



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-146

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

Appearances:

Andrea Spratt, Esq., attorney for petitioner

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. Petitioner (the parent) appeals from that portion of the decision of an impartial hearing officer (IHO) which declined to award compensatory education relief upon finding that respondent (the district) failed to offer the student an appropriate program for the 2020-21, 2021-22, and 2022-23 school years. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail.

Briefly, according to the parent the student attended a district 8:1+1 special class in a specialized school during the 2020-21 school year (see Parent Ex. B at p. 1). The CSE convened on April 19, 2021, determined that the student was eligible for special education programming as a student with autism, and developed an IEP for the remainder of the 2020-21 school year and the

2021-22 school year through the projected annual review date of April 19, 2022 (see generally Dist. Ex. 1).¹ The student continued to attend the district's program for the 2021-22 school year (see Parent Ex. B at p. 1).

The CSE convened on June 23, 2022 to revise the student's IEP for the 12-month 2022-23 school year (see generally Dist. Ex. 6). The parent rejected the CSE's proposed recommendations for the 2022-23 school year and, as a result, notified the district of his intent to unilaterally place the student at Academy of Young Minds (AYM) for the 2022-23 school year and seek "direct funding" for the costs of tuition and transportation (see Parent Ex. B).² In a due process complaint notice, dated January 30, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21, 2021-22, and 2022-23 school years due to, among other things, procedural defects and a lack of applied behavior analysis (ABA) instruction (see Parent Ex. A).³ For the alleged denial of FAPE for the 2022-23 school year, the parent requested district funding for the costs of the student's tuition at AYM and for the alleged denial of FAPE for the 2020-21 and 2021-22 school years, the parent requested 1,472 hours of compensatory ABA services (Parent Ex. A at p. 7).

An impartial hearing convened on March 14, 2023 and concluded on May 17, 2023 after four days of proceedings (Tr. pp. 1-73). In a decision dated June 12, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years, that AYM was an appropriate unilateral placement for the student for the 2022-23 school year, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement; however, the IHO found that the parent's large request for compensatory education services was speculative and difficult to separate from the benefits that the student received from AYM and was therefore denied (IHO Decision at pp. 6-11). For relief, the IHO ordered the district to reimburse the parent for the cost of the student's tuition at AYM for the 2022-23 school year (id. at pp. 8, 11).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited. The gravamen of the parties' dispute on appeal is whether the IHO erred in denying the parent's request for 1,472 hours of 1:1 home/community-based ABA services as compensatory education at a rate of \$270 per hour as relief for a denial of FAPE for the 2020-

¹ Neither party entered the IEP that was in effect for the portion of the 2020-21 school year prior to the April 2021 IEP into the hearing record. Additionally, the student's eligibility for special education as a student with autism is not in dispute (see 8 NYCRR 200.1[zz][1]).

² The Commissioner of Education has not approved AYM as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

³ The parent also asserted that she attempted to obtain compensatory education from the district for services not provided during the COVID-19 pandemic, but disagreed with the district scheduling the compensatory services in the morning, before school started, instead of after school (Parent Ex. A at p. 7).

21 and 2021-22 school years in addition to the tuition reimbursement relief that the IHO awarded for AYM for the denial of FAPE for the 2022-23 school year.

V. Applicable Standards

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];⁴ 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom. Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational

services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

VI. Discussion

A. Preliminary Matters

1. Scope of Review

Neither party appeals from the IHO's finding that the district failed to offer the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years (IHO Decision at p. 6). Additionally, the district did not appeal from the IHO's finding that the unilateral placement was appropriate and that equitable considerations favored an award of tuition reimbursement, or the IHO's order directing the district to directly fund the costs of the student's unilateral placement at AYM for the 2022-23 school year (IHO Decision at pp. 7-8, 11). As such, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Therefore, the only issue left to be resolved is whether the student is entitled to compensatory education services for the denial of FAPE.⁵

2. Subpoena

The parent argues that the IHO should have made a negative inference against the district because the district failed to comply with a subpoena. The district counters, asserting that the parent did not raise this issue at the impartial hearing and that there is no basis to find the district failed to comply with the subpoena.

