



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-449

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Staten Island Legal Services, attorneys for petitioner, by M'Ral Broodie-Stewart, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational programs respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2021-22 and 2022-23 school years were appropriate. The parent also appeals from those parts of the IHO's decision that denied her requested relief despite a finding that the district did not provide a free appropriate public education (FAPE) to her daughter for the 2023-24 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

On January 15, 2021, a CSE convened to develop an IEP for the student with an implementation date of January 29, 2021 (Parent Ex. E at pp. 1, 24). At the time of the CSE meeting, the student was 17 years old and attending a 12:1+1 special class in a district specialized school (*id.* at p. 2). The January 2021 CSE continued to find the student eligible for special

education and related services as a student with autism (id. at p. 1).¹ The January 2021 CSE recommended that the student attend a 12:1+1 special class in a specialized school and receive the related services of one 30-minute session per week of counseling in a group of three, two 30-minute sessions per week of individual occupational therapy (OT), four 60-minute sessions per year of parent counseling and training in a group, individual school nurse services as needed, and two 30-minute sessions per week of speech-language therapy in a group of three (id. at pp. 18-19, 24-25).² The January 2021 CSE also recommended group paraprofessional services for health and seizures, 12-month services, and that the student participate in the alternate assessment (id. at pp. 19, 20, 22).

A private neuropsychological evaluation was conducted on August 24, 2021 and August 27, 2021, to update information regarding the student's level of cognitive and adaptive functioning for transition planning (Parent Ex. F at p. 1). A private psychiatric evaluation was conducted on August 30, 2021, with presenting problems described as the student experiencing significant changes in her adaptive functioning and an increase in avoidance behavior, such as school refusal affecting her academic skills (Parent Ex. G at pp. 1, 2). The August 2021 psychiatric evaluation report also indicated that the student had been in remote learning since March 2020 and that the student was resistant to in-person learning (id. at p. 2). The report further noted that the parent had to physically dress the student on occasion and that the student was not cooperative with getting ready to go out or with going to school at times (id.). The private evaluation included a number of recommendations, including that the student receive a minimum of 10 hours per week of "in-home [s]pecial [e]ducation [t]eacher [s]upport [s]ervices (SETSS) implemented in an intensive, [a]ppplied [b]ehavior [a]nalysis intervention (ABA) model" (id. at p. 5).

A CSE convened on November 29, 2021 and developed an IEP for the student with an implementation date of November 30, 2021 (Parent Ex. H at pp. 1, 30, 33). According to the November 2021 IEP, the student was 18 years old and then-currently attending a 12:1+1 special class in a specialized high school (id. at p. 1). The November 2021 CSE continued the program recommendations set forth in the January 2021 IEP, with the addition of two 30-minute sessions per week of physical therapy (PT) in a group of two (id. at pp. 23, 31).

A follow-up private psychiatric and behavior evaluation was conducted on January 13, 2022 (Parent Ex. I at p. 1). The January 2022 evaluation report indicated that the parent had provided the district with the recommendations from the prior private psychiatric evaluation, the recommendation for the student to receive SETSS was "rejected by the school," and the parent obtained applied behavior analysis (ABA) therapy for the student through insurance two times per week beginning in October 2021 (id.).

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

² The January 2021 IEP notes that the duration of the group counseling service was 330 minutes; however that appears to have been a typographical error (Parent Ex. E at p. 19).

A follow-up private neuropsychological evaluation was conducted on January 27, 2022 (Parent Ex. J at p. 1). The January 2022 evaluation report indicated that the student had returned for a follow-up due to reduced communication skills (id.).

A functional behavioral assessment (FBA) was conducted by the district on March 21, 2022 (Parent Ex. K at p. 1). A CSE convened on March 21, 2022, and developed an IEP for the student with an implementation date of April 4, 2022 (Parent Ex. L at pp. 1, 31). The March 2022 CSE continued to recommend a 12:1+1 special class in a specialized school with the same related services and supplementary supports recommended in the November 2021 IEP (compare Parent Ex. K at pp. 23-24, 25-29, 30, 31-33, with Parent Ex. H at pp. 22-28, 29-32).

By email dated August 17, 2023, the parent requested that the district "reopen an IEP case for CBST referral" for the student (Dist. Ex. 6 at p. 1). In a prior written notice dated September 29, 2023, the district acknowledged the parent's August 17, 2023 request as a request for a reevaluation, proposed a reevaluation of the student, and requested the parent's written consent for an educational evaluation and a social history update (Dist. Ex. 5 at pp. 1-2).

A district psychoeducational evaluation was conducted on October 4, 2023 (Parent Ex. M at p. 1; Dist. Ex. 4 at p. 1). The evaluation report indicated that the student was then-currently 20 years old, was enrolled at a district specialized school but was refusing to attend, that the parent had requested placement in a nonpublic school due to the student's refusal to attend, and the family was awaiting a third impartial hearing (id.). A social history update was conducted on October 4, 2023 (Dist. Ex. 3 at p. 1). In a report dated November 1, 2023, the social history update indicated that from September 2022 through December 2022, the parent did not see any academic progress made by the student while attending a district specialized high school and the parent stated that the student stopped attending in January 2023 (id.).

