The University of the State of New York

The State Education Department
State Review Officer
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No. 25-123

Application of a STUDENT WITH A DISABILITY, by his 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:
The Law Office of Elisa Hyman, P.C., attorneys for petitioner, by Erin O'Connor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, 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 denied her request that respondent (the district) continue funding the cost of her son's private services delivered by Project CaLi Licensed Behavior Analysis, PLLC (Project CaLi) for the 2024-25 school year. The district cross-appeals, contending that the IHO erred in reviewing the parent's request for relief under a compensatory education framework and in ordering relief which the parent did not request. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the student's educational history will not be recited here in detail. At all relevant times, the student was eligible for special education as a student with autism (see Parent Ex. J at pp. 1-2).[1]

[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]).

In December 2023, the student underwent a private neuropsychological evaluation at his parents' request (Parent Ex. D at p. 1). In January and February 2024, the district conducted a classroom observation and a vocational interview of the student (Parent Exs. F; G).

On April 2, 2024, a CSE convened for a meeting and developed an IEP for the student, in which the CSE recommended 12-month services to be implemented at a district non-specialized public school (Parent Exs. J at pp. 2, 20, 25, 27; see Parent Ex. H at p. 1).[2] The April 2024 CSE recommended that, between April 3, 2024 and June 26, 2024, the student attend a 12:1+1 special class for math, English language arts (ELA), and social studies, as well as two 40-minute sessions per week of occupational therapy (OT) in a group setting (Parent Ex. J. at pp. 18-19).[3] The CSE recommended that, beginning on September 5, 2024, the student attend a 15:1 special class for math, ELA, social studies, and science, as well as three 40-minute sessions per week of group OT (id. at p. 19).[4] Additionally, the CSE recommended that, beginning on April 3, 2024, the student receive two periods per week of adapted physical education; one 40-minute session per week of group counseling; two 40-minute sessions per week of group speech-language therapy; and two 40-minute sessions per week of individual speech-language therapy (id. at pp. 18-20). The CSE also recommended that the parent be provided with three 60-minute sessions per year of parent counseling and training (id. at p. 19). Finally, the CSE recommended that the student receive assistive technology, consisting of a laptop with specified software and wireless headphones, to be used both at home and at school; and testing accommodations including extended time, breaks, separate location, use of a calculator, revised test directions, and revised test format (id. at pp. 20-22).[5]

On April 8, 2024, the parent sent an email to a district representative in which she conveyed disagreement with certain content of the April 2024 IEP (see Parent Ex. I). More specifically, the parent expressed concern over purported inaccuracies in the IEP's description of the student, the student's educational program, and the parent's openness to alternative placement options (see id.).

On July 2, 2024, the parent signed a contract with Project CaLi, a private agency providing applied behavior analysis (ABA) services, under which Project CaLi agreed to deliver the following services: 35 hours per week of school-based ABA therapy; 15 hours per week of home-based ABA therapy; supervision from a Board Certified Behavior Analyst (BCBA) for four hours

[2] Although the CSE meeting took place on April 2, 2024, the first page of the subject IEP indicated, in an apparent typographical error, that the projected implementation date was April 3, 2023 (Parent Ex. J at pp. 2, 25). The IEP elsewhere indicated that services would have begun on April 3, 2024 (id. at pp. 18-20).

[3] The April 2024 IEP twice included a recommendation for a 12:1+1 special class in social studies beginning on April 3, 2024 (Parent Ex. J at p. 18). Given the recommendation for a special class in science beginning September 5, 2024 and a science annual goal, it is likely that one of the aforementioned social studies classes was intended to be for science (id. at pp. 13, 19).

[4] The IEP recommended that the student's OT be increased from two sessions per week to three sessions per week beginning on July 5, 2024 (Parent Ex. J at p. 19).

[5] The IEP admitted into evidence as a part of Parent Exhibit J reflects revisions, made in or around May 2024, which, according to the parent, changed the recommended testing accommodations (see Parent Exs. J at p. 1; N ¶ 24). The original April 2024 IEP was not offered for admission into evidence.

per month; and one hour per week of parent counseling and training (Parent Exs. L at pp. 1, 4; O ¶ 11). Under the contract's terms, the parent would be "financially responsible for the cost of all services rendered by Project CaLi" at a rate of $250.00 per hour (id. at p. 1).

