



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-082

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:

The Law Office of Steven Alizio, PLLC, attorneys for petitioner, by Steven J. Alizio, Esq. and Justin B. Shane, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Jay St. George, 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 the decision of an impartial hearing officer (IHO) which denied her request for compensatory educational services for her daughter to remedy respondent's (the district's) denial of appropriate educational programming during the 2021-22, 2022-23 and 2023-24 school years. 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, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant

to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). 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 here in detail.¹ Briefly, the student has a history of developmental delays and received diagnoses of autism spectrum disorder (ASD) and attention deficit hyperactivity disorder (ADHD) (Parent Exs. D at pp. 1, 10-12; L at p. 1). Both English and Cantonese languages were spoken at home, with English reported to be the student's dominant language and language used in her school instruction (Parent Exs. D at p. 1; L at p. 1). Beginning at three years of age, the student attended a specialized preschool setting where she received speech-language therapy, occupational therapy (OT), and physical therapy (PT) services (Parent Ex. D at p. 2). The student attended the Cooke School, a nonpublic special education school from kindergarten through fifth grade (id.).

At the outset of the 2021-22 school year (sixth grade), the student transitioned to public school and the CSE recommended that the student attend a district 6:1+1 special class in a specialized school with related services consisting of one 40-minute session per week of individual counseling services, one 40-minute session per week of counseling services in a group; two 40-minute sessions per week of individual OT; two 40-minute sessions per week of individual PT; two 40-minute sessions per week of individual speech-language therapy, two 40-minute sessions per week of speech-language therapy in a group; and adapted physical education (Parent Exs. A at pp. 2, 3; D at p. 2).

On April 29, 2022, the CSE convened to develop the student's IEP for the 2022-23 school year (seventh grade) (Parent Ex. D at p. 2). The CSE determined that the student was eligible for special education as a student with an other health-impairment and recommended 12-month programming consisting of a 6:1+1 special class placement with related services that included: one 30-minute session per week of individual counseling services, one 30-minute session per week of counseling services in a group of two; two 30-minute sessions per week of individual OT; two 30-minute sessions per week of individual PT; two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group of two (id.).

A clinical psychologist conducted a private neuropsychological evaluation of the student that included a classroom observation in October 2022, testing sessions over two dates in November and December 2022, and a feedback date in January 2023 (Parent Ex. D at p. 1).

¹ This matter concerns three school years during which the student attended district programs under several IEPs; however, none of the student's IEPs were offered into the hearing record. The facts and procedural history were generally taken from a private neuropsychological evaluation of the student conducted in November and December 2022 and reported in January 2023 (Parent Ex. D), an independent speech-language evaluation conducted in December 2023 (Parent Ex. L), as well as the parent's September 2023 due process complaint notice (Parent Ex. A).

On April 17, 2023, the parent responded to an email from the district school psychologist and attached a copy of the recent private neuropsychological evaluation report for the district's review prior to the next IEP meeting (Parent Ex. E).

For the 2023-24 school year, the student attended a district 8:1+1 special class and was mandated to receive related services of two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group of two, in addition to OT and PT services (Parent Ex. L at p. 1).

In a due process complaint notice, dated September 12, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22, 2022-23 and 2023-24 school years (see Parent Ex. A). The parent sought declaratory findings stating that the student was denied a FAPE for the school years in question, that the district failed to evaluate the student in all areas of suspected disability, and that the student was entitled to "curb-to-curb transportation services with limited travel time" (id. at p. 10). As further relief, the parent sought an interim order requiring the district to fund an independent speech-language evaluation (id.). As relief on the merits of her claims, the parent sought funding from the district for a full-time nonpublic or independent school-based program that employed applied behavior analysis (ABA), or if such a school was not available, provision for an independent board certified behavior analyst (BCBA) to work with the student 1:1 throughout the school day; funding from the district for a home-based ABA program with BCBA supervision; an order directing the district to fund a bank of compensatory education services for the student, and provision or funding of appropriate transportation (id.).

An impartial hearing convened on October 26, 2023 and concluded on January 8, 2024, after four days of proceedings (Tr. pp. 1-204).² In a decision dated January 31, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2021-22, 2022-23 and 2023-24 school years, but found that the compensatory relief requested by the parent was unwarranted, and denied in full "all specific claims for relief by [the parent]" (IHO Decision at pp. 14-15). The IHO ordered the district to reconvene a CSE meeting with the presence of a Cantonese interpreter within 25 school days of his decision to review the most recent private speech-language evaluation and consider adjusting the student's IEP mandates (id. at p. 15). The IHO denied all the remaining requested relief including the parent's request for compensatory education (id. at pp. 14-15).