A. Amended Due Process Complaint Notice

In an amended due process complaint notice dated October 10, 2023, the parent alleged that the district denied the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years (Parent Ex. A at p. 1).³ The parent asserted that the district failed to recommend appropriate services in the November 2021 IEP and denied the student a FAPE for the 2021-22 school year, failed to develop an appropriate IEP for the 2022-23 school year by failing to recommend appropriate services and an appropriate placement in the April 2022 IEP, and that the district failed to provide services after "misinformation" given by school staff caused the parent to remove the student from school (id. at pp. 8-10). For the 2023-24 school year, the parent alleged that the district did not provide the student with an IEP or placement (id. at p. 10).⁴ As relief, the parent

³ The copy of the initial due process complaint notice offered into evidence by the parent's attorney is undated. However, the certified hearing record filed by the district with the Office of State Review included a copy of the initial due process complaint notice along with the email the parent wrote to the impartial hearing office wherein she submitted a pro se "[r]equest for [r]emedies" on July 28, 2023 (compare Parent Ex. B at pp. 1-6, with Due Process Compl. Not. at p. 7).

⁴ In the amended due process complaint notice, the parent sought funding for the student's attendance at Eden II for the 2023-24 and 2024-25 school years (Parent Ex. A at p. 11). In addition, the parent stated that if the student was unable to attend Eden II beyond the age of 21, the parent requested funding for 3,960 hours of "SETSS at

sought an appropriate IEP recommending a nonpublic school and 10 hours per week of "home SETSS ABA at market rate," funding for eight hours per month of ABA supervision by a board certified behavior analyst (BCBA) or licensed behavior analyst (LBA) to coordinate programs between home and school at market rate, and funding for two hours per month of parent training by the BCBA or LBA at market rate (id. at p. 11). The parent also requested compensatory speech-language therapy in the amounts of 44 hours for the 2021-22 school year, 66 hours for the 2022-23 school year, and 66 hours for the 2023-24 school year; compensatory OT in the amounts of 22 hours for the 2021-22 school year, 22 hours for the 2022-23 school year, and 44 hours for the 2023-24 school year; compensatory counseling in the amounts of 44 hours for the 2021-22 school year, 44 hours for the 2022-23 school year, and 44 hours for the 2023-24 school year; and compensatory PT in the amounts of 22 hours for the 2022-23 school year and 44 hours for the 2023-24 school year, with all compensatory services to be funded at a market rate (id. at pp. 11-12). The parent also requested funding for an independent functional behavioral assessment (FBA) (id. at p. 12).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 18, 2024 and concluded on July 23, 2024 after 11 nonconsecutive days of proceedings (Tr. pp. 143-321).⁵ In a decision dated September 4, 2024, the IHO found that the district provided the student a FAPE for the 2021-22 and 2022-23 school years (IHO Decision at p. 18). The IHO also found that the district conceded that it did not offer the student a FAPE for the 2023-24 school year (id. at pp. 17, 18, 20, 23). As relief, the IHO ordered the district to fund 42 hours of compensatory speech-language therapy, 42 hours of compensatory OT, 42 hours of compensatory PT, and 21 hours of compensatory counseling (id. at p. 26). The IHO further ordered that funding was "[t]o be paid at market rate to be determined by the [district]'s implementation unit based upon the lowest rates paid to such provider or comparable rates to comparable providers for the same or similar students, minus any services the [district] has provided or funded" (id.). The IHO denied all of the parent's remaining requested relief (id. at pp. 21, 24-26).

market rate" (id.). During the impartial hearing, the parent's attorney stated that due to the length of the impartial hearing, Eden II no longer had a seat available for the student (Tr. p. 167). At that time, the parent's attorney indicated that the parent had located an alternative school (Tr. p. 168). In her post-hearing brief, the parent's attorney requested funding for "tuition at a private school of her family's choice for the next three school years" (Parent Post-Hr'g Br. at p. 14).

⁵ The parties convened for 11 appearances from September 21, 2023 through March 6, 2024, prior to the admission of witness testimony and the parent's exhibits into evidence (Tr. pp. 1-142). On November 30, 2023, the IHO scheduled a hearing date for January 18, 2024 after being advised the student was not in school and was not receiving services (Tr. pp. 56-65). At the January 18, 2024 hearing date, the district began introducing evidence; however, after an objection to one of the district's exhibits, the IHO adjourned the matter (Tr. pp. 85-90). The following hearing dates included some miscommunication as to the parties' and the IHO's expectations resulting in an additional delays before the matter was finally set down for a hearing on April 9, 2024 (Tr. pp. 99-105, 110-24).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the district provided the student with a FAPE for the 2021-22 and 2022-23 school years and in failing to award the parent all of her requested relief for the 2021-22, 2022-23, and 2023-24 school years.