During the 2024-25 school year, the student attended ninth grade at a district public school, where he received the related services of OT, speech-language therapy, and counseling through the district (see Parent Exs. H at p. 1; M at p. 1; N ¶¶ 30-31, 42, 45; O ¶ 94). Project CaLi provided the following additional services during the 2024-25 school year: 30 hours per week of school-based ABA therapy during the 2024 summer session; 32.5 hours of school-based ABA during the 10-month school year; 15 hours per week of home-based ABA therapy; four hours per week of BCBA supervision; and one hour per week of parent counseling and training (see Parent Exs. M at p. 1; O ¶ 95).

A. Due Process Complaint Notice

In a due process complaint notice dated July 1, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (Parent Ex. A at pp. 1-2, 12-14, 17). The issues raised in the parent's due process complaint notice generally fall into the following categories: alleged illegal policies, procedures, and practices by the district, including violations of section 504 of the Rehabilitation Act; procedural flaws in the development of the April 2024 IEP, including alleged insufficiency of the evaluative information that the April 2024 CSE relied on; and substantive deficiencies in the April 2024 IEP itself (see id. at pp. 1-2, 12-16). The parent invoked pendency based on a prior, unappealed IHO's decision (id. at p. 17). As relief, the parent requested "[c]ompensatory education to make up for . . . any failure [by the district] to implement pendency and to provide a FAPE . . . for the 2024-25 school year," as well as for direct/prospective payment or reimbursement for the program described as follows: 12-month extended school year; 35 hours per week of 1:1 ABA therapy, pushed into the student's current placement; 15 hours per week of 1:1 ABA support afterschool or at home; one hour per week of parent counseling and training by an LBA/BCBA; two hours per week of BCBA supervision; two hours per week of BCBA programming; five 60-minute sessions per week of individual speech-language therapy; three 30-minute sessions per week of individual OT; two 30-minute sessions per week of OT in a group of two; and one 30-minute session per week of counseling in a group of six; and assistive technology devices and software for use at school and at home (id. at pp. 17-18).[6]

B. Impartial Hearing and Impartial Hearing Officer Decision

An IHO from the Office of Administrative Trials and Hearings (OATH) was appointed to preside over the matter (see Tr. pp. 1-2). Following a prehearing conference, an impartial hearing convened on September 23, 2024 and concluded the same day (see Tr. pp. 1-144). The district presented no documentary evidence or witness testimony (see Tr. pp. 19, 30). The parent presented various exhibits, all but one of which the IHO admitted into evidence (see Tr. pp. 20-21, 28-29;

[6] Specifically, the parent requested a Microsoft Surface laptop, wireless headphones, and certain software applications (Parent Ex. A at p. 18).

Parent Exs. A-J; L-O).[7] The parent's exhibits included testimony by affidavit from the co-owner of Project CaLi, who provided part of the student's BCBA supervision, and the parent herself (Parent Exs. N; O). Both affiants appeared for cross-examination during the impartial hearing (see Tr. pp. 21-48, 50-71).

During the impartial hearing, the parent requested an order from the IHO providing that the student's program shall include "a 12-month extended school year," "32.5 hours per week of one-to-one ABA therapy pushed into [the student]'s current public school placement, 15 hours per week of one-to-one ABA [therapy] as part of an extended day program provided at home," "one hour per week of parent training and counseling, two hours per week of BCBA program supervision, speech and language therapy five times per week for 60 minutes on an individual basis," OT "five times per week for 30 minutes on an individual basis, counseling once per week for 30 minutes," "continued provision of working and functioning assistive technology hardware," including a Microsoft Surface laptop, an iPad with Proloquo2go applications, and wireless headphones, "to be used at home and school," and continued software services (Tr. 141-42; see Tr. p. 34).[8]

In a decision dated January 15, 2025, the IHO found that the district, having introduced no evidence during the impartial hearing, failed to meet its burden of proving that it offered the student a FAPE for the 2024-25 school year (IHO Decision at p. 8). Having determined that the district denied the student a FAPE for the 2024-25 school year, the IHO then determined the appropriate relief to be awarded, using a compensatory education approach (see id. at pp. 8-20).

