The University of the State of New York

The State Education Department
State Review Officer
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No. 23-096

**Application of a STUDENT WITH A DISABILITY, by his parents, 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 petitioners, by Erin O'Connor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for compensatory education and reimbursement for privately obtained services for the 2020-21, 2021-22, and 2022-23 school years and denied their request for funding and reimbursement for independent educational evaluations (IEE). The appeal must be sustained in part.

### II. Overview—Administrative Procedures

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

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

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

## III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here in detail.[1] During the 2020-21 school year the student attended a Jewish Children's Center (JCC) for preschool (Tr. pp. 121-22). Beginning in December 2020, an early childhood learning center conducted comprehensive Committee on Preschool Special Education (CPSE) evaluations of the student, which were completed in January

[1] Any additional facts necessary to the disposition of the parties' arguments are set forth below to resolve the issues presented in this appeal.

2021 (see generally Parent Ex. H).[2] The CPSE convened on February 16, 2021, to determine the student's eligibility for special education and to formulate the student's IEP (see generally Parent Ex. I at p. 4). The CPSE determined that the student was eligible for special education as a preschool student with a disability and recommended that the student receive five 60-minute sessions per week of individual special education itinerant teacher (SEIT) services and two 30-minute sessions per week of individual occupational therapy (OT) to be delivered at a childcare location selected by the parents (Parent Ex. I at pp. 1, 17).[3, 4] According to the parent, the student began receiving the recommended SEIT and OT services in February 2021 (Tr. pp. 122-23).

For three weeks at the beginning of the 2021-22 school year, the student attended a different parochial preschool; however, according to the parent the school "couldn't really handle" the student and the hour per day of SEIT services was not enough for the student and he stayed home, without receiving SEIT or OT services, until another placement was found (Tr. pp. 124-26; Parent Ex. G at p. 1). In November 2021, the parents unilaterally placed the student at Gesher Early Childhood Center (Gesher), described as a special education preschool, and, subsequently, the student began receiving five 60-minute sessions of SEIT services per week and two 30-minute sessions of OT per week (Tr. pp. 124-25, 150; Parent Exs. D at p. 1; F at p. 1; G at p. 1).

In February 2022, the student underwent a private psychological evaluation (Parent Ex. G). Based on recommendations from the evaluation report, the parents obtained 20 hours per week of applied behavior analysis (ABA) services for the student, which were provided in his classroom and funded through insurance (Tr. pp. 128-29; see Parent Ex. Y). During the 2021-22 school year, the parents also privately obtained one session per week of OT services for the student (Tr. pp. 129-30).

A CSE convened on May 18, 2022 for an initial meeting, determined that the student was eligible for special education as a student with autism, and developed an IEP for school-aged

[2] With respect to preschool students with disabilities, State regulation requires a parent to select an "approved program with a multidisciplinary evaluation component to conduct an individual evaluation"—as defined in 8 NYCRR 200.1(aa)—and for the district to "arrange for such evaluation by the approved evaluator" (8 NYCRR 200.16[c][1]).

[3] The copy of the February 2021 CPSE IEP submitted with the hearing record to the Office of State Review contains handwritten annotations (see Parent Ex. I at p. 2). There is no clarification in the hearing record as to why the annotations are there (see Tr. pp. 1-199; Parent Exs. A-Z; SRO Ex. 1). For purposes of this decision, the handwritten annotations will not to be referenced and the document will be treated as if such annotations did not exist.

[4] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf; "Approved Preschool Special Education Programs Providing [SEIT] Services," Office of Special Educ. [June 2011], available at http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; see Educ. Law § 4410[1][k]).

programming (SRO Ex. 1; see Tr. pp. 130-31).[5, 6] For the 10-month portion of the 2022-23 school year, the May 2022 CSE recommended a programming that consisted of integrated co-teaching (ICT) services in a general education classroom together with OT and parent counseling and training (id. at pp. 8-9).

In a due process complaint notice dated September 8, 2022, consisting of 112 enumerated paragraphs and a number of additional subparagraphs, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21, 2021-22, and 2022-23 school years based on various substantive and procedural allegations (see Parent Ex. A). As part of the parents' request for relief, they asked that the district reimburse them for their private diagnostic evaluation and fund an IEE consisting of various evaluations "on an interim basis to inform the record" (id. at p. 15). In addition, for the district's alleged three school-year failure to offer the student a FAPE and for any services missed as part of a request for pendency, the parents requested that the district fund compensatory education services and reimburse them for their out-of-pocket expenses for the privately obtained services (id. at pp. 14-16). In addition, the parents asked for an increase in 1:1 instruction and related services for the student so that the parents would be free to use the ABA services provided through insurance after school (id. at p. 15).

An impartial hearing convened on February 8, 2023 and concluded on March 23, 2023 after five days of proceedings (see Tr. pp. 1-199).[7] In a decision dated April 21, 2023, the IHO determined that the district did not meet its burden to prove it offered the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years, and that the parents' requests for compensatory relief, private services reimbursement, and district funding and reimbursement for IEEs were not warranted (see IHO Decision at pp. 7-11). The IHO denied all of the parents' requested relief (id. at p. 11).

[5] The student's eligibility for special education and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[6] After a preliminary review of the contents of the hearing record, the undersigned believed a copy of the May 2022 IEP had not been offered into evidence (see Parent Exs. A-Z). The hearing record reflects that the IHO requested a copy of the May 2022 IEP be provided to him (Tr. pp. 171-72). Thus, in a letter to both parties dated June 7, 2023, the undersigned pursuant to 8 NYCRR 279.10[b], directed the district to submit additional documentary evidence consisting of the May 2022 IEP. As directed by the undersigned, the district duly submitted a copy of the May 2022 IEP; however, upon further review of the hearing record a copy of the May 2022 IEP was located by the undersigned as sub-exhibit "D" in support the parents' motion for an interim order for IEEs, which itself was an amalgamation of approximately 9 separate documents (see Parent Ex. C at pp. 87-104). For ease of reference, rather than citing to the May 2022 IEP as a sub-exhibit within the parents' interim motion, the May 2022 IEP will be referenced in this decision by the SRO exhibit that the undersigned requested (SRO Ex. 1).

[7] The parents also attended a pre-hearing conference on January 18, 2023, and two status conferences on January 26, 2023 and February 7, 2023 (see Tr. pp. 1-40). A representative for the district did not attend the pre-hearing conference or the status conference that took place on January 26, 2023; however, a district representative was present at the February 7, 2023 status conference (id.).

## IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer is presumed and, therefore, the allegations and arguments will not be recited in detail. In summary of the parties' arguments, the following issues are presented on appeal and must be resolved in order to render a decision:

1. whether the IHO erred in conducting the impartial hearing with respect to closing arguments and when addressing a motion to compel the production of records;

2. whether the IHO erred by not issuing a decision regarding the student's placement during the pendency of this proceeding;

3. whether the IHO erred by declining to order IEEs on an interim basis and whether the IHO erred in determining that IEEs were not an appropriate final award; and

4. whether the IHO erred in determining that the hearing record does not support an award of compensatory education or reimbursement of out-of-pocket expenses paid for privately obtained services as a remedy for the district's failure to offer the student a FAPE during the 2020-21, 2021-22, and 2022-23 school years.[8]

## 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

[8] The parents have also alleged that the district committed systemic violations (i.e., engaging in predetermination; discriminating based upon disability, and applying blanket policies that prevent CSEs from recommending appropriate school placements and services) and violations of various State and federal laws (see Parent Ex. A pp. 1-2, 5-7, 10-14; Req. for Rev. at pp. 9-10) which they assert should have been determined by the IHO. However, regardless of whether the IHO addressed any of these allegations, an SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504, section 1983, ADA claims, or claims with respect to alleged systemic violations, 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"]). Generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]). Likewise, as compensatory monetary damages are not available in the administrative forum under the IDEA, neither an IHO nor an SRO has jurisdiction to award any remedy for a claim under section 1983 (see Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483 [2d Cir. 2002]; see R.B. v. Bd. of Educ. of the City of New York, 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]). 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, even if the IHO had addressed these claims, an SRO would have no jurisdiction to review any portion of a parent's claims regarding section 504, section 1983, ADA claims, or systemic violations or policy claims, and accordingly such claims will not be further addressed.

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]).[9]

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

The parties have not appealed from the IHO's determination that the district failed to meet its burden to prove that it offered the student a FAPE during the 2020-21, 2021-22, and 2022-23

[9] 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).

school years and, therefore, the IHO's findings regarding FAPE have become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).[10]

**1. Conduct of the Hearing**

The parents argue that the IHO should have permitted the parties to submit post-hearing briefs given the extent of the evidence and object to the IHO's request for specificity regarding rates for compensatory education. Further, the parents claim that the IHO erred in his determination to deny a portion of the parents' motion to compel production of records held by the district and that the IHO erred by raising the issue of rates for compensatory education sua sponte (see generally Tr. p. 76; Parent Ex. B).

Generally, an IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]). Moreover, it was well within the IHO's discretion to attempt to control the hearing by excluding evidence or testimony that the IHO finds to be irrelevant, immaterial, or unduly repetitious and by limiting the witnesses who testify to avoid unduly repetitious testimony (see 8 NYCRR 200.5[j][3][xii][c]-[e]).

As pertinent to the issue raised by the parents, State regulation provides that an IHO "may receive" memoranda of law from the parties not to exceed 30-pages in length (8 NYCRR 200.5[j][3][xii][g]).

Additionally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving

[10] At the outset, I would like to address the submission of additional evidence in this matter. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). The district included with its submission of the certified copy of the hearing record a copy of a prior written notice dated May 20, 2022, which was not admitted into evidence during the impartial hearing (see Tr. p. 54). The district had an opportunity to submit a copy during the impartial hearing but declined to do so (see Tr. p. 54). As such, I will not consider the May 2022 prior written notice on appeal.

disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

Although the parents may have reason to disagree with the IHO's conclusions, upon a careful review of the hearing record, there is no basis to support the parents' allegations that the IHO did not conduct the hearing in an appropriate manner or find that the IHO prejudiced the parents through his conduct of the hearing.

With respect to the issue of rates for compensatory education, the parents argue that the IHO erred in "rais[ing] this issue sua sponte during [the p]arents' closing statement" (Req. for Rev. ¶ 6). However, the hearing record reflects that, at the February 8, 2023 impartial hearing, in response to the parents' opening statement, the IHO explained that he preferred not to issue orders using "terms like 'market rate' or 'enhanced rate'" and wanted the parties to present an argument regarding the rates for compensatory education; the IHO specifically requested that the parties specify a rate or range of rates for each requested service and the basis for the rate (Tr. p. 53). Counsel for the parents indicated that she "[u]nderstood" (id.). The IHO clarified later, on the last hearing date, that he would not accept the term "market rate" as a proposed rate for compensatory education (see Tr. pp. 145-46). Accordingly, the parents were aware of what the IHO required on the issue of rates and had the opportunity during the hearing to present evidence and an argument to support the requested relief. Based on the above, the IHO does not appear to have been raising an issue sua sponte, but was merely seeking information he believed was necessary to render a proper decision in this matter. Pursuant to State regulation the IHO was within his discretion to ask questions of counsel for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]).

Related to the issue of rates, the parents assert that the IHO should have permitted them to file a written closing statement (Req. for Rev. ¶ 8). While State regulation allows IHOs to accept written memoranda of law, it does not require IHOs to do so (8 NYCRR 200.5[j][3][xii][g]). The IHO allowed the parties on the last day of the impartial hearing to prepare and present a closing argument to explain their positions, including the rates for compensatory education (see Tr. pp. 175-92).

More specifically, at the March 23, 2023, impartial hearing, prior to the parties' closing statements, the IHO inquired as to how much time each party needed to prepare for closing statements (Tr. p. 175). The parents' attorney responded that considering the IHO's request for calculated rates for compensatory education, she would need about 30-minutes to prepare (Tr. p. 175). According to the March 23, 2023 transcript, the IHO gave the parties from 1:51 p.m. until 2:20 p.m. to prepare their closing statements and counsel for the parents agreed that this was sufficient (Tr. p. 175). In the district's closing statement, the district representative presented arguments as to why the parents' requested relief should be denied; however, she did not present an argument as to what an appropriate rate for compensatory education would be (see generally Tr. pp. 176-79). During the parents' closing statement (Tr. pp. 179-98), the parents' attorney addressed the issue of rates for compensatory services, stating:

> [W]e do object to the sua sponte raising of the issue of provider rates by the IHO as neither party specifically brought up the issue of the

> provider rates at hearing or contested the rates other than the [p]arent[]s['] request that the IHO order services at market rates to be determined by the [district]'s Implementation Unit.
>
> The [p]arent[s] [are] not currently able to provide rates for specific providers of compensatory one-to-one ABA services and/or occupational therapy as the [p]arent has not yet identified a provider. . . since there has been no award for these services

(Tr. pp. 191-92).

The IHO responded by inquiring as to whether the parents' attorney consulted anyone regarding the rate for compensatory education, and, after being informed that the attorney did not consult anyone, indicated that the parents' request for market rates to be determined by the district implementation unit was too vague (Tr. p. 192). In response, the parents' attorney indicated that because the parents had not yet identified a provider she could submit an affidavit to set forth proposed rates by providers in the field (Tr. pp. 192-94). The district's representative confirmed that she would not object to the submission of the affidavit regarding provider rates if she had the opportunity to respond (Tr. p. 195). The IHO agreed, set a deadline of March 28, 2023 for the submission of the affidavit, and stipulated that the district's response would be due two days later (Tr. p. 196). The parents did submit affidavits which set forth market rates for direct ABA services provided by a board certified behavior analyst (BCBA) in addition to other documents to show what they had already paid out-of-pocket to providers during the 2021-22 and 2022-23 school years, respectively (see generally Parent Exs. N-W; Y-Z).

Based on the above, I see nothing in the hearing record that concerns me with respect to the parents' allegations regarding the IHO's conduct and management of the hearing. In fact, a review of the hearing transcript reveals that both parties were treated fairly, with courtesy, and with respect by the IHO during the impartial hearing (Tr. pp. 1-199). Both parties were given an opportunity to present closing arguments to summarize their arguments and to also address the IHO's concerns regarding rates for compensatory education (Tr. pp. 53, 175-92). Further, I do not find that the IHO's conduct prejudiced the parents as they were able to: object to the IHO's request, which they did during the impartial hearing; present a closing statement; and submit additional evidence including affidavits addressing an appropriate rate for services prior to the closing of the hearing record (see Tr. pp. 115-198; Parent Exs. S-T).

Regarding the parents' argument that the IHO erred by denying a portion of the parents' motion to compel production of records held by the district, as stated above, an IHO has discretion to excluding evidence or testimony that the IHO finds to be irrelevant (see 8 NYCRR 200.5[j][3][xii][c]-[e]). As such, it was within the IHO's discretion whether to grant portions of the parents' motion to compel and/or subpoena for the production of records (see Tr. pp. 30-38; Parent Ex. B). Additionally, the parents do not specify why the additional records are necessary to address the issues being raised on appeal or even how those records might have been relevant to the underlying proceeding (see Req. for Rev. at ¶ 9).[11] I find that the parents' contentions

[11] To the extent that the parents still desire to obtain the student's educational records, the parents have avenues for obtaining those records outside of the due process hearing system. The Family Educational Rights and Privacy

regarding the IHO's alleged errors in conducting the hearing are without merit. Moreover, the IHO ultimately denied the parents' request for compensatory education making the issue regarding rates moot and, as addressed further below, the evidence in the hearing record supports the IHO's determination regarding compensatory education in this matter. As such, I find that the IHO conducted the impartial hearing in an appropriate manner and that the parents' arguments on appeal as to the IHO's conduct do not provide any basis for overturning the IHO's decision.

**2. Pendency**

Regarding pendency, the parents argue that the IHO erred by not issuing an interim order on pendency. The district asserts that pendency was not contested and therefore the IHO did not err by not issuing a pendency order.

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, the IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino, 959 F.3d at 531; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[12] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi

Act (FERPA) and the IDEA grant parents the right to review and inspect their child's education records (34 CFR 99.10[a]; 300.613[a]). Educational records are defined as records that are directly related to a student that are collected, maintained, or used by the district (34 CFR 99.3; 300.613[a]). Districts must comply with a parental inspection request within 45 days (34 CFR 99.10[b]; 300.613[a]). When in-person review is not feasible, districts must provide the parents with a copy of the requested records or make other arrangements for review (34 CFR 99.10[d]; 300.613[b][2]). Parents are also entitled to have the educational records explained or interpreted upon request (34 CFR 300.613[b][1]). However, the right to inspect does not include records kept in the sole possession of the maker which are used only as a memory aid and are not shared with others (see Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426, 435-36 [2002]; Bd. of Educ. v. Horen, 2010 WL 3522373, at *25-*27 [N.D. Ohio Sept. 8, 2010], aff'd 113 LRP 45713 [6th Cir. May 26, 2011]).

[12] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then-current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). If there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

The evidence in the hearing record shows that on September 8, 2022, at the start of the student's kindergarten school year, the parents filed a due process complaint notice requesting that the IHO order the student's pendency program pursuant to "the most recent CPSE IEP," consisting of 10 hours of SEIT services and two 30-minute sessions per week of individual OT (Parent Ex. A at pp. 14-15).[13] An invoice included in the hearing record shows that a provider with Special Edge Support, LLC (Special Edge) began billing for "SETSS/1" on September 13, 2022 (Parent

[13] The February 2021 CPSE IEP, the only CPSE IEP included in the hearing record, recommends 5 hours of SEIT services per week and two 30-minute sessions per week of individual OT (Parent Ex. I at p. 17). Contrary to the 10 hours of SEIT services requested in the due process complaint notice, on appeal the parents assert that the student's pendency program consists of five hours of SEIT services pursuant to the student's February 2021 CPSE IEP (Req. for Rev. ¶ 10).

Ex. L at p. 1).[14] On appeal, the parents argue that the IHO should have issued an order for pendency (stay-put) services pursuant to the student's February 2021 CPSE IEP; notably, their request for review lacks an assertion that the district failed to provide the student's pendency services (see Req. for Rev. ¶ 10). The district in its answer agrees that the student's pendency program arose from the February 2021 CPSE IEP, and asserts that the hearing record does not show that pendency was ever contested or that the student did not receive his pendency services (Answer ¶ 14).

Since there was no dispute between the parties as to what constitutes the student's pendency programming and there is evidence in the hearing record that shows that the district began providing SEIT services/SETSS to the student on September 13, 2022, the IHO was correct to not issue an interim order on pendency as it would have been a waste of limited judicial resources. The parents point to no need for the IHO to issue an order further compelling the district to fund the student's pendency placement other than that they simply wanted one; however, an order by the IHO under these circumstances was unnecessary because the automatic injunction pursuant to the statute was in place and the district was meeting its obligations.

The parents' continued pursuit of the issue of pendency and allegations of IHO error after presenting evidence during the impartial hearing that the district has in fact paid for all of the mandated services pursuant to pendency shows an astonishing level of unreasonableness (see Tr. pp. 54, 91; Parent Ex. L). As the Second Circuit has indicated recently, school districts may implement basic budgetary oversight measures when funding pendency placements and sprinting to obtain injunctive orders is not permissible because parents are not entitled to payments with such immediacy that it would frustrate the fiscal policies of participating states (Mendez v. Banks, 65 F.4th 56, 63 [2d Cir. 2023]; Landsman v. Banks, 2023 WL 4867399, at *3 [S.D.N.Y. July 31, 2023]). Similarly, dashing to the IHO to obtain an order in anticipation that the district will at some point fail to comply with its pendency obligation is not permissible. As the district properly indicates in its answer, if a non-speculative implementation of pendency services claim arises at some point in the future, the parents may file a new due process complaint notice containing allegations relating to the time from September 8, 2022, through the end of this proceeding.

**B. Independent Educational Evaluation**

Turning to the IHO's denial of IEEs at public expense, the parents contend that the IHO erred in both failing to grant the parents' requested IEEs as interim relief and in failing to order the

[14] As noted above, the February 2021 CPSE IEP recommended five hours per week of SEIT services; however, the service provider appeared to bill for the provision of special education teacher support services (SETSS) (compare Parent Ex. I at p. 17, with Parent Ex. L). In a case such as this where SEIT services or SETSS were a form of relief sought by the parent, but by State law and regulation SEIT services are typically not allowed for school-aged students (see Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]), whereas SETSS could be permissibly recommended for the student but are not defined in the State's continuum (see 8 NYCRR 2006), it is not helpful that the hearing record lacks more testimony or evidence that clearly defines the contours and features of SETSS (versus SEIT services) as understood by the parties. However, whether denominated as SEIT services or SETSS, the substance of the relief sought in the instant matter is the provision to the student of educational services by a special education teacher who assists the student in addition to the student's classroom program at the student's nonpublic school.

IEEs as part of his final order. In an answer, the district generally asserts that the IHO's decision should be upheld.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

Here, the parents alleged in their September 2022 due process complaint notice that the district did not adequately evaluate the student in every area of suspected disability, and failed to conduct a number of specific evaluations and follow the procedural IDEA requirements for "all of the evaluations and reevaluations conducted" (Parent Ex. A at p. 8). The parents also asserted that the district failed to conduct an appropriate reevaluation before "making a significant change in the [s]tudent's placement and program" during the student's CPSE to CSE transition (id.). The parents did not specify a particular evaluation or reevaluation conducted by the district that they disagreed with (id.), and instead proffered a general statement that they disagreed with any evaluations or reevaluations conducted (see generally id.). However, in the proposed resolution section of the due process complaint notice the parents requested reimbursement for a private diagnostic evaluation in addition to public funding for "evaluations on an interim basis to inform the record," specifically identifying: a neuropsychological evaluation; an autism/ABA assessment; an OT evaluation; a speech-language evaluation; an assistive technology evaluation; a vision processing evaluation; an observation with an expert in behavior; and a private functional behavioral assessment (FBA) and positive behavior plan for home and school (id. at p. 15).

On the first day of hearing the IHO denied the parents' request for interim IEEs, stating that he does not order IEEs on an interim basis unless he deems them necessary (Tr. pp. 3-6). The IHO clarified that if the parents sought IEEs as part of their final awarded relief, he did not want to issue an interim order for IEEs (Tr. pp. 3-4).

Initially, to the extent the parents object, on appeal, to the IHO's decision not to issue an interim order on IEEs during the hearing, it was within an IHO's discretion whether to order an IEE in order to inform the hearing record and there does not appear to be any reasonable basis for overturning that decision on appeal. It is within an IHO's authority to order an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. Roberts, 2016 WL 6831122, at *7 [E.D. Pa. Oct. 27, 2016] [noting that an IHO "is permitted, and in some cases required, to order an [IEE] at public expense"], on reconsideration in part, Luo v. Owen J. Roberts Sch. Dist., 2016 WL 6962547 [E.D. Pa. Nov. 28, 2016], aff'd, 2018 WL 2944340 [3d Cir. June 11, 2018]; Lyons v. Lower Merrion Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010] [noting that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process"]; see also S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at *9 n.9 [D.R.I. Jan. 14, 2014] [acknowledging opinion that the regulation empowers hearing officers to solicit independent expert opinions but disagreeing that the regulation gives an IHO "the inherent power to make up remedies out of whole cloth"], aff'd, 773 F.3d 344 [1st Cir. 2014]).

In his final decision, the IHO determined that the parents presented no evidence of any disagreement with the district evaluations prior to the filing of the due process complaint notice, and that the student's mother testified that she agreed with the evaluations conducted by the district (IHO Decision at p. 10).

The hearing record shows that the parent indeed testified that she "agreed with [the district] evaluation, but [] didn't agree with the services they thought [the student] needed" (Tr. p. 122). Consistent with the IHO's determination, the Second Circuit has made it clear that a parent must disagree with a district evaluation as of the time it was conducted, and that subsequent changes in circumstances do not support a disagreement with an evaluation (Trumbull, 975 F.3d at 171 [2d Cir. 2020] citing N.D.S. by and Through de Campos Salles v. Acad. for Sci. and Agric. Charter Sch., 2018 WL 6201725, at *2 [D. Minn. Nov. 28, 2018] ["'Informing a school that, subsequent to an evaluation, a child's condition has changed is not the same thing as disagreeing with the evaluation'"]). Under those circumstances, the appropriate course of action "would be more frequent evaluations—and the parents are entitled to request one per year—not an IEE at public expense. If the parent[s] disagree[] with those evaluations, then they would be free to request an IEE at public expense with which to counter" (Trumbull, 975 F.3d at 171).

On appeal, the parents contend that the hearing record shows they repeatedly requested a reevaluation of the student and the district ignored their requests (Req. for Rev. ¶5). However, review of the hearing record does not support finding that the parents made a specific request for the district to reevaluate the student. The student's mother testified that after the February 2021 CPSE meeting, in response to the parents' request for additional services, the district indicated it would reevaluate the student (Tr. pp. 123-24). She also testified "[she] believed[d] [she] asked for a reevaluation, but [she] never received one" and that "[she] just wanted him to be reevaluated" (Tr. pp. 127, 135). Although neither federal nor State regulation requires parents to submit a written request for a reevaluation of a student or identified the specific manner in which such a

request must be made (34 C.F.R. § 300.303; 8 NYCRR 200.4[b]), the parent's equivocal and vague testimony as to a request for a reevaluation does not present a sufficient basis for overturning the IHO's decision not to award an IEE in this matter.

Additionally, I have concerns with the parents' inclusion of the request for an IEE in the due process complaint notice in the first instance (see Parent Ex. A at p. 8). In past decisions SROs, including the undersigned, have permitted a parent to request a district-funded IEE in a due process complaint notice in the first instance (see, e.g. Application of the Dep't of Educ., Appeal No. 21-135); however, I have also expressed reservations that this is not the process contemplated by the IDEA and its implementing regulations (Application of the Dep't of Educ., Appeal No. 23-034; Application of a Student with a Disability, Appeal No. 22-150) and my observation is that the approach has caused more problems than it resolves (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). The statute clearly indicates that a district is required to either grant the IEE at public expense or initiate due process to defend its own evaluation of the student, but a district need only do so "without unnecessary delay" (34 CFR 502[b][2]). The process envisions that a district has an opportunity to engage with the parent on the request for an IEE at public expense outside of due process litigation, and if a delay should occur as a result, one of the fact-specific inquiries to be addressed is whether the IEE at public expense should be granted because the district's delay in filing for due process was unnecessary under the circumstances (see Cruz v. Alta Loma Sch. Dist., 849 F. App'x 678, 679-80 [9th Cir. 2021][discussing the reasons for the delay and degree to which there was an impasse and finding that the 84-day delay was not an unnecessary delay under the fact specific circumstances]; Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 3734289, at *2 [N.D. Cal. Dec. 15, 2006] [finding that an unexplained 82-day delay for commencing due process was unnecessary]; Alex W. v. Poudre Sch. Dist. R-1, 2022 WL 2763464, at *14 [D. Colo. July 15, 2022] [holding that simply refusing a parent's request for an IEE at public expense is not among the district's permissible options]; MP v. Parkland School District, 2021 WL 3771814, at *18 [E.D. Pa. Aug. 25, 2021] [finding that the school district failed to file a due process complaint altogether and granting IEE at public expense];[15] Jefferson Cnty. Bd. of Educ. v. Lolita S., 581 F. App'x 760, 765-66 [11th Cir. 2014]; Evans v. Dist. No. 17 of Douglas Cnty., Neb., 841 F.2d 824, 830 [8th Cir. 1988]). As the Second Circuit observed, at no point does a parent need to file a due process complaint notice to obtain an IEE at public expense (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 168-69 [2d Cir. 2020]).[16] My continued study of the judicial and administrative guidance on the topic has led me to change my previous approach of allowing the parent to initially disagree with a district evaluation and request an IEE in a due process complaint notice (without attempting to raise such disagreement with the district first). Moreover, I am convinced in this case that the parents may have delayed sufficiently clear communication of the IEE request while planning for

[15] The Parkland case also discussed caselaw with different factual circumstances in which the district's failure to file for due process had been excused such as incomplete district evaluations or agreements between the district and parent that the district would conduct further evaluations.

[16] The Second Circuit, in Trumbull, speculated that a "hypothetical scenario in which a parent might need to file a due process complaint for a hearing to seek an IEE at public expense is if the school unnecessarily withheld a requested IEE or failed to file its own due process complaint to defend its challenged evaluation as appropriate" (Trumbull, 975 F.3d at 169).

the student's educational programming continued or more likely included the request for an IEE as an afterthought. This is an improper use of the due process procedures.

Accordingly, I find that the IHO did not err in his decision to deny the parents' request for IEEs at public expense as the request was raised for the first time in the due process complaint notice, nor did the IHO err by denying the parents' request for reimbursement for their February 2022 independent psychological evaluation. While the parents' request for an independent neuropsychological evaluation, an autism/ABA assessment, OT evaluation, speech-language evaluation, assistive technology evaluation, and vision processing evaluation at district expense is denied, the parents may request that the district conduct these evaluations. Upon receipt of such request, the district must consider whether it would be appropriate to conduct the evaluations to assess the student's special education needs and, after due consideration, provide the parents with prior written notice describing, if applicable, its reasons for concluding that additional evaluations of the student are unnecessary (8 NYCRR 200.5[a]; see 34 CFR 300.503, 300.305[d]). If the parents are dissatisfied with the district's response or evaluations, the parents may then submit a request to the CSE that it fund an IEE in the manner contemplated by the IDEA, as discussed above.

Although the evidence in the hearing record does not support the parents' contention that an interim decision directing IEEs at public expense were warranted and thus the IHO's decision is supported by the hearing record, that does not mean that no relief regarding evaluation of the student is merited. The student's needs as reflected in the hearing record indicate that an FBA is warranted to determine if the student requires a behavioral intervention plan (BIP). At the outset of this discussion, I note that the February 2021 CPSE was aware of the student's behavior difficulties and indicated that the student needed a BIP, but there is no evidence in the hearing record that the district ever created a BIP for the student (Parent Exs. I at p. 7; see Parent Exs. A-H; J-Z).

According to the February 1, 2022 private psychological evaluation report, administration of the Autism Diagnostic Observation Scale-2 (ADOS-2), described as "a standardized, semi-structured, observation assessment tool that allow[ed] the examiner to observe and gather information regarding [the student's] social behavior and communication in a variety of different social communicative situations," indicated that the student obtained an overall score of nine, which "[met] the clinical criteria for an autism spectrum disorder," and a "comparison score" of six, which indicated a moderate level of symptoms (Parent Ex. G at pp. 2-3). Regarding behavior, the evaluation report indicated that the student generally understood to stay out of the street but was noted to demonstrate "persistent elopement" behaviors at school, and was, at times, at risk of injury due to climbing to "precarious places" (id. at p. 2). Regarding social/emotional skills, the student was noted to be "routinely impulsive and aggressive" and, at school, his "pushing, hitting, and hurting classmates happen[ed] multiple times a day" (Parent Exs. D at p. 2; G at p. 2; I at p. 6).

Review of the May 2022 IEP revealed concerns regarding the student's ability to participate in class routines independently and comply with school rules (SRO Ex. 1 at p. 1). Within the present levels of performance section of the May 2022 IEP, a psychological evaluation, dated March 30, 2022, described the student as easily distracted and "very fidgety," and indicated that he engaged in "much out-of-seat behavior" and "avoidance techniques" at times (id.). Results of

social/emotional testing of the student reflected in the IEP indicated that the parent reported "hyperactivity, aggression, [and] attention" symptoms within the clinically significant range (id. at p. 2). According to a January 2022 OT progress report reflected in the IEP, the student's "sensory processing delays, self-directed behaviors and difficulties with self-regulation greatly impact[ed] his ability to independently and safely complete classroom tasks" (id. at p. 3). Further, the IEP indicated that the student's "educational classification of autism and struggles with attention, hyperactivity and fine motor skills [ ] impede[d] him from functioning in the general education curriculum" (id.). In addition, the management needs within the May 2022 IEP stated that, among other things, the student benefitted from consistent rules and structure, modeling of appropriate behaviors, opportunities to practice steps and routines, praise and reinforcement, positive rewards, and redirection and refocusing to tasks (id.). In contrast, the CSE concluded that the student did not require "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede the student's learning or that of others" and he did not need a BIP (id. at pp. 3-4).

A February 14, 2023 Special Edge progress report stated that the student benefited from a behavior plan that addressed the student's "unsafe behaviors" in the classroom such as using his hands, feet, and mouth, very low frustration tolerance, impulsivity, inflexibility, and difficulty transitioning (Parent Ex. E at pp. 2, 3). In addition, the report indicated that the behavior plan had shown many "positive effects" for the student and provided the student with the "constant 1:1 support" he required to reach his annual goals (id. at p. 3).

The May 2022 CSE was aware of the student's behavior needs as described in the private psychological evaluation report and the resultant IEP, yet the CSE did not conduct an FBA of the student (Parent Ex. G at pp. 2, 3; SRO Ex. 1 at pp. 1-4). The student continues to exhibit ongoing behavior needs (Parent Ex. E at pp. 2, 3). As stated above, although the hearing record supports the IHOs decision not to award the IEEs at public expense as part of the hearing process, in order to address the student's behavior needs, the district must complete an FBA and, if necessary, develop a BIP for the student and have a CSE reconvene and consider the results of the FBA and any additional evaluative information available to the CSE.

**C. Relief**

As relief for the three-year denial of FAPE found by the IHO, the parents seek a bank of compensatory education hours and reimbursement for services unilaterally obtained. More specifically, the parents seek compensatory education consisting of 740 hours of 1:1 instruction, or 2,700 hours of 1:1 instruction, less the ABA and SEIT services that were provided to the student during the 2020-21 and 2021-22 school years and reimbursement for the unilaterally obtained services in the areas of ABA services and OT for the 2021-22 and 2022-23 school years.

The IHO's main reason for disfavoring an award of compensatory education in this matter was that the parents unilaterally obtained special education services for the student during the three school years at issue and that compensatory education was not an appropriate remedy for the student while continuing to be enrolled in a nonpublic school (IHO Decision at pp. 7-8). The IHO also did not award reimbursement for the OT or ABA services that the parents paid for out-of-pocket, determining that the parents did not meet their burden to show that such services were appropriate (id. at p. 9).

Initially, prior to reaching the merits of the parents' request for relief, the standard applied to the parents' requests must first be addressed. With respect to the parents' request for reimbursement for OT and ABA services provided to the student during the 2021-22 and 2022-23 school years, the IHO applied the correct legal standard.

In this matter, the student has been parentally placed in a nonpublic school and the parents do not seek tuition reimbursement for the cost of the student's attendance there. Accordingly, the issue in this matter is whether the parents are entitled to public funding of the costs of the private special education services they acquired without the consent of the school district authorities, the OT and ABA services the parents obtained for the student. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can 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] [internal quotations and citations omitted]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).

The parents' request for privately-obtained OT and ABA services must be assessed under this type of framework; namely, having found that the district failed to offer the student a FAPE or appropriate special education services under state law during the 2021-22 and 2022-23 school years, the issue is whether the services obtained by the parents constituted appropriate unilaterally obtained special education services for the student such that the cost of the services are reimbursable to the parents upon presentation of proof that the parents have paid for the services (or, alternatively, if circumstances show that they are payable directly by the district to the provider upon proof that the parents are legally obligated to pay).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic

progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365). [22-046]

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

Turning to the IHO's determination regarding compensatory education, the IHO appears to have adopted a standard used by the Third Circuit Court of Appeals in finding that compensatory education in this matter was not available solely because the parents obtained unilateral services for the student (IHO Decision at pp. 7-8).

True to the IHO's analysis, 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"]).

However, 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"]). One court has recently endorsed a combined award of tuition reimbursement and compensatory education based on a denial of FAPE for the same time period (V.W., 2022 WL 3448096, at *5-*6). To the extent this blended approach is adopted, it then begins to blur the parents' responsibility in the hearing process to establish that the unilateral services they obtained for their child are reasonably calculated to enable the student to receive educational benefits in light of the child's circumstances, because it calls on school districts to simultaneously become responsible to correct the shortcomings or defects of a unilateral placement with compensatory education.[17] I am not convinced that is what the Second Circuit intended in its approach on this topic thus far. Should cases continue to trend toward blended unilateral placement and compensatory education forms of equitable relief during the same time period, it will not be possible to effectively differentiate the burden of proof with respect to the unilateral placement that has been placed on parents and the burden of proof with respect to compensatory education which SROs thus far have found rests on districts under state law burden shifting provisions (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]; Educ. Law § 4404[1][c]) because the argument that the unilateral placement successfully enables the student to receive the educational benefits defined by Rowley works against the argument that further compensatory education is necessary to remediate the deprivation of FAPE called for in Rowley.

Given the uncertainty of the appropriate hearing process in such circumstances, rather than adopt the IHO's findings, the undersigned will make an assessment as to whether compensatory services are an appropriate remedy for the periods during which the student was denied a FAPE.

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

[17] As the Supreme Court explained, "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits," thus the Rowley/Endrew F. standard shifts to parents when unilateral placements are involved, albeit with a "totality of the circumstances" test in the words of the Second Circuit or "all relevant factors" element in the words of the Supreme Court (Carter, 510 U.S. at 11, 16; Frank G. v. 459 F.3d at 364).

appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Generally, compensatory services are not designed for the purpose of maximizing a student's potential or to guarantee that the student achieves a particular grade-level in the student's areas of need (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). Rather, an award of compensatory education should place the student in the position that he 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"]).

As part of the discussion as to compensatory education, I find that the parents' argument that the IHO shifted the burden to the parents to establish an appropriate compensatory education remedy for the district's three-year failure to offer the student a FAPE is not supported by the hearing record.

Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district, it is not an SRO's responsibility to craft the district's position regarding the appropriate compensatory education remedy. During the impartial hearing, the district failed to offer any documentary evidence or the testimony of any witnesses and presented a closing statement that did not contain an argument regarding compensatory education. The district was required under the due process procedures set forth in New York State law to address

its burdens by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; see also E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524).

However, the IHO was by no means required to merely adopt the relief proposed by the parents. An outright default judgment awarding compensatory education—or as in this case, any and all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005] [rejecting "lump sum" grant of tutoring as a compensatory remedy for a multi-year denial of FAPE]). Indeed, an award ordered so blindly could ultimately do more harm than good for a student (see M.M., 2017 WL 1194685, at *8 ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). Moreover, if the sum and total of the compensatory education relief requested by the parent was ordered, including the monetization thereof, it could potentially amount to a punitive award (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] [noting that "[t]he purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]).

In this instance, the IHO acknowledged the district's burden of proof and noted that "compensatory education is a fact-based remedy tailored to meet the unique circumstances of each case" (IHO Decision at p. 8). The IHO also acknowledged that the parents identified a specific remedy sought but failed to sufficiently identify what services were missed nor did they provide sufficient evidence in support thereof (id. at pp. 7-8).

Thus, rather than relying solely on the district's failure to present an argument or evidence regarding a compensatory award, I will review the evidence in the hearing record and the parents' arguments regarding relief for each of the school years at issue and the IHO's findings and determine if an award is appropriate.

**1. 2020-21 School Year**

During the 2020-21 school year the student attended a JCC preschool in a class of approximately fifteen students with three teachers (Parent Exs. H at p. 15; I at p. 3). The February 2021 CPSE recommended that the student receive five 60-minute sessions of individual SEIT instruction per week and two 30-minute individual sessions per week of OT for the remainder of the 10-month 2020-21 school year (Parent Exs. I at pp. 2, 4). The parent testified that the student began receiving SEIT services and OT through the district in February 2021 (Tr. pp. 121, 123).

Review of the September 2022 due process complaint notice does not indicate what CPSE services the student missed during the remainder of the 2020-21 school year that would require an award of compensatory education. Additionally, there is no evidence in the hearing record that the student did not receive the February 2021 IEP recommended services while attending the JCC

preschool program and the parents have not alleged as much (see Parent Ex. A at pp. 3-4; Req. for Rev. at pp. 2-4).

Regarding the parents' claim that the services recommended in the February 2021 IEP were insufficient, the parent testified that during the February 2021 CPSE she advised the CPSE that the student needed more 1:1 SEIT support during the day and more weekly OT sessions (Tr. pp. 122-23; see Parent Ex. A at p. 3). However, the parents do not indicate why they believed the student needed additional 1:1 services as of February 2021 and there is no evidence in the hearing record that persuades me that the student needed that level of services at that time. In fact, according to the February 2021 IEP, the student's mother was "in agreement with [the] recommendation" and wanted the student to "receive [the] recommended intervention in order to increase [his] skills" (Parent Ex. I at p. 3). Based on the above, I am unpersuaded that the student missed any services or required more services during this time that would necessitate an award for compensatory education.[18]

**2. 2021-22 School Year**

At the start of the 2021-22 school year, the student's February 2021 IEP was still in effect as his annual review of the IEP was projected to be in February 2022 (Parent Ex. I at p. 4). The student began the school year enrolled in a different parochial preschool than the JCC program he had attended during the 2020-21 school year, but then he was subsequently removed after three weeks (Tr. pp. 124-25; Parent Ex. G at p. 1). There is conflicting evidence in the hearing record as to what services the student received while attending the parochial school during the 2021-22 school year. According to the September 2022 due process complaint notice, the student did not receive any SEIT services or OT during his time at the parochial school; however, the parent testified that at the parochial school's request she privately paid for "someone to be with [the student] in the classroom" for three to four additional hours per day because the parochial school "thought that the one-hour-a-day he was receiving was not enough" (compare Tr. pp. 125-26, with Parent Ex. A at p. 4). Further, the parent testified that from the time the student left the parochial school until he began attending Gesher he did not receive his recommended SEIT services or OT (Tr. p. 125).

The student began attending Gesher in November 2021, and he received SEIT services and OT, for the remainder of the 10-month 2021-22 school year (Tr. pp. 125, 150-51; Parent Exs. D at p. 1; F at pp. 1-3; G at p. 1).[19] In March 2022, the student began receiving 20 hours of 1:1 ABA

[18] To the extent that the parents argue that the February 2022 private psychological evaluation and the January 2023 ABA services treatment request indicate the student required ABA services going back to the 2020-21 and 2021-22 school years, that argument will be addressed in the analysis of the claims regarding the 2022-23 school year. Of note here, this information was not available to the February 2021 CPSE (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]).

[19] The student's January 2022 SEIT progress report indicates that the student started receiving SEIT services and speech-language therapy in November 2021; however, the hearing record does not otherwise indicate that the student received speech-language therapy and this may have been a typographical error as it does not reference OT services (see Parent Ex. F at p. 1).

services per week paid for through the parents' insurance (Tr. pp. 128-29, 158-59; Parent Ex. Y at p. 1).

As correctly identified by the IHO in his decision, the only discernable time that the student did not receive services during the 2021-22 school year that may necessitate an award of compensatory education due to a lack of implementation was from when the student was at home after leaving the parochial school three weeks into the 2021-22 school year until November 2021 when he began attending Gesher (IHO Decision at p. 7 fn. 3; see Tr. p. 125). However, I am not convinced that the parents took the proper steps to ensure the district was aware of where the student was so that it could continue to provide the student with his SEIT and OT services as a preschool student with a learning disability.

Additionally, in reviewing any claim that the student did not receive the recommended SEIT and OT services at the parochial school at the start of the 2021-22 school year, according to State guidance, if a district CPSE is recommending SEIS or SEIT services for a student, the district must request that the parent identify the initial child care location arranged by the parent, or other site, at which SEIS would be provided ("[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at http://www.p12.nysed.gov/specialed/publications/2015memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf). Further, according to the same guidance, "SEIS must be provided at the child care location identified by the parent, which is documented as the "location" for the provision of this service in the IEP" (id. [emphasis added]). That is, the parents had an obligation to inform the district as to the location at which SEIT services were to be provided to the student; this includes informing the district of the new child-care location if the parents decided to enroll the student in a different location than what was previously identified as the student's child-care location.

The evidence in the hearing record established that the February 2021 CPSE was aware that the student was attending a JCC preschool program and beginning in February 2021, the district implemented services according to the February 2021 CPSE IEP at the JCC preschool for the remainder of the 2020-21 school year (see Tr. pp. 121-23; Parent Ex. I at p. 3). Based on a review of the hearing record, the district was aware that the JCC preschool was the "childcare location" identified by the parents for the student to receive his SEIT services during the remainder of the 2020-21 school year, thus, I am hesitant to hold the district responsible for not knowing the student was attending a different childcare location at the start of the 2021-22 school year when there is no evidence in the hearing record that the parents notified the district of their intent to change the childcare location prior to the start of the 2021-22 school year (Tr. pp. 1-199; Parent Exs. A-Z; SRO Ex. 1). Based on my review of the state guidance regarding preschool special education services, it was the parents who were required to identify the location where the student would have been provided SEIT services, whether it be a child care or regular early childhood program or hospital or facility, unless the CPSE determined that, based on documented medical or special needs of the student, the student could not travel to another site which would have entitled the student to receive SEIT services at home ("[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at http://www.p12.nysed.gov/specialed/publications/2015memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf). As such, I find a lack of evidence of notification regarding the parents' decision to change the student's child-care location directly

correlates to why the student did not receive his mandated related services prior to being enrolled at Gesher in November 2021.

As a final matter regarding the 2021-22 school year, the parents request reimbursement for the cost of their insurance co-payments for ABA services delivered to the student beginning in February 2022 and for OT services. The IHO assessed this part of the parents' request for relief under the Burlington/Carter framework and determined there was insufficient evidence to support finding that the services were appropriate (IHO Decision at p. 9). The student's mother testified that she arranged for 20 hours per week of ABA services for the student beginning in February 2022 and that she took the student for OT services once per week after school (Tr. pp. 128-30). The hearing record shows that the parents paid the insurance deductibles for ABA services beginning on February 14, 2022 and continuing through to the end of the 2021-22 school year (Parent Ex. Y at pp. 1-6). It also shows that the parents paid for OT services on five dates during the 2021-22 school year (Parent Exs. N-R; W).

As discussed above, and as determined by the IHO, the parents' request for reimbursement must be assessed under the Burlington/Carter framework; namely, having found that the district failed to offer the student a FAPE, the issue is whether the 1:1 ABA services and private OT constituted appropriate unilaterally obtained services for the student such that the cost of the 1:1 ABA services and private OT are reimbursable to the parents upon presentation of proof that the parents have paid for the services or, alternatively, payable directly by the district to the provider upon proof that the parents are legally obligated to pay but do not have adequate funds to do so. Upon review of the documentation and testimony presented by the parents during the hearing, as determined by the IHO, there is insufficient evidence present in the hearing record to show that the ABA services or the private OT delivered to the student during the 2021-22 school year was appropriate to address the student's special education needs and that the costs would therefore have to be reimbursed to the parents by the district.

**3. 2022-23 School Year**

As for the 2022-23 school year, the parents seek reimbursement for the unilaterally obtained services they acquired for the student in the form of 1:1 ABA services. More specifically, the parents request reimbursement of $915 for the insurance co-payments for ABA services. Similar to the parents' request for reimbursement for services obtained during the 2021-22 school year, the parents' request for reimbursement for the ABA services provided to the student during the 2022-23 school year must be assessed using an analysis of the evidence under the Burlington/Carter framework.