The parent asserts that her requests for relief were properly raised in the amended due process complaint notice, including requests for an appropriate IEP with a recommendation for placement in a nonpublic school and home-based ABA, compensatory education, and funding for Eden II for which the student lost her seat due to the delays in the hearing. The parent claims that the IHO erred in failing to award compensatory education for the three school years at issue and should have awarded the student compensatory related services, ABA instruction, ABA supervision, and parent counseling and training. The parent further asserts that if the IHO required more information to award compensatory education, the IHO was obligated to develop the hearing record on the issue and further argues that the IHO's award was not reasoned as the IHO ignored evidence of the student's lack of progress. In addition, the parent contends that the IHO failed to deem all unopposed facts to be admitted by the district. The parent also alleges that the IHO erred in determining that the student was no longer eligible for special education services when she turned 21 and that the IHO erred in using the student's age and the lack of a gross deprivation of FAPE to deny compensatory education.

The parent further asserts that the IHO erred in finding that the parent sought tuition reimbursement and that an award of a prospective placement would usurp the district's responsibility for educational planning. The parent argues that although the district conceded that the November 2023 IEP did not offer the student a FAPE, it remained in effect and, accordingly, the IHO erred in failing to follow the recommendations of the parent's witness for placement of the student in a full-time ABA program with 15 hours per week of home-based ABA services.

As relief, the parent requests compensatory education for ABA therapy and related services as well as an order directing the district to develop an IEP for the student which places the student in a nonpublic school with 15 hours per week of home-based ABA services, parent counseling and training provided by a BCBA/LBA, and eight hours per month of ABA supervision.

In an answer the district responds to the parent's claims with general denials and argues that the IHO's decision should be affirmed. The district argues that the student was provided a FAPE for the 2021-22 and 2022-23 school years; however, the district avers that if the student was denied a FAPE for the 2022-23 school year, it should be limited to the time period of January 2023-July 2023 (61 hours of related services), when the student stopped attending classes. The district further alleges that the IHO correctly denied the parent's request for compensatory education. Specifically, the district argues that the parent's requested relief continuously changed throughout the proceedings beginning with the amended due process complaint notice, and again during the impartial hearing, in the parent's post-hearing brief, and lastly in the request for review. The district contends that the parent's requested relief should be limited to the actual relief requested in the parent's request for review to the extent it aligns with the amended due process complaint notice. The district also argues that the IHO correctly declined to follow the recommendations of the parent's witness who testified that the parent's home-based ABA program was for generalization of skills and to maximize the student's potential. The district further

contends that the parent is attempting to shift the blame for her failure to support her requested relief to the IHO, who, according to the district, conducted a fair and impartial hearing process. The district also argues that the student was no longer eligible for services after turning 21 and that there was no request for extended eligibility in the amended due process complaint notice. The district asserts that there is no basis in the hearing record to award the parent prospective placement at a nonpublic school. The district contends that the IHO's award of compensatory education was sufficient to remedy the denial of a FAPE for the 2023-24 school year.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

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

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

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. Preliminary Matters - Scope of Review

At the outset, I note that the district does not cross-appeal from the IHO's determination that the student was not offered a FAPE for the 2023-24 school year or from the IHO's award of

⁶ 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).

147 hours of compensatory related services (see IHO Decision at pp. 20, 24, 25, 26). Accordingly, 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 district also correctly argues that the parent's requested relief changed throughout the proceedings beginning with the amended due process complaint notice, and again during the impartial hearing, the parent's post-hearing brief, and lastly in the request for review. Pertinent to this appeal, in the due process complaint notice, the parent requested placement of the student at Eden II for the 2024-25 school year as a form of compensatory education for the alleged three year denial of FAPE and further requested that if the student could not attend Eden II past the age of 21, the district pay for 3,960 hours of SETSS as a form of compensatory education in addition to the requested compensatory related services (Parent Ex. A at p. 11). By the close of the hearing, the parent was no longer requesting placement at Eden II and changed the request to "tuition at a private school of her family's choice for the next three school years" along with requests for home-based ABA services, ABA supervision, and parent counseling and training (Parent Post-Hr'g Br. at p. 14). On appeal, the parent does not specify a specific compensatory remedy, instead generally requesting compensatory ABA therapy and related services along with an IEP that provides the student with a nonpublic school placement and 15 hours per week of home-based ABA services, parent counseling and training, and eight hours per month of ABA supervision (Req. for Rev. at p. 10).

State regulation provides that a pleading must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specifies that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see Phillips v. Banks, 656 F. Supp. 3d 469, 483 [S.D.N.Y. 2023], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21, 2024]; L.J.B. v. N. Rockland Cent. Sch. Dist., 2024 WL 1621547, at *6 [S.D.N.Y. Apr. 15, 2024]; Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]; see Davis, 2021 WL 964820, at *12 [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C., 2018 WL 4997516, at *23 [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]).

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]).

Overall, although the requested compensatory relief has changed from a request for tuition at Eden II for the 2024-25 school year, to a request for tuition at a nonpublic school of the parent's choosing, to a request for a prospective change in the student's IEP to recommend placement in a nonpublic school along with home-based ABA services, the change is not sufficient to find that it is outside the scope of the hearing when considering the length of the hearing combined with the changes in circumstances. Accordingly, the parent's request for relief will be addressed as set forth on appeal.

