



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-046

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 Offices of Nancy Rothenberg, PLLC, attorneys for respondent, by Nancy Rothenberg, 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 awarded respondent (the parent) a nonpublic school placement for her son, funding of related services, and funding of a physical therapy (PT) evaluation. 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 this case and the IHO's decision will not be recited here in detail. Briefly, the student has received diagnoses of autism spectrum disorder (ASD) with accompanying language, cognitive, and motor impairments and attention-deficit/hyperactivity disorder (ADHD) (Parent Exs. P at p. 1; FF ¶ 13). The CSE convened on April 15, 2020, and after finding the student eligible for special education services as a student with autism, formulated an IEP for the student with an implementation date of April 16, 2020 (see generally Parent Ex. F). The April 2020 CSE recommended a 12-month special education program for the student consisting of an 8:1+1 special class placement in math, English language arts (ELA), social studies, sciences, and visual arts together with adapted physical education in a district specialized school (Parent Ex. F at pp. 18-

19, 22-23). In addition, the April 2020 CSE recommended two 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of individual PT, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, and two 30-minute sessions per year of parent counseling and training (id. at pp. 18-19, 23).

The CSE next convened on March 23, 2021 for an annual review (see generally Parent Ex. E). Finding the student continued to be eligible for special education as a student with autism, the March 2021 CSE continued to recommend a 12-month program consisting of an 8:1+1 special class placement in all subject areas together with the same related services of OT, PT, and speech-language therapy at the same frequency and duration as recommended in the April 2020 IEP (compare Parent Ex. F at pp. 18-19, 22-23, with Parent Ex. E at pp. 10-12, 16-17). The CSE convened on March 9, 2022 for the purpose of an annual review and found the student continued to be eligible for special education services as a student with autism (see generally Parent Ex. D). The March 2022 CSE continued the same program recommendations from the prior two years; however, the CSE discontinued the recommendation for PT and modified the student's speech-language therapy from one individual and one group session per week to two group sessions per week (compare Parent Ex. D at pp. 16-17, 21-22, with Parent Ex. E at pp. 10-12).

In September 2022, the student underwent a private neuropsychological evaluation to determine the student's "strengths and weaknesses" as a result of his medical diagnoses (see Parent Ex. P). Thereafter, the parent provided the district with the student's private neuropsychological evaluation report and requested that the CSE reconvene to consider the evaluation recommendations (Parent Ex. AA at p. 1). In response to the parent's request, the district conducted a classroom observation of the student on December 6, 2022, and completed a form reflecting consideration of the student's need for a functional behavioral assessment (FBA) on December 14, 2022 (see Parent Exs. N-O). On January 19, 2023, the CSE reconvened to review the updated evaluative information (see generally Parent Ex. C). The January 2023 CSE continued to recommend 12-month services consisting of an 8:1+1 special class placement and added one 30-minute session per week of individual counseling and one 30-minute session per week of group counseling together with the same previously recommended OT, speech-language therapy, and parent counseling and training (compare Parent Ex. D at 16-17, 21-22, with Parent Ex. C at pp. 18-19, 24-25).

In a due process complaint notice, dated April 20, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21, 2021-22, and 2022-23 school years (see Parent Ex. A). For each of the disputed school years, the parent alleged, among other issues, that the district failed to recommend an appropriate program for the student; the CSEs were not properly composed; the parent was denied meaningful participation in the CSE process; and the district failed to: provide appropriate parent counseling and training, properly evaluate the student, recommend appropriate speech-language, OT, and counseling services, provide home-based applied behavior analysis (ABA) services, develop measurable annual goals, and assess the student's behavioral needs (Parent Ex. A at pp. 7-11). Based on the foregoing, the parent sought a finding that the district denied the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years (id. at p. 12). As relief, the parent requested an immediate CSE meeting to change the student's placement to "a more specialized school program in a nonpublic school" and receive independent educational evaluations (IEE) in the areas speech-

language, OT, assistive technology, an FBA, and an autism skills assessment, as well as compensatory educational services including speech-language services, OT services, counseling and social skills services, assistive technology training, parent counseling and training, and ABA services with Board Certified Behavior Analyst (BCBA) supervision (*id.* at pp. 12-13). The district submitted a due process response, dated April 26, 2023, stating that the January 2023 CSE developed an IEP recommending an 8:1+1 special class in a district specialized school that was reasonably calculated for the student to obtain meaningful benefit.