IV. Appeal for State-Level Review

The parent appeals. 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 here. The essence of the parties' dispute on appeal is whether the IHO erred in failing to order additional relief to the parent including an order for the district to develop a program for the student that included ABA and specific speech-language therapy as well as compensatory education and home-based services.

² The IHO issued an interim decision dated December 4, 2023, ordering the district to fund a private speech-language evaluation (December 4, 2023 Interim IHO Decision).

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132,

quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).³

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).

³ 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).

VI. Discussion

At the outset, the district has not appealed from the IHO's finding that it failed to offer the student a FAPE for the 2021-22, 2022-23 and 2023-24 school years, therefore, that determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

During the impartial hearing, the district failed to offer any documentary evidence or witnesses to defend the appropriateness of its recommended programs; it presented an opening statement, brief cross examination of parent witnesses, and made a closing statement that was in relevant part a request that if compensatory education was awarded by the IHO that it be limited to a timeframe of two years (Tr. pp. 48-49, 124-129, 152-155, 182-184, 188). The parent contends that the IHO erred in denying a compensatory education award and that the IHO's determinations that the parent's witness testimony "did not seem tethered to any data on how the student's levels of performance changed or regressed during her years at the public school" and that "under the circumstances of this case compensatory education is not an appropriate remedy" were error (Req. for Rev. ¶¶ 7-7; see IHO Decision at pp. 12-13). The parent seeks an award of all of the compensatory ABA services, speech-language therapy, and feeding services that were recommended in the independent neuropsychological evaluation and private speech-language evaluation and also sought as relief during the impartial hearing (see Parent Exs. A at p. 10; D).⁴ The district asserts that the IHO was warranted in denying compensatory education, arguing that compensatory education is not mandatory to remedy a denial of a FAPE, that an IHO need not adopt a particular calculation or recommendation, and that much of the parent's request came in the form of home-based services, and a district need not remediate or generalize a student's skills in the home environment.

I will first consider whether relief, if any, is warranted with respect to the parent's request for prospectively ordering a particular education program or services for the student and then consider the parent's request for compensatory education in light of the outcome of the prospective placement relief as well as any other information that can be gleaned about the denial of a FAPE and the student's needs.

A. Student Needs

In order to make a determination regarding the parent's request for relief, a discussion of the student's needs and recommendations made regarding these services is warranted. The student was referred for the January 2023 neuropsychological evaluation due to concerns with her significant developmental delays, social and adaptive functioning, and problems with academic

⁴ The IHO incorrectly concluded that the parent's due process complaint notice failed to allege that the failure to provide feeding therapy to the student contributed to the denial of a FAPE in this instance, as the due process complaint notice alleged that the district failed to evaluate the student in all areas of suspected disability and requested an independent speech-language evaluation, which was conducted during the impartial hearing and uncovered the student's need for feeding therapy, and the parent then requested an order for feeding therapy at the close of the impartial hearing (Tr. pp. 196-97; Parent Exs. A; L at pp. 14-15).

progress and learning (Parent Ex. D at p. 1). The January 2023 neuropsychological evaluation included standardized testing and measures of the student's cognitive ability, academic performance, social/emotional development and behavior (id. at pp. 5-11). Administration of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) to the student yielded a full-scale intelligence quotient (FSIQ) of 60 (<1st percentile, extremely low range) (id. at pp. 5, 10).⁵ According to the Wechsler Individual Achievement Test – Fourth Edition (WIAT-4) the student's sight word reading skills, spelling performance and math abilities all fell in the extremely low range (<1st percentile) (id. at p. 9).

The evaluator reported that despite being in a quiet, 1:1 environment during testing, the student presented with variable focus and mildly impulsive, restless behaviors (Parent Ex. D at p. 11). Further, parent and teacher reports indicated the student had difficulty across settings as related to behavioral, emotional, and cognitive regulation, with greater weaknesses in self-regulation and behavior noted within the school environment (id.). Based upon observations, testing and parent and teacher reports, the evaluator concluded that the student met the criteria for a diagnosis of ADHD, combined presentation (mild to moderate severity) (id.). The evaluator reported that the student continued to qualify for a diagnosis of ASD and stated the student presented at a "Level 2," indicating the student required substantial support in her social communication skills, social interactions, and with regard to restricted and repetitive behavior and also specified accompanying intellectual impairment and language impairment (id. at p. 12).⁶