However, it must be noted that the request for review includes only one paragraph asserting that the student was denied a FAPE and that paragraph focuses solely on the contention that the student did not make progress in the district's program. Accordingly, while the parent had raised a number of claims related to the provision of a FAPE for all of the school years at issue in the amended due process complaint notice, the parent has only asserted a lack of progress on appeal.⁷ State regulation provides that a pleading must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specifies that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see Phillips v. Banks, 656 F. Supp. 3d 469, 483 [S.D.N.Y. 2023], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21, 2024]; L.J.B. v. N. Rockland Cent. Sch. Dist., 2024 WL 1621547, at *6 [S.D.N.Y. Apr. 15, 2024]; Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]). Accordingly, the sole issue presented on appeal related to the parent's allegation that the IHO erred in finding that the district did not deny the student a FAPE for the 2021-22 and 2022-23 school years is that the student did not make progress in the district's program (see Req. for Rev. at p. 6).

B. FAPE

The parent argues that the IHO erred in finding that the district provided the student a FAPE for the 2021-22 and 2022-23 school years. The parent has not reasserted any substantive challenges to the IEPs developed for the school years at issue and solely argues that the student

⁷ The parent argues in her memorandum of law that the district failed to address the student's school refusal and continued to recommend the same annual goals (Parent Mem. of Law at pp. 10-16). However, the scope of the parent's appeal is limited to those issues explicitly raised within the request for review. As a general matter, it has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Davis, 2021 WL 964820, at *11; Application of a Student with a Disability, Appeal No. 19-021; Application of the Dep't of Educ., Appeal No. 12-131). Thus, any issues not raised in the request for review have been deemed abandoned and any arguments included solely within the memorandum of law have not been properly raised and will not be considered herein.

failed to make meaningful progress under each of the IEPs developed for the 2021-22 and 2022-23 school years.

As discussed below, based on the evidence in the hearing record and the parent's allegations of a denial of FAPE for the school years at issue, the January 2021 IEP, the November 2021 IEP, and the March 2022 IEP, at the times they were written, were sufficiently designed to confer educational benefit to the student in light of her circumstances. In addition, review of the hearing record indicates that during the 2021-22 and 2022-23 school years, the CSE reconvened to address the parent's concerns, to review additional evaluative information and make changes to the student's recommended program. The hearing record also demonstrates that the student made some progress during the school years at issue.

It is well settled that a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Revised Sept. 2023], available at <https://www.nysed.gov/sites/default/files/programs/special-education/guide-to-quality-iep-development-and-implementation.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year, courts have been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]; N.G. v. E.L. Haynes Pub. Charter Sch., 2021 WL 3507557, at *9 [D.D.C. July 30, 2021]; James D. v. Bd. of Educ. of Aptakisis-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

In this instance, the student's the January 2021 IEP, November 2021 IEP, and March 2022 IEP all indicated that the student would participate in an alternate assessment, specifically identifying the New York Alternate Assessment (NYSAA) and the Lakeshore Student Annual Needs Determination Inventory (SANDI) assessment (Parent Exs. E at p. 22; H at pp. 31-32; L at p. 28).⁸ As a rationale for why the student was identified for alternate assessments rather than

⁸ Due to the student's participation in alternate assessments, the CSEs were required to create short-term instructional objectives or benchmarks for the student, which are described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal" (see 8 NYCRR 200.4[d][2][iv]; see 20 U.S.C.

participating in regular assessments, the IEPs noted the student's "severe cognitive delays and disability" (*id.*). Review of the IEPs shows that the student's annual goals were based off of the student's performance on the SANDI (Parent Exs. E at pp. 3-4; H at p. 4; L at p. 4). Accordingly, in determining the student's progress during the period the student was in the district, the student's progress must be measured as part of the alternate assessments aligned with alternate academic achievement standards.

The student's January 24, 2020 IEP was admitted into evidence and included information on the student's progress toward her annual goals for the 2020-21 school year (Parent Ex. D at pp. 7-13). The January 2020 IEP included seven annual goals and short-term objectives in the areas of communication, problem solving, cognitive processing, organizing, speech, OT, and transitioning (*id.*). For the first progress reporting period of 2020-21, the student did not make any progress toward any of her annual goals (*id.*). For the second progress reporting period, the student made little progress toward her annual goals in the areas of communication, problem solving, cognitive processing, and organizing (*id.* at pp. 7-10). The student made progress but did not meet the annual goal for transitioning skills during the second progress reporting period (*id.* at p. 13). The student did not make any progress toward her annual goals in the areas of speech and OT for the second reporting period (*id.* at pp. 11-12). For the third progress reporting period, the student made little progress toward her annual goals in the areas of communication, problem solving, cognitive processing, organizing, and transitioning (*id.* at pp. 7-10). The student did not make any progress toward her annual goals in speech for the third and fourth progress reporting periods (*id.* at p. 11). Only two progress reporting periods were completed for OT on the January 2020 IEP (*id.* at p. 12).

A CSE convened on January 15, 2021 and developed an IEP for the student with an implementation date of January 29, 2021 (Parent Ex. E at pp. 1, 24). The January 2021 CSE considered the results of a September 2020 administration of the SANDI, a September 2020 Level I vocational assessment, which included a parent, student, and teacher survey respectively, classroom data, performance task checklists, previous IEPs, and progress notes (Parent Ex. E at p. 2; see IHO Decision at p. 18). The January 2021 IEP included SANDI results, information from the Level I vocational assessment, teacher observations, and further indicated that the student was then-functioning at a sixth-grade reading level and a fourth-grade math level (Parent Ex. E at p. 3). In addition, the January 2021 IEP indicated that the student was able to read with fluency, used decoding strategies and could answer comprehension questions in "full detail" (*id.*). The January 2021 IEP also reflected that the student was able to identify vocabulary words, provide definitions

§1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]). State guidance describes short-term instructional objectives as the "intermediate knowledge and skills that must be learned in order for the student to reach the annual goal" ("Guide to Quality [IEP] Development and Implementation," at pp. 37-38, Office of Special Educ. [Dec. 2010], available at <https://www.nysed.gov/sites/default/files/programs/special-education/guide-to-quality-iep-development-and-implementation.pdf>). According to the same State guidance, short-term instructional objectives break down the skills or steps necessary for a student to accomplish an annual goal into discrete components (see *id.*). Benchmarks are described as "major milestones that the student will demonstrate that will lead to the annual goal;" benchmarks "usually designate a target time period for a behavior to occur" and generally establish "expected performance levels that allow for regular checks of progress that coincide with the reporting periods for informing parents" of progress toward the annual goals (*id.*). "Short-term instructional objectives and benchmarks should be general indicators of progress, not detailed instructional plans, that provide the basis to determine how well the student is progressing toward his or her annual goal and which serve as the basis for reporting to parents" (*id.*).

and use the words appropriately in a sentence (id.). The January 2021 IEP reflected that the student's teacher reported that the student was able to communicate her wants and needs verbally throughout the day but "at times, need[ed] verbal encouragement to initiate conversations with her peers and staff members" (id. at p. 4). The student's teacher stated that she enjoyed "peer to peer interaction," was able to respond well to classmates during activities, and enjoyed speaking about a preferred topic (id. at p. 7). Additionally, the teacher stated that the student could independently complete routine classroom jobs or functional tasks in career readiness activities and was able to independently navigate through a familiar building such as school (id. at p. 6). The January 2021 IEP indicated that the student's occupational therapist reported that the student's attendance in school was a "barrier to her progress in occupational therapy," and the student would not actively participate in "ADLs at home," or in OT sessions with the new therapist (id. at p. 9).

The January 2021 CSE recommended the student's placement in a 12:1+1 special class in a specialized high school for instruction in English language arts (ELA), math, social studies, and science (each for five periods per week) (Parent Ex. E at p. 18). The January 2021 IEP also recommended the student receive related services consisting of one 30-minute session per week of counseling in a small group, two 30-minute sessions per week of individual OT, four 60-minute sessions per year of parent counseling and training in a group, individual nursing services as needed per week, two 30-minute sessions per week of speech-language therapy in a small group, and the support of a 1:1 daily part-time (80%) health paraprofessional (id. at p. 19). The January 2021 IEP indicated that the student was considered eligible for the New York State Alternate Assessment (NYSAA) and was working toward an IEP diploma with a Skills and Achievement Commencement Credential (id. at p. 2). The January 2021 IEP included a recommendation for 12-month services, wherein the student would receive the same program recommendations during July and August 2021 (id. at p. 20).

The January 2021 IEP included annual goals targeting the student's needs in the areas of prevocational training for post-secondary goals, reading, math, speech-language development, OT, and social/emotional/behavioral development (Parent Ex. E at pp. 13-18). In addition, the January 2021 IEP recommended program modifications, and accommodations including use of graphic organizers for written assignments, direct instruction with repetition of concepts, use of a calculator and the provision of five-minute breaks every 30 minutes (id. at p. 10).

The parent testified that during the period when the student was learning remotely due to school closure from the COVID-19 pandemic, she noted concerns about the student's physical and social/emotional skills (Tr. p. 220). The parent stated that the student "wouldn't leave the house," and "stopped moving, she stopped engaging," seemed depressed, and became frustrated very easily (Tr. pp. 220-21). The parent stated that she sought private PT for the student, and then "in the summer of 2021" had both a psychiatric/behavioral evaluation and neuropsychological evaluation conducted of the student (Tr. pp. 221-23; see Parent Exs. F; G).

The CSE convened on November 29, 2021 and reviewed updated evaluations of the student which included a September 2021 administration of the SANDI; a September 2021 Level I vocational assessment which included parent, student, and teacher surveys; classroom data/activities; performance task checklists; previous IEPs; progress notes; and the results from the August 2021 psychiatric/behavioral and neuropsychological evaluations provided to the district by the parent (Parent Ex. H at pp. 1-2).