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see

⁵ The district filed a document captioned as a "Verified Answer and Cross-Appeal," and a Notice of Intention to Cross-Appeal (see Answer with Cross Appeal; Dist. Not. of Intention to Cross-Appeal). However, a review of the answer demonstrates that the district did not cross-appeal any of the IHO's adverse findings. The district is reminded to properly file just an answer, unless it is appealing adverse findings, to avoid confusing the process.

Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). 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]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). 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, an IHO has the authority to issue a subpoena if necessary (see 8 NYCRR 200.5[j][3][iv]).

Here, during the March 14, 2023 hearing, the parent's attorney noted that she would be asking the IHO to sign a document subpoena (Tr. pp. 2-3). The IHO extended the compliance timeline for the case for the issue of the subpoena to be discussed (Tr. p. 5). At the next hearing on April 10, 2023, the district did not appear (Tr. p. 9).⁶ However, the parent's attorney stated that there was no disagreement regarding the subpoena (id.). The next hearing was held on April 20, 2023, at which time the IHO asked if the subpoena issue was settled and the parent's attorney replied that she believed it was, to which the district's representative agreed (Tr. p. 16). The parent's attorney went on to note that "there [were] no arguments about the subpoena" and that it had been served; however, she had not yet received the documents (id.). The district's representative indicated that "it seem[ed] like the school was compiling things for the subpoena" (id.). Approximately one month later, the final day of the hearing was held, on May 17, 2023, during which evidence was offered by the parties in this matter, but there was no discussion regarding the subpoena (see Tr. pp. 22-73). However, several weeks after the hearing had concluded, the parent argued in his closing brief that the district failed to comply with either the March 2022 Family Education Rights and Privacy Act (FERPA) request or the subpoena (Parent Post Hr'g Br. at p. 3).⁷

Neither party entered a copy the subpoena into the hearing record, nor did the parent attach a copy of the subpoena to his request for review or answer to the cross-appeal. The hearing record indicates that the parent was seeking data sheets for ABA services that the district asserted it provided to the student while the student was attending school in the district during the 2020-21 and 2021-22 school years. These data sheets are not in the hearing record (see Parent Exs. A-FF; Dist. Exs. 1-18). The district's bilingual school psychologist (school psychologist) testified that the student's teachers "were using 'principles'" of ABA with the student in the classroom (Dist. Ex. 18 ¶¶ 2, 10). The hearing record is clear that the IHO presented opportunities to discuss the subpoena and evidence production with the parties during the hearing process and that the parent's attorney proceeded through the remainder of the hearing without notifying the IHO of her concern.

⁶ The hearing transcript indicated that the district representative was ill (Tr. p. 9).

⁷ The parent made a request under FERPA for educational records dated March 5, 2022 and entered it into the hearing record (Parent Ex. V). The district responded to this request on March 21, 2022 (Parent Ex. W at p. 1). It is noted that State law does not make provision for review of section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA), the No Child Left Behind Act of 2001, or FERPA claims through the appeal process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012]). ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its State counterpart"].

It was not reasonable for the parent to proceed in this manner, reassert the issue in the closing brief weeks later and then cast blame on the IHO. . Under these circumstances, I will not speculate as to what such sheets might reflect or that they even exist. Most problematic for the parent's argument is that the parent did not seek to admit the subpoena itself into the hearing record and, accordingly, there is no basis to find that the district failed to comply with it, much less find error because the IHO did not draw a negative inference against the district due to alleged nonresponse. Finally, on appeal, the parent has not specified the specific negative inference which she is seeking against the district. Accordingly, based on the above, there is no basis for drawing a negative inference against the district and the available evidence in the hearing record will be reviewed to determine the appropriateness of the parent's requested relief.

B. Compensatory Education

In his due process complaint notice, the parent requested that the district fund 1,472 hours of compensatory ABA services for a denial of FAPE for the 2020-21 and 2021-22 school years (Parent Ex. A at p. 7). In the parent's post-hearing brief, the parent maintained the request for 1,472 hours of compensatory 1:1 ABA services, but further indicated that he requested "a home and community based program consisting of at least 15 hours per week for [] the next two years" (Parent Post Hr'g Br. at p. 15). On appeal, the parent appeals from the IHO's decision denying the request for direct funding of 1,472 hours of compensatory education consisting of "approximately 15 hours per week over the next two years" (Req. for Rev. at p. 2).⁸

When discussing the case law regarding compensatory education, the IHO correctly noted that an outright default judgement awarding compensatory education is disfavored (IHO Decision at p. 9). With respect to this case, the IHO then found that the hearing record demonstrated the student was making progress at the unilateral placement without the requested 15 hours per week of 1:1 home/community-based ABA services and therefore, such a large award of compensatory education was unwarranted (id. at p. 10). The IHO held that the testimony asserting the student needs "15 hours of at home ABA to put her in a position she would have been in had the [district] provided a FAPE," was unclear as to what years that referred to (id. at pp. 10-11). The IHO further found that "the [p]arent can't have it both ways," such that if the unilateral placement was appropriate for the 2022-23 school year, then compensatory education services were not warranted for that school year (id. at p. 11). Regarding the 2020-21 and 2021-22 school years, the IHO determined the "the large number of ABA hours requested [wa]s speculative and impossible to separate from the progress the [s]tudent [wa]s currently making" and that there was "no testimony as to where the [s]tudent should be had she received the services when she was age 3 and age 4" (id.). Therefore, the IHO denied the parent's request for compensatory education services (id.).

⁸ It is unclear how the parent computed the number of hours requested for compensatory education as dividing the number of hours (1,472) by the number of hours requested per week (15) does not come up with a whole number. Additionally, the 10-month school year consists of 36 weeks (180 school days divided by 5 days per week); if a student attends 12-month programming, then the school year would consist of 42 weeks (i.e., 36 weeks plus 6 weeks during summer) (see Educ. Law § 3604[7]; 8 NYCRR 175.5 [a], [c]; 200.1[eee]). Accordingly, if compensatory services were warranted, and 15 hours per week were an appropriate amount, for a full two-school years the total amount requested should have been 1,260 hours.

On appeal, the parent argues that the IHO erred in denying his request for compensatory education services for the 2020-21 and 2021-22 school years and that the IHO improperly applied the caselaw and analyzed the facts. The parent requests that compensatory education services be granted. In rebuttal, the district argues that the IHO was correct by denying the request for compensatory education and a review of the decision demonstrates the IHO properly weighed the evidence in the hearing record. Further, the district asserts that compensatory education should not be granted because generalization of skills across settings is not required of school districts and therefore should not be a basis for compensatory education.⁹

Initially, regarding any allegation that the parent is seeking a default judgment, an outright default judgment awarding compensatory education—or 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 would 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."]). Thus, an IHO by no means is required to merely adopt the relief proposed by parental experts. The IHO found that the district did not explain its programming, and did not challenge the adequacy of the parent's unilateral placement, but did not conclude that the student's programming must be limited to the ABA methodology. The IHO was not required to simply adopt the parent's request for ABA compensatory education services, and as further described below, the IHO was correct that the evidence in the hearing record did not present unambiguous reasons to provide further compensatory relief after awarding tuition reimbursement.

⁹ As noted by the parent, in discussing generalization of skills, courts have indicated that school districts are not required, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (see, e.g., F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-10 [S.D.N.Y. Mar. 1, 2016], *aff'd in part*, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]). In this instance, the head of the school at AYM testified that the requested home/community-based ABA sessions would help the student "to target her communication and attending skills to allow her focus during classroom instruction" and that these additional ABA hours should "focus on her communication skills in order for [the student] to generalize these skill into the classroom" (Parent Ex. AA ¶¶ 1, 44-45). Accordingly, in reviewing the language used by the courts and the head of school without further inquiry, generalization of skills does not appear to be an issue that would necessarily bar relief in this instance. However, it should be noted that if the purpose of the service is simply generalizing skills from one environment to another, there may be little difference between generalizing a skill taught at home to the school environment or a skill taught at school to the home environment.

In order to make a determination as to whether the request for compensatory education should be granted, a discussion of the student's educational needs and progress within the district is warranted. The student attended a district 8:1+1 special class with received related services for the 2020-21 (kindergarten) and 2021-22 (first grade) school years (Parent Ex. A at p. 2; see Dist. Ex. 1 at pp. 24-25).

According to the April 2021 IEP, the Assessment of Basic Language and Learning Skills (ABLBS) was administered to the student in October 2020 (Dist. Ex. 1 at pp. 1-2; see Parent Ex. EE). The April 2021 IEP indicated that the student had shown progress in her early academic skill development including her ability to label items such as colors, body parts, shapes, transportation, letters; identify numbers 1-20; write legible letters given a model; and follow two step directions given visual cues (Dist. Ex. 1 at pp. 2-3). In addition, the student had reportedly made progress in her cooperative play skills and her ability to attend to a task for 10 minutes (id. at p. 3). According to the IEP, the student's "language and play [wa]s self-directed and her language [wa]s mostly made up of immediate and delayed echolalia" (id.). She inconsistently responded to yes/no questions and did not make verbal requests using three-to-four-word sentences (id.). The student communicated using single words and an augmentation alternative communication (AAC) device, and her communication was "more productive using picture symbols" (Dist. Ex. 1 at p. 3; see Dist. Ex. 12). Overall, the student exhibited delays in her expressive, receptive, and pragmatic language skills, and needed to develop more verbal language to express her wants and needs (Dist. Ex. 1 at pp. 3, 7).

The April 2021 IEP indicated that in the area of academics, the student was able to identify letters and numbers, draw short lines, and follow one step directions; but was unable to receptively identify sight words, count objects up to fifteen, copy simple drawings, or follow two step directions (Dist. Ex. 1 at p. 4). The student benefitted from hands-on direct instruction, visual cues, limited distractions, and repetition to retain newly learned skills (id. at pp. 4, 6-7). She did not demonstrate problem solving abilities and avoided tasks that were new or difficult (id. at pp. 4, 7). Additionally, the student required redirection, gestural cues, and verbal prompts to stay on task during group instruction (id. at pp. 5, 7). The student was reportedly able to follow routine directions and complete familiar tasks independently or with little adult support, but required redirection to complete tasks which were newly learned (id. at p. 5). Her participation and focus during instruction improved when provided positive social interaction, music and movement, modeling, redirection, structure, routine, and positive reinforcement (id. at pp. 5-7). The student benefitted from supports including visual prompts and cues, small group and 1:1 instruction, multisensory strategies, checklists, and using a timer (id. at pp. 6-7).

Regarding the student's social/emotional skills, the April 2021 IEP indicated that, in October 2020, a school-based behavior plan was developed to address the student's "sensory/self-stim behaviors" such as self-talk and echolalia (Dist. Ex. 1 at p. 8). The student was described as "very calm and happy," and able to follow classroom rules well (id.). Her play was described as "self-directed," during which she exhibited "a lot of language and facial expressions"; however, her speech was often out of context or echolalic (id.). The student was able to imitate simple actions, look for hidden objects, role play familiar actions, imitate some pretend play, and manipulate mechanical toys (id. at p. 9). She had difficulty maintaining eye contact and using language appropriately to communicate effectively (id.). In the area of physical development, the IEP indicated that the student was able to navigate the classroom safely and was mostly

independent at mealtimes (id. at p. 10). She did not exhibit physical limitations in range of motion and had age appropriate strength and endurance (id.). The student approached challenging activities hesitantly and had difficulty performing age-appropriate gross motor tasks such as jumping and skipping (id.). The student was able to consistently follow one step directions and independently transition from floor to standing but had difficulty going up and down stairs (id.).

The student's April 2021 IEP featured 9 measurable annual goals for the student in the areas of reading, math, writing, social/emotional, activities of daily living (ADLs), speech-language, occupational therapy (OT), and physical therapy (PT) (Dist. Ex. 1 at pp. 13-22). Specifically, the student was working on skills such as reading 10 sight words and matching words to pictures to demonstrate comprehension, counting 15 objects, copying simple lines and circles, making her needs known verbally or with a picture exchange communication system (PECS), following two step directions, making a choice between two objects or activities using words or a PECS, expressing core words verbally or using a PECS during structured activities, using scissors functionally, and climbing a flight of stairs independently (id.). According to the annual goal progress reports, by the end of the 2020-21 school year the student had achieved her goals in reading, following directions, and scissor skills and had made progress on all her other goals (id.).

Turning to the evaluations of the student conducted in spring 2022, the May 16, 2022 speech-language evaluation report indicated that the Evaluating Acquired Skills in Communication-Third Edition (EASIC-3)-Receptive I/II Inventory, an informal expressive language assessment, observation, and a caregiver interview, and an informal expressive language assessment were administered (Dist. Ex. 14 at p. 1). According to the student's grandmother, the student did not verbally make her needs known but rather communicated primarily using gestures such as pulling on adults to make requests (id.). During the observation, the student responded to environmental sounds, and her name inconsistently (id. at p. 2). The student was observed in her classroom exhibiting "good in-seat behavior" and attention to tasks given moderate redirection (id.). The student did not spontaneously respond to her teacher's questions or repeat days of the week given a model (id.). The student was observed to independently follow simple directions appropriately when prompted and the teacher reported that the student was able to follow some two step directions given cues and repetition (id.). During the observation, the student did not initiate any verbal interactions with peers or adults, respond to questions, label most familiar objects, or imitate verbalizations despite repeated prompts (id. at pp. 2-3). During the evaluation, the student was able to receptively identify common objects, body parts, objects by function, and action pictures, and follow simple directions (id. at p. 3). The student had difficulty responding to increasingly complex wh- questions even given picture cues, and comprehending personal and possessive pronouns (id. at pp. 3-4). Overall, the clinician concluded that the student exhibited significant delays in her receptive and expressive language development and recommended that the student continue to receive three 30-minute sessions of individual speech-language therapy per week (id. at p. 4).

According to the May 17, 2022 OT evaluation report, the student was interactive with peers and able to share and take turns, exhibited awareness of her surroundings, and kept her hands to herself even when frustrated (Dist. Ex. 13 at p. 2). The OT evaluation report described the student as nonverbal, easily distracted, and "organized in play, [and] structured activities with global skill carryover" (id. at p. 3). She reportedly enjoyed interactive toys, "instructional jingles," and peer interaction (id.). The occupational therapist reported that the student exhibited limited visual

attention, good postural tone, age-appropriate strength, endurance, and balance, and was reportedly capable of self-regulation (id. at pp. 3-4). The student was able to navigate stairs, walk the hallways in a line, sit upright at her desk, operate a scooter, and run in a straight line (id. at p. 3). Additionally, the student handled scissors "with competence" and was working on cutting "complex geometric forms" (id.). The evaluation report indicated that the student used a "gross grasp prehensile pattern" with crayons for scribbling and was able to mimic actions given a model and repetition (id.). She was able to dress herself given cues, transition between activities easily, and was independent in most self-care activities (id. at p. 4). Finally, the OT evaluation report noted that the student had made "observable" and "measurable" academic progress and therefore recommended a reduction in the student's OT mandate from three 30-minute sessions per week to two 30-minute sessions per week (id.).

According to the May 18, 2022 private psychological evaluation report, during the evaluation, the student was friendly and cooperative, but distracted and fidgety (Parent Ex. X at p. 2). The student reportedly could be hyperactive, anxious, sad, and socially withdrawn; and she exhibited temper tantrums, self-stimulatory behavior, and compulsive behavior (id.). The student's interest, motivation, frustration tolerance, and ability to attend to tasks was adequate given prompts and redirection (id.). According to results of the Vineland Adaptive Behavior Scale III, the student exhibited mild deficits in the daily living and motor skills domains, and severe deficits in the communication and socialization domains (id. at p. 3). Overall, the student's scores indicated significant deficits in the adaptive behavior domain (id. at p. 5). Administration of the Stanford-Binet Intelligence Scales-Fifth Edition to the student yielded a nonverbal IQ of 48, and the Leiter International Performance Scale-Revised (Leiter-R) was also administered resulting in a nonverbal IQ of 56, indicating a mild to moderate intellectual developmental disorder (id. at pp. 4, 5). The private psychologist recommended referral of the student for "ABA therapy" and placement in an "intensive ABA class/school setting during the school day to learn and master pre-requisite skills," and to provide "opportunities with typically developing peers to improve her communication abilities and social interactions" (id. at p. 5).

At the time of the district psychoeducational evaluation, conducted in May and June 2022, the student did not respond to questions in casual conversation and exhibited a very limited attention span (Dist. Ex. 7 at p. 2). During the evaluation, the student engaged in self-stimulatory behaviors such as hand flapping, stomping her feet, singing, and using repetitive stereotypical phrases (id.). The student benefitted from maximum redirection, verbal prompting, cueing, and the use of reinforcers to motivate her engagement in tasks (id.). However, the student's difficulty with attention and distractibility impacted her ability to attend to directions and complete testing tasks, resulting in the inability to obtain cognitive and academic composite scores (id.). The school psychologist concluded that based on informal academic assessment, parent, and teacher report, the student's academic skills were "estimated to be well below her grade level" and she needed to increase her ability to sustain attention and focus during instructional time (id. at p. 10). The school psychologist also reported that the student's overall adaptive behavior skills were in the low range of ability, with motor skills an area of relative strength, and socialization skills an area of relative weakness (id. at pp. 10-11). In June 2022, the parent reported that the student needed to improve her overall academic skills and her ability to focus on tasks and that she was not making "meaningful progress" in her current academic setting (id. at p. 6). Additionally, the parent believed that the student required an intensive ABA program to provide her with individualized instruction (id.).

Turning to the student's need for home/community-based ABA compensatory education services, the school psychologist who conducted the student's June 2022 psychoeducational evaluation testified in an affidavit that at the June 2022 CSE meeting she was informed that the student's teachers were using "principles" of ABA in the classroom including a token economy system, individual and visual schedules, discreet trials and task analysis, along with multisensory and differential instruction (Dist. Ex. 18 ¶¶ 2, 3, 8 10, 11; see Dist. Ex. 7 at p. 11). The school psychologist stated that the recommended district 6:1+1 special classroom "would use ABA methodologies" and multisensory approaches in a "more holistic manner," which would be "good" for the student (Dist. Ex. 18 ¶ 11). The school psychologist acknowledged that the student "could benefit from a few principles of ABA," but opined that using ABA was not the only way for the student to make progress (id. ¶ 12). According to the school psychologist, the student should remain in a setting where she had opportunities to interact with typically developing peers rather than a more restrictive "ABA only" school, as the student was "very receptive to instruction and social growth" (id. ¶¶ 12-13). Additionally, the school psychologist opined that the amount of ABA services the parent was seeking in addition to the student's school schedule was "not feasible" as the student "need[ed] time to relax" and have time with peers, and recommended that the student's after school activities focus on social and sensory activities, rather than additional ABA instruction (id. ¶ at 14).

Review of the evidence in the hearing record shows that the student was making progress in the district's program without the exclusive use of ABA instruction. Results of a May 2022 administration of the ABLLS to the student, reflected in the June 2022 IEP, shows that the student scored the same or higher in all areas tested compared to her scores from April 2021, with the most significant gains in the areas of cooperation and reinforcer effectiveness, visual performance, receptive language, spontaneous vocalizations, and fine motor skills (Parent Ex. EE; compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 6 at pp. 4-5).¹⁰ In these areas and most others, the student demonstrated clear and measurable progress (Parent Ex. EE). Further, as discussed above, during the 2020-21 school year the student achieved some of her annual goals and made progress towards the others, and the June 2022 IEP reflected that the student achieved some of her annual goals during the 2021-22 school year, including her annual goals to match 10 sight words to pictures and follow two step directions, and had made some progress counting objects and copying simple drawings (Dist. Exs. 1 at pp. 13-22; 6 at pp. 5, 6, 7, 8).

Evidence of the student's progress was also reflected in the June 2022 IEP present levels of performance (Dist. Ex. 6 at pp. 3-4, 6-7, 10, 13). For example, during the June 2022 classroom observation the student followed simple rules with fair independence, responded well to her visual schedule, visual supports, and positive reinforcers (id. at pp. 3-4). During speech-language therapy sessions, the student consistently followed directions for cleaning up, sitting at the desk, and retrieving/putting away toys (id. at pp. 6-7). According to the IEP, when the student was able to attend to a task albeit briefly, it was apparent that she possessed a significant vocabulary (id. at p. 7). Further, the student exhibited an increasing ability to communicate using gestures and signs (id.). The student consistently used the sign for "give me" and was working on using the sign for

¹⁰ The parent advocate who attended the June 2022 CSE meeting testified in an affidavit that the special education teacher informed her that the student's ABLLS score in the writing skills domain for June 2022 was a typo, and the corrected score indicating the student had not regressed was reflected in a revised document (Parent Ex. CC ¶¶ 3, 6; compare Parent Ex. DD, with Parent Ex. EE).

"more" (*id.*). The student was also learning to use PECS as an additional method to communicate her wants and needs (*id.*). According to the IEP, the student identified letters and some letter sounds, identified numbers, copied simple lines on paper, and her scissors skills had improved as she was able to independently cut paper with scissors (*id.* at pp. 7, 13). Additionally, the student responded appropriately to her peers; for example, she demonstrated respect towards peers, had made progress initiating interactions, enjoyed participating in movement activities with her peers, and showed interest in their activities (*id.* at p. 10). Given the student's then-current gross motor skill development, the physical therapist recommended a decrease in the student's PT mandate by one session per week (compare Dist. Ex. 1 at p. 23, with Dist. Ex. 6 at p. 28).

The evidence in the hearing record demonstrates that district staff used some ABA principles with the student but does not support a finding that, during the school years at issue, only ABA methodology should have been used with the student to the exclusion of other teaching methods. The school psychologist testified that the student also required other methods of teaching and opined that ABA instruction was not the only way that the student would make progress (see Dist. Ex. 18 ¶¶ 10-12). She testified that instructional method used with the student included ABA principles such as a token economy system, individual and virtual schedules, discreet trials and task analysis, but "in conjunction with multisensory and differential instruction" (*id.* ¶ 10). The school psychologist opined that use of ABA methods and multisensory approaches in a "holistic manner" was "good" for the student (*id.* ¶ 11). As previously discussed, the student made progress in the district's program, and with the exception of the May 2022 private psychological evaluation, none of the evaluative information available to the June 2022 CSE recommended that the student receive ABA services (compare Parent Ex. X at p. 5, with Dist. Exs. 3; 7; 8; 9; 12; 13; 14; 15; 16). Therefore, the evidence in the hearing record did not demonstrate a clear consensus that the student did not, or would not receive educational benefits in the absence of programming limited to ABA instruction that is delivered in the manner preferred by the parent.

Overall as discussed above, the evidence in the hearing record shows that the student made progress in her district 8:1+1 special class during the 2020-21 and 2021-22 school years without the exclusive use of ABA methodology, such that it is reasonable to find that the student does not learn only through the use of ABA methodology and the student does not require home/community-based ABA services, in addition to her placement at AYM, as compensatory education to remedy the district's denial of a FAPE. I am not persuaded by the parent's arguments that the student was not making meaningful progress during the 2020-21 and 2021-22 school years, which undermines the argument that the IHO erred in failing to award compensatory education services. Contrary to the parent's assertions, this is not a case in which there was a clear consensus that the student's programming should only be provided by means of ABA instruction for the 2020-21 and 2021-22 school years, and the student's progress prior to being unilaterally placed tends to support the district's viewpoint.¹¹

¹¹ As noted above, the question of whether the district denied the student a FAPE for the 2020-21 and 2021-22 school year was not appealed and therefore the question becomes what, if anything, is necessary to remediate the denial of a FAPE at this juncture. The question of whether the district would have been mandated to provide ABA services remains relevant to fashioning equitable relief in the form of ABA services. Generally, the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't

Further, the evidence shows that the dispute in this case overlaps the time period in which school buildings were closed and learning was impeded by the COVID-19 pandemic. In January 2022, the district offered the parent "special education recovery services," described as "specialized instruction and related services, targeted to your child's individual needs and IEP goals" and offered "to address needs arising from learning disruption caused by the [COVID-19] pandemic," which did not replace the student's IEP services (Parent Ex. W at p. 6; Dist. Ex. 17 at p. 1). Specifically, the district offered a recovery services program consisting of 20 hours of small group instruction (of 6 or fewer), 10 hours of group OT, 10 hours of group PT, and 10 hours of group speech-language therapy from December 6, 2021 to February 18, 2022 (Parent Ex. W at p. 6; Dist. Ex. 17 at p. 1). However, it appears that the parent declined these services (see Parent Ex. A at p. 7). In the due process complaint notice, the parent states that he attempted to obtain the make-up services offered by the district, but that the district postponed the start date, then rescheduled the services from after school to before school, and the student was "unable to learn very early in the morning" (Parent Ex. A at p. 7). While the parent was not required to accept the recovery services offered by the district, the proffered services provide an example of the district's further efforts to address the student's needs. On balance, I find the district was showing greater attempts to accommodating the student's needs by providing the recovery programming outside of the regular school day and the parent was less so when he rejected the services under the reasoning that the district did not provide make up services on a schedule that suited him. In this instance parent's argument was less convincing when he turned away services offered by the district and then complained that the district programming was insufficiently supportive and sought home-based services as compensatory education relief for the same period.

of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94).

However, when the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). If the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194).

Finally, the parent asserts that Application of a Student with a Disability, Appeal No. 23-024 supports his position that compensatory education must be given. This argument is without merit and demonstrates the parent's misinterpretation of the finding in that decision, which appears to have found that a lack of evidence of the student's progress during the period of the FAPE deprivation required an award of compensatory education (see Application of a Student with a Disability, Appeal No. 23-024). That decision specifically noted that the analysis for a compensatory education award required "a 'qualitative focus on individual needs' of disabled students" (*id.*). Additionally, as has been noted in other decisions, it is proper to not award compensatory education where there is evidence the student has made progress or the deficiency has otherwise been mitigated (see N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014] [finding that a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated"], adopted, 2015 WL 1137588 [D.R.I. Mar. 12, 2015]; Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 [D.D.C. 2013] [finding even if there is a denial of a FAPE, it may be that no compensatory education is required for the denial either because it would not help or because the student has flourished in the student's current placement]).

Based on the above discussion, the evidence in the hearing record does not provide a basis to overturn the IHO's decision to decline to award compensatory 1:1 home/community-based ABA services.

VII. Conclusion

The student is not entitled to the requested relief of 1:1 home/community-based compensatory ABA services for the district's denial of FAPE.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 6, 2023**

**JUSTYN P. BATES
STATE REVIEW OFFICER**