According to the IHO, compensatory relief was, indeed, appropriate but continuation of the student's then-current placement, as per the parent's request, was not (see IHO Decision at pp. 16-20). The IHO reasoned that the student's public school placement was inconsistent with the recommendation of the neuropsychologist who evaluated the student in 2023 for a "small, structured private school program with access to highly trained teachers experienced with students with similar cognitive profiles[] and . . . full-day multi-sensory supports integrated throughout the curriculum" (id. at pp. 5, 16-17).[9]

In determining that a modification to the parent's requested relief was necessary, the IHO noted that the relief the parent requested was inconsistent with the parent's due process complaint notice and that the parent's due process complaint notice was "confusing, lengthy, repetitious and redundant" containing "numerous, repeated boilerplate allegations" regarding matters outside of the IHO's jurisdiction (IHO Decision at p. 18). The IHO explained that she advised the parties, during the prehearing conference, that "an IHO lacks jurisdiction over [systemic] complaints[] and

[7] Proposed Parent Exhibit K was withdrawn (Tr. p. 28).

[8] The parent requested the following software in the due process complaint notice and during the impartial hearing: Read&Write; Fast ForWord; Raz-Kids; Google Docs; TypingClub, School Edition; WordQ 5; and Inspiration 10 (compare Parent Ex. A at p. 18, with Tr. p. 142).

[9] The IHO noted that, according to the evidence in the hearing record, the CSE considered placing the student in the district's Academics, Career, and Essential Skills (ACES) Program; but the parent "wanted to continue [the] [s]tudent's current program" (IHO Decision at p. 17).

that any claims under [s]ection 504 of the Rehabilitation Act can be satisfied by IDEA-based remedies" (id.). The IHO then noted that parent's counsel ignored the IHO's determination and "included lengthy, rote recitations about such claims during closing arguments, even though such recitations contained minimal reference to any evidence actually presented" (id.). According to the IHO a more suitable request for relief "would have been to seek a full time placement for [the s]tudent based on the Neuropsychologist's recommendations" (id. at p. 19).

The IHO then turned to the parent's request for prospective placement of the student and determined that the student's April 2024 IEP was then still in effect and, accordingly, a prospective order changing the student's IEP was not inappropriate (IHO Decision at p. 20).

Thus, the IHO ordered the district to convene a CSE to review the 2023 neuropsychological evaluation report, entered into evidence as Parent Exhibit D, and develop a 12-month program for the student, described as follows: full-time placement in a small class setting "with instructors and therapists trained and experienced with students with autism spectrum disorder, language impairments, and social-pragmatic impairments, and with access to full-day multi-sensory supports integrated throughout the curriculum;" related services of OT and speech-language therapy; and parent counseling and training "from an appropriately licensed provider" (IHO Decision at pp. 20-21). The IHO further ordered the district to defer the student's revised IEP to its Central Based Support Team (CBST) to "locate an appropriate non-public school program that can implement the revised IEP" (id. at p. 21).

As for the ABA component of the student's then-current program, the IHO expressed concern that the parent's BCBA witness, the co-owner of Project CaLi, could not explain the way in which one-to-one ABA therapy helped the student gain independence (IHO Decision at p. 14). The IHO expressed particular concern with the BCBA's admission that Project CaLi did not have a long-term plan to reduce the student's dependence on one-to-one prompting (id.). Considering the BCBA's testimony and the relief requested, the IHO concluded that the BCBA had an interest in the outcome of the case and declined to give her testimony "significant weight" id. at pp. 14-15). Considering Project CaLi's interest in the outcome of the case, the total cost of their services for the 2024-25 school year, and the parent's failure to "proactively" seek a placement that aligned with the neuropsychologist's recommendations, the IHO declined to order continued funding of the student's services from Project CaLi (see id. at pp. 15-17, 20-22).[10]

Instead, the IHO ordered that the district shall have the option to either provide the following compensatory services or fund the same services from a provider of the parent's choice: up to 35 hours per week of school-based 1:1 ABA therapy; up to 15 hours per week of home-based ABA therapy; up to one hour per week of home-based parent counseling and training; and up to four hours per month of BCBA supervision and treatment planning (IHO Decision at pp. 16, 21).[11]The aforementioned compensatory services would begin on July 1, 2024 and continue "until

[10] While the IHO did not make determinations under the Burlington/Carter framework, the IHO discussed factors that relate to the appropriateness of Project CaLi's services and equitable considerations (see IHO Decision at pp. 14-16).

[11] The IHO's order provided that the "parent shall co-operate with the [district] and any provider sourced by the [district]; but, if the district did not identify a provider "within 60 days of implementation of [the IHO's] order,"

the [s]tudent [wa]s placed in a full-time nonpublic school" program that could implement the revised IEP (id. at p. 21). The IHO ordered that, if any compensatory services were delivered by a provider of the parent's choice, payment to that provider would be conditioned on submission to the district's Implementation Unit of an itemized invoice; an affidavit of the service provider "attesting to the provider's qualifications and the exact date and time that each of the billed services were provided to the [s]tudent;" and "a report of [the] [s]tudent's progress with respect to any hours implemented over the period invoiced, [with] such progress reports to be delivered simultaneously to the CSE" (id.). Finally, the IHO ordered that any payment to a provider of the parent's choice shall reflect "the market rate of the applicable provider[,] consistent with the rates paid by the Implementation Unit to provider(s) of substantially similar services pursuant to hearing orders within the year preceding the delivery of such services" (id. at p. 22).

The IHO denied "any relief not specifically discussed" therein; and dismissed any "remaining claims not discussed" therein (IHO Decision at p. 20).[12]

IV. Appeal for State-Level Review

The parent appeals, contending that the IHO erred by ordering changes to the student's program; by deferring decisions regarding the student's educational program back to the CSE and CBST; by terminating the student's speech-language therapy, OT, and assistive technology services; by placing arbitrary conditions on payment for any ABA services delivered by a provider of the parent's choice; and by placing arbitrary limitations on the rate of funding for any ABA services delivered by a provider of the parent's choice. The parent argues that, by faulting the parent for failing to place the student in the district's ACES program or the neuropsychologist's recommended program, the IHO improperly shifted the burden to the parent to establish an appropriate remedy for the district's denial of a FAPE. According to the parent, the student's ABA program was not a unilateral placement and, as such, the IHO should have continued the student's entire program without any showing from the parent. Regarding the change to the student's placement, the parent further argues that the hearing record includes no evidence that an approved nonpublic school would align with the neuropsychologist's recommendations, meet the student's needs, and have a seat available for the student in the middle of the school year. Regarding the IHO's order for compensatory ABA services, the parent further argues that the student would likely have no ABA provider for two months while the district tries to find a provider. Additionally, the parent contends that the IHO should have ordered compensatory relief for the district's failure to provide the student with a working laptop in accordance with his assistive technology mandate. Finally, the parent contends that the IHO erroneously denied the parent's section 504 claims without considering their merits. The parent requests an order, reversing the IHO's order and providing that the programming the student was receiving continue or, at a minimum, that Project CaLi may continue providing ABA services until such time as the district secures a provider.

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the parent would be permitted to "select a provider of [her] choice" (IHO Decision at p. 21).

[12] The parent asserted that the district committed systemic violations of the IDEA and of section 504 of the Rehabilitation Act of 1973 (section 504) (Parent Ex. A at p. 15).

The district cross-appeals, contending that the IHO erred in reviewing the parent's claims under a compensatory education framework, rather than applying the Burlington/Carter three-part test, and that the parent failed to establish entitlement to relief under the Burlington/Carter framework. In its answer and cross-appeal, the district agrees that the IHO should not have ordered the district to reconvene a CSE meeting or defer the student's case to the CBST, arguing that the parent did not request such relief in her due process complaint notice and that such an order improperly "circumvents the CSE's role" (Answer & Cr.-Appeal ¶ 21). The district also contends that, to the extent the parent seeks a declaration specifying the student's program going forward, such relief is improper, "as it effectively seeks an IEP amendment" (id. ¶ 22). Finally, the district asserts that SROs lack jurisdiction to review section 504 claims. The district requests an order, reversing the IHO's order and denying or, at least, reducing the requested relief.

The parent interposed an answer and reply to the district's answer and cross-appeal, arguing that the IHO's use of a compensatory education analysis should be upheld. The parent further argued that, in any event, she established her entitlement to relief under the Burlington/Carter framework. The parent acknowledged that SROs lack jurisdiction to review section 504 claims, indicating that she raised the issue for exhaustion purposes.[13]

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

[13] An SRO lacks jurisdiction to consider a parent's challenge to an IHO's finding or failure or refusal to rule on section 504, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, as the district asserts and the parent acknowledges, an SRO lacks jurisdiction to review any portion of the parent's claims regarding section 504 and, accordingly, such claims will not be further addressed.

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]).[14]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

Initially, I note that neither party has appealed the IHO's determination that the district denied the student a FAPE for the 2024-25 school year. Accordingly, that 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]).

In addition, generally, both parties appeal from the IHO's order directing the CSE to reconvene, review the December 2023 neuropsychological evaluation, and develop an educational program for the student with specific requirements including a deferral for placement in a nonpublic school. While the district objects to an order of prospective relief, the parent contends that the IHO erred in declining to order continuation of the student's pendency program, inclusive of ABA services, the program the parent requested in the due process complaint notice (see Tr. pp. 33-34, 141-42; Parent Ex. J at pp. 18-20; Rev. for at pp. 3-4, 10.) An award of prospective relief in the form of IEP amendments, including prospective placement in a nonpublic school, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the

[14] 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).

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, 2008 WL 4890440, at *16 [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"]). Such an award is appropriate only in rare cases (see Connors v. Mills, 34 F.Supp.2d 795, 799, 804-06 [N.D.N.Y. Sept. 24, 1998] [noting that prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate"]).

In this instance, and at this point of the proceeding, the 2024-25 school year at issue has ended; and, presumably, the CSE should have convened to craft an IEP to meet the student's needs for the 2025-26 school year (see Parent Ex. J at p. 2). Accordingly, there is no basis to award prospective relief in this case (see 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]). If "the parent disagrees with the recommended programming for the 20[25-26] school year, the appropriate course would be to begin a new impartial hearing" (Application of a Student with a Disability, Appeal No. 23-010).

1. Legal Standard

Before reaching the merits, I must address the appropriate legal standard for assessing the parent's entitlement to relief. As indicated above, the district contends that the IHO should have applied the Burlington/Carter three-part test, while the parent contends that the IHO's compensatory education analysis should be upheld. The district argues that the parent unilaterally obtained ABA services from Project CaLi, having entered into a contract with said provider, and, as such, the IHO should have applied the Burlington/Carter three-part test. Conversely, the parent argues that she was not seeking tuition reimbursement for a unilateral placement and that the district has consented to the student's ABA services by operation of law as a part of the student's last agreed upon program.

In this case, the parent did not unilaterally place the student in a nonpublic school and seek tuition reimbursement as a remedy for the district's failure to offer the student a FAPE for the 2024-25 school year. Instead, as a self-help remedy, the parent supplemented the recommended programming with private services that she unilaterally obtained for the student without the consent of school district officials and then commenced due process to obtain remuneration for the cost thereof (see Parent Exs. A at pp. 16-18, L at pp. 1, 4).[15] Accordingly, the issue in this matter is whether the parent is entitled to public funding of the cost of those private services.

[15] The parent seems to conflate the district's obligation to fund pendency services with consent to the parent's procurement of private ABA services, as a self-help remedy, for the 2024-25 school year (see generally T.M., 752 F.3d at 170-71 [holding that the IDEA's pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]). The district is not a party to the parent's

The Second Circuit has determined that parents who think that a school district "has failed to offer their child a FAPE . . . may pay for private services, including private schooling" (T.M., 752 F.3d at 152 [emphasis added]) and then "obtain retroactive reimbursement from the school district[,] after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020]; see also L.J.B v. North Rockland Cent. Sch. Dist., 2024 WL 1621547, *5 [S.D.N.Y. Apr. 15, 2024], quoting Ventura de Paulino, 958 F.3d at 526 ["Parents who are dissatisfied with their child's education can . . . pay for private services, including private schooling" and "obtain retroactive reimbursement . . . if they satisfy . . . the Burlington-Carter test"]). Through such language, the Second Circuit Court of Appeals has implicitly noted that applicability of the Burlington/Carter standard is not limited to requests for private school tuition reimbursement.

Moreover, the most defining factor that has arisen in disputes over the appropriate category of relief and the standards attendant thereto is whether the parent engaged in self-help and obtained relief contemporaneous with the violation and then sought redress through a due process proceeding (i.e., the Burlington/Carter scenario) or whether the relief is prospective in nature with the purpose to remedy a past harm (i.e., compensatory education). In the former, the parent has already made decisions unilaterally, without input from the district, and, therefore, must bear a burden of proof regarding those services. For prospective compensatory education ordered to remedy past harms, relief may be crafted to be delivered in the future with protections to avoid abuse and to promote appropriate delivery of services. While some courts have fashioned compensatory education to include reimbursement or direct payment for educational expenses incurred in the past, those cases are in jurisdictions that place the burden of proof on all issues at the hearing on the party seeking relief, namely the parent, making the distinction between the different types of relief perhaps less consequential (Foster v. Bd. of Educ. of the City of Chicago, 611 Fed App'x 874, 878-79 [7th Cir. 2015]; Indep. Sch. Dist. No. 283 v. E.M.D.H., 2022 WL 1607292, at *3 [D. Minn. 2022]). In contrast, under State law in this jurisdiction, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F., 746 F.3d at 76; R.E., 694 F.3d at 184-85). Treating the requested relief as compensatory education is problematic in that it places the burden of production and persuasion on the district to establish appropriate relief when the parent has already unilaterally chosen the provider, obtained the services, and is the party in whose custody and control the evidence necessary to establish appropriateness resides.

Based on the foregoing, I find that the IHO should have applied the Burlington/Carter three-part test to assess whether the parent was entitled to public funding of the cost of the ABA services delivered by Project CaLi. However, before assessing the parent's entitlement in that

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contract with Project CaLi (see Parent Ex. L at pp. 1, 4); and, while the hearing record reflects the district's agreement to fund ABA services as a part of the student's pendency program, there is no indication that the district consented to the parent's procurement of private services to remedy the district's failure to offer the student a FAPE for the 2024-25 school year (see Tr. pp. 22-28; Parent Ex. O ¶ 95; IHO Decision at p. 13 n.51).

regard, I must address another preliminary matter, that is, whether the passage of time has rendered the parent's request for relief moot.

2. Mootness

Based on the facts of this case and the length of time it took to reach this point in the proceeding, I find that it is unnecessary to review whether the ABA services that the parent unilaterally obtained from Project CaLi were appropriate or whether equitable considerations warrant a reduction in relief, as the district has already funded, or at least is obligated to fund, the requested ABA services pursuant to pendency. In other words, there is no longer a live controversy.

A dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007).

While a student is entitled to remain in his or her stay-put placement during the pendency of a proceeding, this statutory protection is similar to preliminary injunctive relief, as it protects the student while the proceedings are pending and is distinct from the ultimate relief available to a parent through the due process proceedings (20 U.S.C. § 1415 [j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]). In this case, however, the parent requested the services the student received as pendency during the proceeding as the ultimate relief for the district's denial of a FAPE for the 2024-25 school year; a pendency agreement was in place as of September 4, 2024, with the district agreeing to the student's pendency program based on an unappealed April 22, 2023 IHO decision retroactive to the filing of the due process complaint notice on July 1, 2024; the parent's request for review does not allege a failure to implement pendency; and, during the pendency of this appeal, both counsel for the parent and counsel for the district represented, in correspondence to this office requesting extensions, that the student was receiving pendency services (see Tr. pp. 15, 22-28, 33-34, 141-

42; Parent Exs. A at p. 17; O ¶ 95; Pendency Implementation Form).[16] Accordingly, the student has received all of the ABA services sought in this proceeding, under pendency, for the entirety of the 12-month 2024-25 school year and beyond April 2025, the time for developing a new IEP (Parent Ex. J at p. 2).

Nevertheless, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Toth, 720 Fed. App'x at 51; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040). The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and it is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88). Many IEP disputes escape a finding of mootness due to the short duration of the school year facing the comparatively long litigation process (see Lillbask, 397 F.3d at 85). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; Toth, 720 Fed. App'x at 51; see Hearst Corp., 50 N.Y.2d at 714-15). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet, 260 F.3d 114, 120 [2d Cir. 2001]). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; but see A.A., 2017 WL 2591906, at *7-*9 [finding that the controversy as to "whether and to what extent the [s]tudent can be mainstreamed" constituted a "recurring controversy [that] will evade review during the effective period of each IEP for the [s]tudent"]; see also Toth, 720 Fed. App'x at 51 [finding that a new IEP that did not include the service requested by the parent established that the parent's concern that the prior IEP would be repeated was not speculative and the "capable of repetition, yet evading review" exception to the mootness doctrine applied]).