On May 22, 2023, an IHO appointed by the Office of Administrative Trials and Hearings (OATH) held a prehearing conference and the IHO issued a Prehearing Conference Summary and Order dated May 30, 2023 (May 30, 2023 Interim IHO Decision). On June 16, 2023, a second prehearing conference was held in which the parent requested an autism skills assessment to which the district objected (June 2023 Tr. pp. 1-12).¹ On June 23, 2023 the IHO issued an interim order for the parent to obtain an independent autism skills assessment (June 23, 2023 Interim IHO Decision).² An impartial hearing convened and concluded on September 21, 2023 (Tr. pp. 1-111).

In a decision dated December 29, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years (IHO Decision at pp. 2, 7-8, 13). As relief, the IHO ordered the district to refer the matter to the district's Central Based Support Team (CBST) for a nonpublic school placement (*id.* at pp. 10-11, 13). In addition, the IHO ordered the district to fund 10 hours per week of home-based ABA services, with eight hours per month of BCBA supervision for the home-based program; four hours per month of home-based parent counseling and training; and 30 hours per week of ABA services pushed into the student's current classroom with two hours per week BCBA supervision (*id.* at pp. 9-10, 13). The IHO also ordered 1,380 hours of compensatory ABA services, 276 hours of BCBA supervision, and 138 hours of compensatory parent counseling and training (*id.* at p. 13). The IHO then awarded the following compensatory services in a "co-treatment model with the ABA provider": 138 hours of compensatory speech-language therapy, 138 hours compensatory OT, 46 hours of compensatory assistive technology instruction, 46 hours of compensatory assistive technology parent training (*id.*). The IHO directed that the availability of the compensatory services be capped at 18 months from the date of the implementation of the order (*id.*). Finally, the IHO ordered PT and assistive technology evaluations, an FBA, and behavioral intervention plan (BIP) (*id.*).

IV. Appeal for State-Level Review

The district appeals. 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 specific allegations and arguments raised therein will not be recited here in detail. The parties' dispute on appeal relates solely to the relief awarded by the IHO. The district argues that the IHO

¹ The transcripts for the hearings were not consecutively paginated; as the June 16, 2023 pre-hearing conference is the only hearing date other than the September 21, 2023 hearing, for ease of reference, citation to the pre-hearing conference transcript will be preceded by the date while citation to the September 21, 2023 transcript will not (June 2023 Tr. pp. 1-12; Tr. pp. 1-111).

² The student underwent the autism skills assessment on August 2, 2023 and a report was generated on September 8, 2023 (*see* Parent Ex. G).

erred in ordering the district to "secure" a nonpublic school placement for the student. The district asserts that this directive is prospective relief and replaces the role of the CSE to recommend and develop an IEP for the student. Next, the district appeals the portion of the IHO's order of "immediate funding for school and home-based ABA, [parent counseling and training] and BCBA supervision." Again, the district argues that this type of relief is prospective in nature and usurps the role of the CSE, noting that because the award can extend for 18 months it would reach into the end of the 2024-25 school year. Additionally, the district asserts that the relief is excessive because the IHO awarded banks of compensatory education services for the three-year denial of FAPE. The district further objects to the awarded evaluations, arguing that the IHO's award of funding for a PT evaluation was outside the scope of the due process complaint notice and that a BIP is not an evaluation, but is instead a possible outcome of an FBA and requiring a BIP "regardless of the outcome of an FBA" is contrary to State regulations.

In its answer, the parent generally denies the material allegations contained in the request for review. The parent asserts that the district mischaracterizes the IHO's award because the relief ordered by the IHO was all compensatory to "remediate" for the district's failure to offer the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years. Ultimately, the parent seeks a dismissal of the district's request for review and that the IHO's decision be upheld in its entirety.

V. Applicable Standards

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). 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"]).

VI. Discussion

The district does not appeal from the IHO's finding that it denied the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years; the IHO's directive for the district to fund an autism skills assessment, assistive technology evaluation, or FBA; or the IHO's award of compensatory education services consisting of 1,380 hours of ABA services, 276 hours of BCBA supervision, 138 hours of parent counseling and training, 138 hours of speech-language therapy services in a co-treatment model with the ABA provider, 138 hours OT in a co-treatment model with the ABA provider, 46 hours of assistive technology instruction in a co-treatment model with the ABA provider, and 46 hours of assistive technology parent training. As such, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The remaining disputed issues before me are whether: (1) the IHO correctly ordered the district to refer the student to the CBST for a nonpublic school placement; (2) the IHO properly directed the district to fund 10 hours per week of home-based ABA services, with eight hours per month of BCBA supervision for the home-based program, four hours per month of home-based parent counseling and training, and 30 hours per week of ABA services pushed into the student's current classroom with two hours per week BCBA supervision; and (3) the district is required to fund a PT evaluation and a BIP.

As compensatory education is designed to remedy a denial of FAPE, a brief examination of the denial of FAPE in this matter is necessary. Here, the IHO found that the IEPs developed for the student for the school years in dispute "largely mimicked each other and were not significantly updated to reflect the fact that [the student] was not achieving any meaningful educational milestones or progress" (IHO Decision at p. 7). As a result, the IHO found that the student "require[d] extensive remediation and compensatory education" (id. at p. 10). The IHO found that the parent provided "precise evidence" of the compensatory education services that should be provided to the student, which was largely "uncontroverted" by the district, and granted the compensatory education services requested by the parent in its entirety (id. at pp. 10-11). In awarding relief, the IHO deemed all of the relief as compensatory in nature (id. at pp. 11-13).

Turning to the first issue, the district claims that the IHO erred in ordering the CBST to convene and place the student in a nonpublic school as it constitutes prospective relief for a school year that is not properly under review in this matter.³ The district also argues that the IHO's order "usurps" the role of the CSE to develop an IEP for the student. Further, the district argues that the

³ Although not defined in the hearing record in this matter, "CBST" likely refers to the district's central based support team, an entity which facilitates placement in nonpublic schools (see, e.g., Application of a Student with a Disability, Appeal No. 15-054; Application of a Student with a Disability, Appeal No. 15-051).

recommendation for a nonpublic school is on the continuum of recommendations that can be made by the CSE after consideration of information, including why a public-school placement in a lesser restrictive environment is not appropriate. The district asserts that rather than requiring the matter be deferred to the CBST for a nonpublic school placement, the IHO should have directed the CSE to convene and consider placement of the student in a nonpublic school. The parent argues that the IHO's total award is compensatory and the IHO's directive for a nonpublic school placement was "not designed to develop a FAPE for the 2023-[24]" school year. Additionally, the parent states that the district is "not required" to place the student in a nonpublic school, but to develop an appropriate program with the compensatory educational services to be provided in the recommended placement. The parent asserts that the compensatory services are limited in time and were ordered "to provide remediation for the FAPE violations."

Turning to the facts of this matter, the parent participated in the March 2022 CSE meeting and expressed her satisfaction with the student's current academic services and that she saw growth in his performance (Parent Ex. D at pp. 3, 24-25). Although the parent expressed that she wanted to see improvement in the student's "reading, writing, mathematics[,] and communication" skills she indicated she was "pleased" with the recommendations to be implemented for the student to meet his academic goals (*id.* at pp. 3, 23). The parent also expressed concerns about the student expressing himself when he was frustrated (*id.* at p. 23). Later, during the January 2023 CSE meeting, the parent described concerns about the student self-harming while riding the school bus (Parent Ex. C at p. 5). In response, the January 2023 CSE recommended counseling services to help with coping skills and peer interactions, to which the parent agreed (*id.*). The parent also requested paraprofessional services for the student, but the CSE determined that the student did not exhibit "extreme behaviors" to warrant such a recommendation (*id.*). The parent stated that she would seek afterschool support for the student (*id.*). Additionally, because of concerns with the student's handwriting and fatigue with writing assignments, the CSE scheduled an assistive technology evaluation (*id.* at p. 6). Of note, the parent did not request that the student be considered for a nonpublic school placement at either the March 2022 or January 2023 CSE meetings (*see generally* Parent Exs. C-D). Furthermore, in the parent's letter expressing disagreement with the district's evaluative information, the parent did not suggest or request a nonpublic school placement for the student (*see* Parent Ex. B). Nor was there a claim in the April 20, 2023 due process complaint notice that the district failed to recommend a nonpublic school placement for the student at either CSE meeting; instead, the first time a nonpublic school placement was raised as a possibility for the student was as a request for relief (Parent Ex. A at pp. 7-12).

Here, the IHO attempted to address what type of program would be appropriate for the student to attend when he directed the district to convene the CBST to recommend placement of the student in a nonpublic school (IHO Decision at pp. 10-11). The IHO found that the compensatory services awarded "must continue until a suitable non-public school is located" for the student (*id.* at p. 10). Next, the IHO held that if finding a nonpublic school became difficult or if the district refused to recommend a nonpublic school, the compensatory services awarded "will continue up until a maximum of eighteen months from the date of implementation of this order, which should provide ample time to reevaluate [the] [s]tudent's needs and progression" (*id.* at pp. 10-11). The IHO held that if the parties were unable to locate a nonpublic school within 18 months of the date of the decision, a new CSE meeting must be convened to develop an IEP for the student (*id.* at pp. 11-12). Accordingly, the IHO's directive for placement in a nonpublic school appears to have been intended to be a compensatory award in addition to the compensatory award for ABA

services, BCBA supervision, speech-language therapy, OT, and assistive technology instruction for the student and parent training (*id.* at pp. 11-13). In order to have the award for placement in a nonpublic school make sense with the remainder of the IHO's ordered relief, it must be interpreted as providing that once the student is placed in a nonpublic school, the award of weekly services (including the 30 hours per week of ABA services to be delivered in the student's current classroom) would end and be replaced by the educational program to be delivered by the recommended nonpublic school.

One of the issues with the IHO's deferral of the student's educational programming to the district's CBST is that it overlooks the role of the CSE in the educational planning process—the CBST does not serve the role of the CSE and does not design an educational program for the student and is merely an administrative mechanism the district uses to carry out the placement of students in nonpublic schools in accordance with the IEP designed and approved by the CSE. As the IHO's directive for an education program going forward appears tied to the student's current classroom, rather than immediately directing deferral to the CBST, it would be more appropriate for the CSE to reconvene to reconsider the student's educational programming. This is particularly so because, as noted above, the CSE has not yet been presented with a request for placement of the student in a nonpublic school for consideration. An award of prospective relief in the form of an IEP amendment or prospective placement, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (*see Adams v. Dist. of Columbia*, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; *see also Student X v. New York City Dep't of Educ.*, 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). Accordingly, another option available to the IHO was to order the CSE to reconvene to determine what an appropriate program for the student would be, given his determination that the student had not made any progress in the district's recommended program over several years (IHO Decision at pp. 7-8, 10-11). As such, I find it appropriate in this matter to modify the IHO's order to require the CSE to reconvene and determine what program and placement would be appropriate for the student to meet his unique needs.

Additionally, as raised by the district, there are concerns about circumventing the CSE process where the school year challenged has ended and, in accordance with its obligation to review a student's IEP at least annually, the CSE would have already convened to produce an IEP for the following school year (*see V.W. v. New York City Dep't of Educ.*, 2022 WL 3448096, at *7 [S.D.N.Y. Aug. 17, 2022] [acknowledging that "orders of prospective services are disfavored as a matter of law" and, in the matter at hand, indicating that "the CSE should have already convened for subsequent school years"]; *M.F. v. N. Syracuse Cent. Sch. Dist.*, 2019 WL 1432768, at *8 [N.D.N.Y. Mar. 29, 2019] [declining to speculate as to the likelihood that the district would offer the student a FAPE "in the future" and, therefore, denying prospective relief]; *Eley v. Dist. of Columbia*, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current school year]). This is exactly the instance here as the school years at issue—2020-21, 2021-22 and 2022-23—are over and, in

accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to produce an IEP for the remainder of the 2023-24 and/or the upcoming 2024-25 school years (see Eley, 2012 WL 3656471 at *11).⁴ In another matter, decided by the undersigned today, there was evidence showing the perils faced by one IHO who was left with a prior unappealed IHO order directing prospective placement in a nonpublic school by the CBST and how the effect upon the parties thrust them into further chaos due to the IHO's vague, ill-considered directives (see Application of a Student with a Disability, Appeal No. 24-052). The IHO in this matter demonstrated more care and consideration of the prospective nature of the relief and at least recognized that future events were uncertain and might not come to pass as anticipated.

Nevertheless, considering that the student's educational programming has been found to be inappropriate for a number of school years, even if the CSE has already convened, unless the parties otherwise agree, I direct the CSE to reconvene within 30 days of the date of this decision to create an appropriate IEP for the student, taking into consideration any new evaluative information available. I find also that the CSE should consider a possible referral to the CBST to recommend an appropriate State-approved nonpublic school program that offers ABA instruction and an evidence-based, multisensory approach to instruction, and, in determining whether such deferral is appropriate, to consider the recommendations contained in the student's evaluations and whether it is best for the student to receive the supports recommended for the student in a State-approved nonpublic school.

In reconvening, the CSE is explicitly directed to consider placement of the student in a State-approved nonpublic school, and if a nonpublic school placement is not recommended, the district is directed to issue a prior written notice explaining what evaluative information was relied on in finding that a State-approved nonpublic school was not appropriate for the student.⁵ As appropriate equitable relief, I find that a narrative explanation should be provided to the parent which should be clear and cogent rather than limited to merely checking a box or boilerplate text, but the narrative can be provided in conjunction with the other requirements of a prior written notice.

If the parent is not satisfied with the CSE's recommendations and no recommendation is made for the student's placement in a State-approved nonpublic school, she may file a new due process complaint notice to assert such claims. Also, the parent may select a public, State-approved nonpublic, or unapproved private school with appropriate special education programming for the student and then initiate a due process complaint proceeding requesting prospective equitable relief from an administrative hearing officer; however, in such a proceeding the parent would be responsible to establish with specific objective evidence before the IHO that

⁴ Here, the January 2023 IEP reflects an implementation date of February 2, 2023 and a projected annual review date of January 19, 2024 (Parent Ex. C at p. 1). The hearing record does not contain the IEPs developed for the remainder of the 2023-24 school year after January 31, 2024 and/or the 2024-25 school year.

⁵ Pursuant to State and federal regulation, a prior written notice must include a description of the action proposed or refused by the district; an explanation of why the district proposed or refused the action; a description of the other options that the CSE considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action; and a description of the other factors relevant to the CSE's proposal or refusal (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]).

such a unilateral placement, chosen by the parent without the consent of district officials, is an appropriate placement under the IDEA.

Furthermore, in an abundance of caution to ensure the student receives some level of specialized academic instruction until the CSE reconvenes, especially considering that even with the bank of compensatory education awarded it may not be possible to receive those services during the school day, I will order the district to provide programming in the form of compensatory education that mirrors the IHO's ordered relief as follows: 10 hours per week of home-based ABA services; eight hours per month of BCBA supervision for the home-based program; four hours per month of home-based parent counseling and training; 30 hours per week of ABA services pushed-into the student's current classroom; and two hours per week of BCBA supervision in the classroom (IHO Decision at p. 13). In this case, it is more appropriate for the undersigned to designate the relief as compensatory education for the period of time until the CSE is able to locate an appropriate program and placement for the student, and for no longer than 18 months from the date of this decision. Despite the district's argument that the relief described in the paragraph above is prospective in nature, the totality of the relief is to address the remediation of past harms by the district through compensatory means, and compensatory education by its very nature is prospective relief.

Next, I will address the district's allegation that the IHO's award of a PT evaluation was beyond the scope of the parent's April 2023 due process complaint notice (see Parent Ex. A). While it is true that the parent's due process complaint notice did not specifically request a PT evaluation, as explained below, the due process complaint notice sufficiently identified a request for relief as known to the parent at the time of the filing of the complaint.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

With respect to relief (versus alleged violations), State and federal regulations require the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]).

In a letter dated April 19, 2023, the parent requested IEEs for her son (Parent Ex. B at p. 1). The parent outlined the student's needs, stating that the district's evaluations were not

comprehensive and failed to provide information for the development of an appropriate program for the student (*id.* at pp. 1-2). In disagreeing with the district's evaluations, she stated that the district did not evaluate her son's physical needs (*id.*). The parent then specifically requested IEEs in the areas of speech-language, OT, assistive technology, and autism skills assessment (*id.* at pp. 2-3). There was no response from the district. Then, on April 20, 2023, in her due process complaint notice, the parent alleged that the evaluations relied on by the CSEs failed to contain enough information to develop an appropriate program (Parent Ex. A at p. 8). The parent asserted that the district's failure to evaluate the student contributed to the district's denial of FAPE (*id.* at pp. 8-9). The parent requested IEEs in speech-language therapy, OT, assistive technology, and an autism skills assessment (*id.* at pp. 9, 12). There was no specific request for a PT evaluation in the due process complaint notice (*see* Parent Ex. A).

A private neuropsychological evaluation of the student was conducted on September 21 and 28, 2022 (Parent Ex. P at p. 1). The neuropsychologist noted that the student underwent a PT evaluation on August 10, 2021 but was not currently receiving PT (*id.* at p. 2).⁶ The neuropsychological report included a recommendation that the student continue to receive PT services (*id.* at p. 5). In another evaluation obtained privately by the parent in September 2023, the evaluator stated that the student needed PT based on the results of a PT evaluation (Parent Ex. H at pp. 5-6). In an OT evaluation conducted in June 2023 with a report dated August 2023, the occupational therapist recommended a PT evaluation to assess the student's "persistent toe walking, tight heel cords/Achilles tendons" (Parent Ex. J at p. 17). The compensatory services plan that was prepared for the purposes of the impartial hearing also recommended a PT evaluation (Parent Ex. JJ at p. 22). According to the parent, she provided the district with a copy of the neuropsychological evaluation report and the other above-referenced evaluations were provided during the course of the impartial hearing (Answer ¶ 18; Parent Ex. AA at p. 1). Based on the foregoing, the parent was not required to raise a request for a PT evaluation in the due process complaint notice and the IHO's order for a PT evaluation of the student was supported by the evidence in the hearing record and reasonable under the circumstances.⁷

⁶ The April 2020 and March 2021 CSEs recommended that the student receive adapted physical education and related services of PT (Parent Exs. E at pp. 11-12; F at p. 18). Thereafter, neither the March 2022 nor January 2023 IEPs recommended PT for the student (Parent Exs. C at pp. 18-19; D at pp. 16-17). During the March 2022 CSE meeting the parent did not have any concerns regarding the student's physical development and agreed to discontinue PT for the student (Parent Ex. D at pp. 5, 23).

⁷ A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; *see* 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; *see Letter to Clarke*, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR

Lastly, the district appeals from the IHO's order for a BIP as an evaluation. The district does not appear to appeal or disagree that it must fund an FBA of the student, but states that a BIP is only warranted in some instances after the FBA has been completed. I agree with the reasoning of the district that an FBA is the "process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]). A BIP "is based on the results of a functional behavioral assessment" to address the student's behaviors (8 NYCRR 200.1[mmm]). Accordingly, the CSE shall consider developing a BIP for the student if the results of the FBA shows that the student exhibits persistent behaviors that impede his learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions or the student's behavior places the student or others at risk of harm or injury, or if the CSE is considering more restrictive programs or placements as a result of the student's behavior (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). The district is directed to conduct an FBA and based on the results the CSE shall determine whether a BIP should be developed for the student.

VII. Conclusion

Based on the foregoing, the IHO was correct in determining that the district failed to offer the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years but erred in ordering placement in a nonpublic school. Accordingly, the IHO's decision is modified to the extent indicated above to provide the student with compensatory education until the CSE reconvenes to consider updated evaluative information and a State-approved nonpublic school placement, and recommends an appropriate program and placement consistent with this decision. The IHO's decision is further modified so that the CSE will be tasked with considering a BIP for the student based on the results of the ordered FBA.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated December 29, 2023, is modified by reversing that portion which ordered a deferral to the CBST for the student's placement in a nonpublic school; and

IT IS FURTHER ORDERED that the district shall reconvene the CSE within 30 days of the date of this decision and recommend an appropriate program and placement for the student in accordance with the directives in the body of this decision; and

IT IS FURTHER ORDERED that the IHO's decision, dated December 29, 2023, is modified by requiring the district to provide the student with 10 hours per week of home-based ABA services; eight hours per month of BCBA supervision for the home-based program; four hours per month of home-based parent counseling and training; 30 hours per week of ABA services pushed-into the student's current classroom; and two hours per week of BCBA supervision in the

200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

classroom, to be in effect until the CSE reconvenes for consideration of the student's current evaluative information and placement of the student in a nonpublic school; and

IT IS FURTHER ORDERED that the IHO's decision, dated December 29, 2023, is modified by reversing that portion which directed the district develop a BIP for the student as an evaluation; and,

IT IS FURTHER ORDERED that upon reconvening the CSE shall consider whether a BIP is required for the student based on the results of the unappealed directive to complete an FBA.

Dated: **Albany, New York**
 April 11, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER