[id] not believe the IEP [wa]s sufficient to meet [the student]'s educational needs" (Parent Ex. O at p. 3).³ Then in a June 21, 2023 letter, the parents notified the district that the student was not receiving mandated services and that they disagreed with the April 2023 IEP because it did not recommend a nonpublic school with applied behavior analysis (ABA) for the student (Parent Ex. P at p. 1). The parents indicated that they would continue to provide the student with 30 hours per week of ABA services and would seek reimbursement for those services from the district (id.).

In a due process complaint notice, dated July 6, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p. 3). The parents asserted that despite having access to recent, comprehensive evaluation reports the district failed to recommend appropriate related services, supports, and accommodations for the student including feeding therapy, social skills instruction, or a sensory diet (id.). In addition, the parents alleged that the district failed to recommend research based-methodologies, develop appropriate annual goals, or recommend 12-month services for the student, and claimed that the district impeded the parents' meaningful participation in educational decision making for the student by failing to address the parent's concerns as raised at the April 2023 CSE meeting (id. at p. 4). The parents indicated that even though they believed that the district's assigned public school was not appropriate for the student as it did not provide the student with a board certified behavior analyst (BCBA), ABA therapy, and did not have a sensory gym,

¹ Parent Exhibit C and District Exhibit 1 are duplicates, as well as a number of other exhibits (Parent Exs. E-LN; Dist. Exs. 3; 13-21). For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content. I remind the IHO that it is his responsibility to exclude evidence that he "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][xii][c]).

² 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]).

³ The district notified the parents that the student was eligible for the district's gifted and talented program, but the parents testified that they could not accept the gifted and talented placement because the offered class "did not have a special education teacher, which [the student] need[ed]" (Parent Exs. M at p. 1; V ¶ 35).

they enrolled the student in the assigned public school because they believed that they had no other placement options (id. at p. 4).

A pendency hearing was held on July 25, 2023, resulting in an interim decision on pendency dated August 1, 2023 (Tr. pp. 1-12; IHO Ex. II).⁴ A pre-hearing conference was held on August 11, 2023 (Tr. pp. 13-31).

An impartial hearing convened on September 19, 2023 and concluded the same day (Tr. pp. 32-73). Notably, the district "offered no testimony at hearing defending the decisions made in the [s]tudent's IEP" and did not cross examine any of the parent's three witnesses (Tr. p. 55; IHO Decision at p. 9). In a decision dated October 20, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year, that the district "failed to challenge the [p]arent[s'] proffered evidence with adequate evidence of their own," and that equitable considerations weighed in favor of the parents' request for an award of compensatory services and a reconvening of the CSE (IHO Decision at pp. 3, 9, 11, 18-19). As relief, the IHO ordered the district to reconvene the CSE within 30 days of the date of the order "for the purpose of considering [s]tudent's IEEs and to develop an appropriate IEP" to include: (a) a class size between 8-12; (b) three 45-minute sessions per week of individual OT; (c) two 45-minute sessions per week of individual PT; (d) one 45-minute session per week of group speech-language therapy; (e) two 45-minute sessions per week of individual speech-language therapy; (f) a sensory diet; (g) five hours per day of ABA therapy at school; (h) 10 hours per week of ABA therapy at home; (i) access to a sensory gym; (j) extended school year services; and (k) to implement the student's behavioral intervention plan (BIP) (id. at pp. 19-20). The IHO also directed the district to fund compensatory education to be provided by providers of the parents' choosing and at the parents' chosen times, including a bank of 69 hours of speech-language therapy; a bank of 69 hours of OT; a bank of 23 hours of PT; and a bank of 920 hours of ABA therapy (id. at p. 20). The IHO further ordered the district to provide the student with appropriate transportation to and from his related service appointments (id.). Further, the IHO directed the district to find an appropriate placement for the student and, if the district could not identify an appropriate placement, the IHO directed the district to defer the matter to the district's "Central Based Support Team (CBST)" to identify an appropriate placement for the student; further, in the event that the CBST could not locate an appropriate nonpublic school within 30 days of the ordered CSE reconvene, the district was directed to "fund a private school of the Parent's choosing" (id. at pp. 20-21). Specifically with respect to delivery of the ABA instruction ordered, the IHO ordered the district to fund 30 hours per week of push-in, individual ABA instruction by a provider chosen by the parent until an appropriate placement was located and the student began attending it and to fund 10 hours per week of home-based ABA