The November 2021 IEP reflected the results of a September 2021 administration of the SANDI, in which the student did attain higher (by one or two points) scores in each subtest as compared to the September 2020 administration of the same assessment (compare Parent Ex. H at pp. 1-2 with Parent Ex. E at p. 2).

The November 2021 IEP also reflected the parent's concerns regarding the student's lack of "performance of skills performed in school at home," and lack of verbal communication skills, as the student had then-recently been refusing to speak at home and in the community (Parent Ex. H at p. 6). The parent also stated that she wanted the student to stop twirling pens/rubber bands (id.). The November 2021 IEP indicated that the "IEP Team" would be working on redirecting the student's focus away from these items (id.). The November 2021 IEP also noted that according to the parent, the student would not speak to her private, home-based ABA therapist and the parent requested that the district provide special education teacher support services (SETSS) at home for the student to generalize skills she displayed at school (id.). The parent specifically requested that a SETSS teacher work with the student on money skills, and to increase the speed with which she completed tasks (id.). On the September 2021 Level I vocational assessment, the parent indicated that in order to be successful in the future the student needed to develop skills related to decision making, listening without interrupting, everyday math, and time management (id.). The parent also noted that, at home, the student needed assistance for personal grooming, completing household chores, following daily schedules and preparing a meal; however, the parent also stated that the student had no responsibilities at home (id. at p. 3). The parent also expressed, at the CSE meeting, that she had concerns regarding the student's "mental and physical well[-]being" and that the student had started a new medication to treat her depression and it was "helping" (id. at pp. 10, 12).

The November 2021 IEP indicated that the student was making steady progress in class and in her related service therapy sessions (Parent Ex. H at p. 3). The IEP also included a report in the student's present levels of performance that the student "had been making great progress in all classroom and ADL activities, that she was able to complete her bathroom routine with little to no help, had progressed to walking around the classroom holding items with her hands, would take part in an activity with few to no prompts, would ask to go out with the snack cart, wanted to be the bank teller when students received their checks, and completed her job as a classroom folder monitor (id. at p. 6). The IEP noted that "n]ow that the student was attending school regularly she was making consistent progress toward her goals" (id. at p. 7).

In response to the information shared at the November 2021 CSE meeting, the CSE recommended the student begin receiving PT for two 30-minute sessions per week in a group of two, and that the recommended fulltime paraprofessional services be modified to a group of two, to foster independence (Parent Ex. H at pp. 9, 11, 23). The November 2021 IEP indicated that home-based SETSS was not recommended at that time as the student had been attending school regularly and making consistent progress toward her goals (id. at p. 7). The student's annual goals reflected both the parent's concerns as well as those of her teacher and related service providers. The November 2021 IEP included many goals previously listed on the January 2021 IEP, but also added PT goals (compare Parent Ex. E at pp. 12-18, with Parent Ex. H at pp. 13-22). In addition, the IEP noted that the student's 12:1+1 special class should include, among other things, "a community-based vocational training opportunity in areas that utilize and build upon the skills [the student] already ha[d]," as requested by her parent (Parent Ex. H at p. 14). The IEP stated the

student would continue to work in community-based learning programs in school that involved "coffee cart, snack cart, grub hub, money skills and an inventory training program" (*id.* at pp. 14-17, 19).

The parent testified that in "the fall of 2021" the student's depression and school attendance were improving but her adaptive functioning was still low and during September 2021 she was refusing to speak at home (Tr. pp. 236, 258). The parent noted that PT was added to the student's IEP in November 2021 but no additional changes were added as she was told that the student's needs could be accommodated in the classroom (Tr. p. 237). The parent also testified that the student attended a "Covid recovery" program two days after school during the 2021-22 school year which was "sort of enjoyable" for the student and that the student was attending school more regularly (Tr. pp. 257-58). The parent also indicated that the student attended school in-person for the entire 2021-22 school year and received all of her related services as set forth in the 2021-22 IEPs (Tr. p 260).

A follow-up psychiatric evaluation was conducted on January 13, 2022, a follow-up neuropsychological evaluation was conducted on January 27, 2022, and an FBA was completed on March 21, 2022 (Parent Exs. I; J; K).⁹ The parent testified that she had requested a behavior intervention plan (BIP) for the student and felt it would assist the student with "executive function skills, like focus and organization, with social etiquette skills . . . a whole list of things that she was having difficulty with," including writing and verbalization (Tr. p. 239). The March 2022 FBA identified the student's targeted behaviors as refusal to speak and task refusal including ignoring teachers' instructions, failure to initiate and complete tasks, verbal protest or refusal, tearing materials or disrupting others (Parent Ex. K at p. 1). The FBA narrative indicated that a BIP was not warranted at that time as the student's behaviors were easily able to be redirected in her then-current class environment, and after only a few prompts the student would comply with the task given and speak during the task given (*id.* at p. 7). The FBA further noted that the student's behavior did not impact everyone in the class, did not impact other classrooms or common areas, and no "seriously dangerous violent behavior" was present (*id.*).

⁹ The parent testified that the student had a follow-up neuropsychological evaluation in January 2022 and she gave the results to the district for consideration as the neuropsychologist's previous recommendations were still valid and a review of the record indicates that the neuropsychologist did repeat the same recommendations from the prior evaluation conducted in 2021 (Tr. pp. 239-240; compare Parent Ex. F at p. 10, with Parent Ex. J at p. 4). The neuropsychological evaluation report included recommendations for a small school setting and for a program where ABA would be provided along with supportive therapies, as well as a recommendation that the student's ABA trainer "implement an in-home program so that the interventions c[ould] continue with consistency at home" (Parent Exs. F at p. 10, Ex. J at p. 4). The parent also had an August 2021 psychiatric evaluation and a January 2022 update of that evaluation, with both evaluations recommending that the student receive home-based ABA services, identified as 10 hours per week of SETSS (Parent Exs. G at p. 5; I at p. 4). However, the evaluation report also indicated that the purpose of the home-based SETSS was for "generalization across individuals and settings" (Parent Ex. G at p. 5). As has been argued by the district, courts have indicated that school districts are not required, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (see, e.g., C.M. v. Mount Vernon City Sch. Dist., 2020 WL 3833426, at *21, *28 [S.D.N.Y. July 8, 2020]; F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K., 2016 WL 899321, at *8-*10).

A CSE convened on March 21, 2022 to review the results of the FBA and develop recommendations for the 2022-23 school year (Parent Ex. L). The March 2022 CSE developed an IEP for the student with an implementation date of April 4, 2022 (id. at p. 1). The March 2022 IEP indicated that in school, the student was making "slow but steady progress" in her adaptive skills (id. at p. 4). The IEP stated that the student was able to communicate her wants and needs in a low tone of voice to some extent and would gesture until prompted to "verbally speak up" but also noted that the student was able to initiate conversations with peers whenever she wanted and had no problem doing so if she felt like it (id.). The March 2022 IEP included a report on the student's speech-language skills which indicated that, in the past, the student was able to use full complex sentences, initiate and participate in collaborative conversations, and ask and respond to a variety of "wh" questions but at the time of the March 2022 CSE meeting the student exhibited speech that was low in tone, used simple sentences when responding to questions, and had demonstrated a decrease in participating in group discussions (id. at p. 5). The IEP noted that in recent months the student's speech had become more fluent, and while the student needed verbal prompting, she was becoming more aware and self-monitoring to correct any speech disfluencies (id.). The student also was self-correcting from observing the facial expressions of her listeners, seemed happier, and was initiating conversations and participating more during class activities (id.). With regard to physical development, the March 2022 IEP indicated that the student demonstrated poor postural control, weakness, and poor balance and coordination had difficulty transitioning from sitting to standing and lying to sitting, and although she could independently ambulate through the school environment, the student demonstrated a slow shuffling pattern and had difficulty ascending and descending stairs (id. at pp. 9-10). Further, the March 2022 IEP reflected that the student was able to negotiate bus stairs using a foot-to foot pattern and holding on to the rail, and find her seat and buckle her seat belt, but had difficulty due to strength and motor planning in opening classroom or hallway doors (id. at p. 10). However, according to the IEP, during the CSE meeting, the physical therapist noted that there had been improvement in the student's strength and mobility (id.).¹⁰

Overall, as described in detail above, the hearing record portrays a student who was not excelling within the school district. In particular, and consistent with the parent's argument, from the September 2020 to September 2021 testing, the student's scores on the SANDI stayed consistent (compare Parent Ex. H at pp. 1-2 with Parent Ex. E at p. 2). While the student's testing showed that the student was either consistent or regressing in some areas and the parent expressed valid concerns regarding the student's functioning at home, the information available to the November 2021 and March 2022 CSEs showed that the student's performance was varied. For example, while the March 2022 IEP noted that the student's language skills were previously more developed than they were at the time of the meeting, the IEP also noted that the student's speech had become more fluent over the past three months further indicating that a reason for this may have been the student's increased awareness and self-monitoring (Parent Ex. L at p. 5). During the hearing, the district pointed towards the student's progress toward her annual goals, which as described above was limited, but focused on the appropriateness of the educational program (see Dist. Closing Br.). However, as discussed above, the parent has not raised any specific challenge

¹⁰ The hearing record indicates that the district continued to offer placement for the student at the district specialized high school for the 2022-23 school year and that the student stopped attending in January 2023 (Parent L at p. 1; Dist. Exs. 3 at p. 1; 4 at p. 1).

to the IHO's determination that there were no procedural or substantive defects in the January 2021, November 2021, or March 2022 CSE meetings or IEPs (IHO Decision at p. 18; Req. for Rev. at p. 6). Accordingly, while the student's lack of progress in the district is concerning and, while the result may have been different had there been additional allegations raised on review as to specific programming decisions made by the district or a lack thereof, the parent has not presented a sufficient basis on appeal for finding that the district's programs for the 2021-22 and 2022-23 school years were not reasonably calculated to provide the student with an educational benefit in light of her circumstances.

C. Compensatory Education and Other Relief

Turning to relief for the 2023-24 school year, the IHO found that the district conceded that it did not offer the student a FAPE for the 2023-24 school year and the district has not cross-appealed from that determination. I turn now to the appropriate relief for the district's failure to offer the student a FAPE for the 2023-24 school year.

