



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-115

**Application of the BOARD OF EDUCATION OF THE  
MONTICELLO CENTRAL SCHOOL DISTRICT for review  
of a determination of a hearing officer relating to the provision  
of educational services to a student with a disability**

**Appearances:**

Guercio & Guercio, LLP, attorneys for petitioner, by Frank G. Barile, Esq.

The Law Office of Nora A. Lynch, PLLC, attorneys for respondent, by Nora A. Lynch, 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 a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to fund compensatory education and other relief related to the 2022-23 school year. 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 student has been diagnosed as having autism spectrum disorder, attention deficit hyperactivity disorder, and "global delays" (Dist. Exs. 2 at p. 1; 14 at p. 2; 17 at p. 1). He received 1:1 applied behavior analysis (ABA) therapy through the Early Intervention Program and for preschool received services in a 6:1+2 special class (Parent Ex. A at p. 2; Dist. Ex. 2 at p. 1). For kindergarten through second grade, the student attended a 6:1+1 special class in a specialized school in the New York City public schools where he received the additional support of a 1:1 "crisis" paraprofessional and related services of speech-language therapy, occupational therapy (OT), and counseling (Parent Ex. A at p. 3; see Parent Ex. B at pp. 9-10). The parent was also recommended to receive parent counseling and training (Parent Ex. B at p. 9). The student had a behavioral intervention plan (BIP), dated November 2021, that identified non-compliant and

aggressive behaviors exhibited by the student and described interventions to address the student's identified behaviors (Dist. Ex. 3).<sup>1</sup> The family relocated and the parent enrolled the student in Monticello Central School District during summer 2022 (Parent Ex. M at p. 1).

A CSE for the Monticello Central School District convened on September 15, 2022 and recommended that the student receive home instruction pending placement in an out-of-district 6:1+1 special class (Tr. pp. 53-54; Dist. Exs. 5; 6). The September 2022 CSE recommended that the student receive five-and-a-half hours per week of 1:1 special class instruction at home along with related services of three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, and one 30-minute session per week of psychological counseling services, beginning on October 10, 2022 (Tr. pp. 23, 95-96; Dist. Ex. 5 at pp. 6-7). Upon finding that the district could not guarantee that the recommended home instruction would be provided by someone trained to teach children with the student's level of disability, the parent rejected this program (Tr. pp. 146-47, 149). Because the district was unable to secure an out-of-district placement for the student, the CSE reconvened on November 10, 2022 to create a new IEP for the student for the 2022-23 school year (Tr. pp. 65-68; 147-49; Dist. Ex. 7). The November 2022 IEP recommended that the student attend a 12:1+1 special class and receive three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, one 30-minute session per week of individual psychological counseling services, and an assistive technology device to aid with communication (*id.* at pp. 6-7).<sup>2</sup>

The student began attending the recommended 12:1+1 special class placement on or around November 15, 2022 (Tr. p. 150). Although not listed on the student's IEP, the parent reported that he received the support of a 1:1 paraprofessional (Tr. p. 150). Despite having sent out multiple intake referrals and packets, the student was not accepted to any out-of-district placements (*see* Dist. Ex. 10). While attending his assigned public school placement, the district suspended the student for 11 days between November 2022 and February 2023 (*see* Parent Exs. D, E, F, G, H, I; Dist. Ex. 13 at p. 1). A manifestation determination review was conducted on February 15, 2023, in which it was determined that there was "a direct and substantial relationship between [the student's] misconduct and disability" and that the misconduct did not occur due to the district's failure to implement the IEP (Dist. Ex. 13 at p. 1). In February 2023 the CSE recommended that the student return to home instruction pending placement (Dist. Ex. 11 at pp. 1, 13-14). Although the district and the parent attempted to create a schedule for the student to come to school to receive an hour of instruction and related services either before school started or after school ended, the parent ultimately notified the district that she rejected the proposed program as insufficient because

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<sup>1</sup> The parent reportedly provided the district with a copy of the student's functional behavioral assessment (FBA) and BIP prior to moving to the district (Parent Ex. A at p. 3).

<sup>2</sup> The parent reported that the 12:1+1 special class was intended to be a temporary placement to provide the student with routine and structure (Tr. pp. 149-50). According to the parent, the district acknowledged that it was not an appropriate setting for the student (Tr. p. 149).

she believed that an hour of instruction for the student would not be productive (Dist. Ex. 12 at p. 1, Tr. pp. 72-74, 166-68).

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

In a due process complaint notice dated January 13, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A). The parent alleged that the district failed to comprehensively evaluate the student in all suspected areas of disability, failed to recommend appropriate assistive technology services, failed to recommend an appropriate school placement, failed to implement the student's prior BIP or complete a functional behavioral analysis (FBA) and create a new BIP for the student, failed to provide the parent with mandated parent counseling and training, failed to provide the parent with prior written notices, and allowed the student to regress (id. at pp. 5-6). As relief, the parent requested an order directing the district to: fund independent educational evaluations (IEEs), fund an independent FBA; create an independent BIP, create an appropriate IEP, provide the student with compensatory education, and provide the student with a 1:1 paraprofessional (id. at pp. 7-8).

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

An impartial hearing convened on June 5, 2023 and concluded on June 16, 2023 after two days of proceedings (Tr. pp. 1-287). During the impartial hearing, the district conceded that it failed to provide the student with a FAPE for the 2022-23 school year and counsel for the parent withdrew the request for IEEs, indicating the parent was "perfectly satisfied" with the district evaluations but reserving the right to request IEEs in the future (Tr. pp. 14, 31-32). In a decision dated February 27, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year because it did not defend its program and further found that equitable considerations weighed in favor of the parent's request for a slightly reduced award of compensatory education and an assessment by a board certified behavior analyst (BCBA) (IHO Decision at pp. 5, 10-11). However, the IHO rejected the parent's request for placement of the student at a specific nonpublic school for the 2023-24 school year as that school year was not at issue in the proceeding and the request was therefore premature (id. at pp. 9-10). As relief, the IHO ordered the district: to fund compensatory services to a provider of the parent's choosing for applied behavioral analysis (ABA), BCBA supervision, and family engagement services; to provide or fund compensatory related services; to reimburse the parent for an independent assessment of the student; and to hire and train a local registered behavioral technician (RBT) (IHO Decision at p. 11).<sup>3</sup>

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<sup>3</sup> The IHO awarded the parent the following compensatory services to be paid by the district and delivered by a provider of the parent's choosing: 1,200 hours of ABA services at a rate of up to \$300 per hour; 226 hours of BCBA supervision at a rate of up to \$350 per hour; and 48 hours of family engagement sessions at a rate of up to \$350 per hour (IHO Decision at p. 11). The IHO directed the district to provide or fund the following compensatory related services: 69 hours of speech-language therapy; 69 hours of OT; and 23 hours of counseling (id.). The IHO further directed that the district fund the cost of hiring and training an RBT of the parent's choosing at a cost of up to \$5,000 (id.).

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

The district appeals from the IHO's award of compensatory education services.<sup>4</sup> The district argues that "[t]he IHO's award of compensatory services [wa]s excessive, arbitrary, inappropriate and unrelated to the [s]tudent[']s individualized needs." The district requests that the IHO's compensatory service awards be reduced in hours and rate and that an expiration date be set on all compensatory services awarded. The district further alleges that the portion of the IHO's order directing the district to hire and train an RBT be annulled.

As part of its appeal, the district presents an affidavit of the district's director of pupil personnel services (district director) dated April 1, 2024, which includes four exhibits (Apr. 1, 2024 Aff.; Apr. 1, 2024 Aff., Exs. A-D). The director's affidavit affirms that "[o]n or about August 10, 2023... the [d]istrict received a letter from The Center for Discovery notifying the [d]istrict of its acceptance of [the student] for admission into its school-age program beginning September 6, 2023" (Apr. 1, 2024 Aff. ¶ 5). The Center for Discovery (CFD) sent the director a letter dated August 10, 2023 accepting the student (Apr. 1, 2024 Aff., Ex. A). The August 10, 2023 letter states that before the student could be admitted into the CFD, the district would have to update the student's IEP to recommend a day placement for the student at the CFD with a classroom ratio of 6:1:3.5, two 30-minute sessions per week of individual OT and two 30-minute sessions per week of individual speech-language therapy (*id.*). The CFD requested "initial approval to complete a Functional Behavioral Assessment (FBA) to be completed when the student is admitted" (*id.*). An updated IEP, dated August 16, 2023, reflects changes made as requested by the CFD and that the parent was "in agreement with school model," further noting that the CFD placement "is a permanent program" (Apr. 1, 2024 Aff., Ex. B at pp. 1, 2, 13).<sup>5</sup> An August 16, 2023 prior written notice also shows that the CSE convened on August 16, 2023 "to review the [CFD's] acceptance letter and plan for the coming year" (Apr. 1, 2024 Aff., Ex. C at p. 1). Finally, the director includes, as an exhibit with her affidavit, a copy of the student's December 8, 2023 IEP, which reflects the student's progress at the CFD and reports that the parent is "happy with the placement" (Apr. 1, 2024 Aff., Ex. D at p. 1).<sup>6</sup> In her affidavit, the director indicated that, to her knowledge, the student was continuing to attend CFD (Apr. 1, 2024 Aff. ¶ 8).

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<sup>4</sup> Neither party has appealed from the IHO's finding that the district failed to provide the student with a FAPE for the 2022-23 school year. As such, this determination has 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]).

<sup>5</sup> The August 2023 CSE recommended that for the 10-month portion of the 2023-24 school year the student attend a 6:1+3.5 special class at the CFD and receive related services consisting of two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual occupational therapy (Apr. 1, 2024 Aff., Ex. B at p. 13).

<sup>6</sup> Finding that the student remained eligible for special education as a student with autism, the December 2023 CSE recommended that the student continue to attend a 6:1+3.5 special class at CFD and receive related services consisting of two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, and added two 45-minute sessions per year of parent counseling and training for the 2023-24 school year (Apr. 1, 2024 Aff., Ex. D at pp. 1,16). Additionally, the December 2023 CSE recommended that the student receive adapted physical education for two 45-minute sessions per week (*id.* at p. 16). Regarding

In an answer, the parent generally argues for the IHO's decision to be affirmed in its entirety.

## V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents'

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the student's management needs, the IEP indicated that the student required behavioral strategies which included intensive supervision in the educational setting, individualized attention to focus on tasks, a flexible academic environment, a reward system for completing tasks, a visual schedule/first-then chart to stay on task, and home/school communication (id. at p. 13). The IEP indicated that an FBA was in process at the time of the December 2023 CSE meeting (id. at p. 3). The December 2023 IEP included approximately 14 annual goals targeting the student's needs related to reading, mathematics, speech and language, social/emotional/behavior, fine motor, and daily living skills (id. at pp. 14-16). The December 2023 IEP also indicated that the student required assistive technology, specifically the use of an iPad paired with communication symbols, and "apps for daily communication (wants/needs/ participation)" throughout the school environment (id. at pp. 14, 17). The IEP listed as a support for school personnel, one 30-minute session per month of behavioral intervention consultation (id.). Lastly, special transportation of a small bus with an attendant was to be provided to the student from home to school and to the "gym building" at CFD for adapted physical education (id. at p. 19).

opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>7</sup>

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<sup>7</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

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

## **VI. Discussion**

### **A. Compensatory Education**

As set forth above, the district conceded during the hearing that it failed to provide the student with a FAPE for the 2022-23 school year because "[t]o date, the student [wa]s yet to be accepted into an appropriate out-of-district day placement appropriate to his needs" (Tr. at p. 14; IHO Decision at p. 5). To make up for the denial of a FAPE, the IHO awarded 1,200 hours of ABA services at a rate of up to \$300 per hour, 226 hours of BCBA supervision at a rate of up to \$350 per hour, 48 hours of BCBA parent training at a rate of up to \$350 per hour, as well as compensatory related services consisting of 69 hours of speech-language therapy, 69 hours of OT, and 23 hours of counseling (IHO Decision at p. 11). The district argues that the IHO's award of compensatory services should be modified by reducing the overall number of services awarded, by reducing the rates for the services as set by the IHO, and by setting a reasonable expiration date for the compensatory education and related services. According to the district, the IHO "failed to factor in the [s]tudent's impending placement at a full-day out-of-district program with built-in behavioral supports" in rendering his award. The district further asserts that the number of hours of services will overwhelm the student and that there is no objective data justifying the awarded services.

Turning to the hearing record, the student did not receive his recommended home instruction, OT services, speech-language therapy, or counseling services during the 2022-23 school year, as the district was searching for a day placement for the student (Tr. pp. 53-54; Dist. Ex. 5 at pp. 6-7). During the June 5, 2023 impartial hearing, the district director testified that the student "[wa]s still on a pending waitlist for Center for Discovery for day. [The district was] anxiously awaiting that response for a potential intake for him" (Tr. p. 60). The district's post hearing brief was dated July 21, 2023 and the parent's closing brief was dated August 1, 2023. The district was not notified of the student's acceptance into the CFD until August 10, 2023, after the parties had already submitted their closing briefs (Apr. 1, 2024 Aff., Ex. A); however, there is no indication that this information was relayed to the IHO, although the IHO had not yet issued his decision at that point in time.<sup>8</sup> Additionally, in this proceeding, the purpose of the compensatory

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<sup>8</sup> According to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]). While an IHO determines when the record is closed, guidance from the Office of Special Education explains that "[a] record is closed when all post-hearing submissions are received by the IHO. Once a record is closed, there may be no further extensions to the hearing timelines. . . . [and] the decision must be rendered and mailed no later than 14 days from the date the IHO closes the record ("Requirements Related to Special Education Impartial Hearings" Office of Special Educ. [Sept. 2017], available at <http://www.p12.nysed.gov/specialed/publications/2017-memos/documents/requirements-impartial-hearings-september-2017.pdf>; see 8 NYCRR 200.5[j][5][iii]). In this matter, it appears as though the last filings in this matter were the district's post hearing brief, dated July 21, 2023, and the parent's closing brief, dated August 1, 2023. Accordingly, the record close date should have been set as of the date the IHO received those final submissions, making the decision due 14 days thereafter ("Requirements Related to Special Education Impartial Hearings," Office of Special Educ. [Sept. 2017]; 8 NYCRR 200.5[j][5]).



education award sought by the parent was to provide an equitable remedy for the district's denial of a FAPE to the student for the 2022-23 school year, and the "impending placement" the district refers to in its request for review, and also has provided further information about in the district director's affidavit and exhibits it has submitted in support of its appeal, is for the 2023-24 school year. While the district contends that the IHO did not consider the student's upcoming placement for the 2023-24 school year in making his decision regarding compensatory education, review of the decision shows the opposite (*see* IHO Decision at pp. 8-10). While the IHO did not have the information before him regarding CFD's acceptance of the student for the 2023-24 school year at the time he rendered his decision, he did consider the parent's request to have the student placed at a specific nonpublic school for the 2023-24 school year and rejected that request, thereby allowing the district to find a placement for the student for the 2023-24 school year which it ultimately did (*id.* at p. 10). Accordingly, in crafting relief, the IHO correctly considered the information before him with respect to what compensatory education award would place the student where he would have been educationally but for the district's denial of a FAPE to him for the 2022-23 school year while declining to usurp or interfere with the district's ongoing efforts to place the student in an appropriate placement for the 2023-24 school year.

Based on the information before him in the impartial hearing record, including testimony from the clinical director of an agency that provides ABA and BCBA services, who is also a BCBA and LBA, and who recommended that the student receive 40 hours a week of ABA services provided by an RBT, eight hours per week of supervision by a BCBA, and two hours per week of family engagement provided by a BCBA "to ensure [the student]'s safety and continued learning... to ensure that [the student] makes meaningful progress," the IHO awarded the parent the following compensatory education award: 1,200 hours of ABA services at a rate of up to \$300 per hour, 226 hours of BCBA supervision at a rate of up to \$350 per hour, and 48 hours of BCBA parent training at a rate of up to \$350 per hour (Tr. pp. 250, 277; IHO Decision at p. 11; Parent Exs. L; M at p. 7).<sup>9</sup> The IHO also awarded the parent the following compensatory related services, which consisted of 69 hours of speech-language therapy, 69 hours of OT, and 23 hours of counseling, which were the amounts requested by the parent in her closing brief based on the services not

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<sup>9</sup> The parent specifically requested an award of 1,840 hours of ABA services, 368 hours of BCBA supervision and 144 hours of parent training by a BCBA in her closing brief (Parent Closing Br. at p. 25). In its closing brief, the district suggested an appropriate compensatory award would consist of between 10 and 20 hours of ABA services per week (Dist. Closing Br. At p. 11). It is worth noting that the IHO reduced the proposed award holding that his reduction was "still quite a substantial award, but a substantial award in its order here" because "[t]he record suggests a [s]tudent with serious issues that needs intense professional attention, and that the compensatory education request does correspond to the FAPE deprivation and is supported by the record" (IHO Decision at p. 9). In fact, the IHO's final award was closer to the upper limit of the district's proposed compensatory award than the parent's request.

provided to the student through his February 2023 IEP (IHO Decision at p. 11; SRO Ex. 7 at p. 25).<sup>10, 11</sup>

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., 758 F.3d at 451; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of

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<sup>10</sup> Although the IHO specified that compensatory ABA services be paid "at a rate up to \$300 an hour" and compensatory BCBA services be paid at a "rate up to \$350 an hour," the IHO "decline[d] to set a dollar limit on" speech-language therapy services, OT services, and counseling services, instead ordering "the services be reimbursed in accord with the reasonable and customary rates in the community" (IHO Decision at pp. 8, 11). The district objects to the specific increased reimbursement rates carved out for ABA and BCBA providers; however, the district is not aggrieved by the IHO setting an upper limit on the rate for those services. The district argues that the rate should be reduced to the "customary rates available to the [d]istrict in its geographical area (i.e., between \$100 to \$125 for ABA services), or, in the alternative, remand the issue back to the IHO for further development of the record in this regard." However, the IHO did not specify a set rate for the ABA and BCBA providers be paid, rather, the parent is still required to obtain services at a reasonable rate and the IHO only set a maximum allowable rate. If the district believes the parent has obtained services in excess of a reasonable rate or that the parent is colluding with a provider to artificially inflate their customary rate based on the IHO's award, the district may investigate and pursue any such claims outside of the due hearing process hearing system which is not an appropriate forum set up to handle those types of disputes in the context of a compensatory education award. For these reasons, I decline to modify the rates set by the IHO.

<sup>11</sup> The district argued during the hearing, and continues to do so on appeal, that the parent's requested compensatory education and related services should be reduced based on the parent's refusal of special education and related services after February 15, 2023 (IHO Decision at p. 8; Req. for Rev. ¶ 15). From my review of the hearing record, the parent explained that she rejected the district's proposed one-hour of instruction before school because she did not believe that the student would receive any productive benefit from such a short period of instruction and, based on the student's documented need of "the support of a highly organized, small classroom that offers him a predictable routine." I decline to reverse the IHO's finding that the district's proposed hour of instruction before the start of the school day failed to constitute "careful consideration of [the student's] present levels of achievement, disability, and potential for growth" (Tr. pp. 165-68, 196; IHO Decision at p. 8; Dist. Ex. 11 at p. 6). Additionally, the district director testified that she did not believe that "a student with [the student's] academic profile [wa]s capable of making meaningful progress with one hour of school a day" (Tr. p. 108). As such, I do not find that the parent's refusal to accept the one hour of instruction per day merits a reduction of the compensatory education awarded for the denial of a FAPE for the 2022-23 school year.

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"]).

Having reviewed the hearing record, including the information provided by the district director's affidavit and exhibits submitted in support of the district's request for review which confirm that the student has been placed in an out-of-district day program for the 2023-24 school year, I find no reason to disturb the IHO's determinations as to the appropriate compensatory education award for the district's denial of a FAPE to the student for the 2022-23 school year; however, I do find that there should be an expiration date set for use of the compensatory services. The December 8, 2023 IEP reflects that the student is attending a full-day program at CFD (Apr. 1, 2024 Aff., Ex. D). The December 2023 IEP indicated that while attending CFD, the student was "exposed to a life skills curriculum where he is learning to become self-sufficient in daily living skills, safety and community awareness. He can wash his hands, use the bathroom when taken and dress himself with minimal assistance" and the student "is able to participate in small and whole group activities" (id. at p. 9).<sup>12</sup> This reflects progress in the student's abilities and levels of functioning from those which were described during the 2022-23 school year. Further, it appears that the parent is satisfied with the student's progress and that the student "is recommended to continue in the current program" (id. at pp. 2, 3). While the district director testified that it was always the district's intention to place the student in an appropriate day program, and it appears that the district has succeeded in doing so for the 2023-24 school year, at least as of the time the exhibits submitted with the district director's affidavit were generated, the student was nonetheless denied a FAPE for the 2022-23 school year because the district failed to find an appropriate placement for him for that time period.

As such, the award for compensatory education is supported by the hearing record. However, as the student is currently enrolled in CFD, attending a six-hour 6:1+3.5 special class five days a week and is receiving two 45-minute sessions per week of adaptive physical education, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual OT, and is showing evidence of progress in that program and placement, the student's current educational schedule and services should be taken into account by the parent when determining how best to utilize the compensatory education services awarded. Accordingly, while I decline to reduce the hours of compensatory education and related services awarded, I agree with the district's argument that it is fitting to put a reasonable expiration date on the parent's use of the award, as the goal of compensatory education is to place the student in the position he would have been in if he had not been denied a FAPE, a goal that becomes increasingly

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<sup>12</sup> The December 2023 IEP reflected that academically, the student was working on guided reading concepts, increasing his participation in reading activities, exposure to various math concepts which included colors, sorting, matching, 1:1 correspondence and number awareness (Apr. 1, 2024 Aff., Ex. D at p. 9). With respect to adaptive skills, the December 2023 IEP stated that staff was assisting the student with using various strategies to increase his self-feeding and reduce his distractions during mealtimes, and he was adhering to a bathroom schedule and had emerging abilities to request the use of the bathroom functionally (id. at pp. 7-8). Regarding communication, the student used total communication techniques including an iPad using direct selection via his index finger, a "few" single word approximations, gestures, proxemics, and eye gazes (id. at p. 8).

more difficult as time elapses between the denial of FAPE and the implementation of the remedial services, particularly when taking into account the current program the student is in and whatever educational benefit he is now receiving from CFD. Therefore, the parent will have three years from the date of this decision to use the awarded compensatory education and related services.

## **B. Registered Behavior Technician (RBT) Services**

In his decision, the IHO noted that he was awarding the parent's request to have the district "cover the cost of hiring and training a local [RBT] of the parent's choosing at a cost of up to \$5000" because there were "no objections to [the requested] relief in the school district's brief" (IHO Decision at p. 10). While the district failed to address the parent's request for the RBT in its closing brief, it must be noted that the parent did not request RBT services in her due process complaint notice (see Parent Ex. A).

The main discussion during the hearing regarding services to be provided for the student by an RBT came from the director of the private school (private school director) that the parent had requested as a placement for the student for the 2023-24 school year (Tr. pp. 220-243; see Parent Closing Br.). The private school director testified that based on the student's profile and her limited knowledge of him, "he would need a one-to-one support throughout his day so he would have an RBT" (Tr. p. 229). The private school director discussed the importance of generalization and suggested that the student "would probably have three RBTs that would rotate with him throughout the day" (Tr. pp. 229-30). The private school director testified that there was a seat open for the student at the private school, but that the private school "would need a little time to plan and program [to] make sure the right staffing was available" (Tr. pp. 232).

The BCBA who testified, explained that her company charged \$300 an hour for an RBT (Tr. pp. 248, 262). The BCBA further explained that an RBT "is a behavior technician who has gone through a 40-hour training, as well as supervised hours under [a] BCBA to sit for the register[ed] behavior technician exam under the Board" (Tr. 248). In her applied behavior analysis treatment plan the BCBA had recommended that the student receive 40 hours per week of ABA therapy provided by a certified RBT (Parent Ex. M at p. 7).

Based on the above, it appears the order directing the district to fund the hiring and training of an RBT was intended as a means of implementing the compensatory ABA services awarded to the student. However, the hearing record does not support finding that the cost of hiring and training an RBT would not be included in the hourly rate set by the agency for the ABA services or that there was such a need for an RBT in the student's geographic area that the district should be responsible for funding the agency's cost in obtaining a provider.<sup>13</sup> Accordingly, that portion of the IHO's decision directing the district to fund the cost of hiring and training an RBT is reversed.

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<sup>13</sup> In her closing brief, the parent cited to the BCBA's testimony as support for the assertion that the hiring and training of an RBT for the student "would be covered by the \$5000 assessment proposed by the earlier agency" (Parent Post-Hr'g Br. at pp. 18-19). However, the cited to portion of the transcript did not indicate what was described in the closing brief and, in reviewing the hearing record, there was nothing to support the parent's contention in that regard (id.; see Tr. p. 48).

**VII. Conclusion**

Having determined that the IHO correctly found that the district failed to provide the student with a FAPE for the 2022-23 school year and awarded compensatory education and related services as equitable relief, the necessary inquiry is at an end. However, as noted above, the parent's request for \$5,000 for an assessment and training for an RBT as part of the compensatory education award was not supported by the hearing record.

Having considered the parties' remaining contentions, I find them to be without merit.

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

**IT IS ORDERED** that the February 27, 2024 IHO decision is modified to the extent that the awarded compensatory education and related services shall have an expiration date of three years from the date of this decision;

**IT IS FURTHER ORDERED** that the February 27, 2024 IHO decision is modified by reversing that portion of the decision which directed the district to fund a highly individualized program to cover the cost of hiring and training a local RBT of the parent's choosing at a cost of up to \$5,000.

**Dated:**            **Albany, New York**  
                         **May 8, 2024**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**