⁴ The interim decision on pendency directed the district to provide the student with the following program retroactive to the date the parents filed their due process complaint notice (July 6, 2023): 12 hours per week of individual Special Education Itinerant Teacher Services (SEIT); two 40-minute sessions per week of individual PT; two 40-minute sessions per week of individual OT; two 40-minute sessions per week of individual speech-language therapy; and 10 hours per week of individual ABA services to be provided at home (IHO Ex. II at p. 3).

instruction (to the extent not covered by the parents' insurance) until the student begins to receive home-based ABA instruction pursuant to his new IEP (*id.* at p. 21).⁵

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parents' answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here.⁶ The following issues related to the relief awarded by the IHO are presented on appeal and must be resolved in order to render a decision in this matter:

- (1) Whether the IHO erred in ordering the district to provide the student with a specific educational program for the 2023-24 school year which included a class size of between 8-12 students, specific related services, a sensory diet, ABA for five hours per day in school, ABA for 10 hours a week at home, access to a sensory gym, extended school year services, and implementation of the student's BIP;
- (2) Whether the IHO erred in ordering that if the district could not provide the student with the specified educational program that the district was to place the student in a nonpublic school; and
- (3) Whether the IHO erred in ordering that if the district could neither provide the student with the specified educational program or a nonpublic school placement that the district was to fund a private school of the parents' choosing.

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.

⁵ The IHO directed that all providers chosen by the parent were to be paid by the district at "their standard ordinary market rate" with the ABA provider to be paid "at the provider's normal and customary rate" (IHO Decision at pp. 20-21).

⁶ The parents submit an affidavit with their answer as additional evidence, in which the parents indicate that the district has not yet complied with the IHO decision under appeal. The district submits a reply in which the district objects to consideration of the parents' affidavit. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). While the additional evidence proffered by the parents was not available at the time of the impartial hearing, the district's compliance with the IHO's directives are not at issue on appeal and it is not necessary to consider the additional evidence.

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]).⁷

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. Scope of Review

State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review,

⁷ 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).

answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]).

In this instance, neither party has appealed the IHO's determination that the district denied the student a FAPE for the 2023-24 school year. Additionally, neither party appealed from the IHO's award of compensatory education, including 920 hours of ABA therapy; 69 hours of speech-language therapy; 69 hours of OT; and 23 hours of PT or from the directives related to the compensatory award. As such, those determinations have become final and binding on both parties and they will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

As noted above, the remaining claims before me are whether: (1) the IHO correctly ordered that the CSE reconvene to create a specific program for the student; (2) that if the district cannot recommend an appropriate placement, then the district shall ask the CBST to identify an appropriate placement; and (3) that if the CBST cannot locate an appropriate non-public school the district shall fund a nonpublic school chosen by the parents.

B. Relief – Educational Placement

As an initial observation, it is commendable that the parents, the district, and the IHO utilized the due process proceeding's potential to resolve educational issues expeditiously which resulted in the student's appropriate placement for the 2023-24 school year being decided earlier than midway through the school year, thereby giving the IHO the opportunity to hear testimony and to review necessary evaluations for the student's current school year while it was still underway, and fashion a remedy that could go into effect well before the conclusion of the school year at issue. Turning to the district's arguments regarding the relief ordered by the IHO, a review of the student's needs is warranted prior to determining if the totality of his award constituted an appropriate remedy for the district's failure to provide the student with a FAPE for the 2023-24 school year.

1. Student's Needs

Review of the present levels of performance contained in the April 2023 IEP reflect that the parent had the student evaluated and that the CSE reviewed the private evaluative information prior to developing the student's IEP for the 2023-24 school year, including the results of the following: (1) a functional behavioral assessment (FBA) and BIP, both dated January 26, 2023; (2) an ABA assessment dated February 6, 2023; (3) an assistive technology evaluation dated February 23, 2023; (4) a feeding and swallowing evaluation dated February 23, 2023; (5) a speech-language evaluation dated February 23, 2023; (6) an OT evaluation dated February 28, 2023; (7) a PT evaluation dated March 13, 2023; and (8) a neuropsychological evaluation dated March 16, 2023 (compare Parent Ex. C at pp. 1-14, with Parent Exs. D-K). Prior written notice provided by the district does not identify the private evaluative information reviewed by the CSE and only identifies a classroom observation conducted by a district social worker in April 2023 (Dist. Ex. 3; see Parent Ex. C at p. 31; L).

The March 2023 neuropsychological evaluation included a brief review of the student's educational background, behavioral observations of the student during testing, and the results of

the administration of numerous qualitative and quantitative assessments (Parent Ex. K at p. 4). The psychologist who assessed the student indicated that his "overall intellectual functioning was within the extremely high range" but that his performance on verbally based measures was somewhat variable (id. at p. 10). According to the evaluator the student's visual spatial skills were exceptional (id.). However, the student's immediate non-verbal memory was variable as "[i]t was attenuated by his high level of hyperactivity" (id.). The evaluator characterized the student's executive functioning skills as "extremely weak," and noted that his teachers reported severe impairments in the classroom setting (id.). The evaluator reported that the student's "overall level of academic achievement was truly special" and indicated that the student's reading comprehension was at a first-grade level and his math skills were extremely well developed (id.). In regard to the student's social development, the evaluator reported that the student's social perception abilities were delayed and that although the parents did not report any symptoms of autism spectrum disorder, the student's teachers did (id. at p. 11). According to the evaluator, the student was not able to understand other's emotions and desires, did not often engage in joint attention, and his conversations revolved around his own personal demands (id.). The evaluator reported that the student played near others when the activity was related to his area of interest but was otherwise difficult to engage and noted that transitions caused anxiety for the student (id.). The evaluator offered diagnoses of autism spectrum disorder, mixed expressive receptive language delay, and attention deficit/hyperactivity disorder, primarily hyperactive type (id.). The April 2023 IEP reflected that the student "present[ed] with communication, social, self-help, and other behavioral difficulties that inhibit[ed] his ability to function at an age-appropriate level in all settings" (Parent Ex. C at p. 9).

The FBA and BIP and the ABA skills assessment were completed by the same BCBA (compare Parent Ex. D at p. 1, with Parent Ex. E at p. 1). In the FBA and BIP, completed in January 2023, the BCBA identified five behaviors the student exhibited "that prevent[ed] him from functionally engaging in his environment ": (1) task refusal; (2) stereotypy; (3) non-compliance; (4) out of seat behavior; and (5) scripting (id. at p. 7).⁸ The BCBA noted that the student's pre-kindergarten classroom setting was appropriate for the number of students and that the student had

⁸ The BCBA noted:

Based on the results of the [Functional Analysis Screening Tool], [the student's] behaviors are mostly social (attention/preferred items), social escape/avoidance (escape from tasks/activities), and automatic (sensory stimulation). When [the student] wants to escape from non-preferred activities, he engages in maladaptive behaviors in the form of scripting, task refusal, and non-compliance. When he wants attention or preferred items, he engages in the target behaviors which include repetitive behaviors, out of the seat, and task refusal. [The student] engages in sensory automatic stimulating behaviors because they are reinforcing to him. He has been reinforced in the form of attention and access to preferred items which serves as a function of his maladaptive behavior. He does not wait in a socially acceptable manner when knowing a reinforcer/preferred activity is coming. He also displays task refusal in the form of saying "no" or "negotiating" and scripting behavior when he does not want to transition from a preferred to a non-preferred activity. When performing a task for extended periods [the student] displays out-of-seat behavior, off-task, and jumps up and down in place while flapping his hands. He has a dedicated aba therapist who constantly needs to redirect him to work on tasks. (Parent Ex. D. at p. 8). The BCBA further reported that during direct observation the student "displayed target behaviors in the form of task refusal, non-compliance, out of the seat, compliance and stereotypy in the form of walking on his toes, jumping up and down, and flapping his hands" (id.). He reported that possible functions of the student's behaviors included escape/avoidance, attention/access to tangibles and sensory/automatic (id. at pp. 9-10).

a dedicated ABA therapist provided by the parents (id. at p. 12). However, the BCBA opined that "classroom size could be inappropriate when [the student] transition[ed] to kindergarten as there could be more distractions" (id.). The BCBA reported that the student's then-current school allowed students to choose the activities they wanted to participate in but suggested that the student "require[d] a school with more structure and one which could challenge him academically" (id. at p. 14). The BCBA expressed concerns that the student's "target behaviors ha[d] been largely effective in achieving their functions" and that the student's "IEPs indicate[d] years of history in which his target behaviors allowed him to escape demands, access preferred activities/items/routines, engage in automatically reinforcing behaviors, and obtain attention" (id. at p. 15). The BCBA stated that the student "need[ed] a behavior support plan in place to teach him socially acceptable behaviors in attaining his needs" (id.). The BCBA concluded that the student "would benefit greatly from ongoing oversight by a Board-Certified Behavior Analyst who collects behavioral data, uses data to assess the function(s) of [the student's] behaviors, and designs and implements a [BIP] to facilitate a reliable reduction of interfering behaviors" (id.). The BCBA recommended that the student be placed "in a small, structured class (10-12 students) as well as have a dedicated 1:1 BCBA or RFT to assist him with task maintenance, distractibility, and to monitor completion and comprehension of classroom materials" (id. at 16).

The January 2023 ABA skills assessment conducted by the BCBA included, among other things, administration of the Assessment of Basic Language and Learning Skills – Revised (ABLRS-R), completion of the Positive Environment Checklist and completion of the Adaptive Behavior Assessment System (Parent Ex. E at p. 6). The BCBA explained that the student "underwent an extensive assessment of his academic, cognitive, social, speech-language, self-help, and communication skills to determine his current level of skill, as well as areas of focus for skill development" (Parent Ex. E at p. 6). Based on his assessment, the BCBA reported that the student "present[ed] with communication, social, self-help, and other behavioral difficulties that inhibit[ed] his ability to function at an age-appropriate level in all settings" and that the student "need[ed] to be taught appropriate skills so that he c[ould] interact socially with others, communicate appropriately, and decrease his maladaptive behaviors of non-compliance" (id. at p. 20). The BCBA determined that the student required ABA services to address the following deficit areas: communication, social, and activities of daily living (ADL)/self-help (id. at pp. 20-21). The BCBA opined that "it [wa]s absolutely critical that [the student] have a behaviorally trained one-to-one [ABA] provider who c[ould] deliver rewards at appropriate moments to keep him on task and reduce his target behaviors, which [we]re distracting to the class and keeping him socially isolated from peers of his age" (id. at p. 22). The BCBA recommended the student attend "[a] school with smaller classroom sizes" (id. at p. 23).

The February 2023 speech-language evaluation, feeding and swallowing evaluation, and assistive technology evaluation were all conducted by the same speech-language pathologist (compare Parent Ex. F at p. 1, with Parent Ex. G at p. 1; H at p. 1). The February 2023 assistive technology evaluation report indicated that after trialing several assistive technology devices, assistive technology was not recommended because given the student's "age and current level of function, it [wa]s imperative that he receive foundational instruction to address his reading comprehension difficulties, and not be stifled by the integration of technology that may detract from the efficacy of more traditional intervention" (id. at pp. 4, 7-8). The speech-language

pathologist opined that the student "w[ould] benefit from multisensory reading instruction" (id. at p. 8).

With respect to the student's needs in the areas of feeding and swallowing, the speech-language pathologist concluded that the student "present[ed] with a mild to moderate sensorimotor feeding disorder" and that the student's feeding delays impacted his "social relationships and independence, in both academic and home settings" (Parent Ex. G at p. 7).

Based on formal and informal assessment, the speech-language pathologist determined that the student presented with "delays in higher level expressive language skills and social/pragmatic language skills" and opined that those delays "w[ould] have negative secondary effects on his ability to participate in the current curriculum" (Parent Ex. H at p. 8).

Based on the results of formal testing and clinical observation, the occupational therapist who evaluated the student in February 2023 reported that the student had "significant difficulties [with] motor coordination, bilateral coordination, fine motor, visual motor, sensory processing, self-regulation, ADL/iADL, attention, and transition skills at home and at school" (Parent Ex. I at p. 15). The occupational therapist recommended that the student receive three 45-minute sessions per week of individual OT (id.).

The physical therapist who evaluated the student contemporaneously reported that the student "present[ed] with deficits in all areas of gross motor function including posture, ambulation, balance, coordination, strength, and endurance" and that "it [wa]s difficult for [the student] to participate in age-appropriate gross motor activities and engage with peers" (Parent Ex. J at p. 11). The physical therapist recommended that the student receive two 45-minute sessions per week of individual PT (id.).

The neuropsychological evaluation report stated that the student "has clinically significant deficits in social perception, language, and attention that make most educational settings challenging for him" and that "he will require placement in a small full time special education program geared towards children with autism spectrum disorder and hyperactivity" (Parent Ex. K at p. 12). The evaluator recommended that the student's class size be "no more than 8-12 children" and that the student required: speech-language therapy three times per week; social skills group three times per week; OT, a positive behavior chart, a sensory diet, and treatment in a sensory gym, (id. at pp. 12, 15).⁹

As noted above, the district social worker who attended the April 2024 CSE conducted a classroom observation of the student on April 20, 2023 (Parent Exs. C at p. 31; L). The classroom observation report noted that the student "has a very strong understanding of math concepts and possesses excellent reading decoding skills" but "presents with some challenging behaviors and

⁹ In reviewing the record as a whole, the IHO noted that "[i]n balancing the evidence, including the lack of evidence on [the student's sensory needs] offered by the [d]istrict, I find a sensory diet is necessary for Student to make progress in the school environment" (IHO Decision at p. 15). Likewise, the IHO cited to the recommendations made in the PT evaluation and neuropsychological evaluation indicating that the student "should receive treatment in a sensory gym" to support his holding that the student's IEP should be modified to recommend the student access a sensory gym (id. at pp. 16, 19-20).

requires constant 1:1 support and supervision in the classroom" (Parent Ex. L at p. 1). The evaluator noted that the student experienced difficulty with transitions and without adult support "would reportedly cry, scream, and throw objects" (*id.*). According to the evaluator, the student's teachers felt that "in order to ensure successful transition to a kindergarten setting the student required "the provision of appropriate supports as well as placement in a classroom with a small staff – to – student ratio and 1:1 support to ensure his safety" (*id.* at pp. 1-2).

2. Prospective Placement

Taking the foregoing evidence of the student's needs into account, I can now address the district's appeal from the IHO's decision which ordered the CSE to convene and develop an IEP for him that includes specific recommendations for a class size of 8-12 students, specific related services, a sensory diet and access to a sensory gym, in-school and at-home ABA therapy, implementation of a BIP, and extended school year services. 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).

Here, the IHO ordered a combination of both IEP amendments that would take effect during the current school year and a potential prospective approved nonpublic or parentally-chosen private placement of the student. As each item of relief necessitates a different analysis, I will address the IHO's address directives concerning the amendment of the student's IEP and the prospective placement issues separately below.

As noted above, the student has received diagnoses of autism spectrum disorder, mixed expressive receptive language delay and attention deficit/hyperactivity disorder (Parent Ex. C. at

p. 11). In rendering his decision, the IHO emphasized that the district failed to defend the decisions made by the April 2023 CSE with documentary evidence or witness testimony (IHO Decision at p. 11, 12, 15). Additionally, as noted above, the April 2023 CSE already had the opportunity to review the evaluative information considered by the IHO in making his determination as to an appropriate placement for the student for the current school year, the 2023-24 school year. Additionally, a review of the IHO's decision shows that he thoroughly reviewed the documentary evidence presented by the parent and the district, he considered the testimony of the parents' witnesses, and he went through each request contained in the parents' due process complaint notice in determining whether the request was supported by the evidence in the record (IHO Decision at pp. 11-19).

Specifically relating to class size, the IHO noted that the district "offered no witness testimony at the D[ue] P[rocess] H[earing]" and that "[t]he only evidence provided by the [district] defending their decision to recommend an ICT classroom came from the Prior Notice Package" (IHO Decision at p. 12). In contrast, the IHO found that the ABA evaluation and the neuropsychological evaluation both recommended a small class size of between 8-12 students (*id.*). The IHO found that district failed to rebut the parents' argument that the evidence established that the student needed a smaller class size (*id.*). Additionally, based on his review of the recommendations made by the BCBA, the IHO found that "at-school ABA [was] appropriate in order for Student to make appropriate progress" and ordered the district to provide the student with ABA (*id.* at pp. 15, 20). Further, the IHO found that the "[s]tudent's BIP should be implemented" and ordered the district to do so (*id.* at p. 16). However, based on his review of the neuropsychological evaluation report, the IHO determined that the recommendation for adding a social skills group to the student's IEP was not supported (*id.* at pp. 13-14). With respect to related services, the IHO noted that the April 2023 IEP recommended that the student receive two 30-minute sessions per week of PT, but that the parent's request for increased PT was appropriate because the student's PT evaluation "indicate[d] he [wa]s below average compared to neurotypical peers as it relate[d] to gross motor function" (*id.* at p. 13). In his review of the hearing record regarding the parent's requested OT, the IHO noted that the district "provided no evidence or testimony to support their OT recommendation in Student's IEP" (*id.* at p. 12). As such, the IHO ordered the district "to amend Student's IEP as it relate[d] to OT to three times per week, individually for 45-minute sessions" (*id.*). Additionally, having reviewed the speech-language evaluation, the IHO determined that the student should have had an IEP that included the speech-language therapy sessions recommended by the evaluator (*id.* at pp. 13, 19). However, the IHO did not award the parent with requested multisensory reading and writing instruction, as a need for such instruction was not supported by the evidence (*id.* at p. 17). The IHO also determined that "[t]here [wa]s no evidence in the record to indicate [that the] Student's ability to attend and benefit from school ha[d] been affected by a lack of proper nutrition" (*id.* at pp. 14-15). Accordingly, the IHO denied the parent's request for prospective feeding and swallowing therapy (*id.*). Additionally, the IHO noted that the assistive technology evaluator recommended that the student should not receive assistive technology and he declined to order assistive technology (*id.* at p. 16). Based on the above, the IHO thoroughly reviewed the evidence in the hearing record in formulating an educational program for the student for the remainder of the school year. Additionally, the hearing record shows that the IHO relied on the same evaluative information as was considered by the April 2023 CSE in developing the student's educational program for the 2023-24 school year. Accordingly, the district's argument that the matter should be returned to the CSE for an additional

review of the student's educational programming based on the same evaluative information, after the CSE has already failed to develop an appropriate program for the student for the 2023-24 school year is without merit. If the district wished to contest the recommendations contained within the private evaluations presented by the parent, the district should have defended the recommendations made by the April 2023 CSE or presented arguments or evidence during the hearing as to what would constitute an appropriate educational placement for the student for the current school year.

Additionally, a review of the evidence in the hearing record leads me to the conclusion that, absent a smaller classroom size and ABA services, the student is not likely to make steady progress in his educational goals and the evidence is unequivocal as to the likelihood of regression in the classroom due to the student's significant level of ongoing need for educational and developmental support (see generally Parent Exs. A at p. 4; B at p. 6; E; H at pp. 7-8; I at pp. 14-17; J at p. 11; K at pp. 12-15; L at pp. 1-2). In light of the IHO's finding that the district failed to offer the student a FAPE for the 2023-24 school year, the lack of a cross-appeal by the district as to FAPE, and the district's failure to prove that the student does not require a smaller class size, ABA services and specific related services in order to obtain an educational benefit, there is insufficient basis in the hearing record to overturn the IHO's directive that the district shall provide the student with an IEP that includes: (a) a class size between 8-12; (b) three 45-minute sessions per week of individual OT; (c) two 45-minute sessions per week of individual PT; (d) one 45-minute session per week of group speech-language therapy; (e) two 45-minute sessions per week of individual speech-language therapy; (f) a sensory diet; (g) five hours per day of ABA therapy at school; (h) ten hours per week of ABA therapy at home; (i) access to a sensory gym; (j) an extended school year; and (k) to implement the student's behavior intervention plan (BIP). Additionally, such program should remain in effect through the end of the 2023-24 school year.

However, for the reasons that follow, the IHO exceeded his authority by alternatively ordering that the district place the student in "an appropriate non-public school" placement or to "fund a private school of the Parent's choosing" (IHO Decision at p. 20). 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, a smaller classroom size, specific hours of specific related services, a sensory diet, ABA services at school and at home, access to a sensory gym, extended school year services, and implementation of the student's BIP (see IHO Decision at pp. 19-20). 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.

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

Likewise, the IHO's further alternative order directing placement of the student in a private school of the parents' choosing must be overturned. A district court described a situation similar to the one in this matter insofar as: "[the parents] ha[d] not expended any money on tuition thus far and [we]re not, at th[at] time, requesting any tuition reimbursement for past-made payments"; the court characterized the parents' request in that matter as "a request for prospective placement reasonably intended as compensatory education" (Smith v. Cheyenne Mountain Sch. Dist. 12, 2018 WL 3744134, at *7-*8 [D. Colo. Aug. 7, 2018] [concluding that the administrative law judge's decision not to award compensatory education services was supported by the record and not erroneous and that an award of prospective nonpublic school placement as compensatory relief was likewise unwarranted, particularly in light of the IDEA's preference for avoiding "separate schooling or other removal . . . from the regular educational environment"], quoting 20 U.S.C. 1412[5][A]; see also Eley v. District of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges that IEP]). In contrast, another district court seemed less concerned with the need to avoid an unnecessary removal from public schooling and instead appeared to employ an analysis closer to, but not identical to a parental unilateral placement/reimbursement case, relying on the Supreme Court's decision in Carter to determine whether the parent's proposed private school placement was "proper under the Act" (S.C. v. Chariho Reg'l Sch. Dist., 298 F. Supp. 3d 370, 381 [D.R.I. 2018], quoting Carter, 510 U.S. at 15; see also D.C. v. Oliver, 2014 WL 686860, at *5 [D.D.C. Feb. 21, 2014] [discussing both Reid compensatory education relief, Carter, and Forest Grove reimbursement, and finding that, when a school district has failed to develop an IEP, propose a location of services, and otherwise offer an eligible child a FAPE, parents may seek placement at a nonpublic school on a prospective basis and are not required to wait and see a proposed IEP in action before concluding that it is inadequate and choosing to enroll their child in an appropriate nonpublic school]; J. v. Portland Pub. Sch., 2016 WL 5940890, at *23 [D. Me. Oct. 12, 2016] [suggesting that LRE considerations, although required by the Act, may be of lesser importance when an administrative hearing officer is fashioning relief in the form of a compensatory educational placement in a nonpublic school setting], adopted at, 2016 WL 7076995 [D. Me. Dec. 5, 2016]). There are various practical differences that come into play depending on how this sort of relief is characterized, not the least of which is application of the burden of proof (compare Educ. Law § 4404[1][c] [providing that a "parent or person in parental relation seeking tuition reimbursement for a unilateral parental

placement shall have the burden of persuasion and burden of production on the appropriateness of such placement"], with 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]; Application of a Student with a Disability, Appeal No. 19-016; Application of the Dep't of Educ., Appeal No. 17-105). In this matter, because the parents have not yet chosen a private school, the hearing record is devoid of any evidence of the appropriateness of the as yet unidentified private school and the IHO's order directing the district to fund an unidentified private school must 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 as directed by the IHO. The CSE should reconvene to create an appropriate IEP for the student as directed by the IHO, taking into consideration any new information available.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the IHO's order directing the district to provide the student with an IEP that provides the student: (a) a class size between 8-12; (b) three 45-minute sessions per week of individual OT; (c) two 45-minute sessions per week of individual PT; (d) one 45-minute session per week of group speech-language therapy; (e) two 45-minute sessions per week of individual speech-language therapy; (f) a sensory diet; (g) five hours per day of ABA therapy at school; (h) ten hours per week of ABA therapy at home; (i) access to a sensory gym; (j) an extended school year; and (k) to implement the student's BIP, was a rational and well-thought out determination based on his careful reading of the due process complaint notice and consideration of the evidence in the hearing record, I decline to disturb that portion of the IHO's order.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated October 20, 2023, is modified by reversing that portion which ordered the district to identify an appropriate placement within 15 days of the IEP meeting or to have the CBST identify an appropriate non-public school for the student; and

IT IS FURTHER ORDERED that the IHO's decision, dated October 20, 2023, is modified by reversing that portion which ordered the district to pay for a nonpublic school of the parents' choosing in the event that it could not comply with providing the student with an appropriate public school placement within 15 days of the CSE meeting, or an appropriate non-public school chosen by the CBST withing 30 days of the CSE meeting.

Dated: Albany, New York
December 29, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER