The University of the State of New York

The State Education Department
State Review Officer
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No. 23-164

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 educational services for the 2021-22 school year and denied their request for prospective funding of their son's tuition costs at the Foundry Learning Center (Foundry) for the 2023-24 school year. 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 proceeding and the IHO's decision will not be recited in detail here. Briefly, the Committee on Preschool Special Education (CPSE) convened on July 30, 2021, and found the student eligible for special education and related services as a preschool student with a disability (Dist. Ex. 1 at pp. 1, 3). For the 2021-22 school year, the CPSE recommended that the student receive 12-month services and attend a 6:1+2 special class in an approved preschool program for five hours per day, five days per week (Dist. Exs. 1 at pp. 1, 11; 13; 15). The CPSE also recommended that the student receive three 30-minute sessions per week of individual speech-language therapy and three 30-minute sessions per week of individual occupational therapy (OT), and that the parents receive one 60-minute session per quarter of parent counseling and training

(Dist. Ex. 1 at pp. 1, 11). By notice dated August 9, 2021, the district summarized the July 2021 CPSE's recommendations and identified the particular school site to which the student had been assigned (Dist. Ex. 13). The notice indicated that the parents electronically signed the document consenting to both 10-month and 12-month services on August 10, 2021 (id.).

The CPSE convened on August 3, 2022 to recommend a program and placement for the student for the 2022-23 school year (Dist. Ex. 2 at pp. 1, 3). The August 2022 CPSE recommended a 6:1+2 special class in an approved preschool program for five hours per day, five days per week (id. at pp. 1, 15). The CPSE also recommended that the student receive three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT and two 30-minute sessions per week of individual physical therapy (PT) and that the parents be provided with one 60-minute session per quarter of parent counseling and training (id.).

In a due process complaint notice, dated March 24, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years (IHO Ex. I at p. 15). The parents raised allegations related to a lack of parent participation in the development of the student's educational program, possible discrimination, the lack of evaluations of the student for the 2022-23 school year, a failure to address the student's speech-language needs, a failure to recommend 1:1 ABA instruction, and the appropriateness of the school the student was assigned to attend (id. at pp. 4-14). As relief, the parents sought 2400 hours of compensatory home-based 1:1 applied behavior analysis (ABA) services for the 2021-22 and 2022-23 school years (id. at p. 15). The parents also sought prospective placement of the student at Foundry for the 2023-24 school year, including one hour per day of speech-language therapy and 20 hours per week of home-based 1:1 ABA services (id.at pp. 15-16).

An impartial hearing convened on June 22, 2023 and concluded on the same day after two sessions of hearings (Tr. pp. 1-110).[1] In a decision dated July 10, 2023, the IHO determined that the district offered the student a FAPE for the 2021-22 school year and failed to offer the student a FAPE for the 2022-23 school year (IHO Decision at pp. 2, 13-16).[2] The IHO determined that for the 2021-22 school year, there were no procedural or substantive violations, noting that the IEP was based on the evaluative information available at the time and contained appropriate annual goals and that the assigned school was appropriate for the student (id. at pp. 13-15). For the 2022-23 school year, the IHO found a denial of FAPE because the student required additional supports and because the CSE did not include the parent in the development of the IEP (id. at pp. 15-16). The IHO also recounted in his decision that the parents had attempted to raise claims in a prehearing statement that were not included in the March 24, 2023 due process complaint notice, which the IHO declined to consider (id. at pp. 1, 2, 3-4, 11). As relief for the denial of a FAPE for the 2022-23 school year, the IHO awarded 480 hours of 1:1 ABA instruction to be provided at a

[1] A prehearing conference was held on April 27, 2023 (Apr. 27, 2023 Tr. pp. 1-37). The transcripts for the prehearing date and the day of the hearings were not paginated consecutively. However, because the transcripts for the June 22, 2023 hearings are consecutively paginated for that day and it is unnecessary to cite to the April 27, 2023 prehearing conference, the transcript cites will not be preceded by the hearing date in this decision (Tr. pp. 1-110).

[2] The IHO's decision reflects that a status conference was held on May 11, 2023; however, it appears it was not recorded (IHO Decision at p. 2; see IHO Exs. II at p. 1; V at pp. 1-4).

market rate (id. at pp. 16-18). The IHO further denied the parents' request for prospective funding of tuition at Foundry for the 2023-24 school year (id. at pp. 18-19).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review in the parents' request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited in detail. The crux of the parties' dispute on appeal is whether the IHO correctly awarded the parents 480 hours of compensatory 1:1 ABA services as a remedy for a denial of a FAPE to the student for the 2022-23 school year and whether the IHO correctly denied the parents' requests for prospective placement for the 2023-24 school year at Foundry along with 20 hours per week of home-based 1:1 ABA services.[3]

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional

[3] In its answer, the district argues that the parents did not comply with the regulations governing practice before the Office of State Review. State regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). The district asserts that the parents failed to provide a clear and concise statement of the issues presented for review and the grounds for reversal or modification. The district further contends that while the parents have numbered issues in a section labeled "Argument," they have also raised what could be construed as several additional arguments in other sections of the request for review. The district requests that any statements made outside of the "Argument" section be disregarded. Although the district's characterization of the request for review is accurate, the district did not allege any prejudice and was able to prepare and file an answer, therefore I decline to exercise my discretion to dismiss the request for review based on the failure to comply with the practice regulations.

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]).[4]

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

Initially, the issues presented on appeal appear to be somewhat limited by how the parents have framed their request for review. For instance, much of the parents' allegations relate to the recommendations made by a pediatrician after an evaluation of the student in January through March 2023 (Req. for Rev. at ¶¶ 15-19, 38, 41; see Parent Exs. G; P at ¶¶ 16, 30-39). The review of the doctor's evaluations was part of a May 2023 CSE meeting with respect to the planning for the student's educational program for the 2023-24 school year (see Parent Ex. J). Accordingly, such arguments, although woven in with the parent's arguments related to the 2021-22 and 2022-23 school years, are more related to the parent's request for a finding that the student's recommended program for the 2023-24 school year was inappropriate, which the IHO correctly determined was outside the scope of this proceeding (see IHO Decision at pp. 11-12).[5] Additionally, the parents do not point to a specific error on the part of the IHO to support a finding that the district denied the student a FAPE for the 2021-22 school year (see Req. for Rev.). For example, rather than challenging the design or implementation of the student's educational programming for the 2021-22 school year, the parents' arguments focus on the student's progress while attending the assigned school after the July 2021 CPSE meeting, which information would be retrospective and cannot be used to assess the CPSE's recommendations (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a

[4] 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).

[5] The IHO separately addressed the parents' request for prospective placement of the student for the 2023-24 school year based on the denial of FAPE for the 2022-23 school year (see IHO Decision at pp. 11-12, 18-19).

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"], citing R.E., 694 F.3d at 186–87).[6]

At the outset, I note that the IHO in this matter engaged in a thorough prehearing process to determine the ripeness of the parents' requests for prospective relief, to explain his lack of jurisdiction over some of the parents' claims and to determine which claims were properly within the scope of the impartial hearing (IHO Decision at pp. 1-4, 11; see IHO Exs. II; V; VII).[7] In addition, in a well-reasoned and well-supported decision, the IHO correctly reached conclusions on the claims raised by the parents relating to the 2021-22, 2022-23, and 2023-24 school years. In particular, I find that the following of the IHO's determinations were well-reasoned and supported by the evidence in the hearing record: that the July 2021 CPSE was properly composed; that the CPSE had sufficient evaluative material to create the July 2021 IEP; that the July 2021 IEP contained clear annual goals; and that the recommendations for the student were appropriate, accepted by the parents, and reasonably calculated to enable the student to make appropriate progress in light of his circumstances (IHO Decision at p. 14; see Parent Ex. A at pp. 1-21, 23-26; Dist. Exs. 1 at pp. 1, 2, 6-14; 13). The IHO further found that none of the parents' witnesses demonstrated any procedural or substantive violations relative to the July 2021 IEP and instead expressed a "retroactive dissatisfaction" with the student's progress (IHO Decision at p. 14; see Parent Exs. H at pp. 2, 3, 4; P at p. 4; R at p. 1). With regard to the student's center-based preschool program, the IHO found that the recommended school site was a proper placement that was capable of implementing the July 2021 IEP (IHO Decision at pp. 14-15).

Turning to the 2022-23 school year, the IHO determined that the student's present levels of educational performance at the time of the August 2022 CPSE meeting reflected that the student "required teacher support for almost every activity, such as completing assignments, being reminded of class rules, putting away toys, walking in a line, feeding himself, and toileting" (IHO Decision at p. 15; see Parent Ex. C at pp. 3-8). The IHO further noted that the student "could not interact with peers or adults, identify peers by name, consistently respond to his name or use expressive language to indicate his needs" (IHO Decision at p. 15; see Parent Ex. C at p. 4). The IHO found that the August 2022 CPSE did not consider whether the student needed 1:1 instruction or a more supportive placement, failed to develop appropriate management needs, and failed to increase the student's frequency or duration of speech-language therapy and OT, given the student's struggles during the prior school year (IHO Decision at p. 15; see Parent Ex. C at p. 1). In addition, the IHO noted that the August 2022 IEP indicated that the parents agreed with the

[6] The parents assert that the IHO erred in describing the preschool the student was assigned to attend as a public preschool program; however, the import of such an allegation is unclear as districts are permitted "to enter any contractual or other arrangements necessary to implement the district's prekindergarten plan" (Educ. Law §3602-e[5][d]).

[7] The parents' due process complaint notice included alleged violations of section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. § 794[a]), the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.), alleged violations of the student's federal civil rights (section 1983) (42 U.S.C. § 1983), as well as alleged violations of State and city human rights laws.

recommendations; however, it was not disputed that the August 2022 CPSE meeting was held without the parents in attendance (IHO Decision at p. 16; see Parent Ex. C at pp. 2, 7).

In finding that the district failed to offer the student a FAPE for the 2022-23 school year, the IHO then considered the parents' request for 1200 hours of 1:1 ABA instruction as compensatory education (IHO Decision at pp. 16-18). The IHO determined that the parents' request for 1200 hours was excessive and not supported by the hearing record (id. at p. 17). The IHO considered the parents' developmental pediatrician's recommendation for 40 hours per week of 1:1 ABA services and determined that the student received 30 hours per week of instruction at his preschool program, which left a deficit of ten hours per week (IHO Decision at p. 17; see Parent Exs. H at p. 4; P at p. 8). The IHO determined that the request for 1200 hours equated to an additional six hours of instruction per day and noted that the developmental pediatrician "acknowledge[d] that children can be overwhelmed by too much education" (IHO Decision at p. 18; see Tr. pp. 93-94). The IHO found that the hearing record did not demonstrate that the student could "stay focused or benefit from such a large amount of additional therapy" (IHO Decision at p. 18).[8, 9] As relief for the 2022-23 school year, the IHO awarded ten hours per week of home-based 1:1 ABA services for a total award of 480 hours (id.).

The IHO next considered the parents' requests for prospective relief for the 2023-24 school year (IHO Decision at pp. 18-19). The IHO found that the parents' request for prospective relief was based on their subjective belief that because the student's preschool program and placement were inappropriate, any future recommendation by the CSE would also be inappropriate (id. at p. 18). The parents also argued that the only acceptable placement for the student was "an ABA-based facility" (id.). The IHO noted that the student had turned five in April 2023 and the CSE had not convened a "turning five" meeting to determine the student's program and placement recommendations for the 2023-2024 school year (id.). The IHO found that the CSE had "not yet missed any deadlines and c[ould] amend the 2023 IEP before the September 2023 commencement date" (id.). The IHO also found that the parents' position was based on "speculation and unsupported claims of ineptitude" (id.). The IHO further stated that under the IDEA, school districts are granted "discretion when making an educational decision on how to teach a student, and the IDEA does not require a school district to provide a specific program or employ a specific methodology in providing for the education of children with disabilities" (id.). As a result of the foregoing reasoning, the IHO determined that the parents were not entitled to prospective placement of the student at Foundry and not entitled to 20 hours per week of home-based 1:1 ABA services (id. at pp. 18-19), a finding that comports with the generally accepted principle that the

[8] The parents' developmental pediatrician testified that her recommendation was for 40 hours per week and that the recommendation for 2400 hours to remedy a two-year denial of a FAPE was provided to her (Tr. pp. 86-87).

[9] The IHO's reasoning in this regard, supported by the testimony of the developmental pediatrician, comports with concerns raised by several courts that while an award of compensatory education should place the student in the position he or she would have been in but for the district's denial of a FAPE, attention should also be paid to whether an award is so large that it can become a detriment, rather than a benefit, to the student (see e.g. 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]; M.M. v. New York City Bd. of Educ., 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"]).

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 v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

As to these issues, the IHO accurately recounted the relevant facts of the case and set forth the proper legal standards to determine whether the district offered the student an appropriate educational program for the 2021-22 and 2022-23 school years by recommending appropriate educational programming for the student that met his individual and unique needs, and applied those standards to the facts as presented in this proceeding. The IHO also properly analyzed the parents' requests for prospective relief for the 2023-24 school year. Review of the IHO's decision shows that, for these issues, the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that he weighed the evidence and properly supported his conclusions (see generally IHO Decision). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is not a sufficient basis presented on appeal to modify these determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, the conclusions of the IHO described above are hereby adopted.

VII. Conclusion

The hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2021-22 school year, and failed to offer the student a FAPE for the 2022-23 school year. Having determined that the IHO did not err in awarding 480 hours of compensatory 1:1 ABA services and in denying the parents' requests for prospective relief, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 25, 2023

STEVEN KROLAK
STATE REVIEW OFFICER