Some courts have taken a dim view of dismissing a Burlington/Carter reimbursement case as moot because all of the relief has been obtained through pendency (New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at *2 [S.D.N.Y. Dec. 4, 2012]; New York City Dep't of Educ. v. V.S., 2011 WL 3273922, at *9-*10 [E.D.N.Y. Jul. 29, 2011]), while others have found it an acceptable manner of addressing matters in which the relief has already been realized through pendency (see V.M., 954 F. Supp. 2d at 119-20 [explaining that claims seeking changes to the

[16] The hearing record reflects minor discrepancies between the pendency mandate, the parent's request for ultimate relief, and the services the student actually received in terms of the frequency of in-school ABA therapy and BCBA supervision (see Tr. pp. 33-34, 141-42; Parent Exs. A pp. 10, 17; O ¶ 95; Req. for Rev. at pp. 3-4). Pertinently, the co-owner of Project Cali testified that the student received less than the 35 hours per week of in-school ABA services because the student's school day was only 30 hours per week over the summer and 32.5 hours per week over the course of the 10-month school year (Parent Ex. O ¶ 95). Additionally, the request for review raises no concern with the frequency of the services provided under pendency and, instead, requests continuation of the program the student "was receiving under pendency" (Req. for Rev. at pp. 3-4, 10). As such, any minor discrepancies between the pendency program and the program the student received will not be further reviewed on appeal (see 8 NYCRR 279.8[c][4] [providing 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"]).

student's IEP/educational programing for school years that have since expired are moot, especially if updated evaluations may alter the scrutiny of the issue]; Thomas W. v. Hawaii, 2012 WL 6651884, at *1, *3 [D. Haw. Dec. 20, 2012] [holding that once a requested tuition reimbursement remedy has been funded pursuant to pendency, substantive issues regarding reimbursement become moot, without discussing the exception to the mootness doctrine]; F.O., 899 F. Supp. 2d at 254-55; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011]; M.S., 734 F. Supp. 2d at 280-81 [finding that the exception to the mootness doctrine did not apply to a tuition reimbursement case and that the issue of reimbursement for a particular school year "is not capable of repetition because each year a new determination is made based on [the student]'s continuing development, requiring a new assessment under the IDEA"]).

Initially, review of the district court decision in V.S., shows that matter was determined not to be moot because a decision as to the adequacy of the proposed IEP in that matter would have supplanted the student's then-current pendency placement in that matter and established a new educational placement for the student (V.S., 2011 WL 3273922, at *10). However, in this matter, neither party has appealed from the IHO's determination that the district failed to offer the student a FAPE for the 2023-24 school year (see IHO Decision at pp. 18, 31). Accordingly, there can be no pendency changing determination in this proceeding and there is no further relief that could be addressed in this matter that is ongoing and remediable.

Additionally, the capable of repetition yet evading review exception to mootness would not apply because the conduct complained of—the district's failure to offer the student a FAPE—is no longer at issue in this proceeding. Rather, the parties' dispute centers around the particular services that the parents obtained, as self-help, to remedy the district's denial of a FAPE to the student. As the FAPE determination has already been addressed and the only issues that relate to the appropriateness of unilaterally obtained services and the weighing of equitable considerations, any parental concern that the district would continue to recommend the same program is not addressable at this level of the proceeding and cannot be used to justify a finding that the matter is "capable of repetition, yet evading review." While the Second Circuit has noted that "IEP disputes likely satisfy the first factor for avoiding mootness dismissals" because "judicial review of an IEP is 'ponderous'" (Lillbask, 397 F.3d at 87), this does not seem to be a concern in this matter as the IEP dispute has been removed. Without an IEP dispute, the question of the appropriateness of unilaterally obtained services could be made in a much shorter time frame. More pertinently, however, there is no district action "capable of repetition, yet evading review, "as there is no longer a dispute regarding the student's educational programming. As such, the issue of whether a unilateral placement is appropriate, unlike FAPE, does not fit into the mootness exception as it is not capable of repetition yet evading review.

Based on the foregoing, no meaningful relief may be granted except to the extent indicated below.