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 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"]).

The IHO awarded the parent 147 hours of compensatory education consisting of 42 hours of speech-language therapy, 42 hours of OT, 42 hours of PT, and 21 hours of counseling to remedy the district's failure to offer the student a FAPE for the 2023-24 school year (IHO Decision at pp. 24, 26). The IHO's award appears to represent a 42-week, 12-month school year and includes only the related services recommended in the student's March 2022 IEP (Parent Ex. L at p. 24).

In her appeal, the parent requests compensatory ABA therapy, related services, an IEP recommending a nonpublic school placement and 15 hours per week of home-based ABA, parent counseling and training, and eight hours per month of ABA supervision.

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

The hearing record indicates that the district completed a reevaluation of the student after the impartial hearing began and a CSE convened on November 9, 2023 to develop an IEP for the student with an implementation date of November 23, 2023 (Dist. Ex. 2 at pp. 1, 23, 26). The November 2023 IEP indicated that the student was 20 years old and continued to be enrolled at the district specialized high school (*id.* at p. 1). The November 2023 CSE recommended the student attend an 8:1+1 special class with eight periods per week of ELA and math and five periods per week of social studies and sciences (*id.* at p. 16). The November 2023 CSE also recommended one 30-minute session per week of counseling in a group of three, two 30-minute sessions per week of OT in a group, two 60-minute sessions per year of parent counseling and training, two 30-minute sessions per week of PT in a group of two, and two 30-minute sessions per week of speech-language therapy in a group of three (*id.* at pp. 16-17). The November 2023 CSE recommended 12-month services, special transportation, and indicated that the student would participate in an alternate assessment (*id.* at pp. 18, 21, 22-23). The November 2023 IEP further indicated that the CSE had considered and rejected a 12:1+1 special class because the student required a more structured learning environment with an emphasis on functional academics and vocational training to support her due to her evidenced deficits in ELA, math, communication skills, fine motor skills, gross motor skills, daily living skills, and vocational skills (*id.* at p. 25). The November 2023 IEP also noted that the CSE recommended an 8:1+1 special class because the student's cognitive abilities and social adaptive skills met the criteria for the program and that there had been regression regarding her academic skills which would be supported by the class size (*id.*).

Review of the November 2023 IEP demonstrates that the district was attempting to address the student's regression that the district attributed to her removal from school by the parent during the 2022-23 school year. Overall, review of what took place during the 2023-24 school year does not warrant an additional compensatory award and there is insufficient basis to disturb the IHO's compensatory education award.

Turning to the parent's request for a prospective placement for the student for the current school year, generally, a parent's request to prospectively place students in a particular type of program and placement through IEP amendments can, under certain circumstances, have 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"]. This is particularly so when the school year at issue is over and, in accordance with its obligation to review a student's IEP at least annually, a CSE should have already produced an IEP for the following school year, which has not been the subject of a due process proceeding (see also 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 year]).

At the time of the IHO decision in September 2024, the 2023-24 school year at issue had ended and presumably the CSE had an opportunity to craft an IEP to address the student's needs for the 2024-25 school year (see also 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 year]). Although the November 2023 IEP may be effective for a portion of the 2024-25 school year, the parent has not challenged the November 2023 IEP in this proceeding, and the parent's amended due process complaint notice limited the allegations to the 2021-22, 2022-23, and 2023-24 school years (see generally Parent Ex. A). Further, the hearing record does not support finding that a nonpublic school placement and a home-based program of ABA therapy, parent training, and ABA supervision are an appropriate manner of addressing the student's needs going forward.

Nevertheless, the student is entitled to services until her 22nd birthday (see A.R. v. Connecticut State Board of Education, 5 F.4th 155 (2d Cir. 2021), and the New York State Education Department's (NYSED's) Office of Counsel's Formal Opinion No. 242 (July 2023), available at <https://www.counsel.nysed.gov/sites/counsel/files/242.pdf>) and the district should reconvene the CSE and develop a program for the student for the 2024-25 school year to the extent that it has not already done so. In the event that the parent disagrees with the recommended programming for the 2024-25 school year, the appropriate course is to challenge the district's recommended programming for the 2024-25 school year in separate proceeding. Accordingly, the hearing record does not support modifying the student's educational program for the current school year based on the parent's allegations related to the 2021-22, 2022-23, and 2023-24 school years.

VII. Conclusion

In summary, the IHO correctly determined that the district offered the student a FAPE for the 2021-22 and 2022-23 school years. The IHO awarded an appropriate amount of compensatory education to remedy a denial of a FAPE to the student for the 2023-24 school year. However, the IHO erred in determining that the student was not eligible for IDEA services after she turned 21 years old.

I have considered the parent's remaining contentions and find they are without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated September 4, 2024, is modified by reversing that portion which found the student was not eligible for IDEA services after turning 21 years of age.

Dated: **Albany, New York**
 February 5, 2025

STEVEN KROLAK
STATE REVIEW OFFICER