The parents base their claim for reimbursement of the insurance co-payments for the ABA services on the fact that the February 2022 private psychological evaluation recommended ABA services (see Parent Ex. G). The hearing record shows that Proud Moments ABA provided the student's ABA services during the 2022-23 school year (Parent Exs. J; Y at pp. 6-13). The evidence shows that the parents had a financial obligation to pay the co-payments for the student's ABA services during the 2022-23 school year from September 8, 2022 through December 29, 2022 (Parent Ex. Y at pp. 6-13).

Unlike the lack of evidence regarding the 2021-22 school year, for the 2022-23 school year the hearing record includes a January 2023 ABA treatment request prepared by Proud Moments

ABA that included a request for authorization for 20 hours per week of ABA services from August 18, 2022 to February 18, 2023 (Parent Ex. J at pp. 1, 2, 17).

Regarding the ABA services Proud Moments ABA provided to the student during the 2022-23 school year, the ABA treatment request reflects information including the student's current diagnosis of autism spectrum disorder; the type (direct intervention, adaptive behavior treatment, family adaptive behavior treatment, indirect treatment planning, and reassessment), number of hours, and frequency of services requested; student history; current student observations; assessment of current functioning; current problem areas (communication, socialization, functional skills, maladaptive/repetitive/restrictive behaviors) and behaviors targeted; a BIP; preference and risk assessment; crisis management; coordination of care; caregiver involvement; and transition and discharge plans (see Parent Ex. J).

Regarding the student's needs, according to the ABA treatment request an observation of the student reflected that he needed prompting to attend, took toys from peers, appeared to become bored, had difficulty regulating his body and emotions, yelled at peers, pushed a chair, and required additional prompting to transition appropriately to a new activity (Parent Ex. J at p. 5). Administration of the Vineland Adaptive Behavior Scales to the student indicated that he exhibited delays in interacting and communicating with others, maintaining reciprocal conversations, picking up on non-verbal communication, and staying on topic (id.). Socially, the student had "a very difficult time relating to others appropriately and he [could ]not sustain meaningful relationships," he struggled to play with others appropriately, displayed rigidity, and needed prompting to tolerate demands and rules from others (id. at p. 8). Regarding functional skills, the ABA treatment request identified that the student struggled with transitioning between activities and did not engage in task completion (id. at p. 9). The student exhibited maladaptive behaviors that were targeted for decrease including tantrum, physical and verbal aggression, eloping, and interrupting; functional language, and coping/tolerance replacement behaviors (id. at pp. 10-11).

To meet the student's needs, review of the ABA treatment request indicated that Proud Moments ABA services "generally involve[d] implementation of treatment goals using various intervention methods, including discrete trial teaching, functional communication training, antecedent-based interventions, and natural environment teaching" (Parent Ex. J at p. 3). Proud Moments ABA developed approximately 22 goals for the student in the areas of communication, social interaction, functional skills, reduction of maladaptive behaviors, and use of replacement behaviors, with July 2023 as the end target date for all but one of the goals (id. at pp. 6-11). The agency also developed a BIP for the student to reduce instances of the student's maladaptive behaviors, and identified reinforcers such as candy, prizes, and stickers (id. at pp. 11-13). Additionally, the ABA treatment request reflected notes from the agency personnels' interactions with the student's teacher regarding his behavior, and caregiver training goals, as well as benchmarks for transition and discharge planning (id. at pp. 14-16).

Therefore, contrary to the IHO's finding, the evidence in the hearing record shows that Proud Moments ABA identified the student's needs and provided appropriate ABA services to the student during the 2022-23 school year such that the parents are entitled to reimbursement for the insurance co-payments for those services.

In addition to reimbursement for the insurance co-payments related to the privately obtained ABA services, the parents request compensatory education for the portions of the 2020-21 and 2021-22 school years when the student was not receiving ABA services. However, as noted above this request for compensatory services is based on the February 2022 psychological evaluation recommendation and the student's progress receiving ABA services as shown in the ABA treatment request signed in January 2023, and this information was not available to the district during the period the student was not receiving ABA services (see Parent Exs. G; J). Additionally, on appeal, the parents assert that the student "was delayed and needed compensatory 1:1 instruction for the failure to provide it during critical developmental years"; however, the parents do not specifically identify any need areas that the requested compensatory 1:1 instruction would address (Req. for Rev. ¶ 4). Upon review of the hearing record, of particular note regarding a potential compensatory award, the February 2022 psychological evaluation indicated that, academically, the student was "on-par or above grade expectations" (Parent Ex. G at p. 2). Further, as discussed above, the ABA treatment request indicates that the main area of focus for the student's ABA services was communication skills including functional communication and emotional regulation, functional skills such as transitioning between activities and completing tasks, and maladaptive behaviors (Parent Ex. J at pp. 5-11). In this instance, rather than award a number of hours of 1:1 instruction to target an unspecified area of need, a more proper course of action is to direct the district to conduct an FBA for the student and, if necessary, develop a BIP to address the student's maladaptive behaviors. Additionally, when the CSE reconvenes to consider the FBA, the CSE should also consider the student's progress when receiving ABA services and whether additional services are necessary going forward.[20]

## VII. Conclusion

As described above, the evidence in the hearing record supports the IHO's determinations that (1) an interim decision regarding pendency was unnecessary; (2) IEEs were not warranted under an interim decision or as final relief; (3) compensatory education in the form of 1:1 ABA services was not an appropriate remedy for the three-year denial of FAPE; and (4) that reimbursement for the private OT obtained during a portion of the 2021-22 school year was not warranted. Further, I find sufficient reason to reverse the IHO's denial of reimbursement for the

[20] On appeal, the parents request a determination as to what an appropriate program would be for the student on a going forward basis. Generally, an award of prospective relief in the form of IEP amendments and the prospective placement of a student in a particular type of program and placement, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X, 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"]). At the time of the IHO's decision in April 2023, the 2022-23 school year had not yet ended, and the student's annual review was not due to occur until May 18, 2023 (see SRO Ex. 1 at p. 1); however, as of the date of this decision the 2022-23 school year has ended and the student's annual review should have taken place. Additionally, the evidence in the hearing record is not sufficiently developed to warrant a prospective amendment to the student's IEP particularly given that the district is being directed to complete an FBA and consider the results in formulating a program to address the student's current needs.

insurance co-payments related to the ABA services the student received during the 2022-23 school year and a sufficient basis to order the district to conduct an FBA of the student.

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

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

**IT IS ORDERED** that the IHO's decision, dated April 21, 2023, is modified by reversing that portion that found that the parents were not entitled to reimbursement for the co-payments related to the ABA services the student received during the 2022-23 school year; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parents for the co-payments associated with the student's 2022-23 ABA services upon proof of payment; and

**IT IS FURTHER ORDERED** that, unless the parties otherwise agree, the district shall conduct an FBA of the student within 30 days of the date of this decision and the CSE shall convene upon completion of the FBA to review and consider the completed FBA and whether a BIP is warranted.

**Dated:** **Albany, New York**
**August 4, 2023**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**