B. Compensatory Relief – Assistive Technology

As indicated above, the parent contends that the IHO should have ordered compensatory relief for the district's failure to provide the student with a working laptop in accordance with his assistive technology mandate. The district's answer and cross-appeal is not responsive in that regard. Compensatory education is an equitable remedy that is tailored to meet the unique

circumstances of each case (see Wenger v. Canastota, 979 F. Supp. 147, 151 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [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"]).

While some courts have held that compensatory education is not available as an additional or alternative remedy when reimbursement for the costs of a unilateral placement is also at issue for the same time period (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]), the Second Circuit Court of Appeals has not directly addressed this question and, generally, appears to have adopted a broader reading of the purposes of compensatory education than the Third Circuit (compare P.P., 585 F.3d at 739 [finding that "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education"], with E. Lyme, 790 F.3d at 456-57 [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]). Unlike the Third Circuit, the Second Circuit's approach to compensatory education thus far may have left room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but the parent's request for tuition reimbursement is denied under a Burlington-Carter analysis (see Application of a Student with a Disability, Appeal No. 16-050), or where a student is unilaterally placed but additional related services are required in order for the placement to provide the student with a FAPE (see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at *5–7 [S.D.N.Y. Aug. 17, 2022] [finding that awards of tuition reimbursement and compensatory education are not

mutually exclusive and that an award of "both education placement and additional services may be necessary to provide a particular student with a FAPE"]).

In her due process complaint notice, the parent requested "[c]ompensatory education to make up for . . . any failure to implement non-disputed services" (Parent Ex. A at pp. 2-3). The parties do not dispute that the student was entitled to a Microsoft Surface laptop, for use at school and at home, as recommended in the April 2024 IEP (see Parent Exs. A at pp. 12, 18; J at p. 20). The evidence in the hearing record, namely testimony from the BCBA, indicates that the student's laptop had stopped functioning properly; that the parent had requested a replacement; and that, as of September 23, 2024, the date of the impartial hearing, the student did not "have access to a working laptop" (Tr. pp. 15, 49, 66, 76). Although the due process complaint notice did not explicitly request a replacement laptop, considering that the district has not objected, I find a compensatory award, replacing the student's nonfunctioning laptop, to be appropriate under the circumstances (see Application of a Student with a Disability, Appeal No. 24-347 [declining to disturb the IHO's compensatory education award, although funding of the cost of unilaterally obtained services was also at issue, where the parent requested compensatory education "'for any mandated services not provided by the [district]"' in the due process complaint notice]; Application of a Student with a Disability, Appeal No. 24-321 [awarding compensatory SETSS for the portion of the school year during which the student did not receive unilaterally obtained SETSS where the student's entitlement to SETSS was undisputed].[17] Accordingly, I will order that the district provide the student with a functioning Microsoft Surface laptop, as recommended in the April 2024 IEP, to the extent the district has not already done so.

VII. Conclusion

The IHO's order, awarding relief under a compensatory education approach, must be reversed, as the IHO did not apply the appropriate legal standard to assess the parent's entitlement to relief in this case and, at this point in the proceeding, an award of prospective relief is no longer appropriate. Although the IHO should have applied the Burlington/Carter three-part test to determine whether the parent was entitled to public funding for the ABA services that she unilaterally obtained from Project CaLi, I find that it is unnecessary to review whether such unilaterally obtained services were appropriate or whether equitable considerations warrant a reduction in relief because the district has already funded the requested ABA services pursuant to

[17] Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). With respect to relief (versus alleged violations), the due process complaint notice must 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]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). In any event, to the extent the district's failure to provide a working laptop may have been outside the scope of the impartial hearing, that issue is deemed abandoned, as the district has not asserted such an argument (see 8 NYCRR 279.8[c][4] [providing 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"]).

pendency. As explained above, I find that a compensatory award, providing the student with a functioning Microsoft Surface laptop, to the extent the district has not already done so, is the only remaining relief that is appropriate under the circumstances of this case.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that IHO's decision, dated January 15, 2025, is modified by reversing those portions which awarded relief under a compensatory education framework;

IT IS FURTHER ORDERED that the district shall provide the student with a functioning Microsoft Surface laptop, as recommended in the April 2024 IEP, to the extent the district has not already done so.

Dated: **Albany, New York**
November 25, 2025

STEVEN KROLAK
STATE REVIEW OFFICER