In view of the student's needs as described above, the January 2023 neuropsychological evaluation report included recommendations that the student be placed in a small, structured classroom setting that used an ABA approach throughout the school day and provided those services on a 1:1 basis (Parent Ex. D at p. 12). The evaluator recommended that if an ABA-based school program was not available, the student required her current public-school program to be significantly modified by providing a 1:1 BCBA assigned to work with her for the entirety of the school day (id.). The evaluator also recommended that the student receive 15-20 hours per week of home-based ABA services, along with three to four hours per week of home-based BCBA supervision due to reports of "greater severity of [the student's] ASD behaviors" within the home setting (id.). Further recommendations included daily speech-language therapy sessions to address "pervasive and global" receptive and expressive language and social communication delays, continued OT and PT services, extended 12-month programing, in addition to assistive technology

⁵ The evaluator reported discrepancies in the student's profile and reported that the FSIQ was not a valid indicator of the student's cognitive potential; two alternative composite scores were calculated with the student's verbal and nonverbal cognitive potential assessed to be in the very low range (2nd percentile), in addition to assessing the student's executive function skills related to working memory and processing speed, which fell in the extremely low range (< 1st percentile) (Parent Ex. D at pp. 5, 10). The student demonstrated significant strength in nonverbal fluid reasoning abilities with measurements on the WISC-V and the Test of Nonverbal Intelligence-Fourth Edition (TONI-4) in the low average range (id. at p. 10).

⁶ According to the evaluator and the classroom teacher's rating scales completed to examine the student's symptomatology related to ASD, the classroom teacher endorsed "more [m]ild symptoms, and the evaluator observed "[m]ild-to-[m]oderate" symptoms; whereas, the parent reported more severe concerns of ASD on the rating scales (Parent Ex. D at p. 10).

to support progress, an assistive technology evaluation, and curb to curb transportation services (id. at pp. 12-13).

During the impartial hearing, the neuropsychological evaluator testified that ABA "was currently considered the gold standard method" in addressing the student's needs as related to language, social, and adaptive functioning in addition to attention and behavior (Tr. p. 145). The evaluator testified "[t]here are a number of different ways that any student c[ould] receive instruction. However, ABA is the type of instruction that I believe, based on my experience and knowledge of [the student], that she requires and required" (Tr. p. 153). As related to the student's programming, the evaluator testified that the student needed a small, structured school setting that used an ABA approach the entire school day and delivered through 1:1 instruction (Tr. p. 143). Next, the evaluator testified that because the student's programming "over the last three years" was not appropriate, the student required "compensatory services" including a "bank" of ABA service hours in addition to the "going forward" recommendations for her current programming (Tr. pp. 148-51). The evaluator testified that "all along" the student should have been receiving 30 hours per week of in-school ABA services and 15-20 hours per week of home-based ABA services; therefore, she recommended that the student receive 45-50 hours per week of compensatory services for every week she did not receive such services during the 2021-22, 2022-23, and 2023-24 school year (Tr. p. 152).

Further, in agreement with the neuropsychological evaluator, a BCBA testified that the student should receive compensatory ABA services amounting to 45 hours of 1:1 ABA instruction, and nine hours of BCBA supervision for every week of the 2021-22, 2022-23 and 2023-24 school years she did not receive ABA services (Tr. pp. 177-78). The BCBA testified that based on review of the student's records that included the January 2023 neuropsychological evaluation, the December 2023 speech-language evaluation, her recent IEPs, and conversations with the parent and neuropsychologist, the student's profile was similar to multiple students who she had worked with that were missing prerequisite skills and "through implementation of ABA therapy, we've been able to fill in some of those gaps so that they [we]re able to meet some of the long term goals that [we]re essential for them and their families" (Tr. p. 170). The BCBA further testified that the student needed intensive ABA instruction daily at school and at home to focus on skills she needed in order to progress, and specified that she required either a full day ABA-based school or 30 hours of ABA services per week pushed in to the public school, with 15 hours of ABA services at home, as well as one hour of BCBA supervision for every five hours of direct ABA instruction provided (Tr. pp. 170, 172, 173-74). The BCBA testified that during the 2021-22, 2022-23 and 2023-24 school years, to her knowledge, the student did not receive any ABA services as it was not mentioned in her IEPs or by the parent (Tr. pp. 175-76). The BCBA testified that "[the parent] ha[d] never been offered ABA [services] in the school setting" (Tr. p. 176). The BCBA stated that the student "ha[d] not gained or retained any information that ha[d] been provided to her thus far" due to the lack of ABA services and the student was "currently in a classroom where she [wa]s not progressing academically" (Tr. p. 176).

B. Educational Placement

Taking the foregoing information about the student's needs and the evaluator's recommendations into account, I turn to address the IHO's order requiring the CSE to reconvene

and review the recent December 2023 speech-language evaluation and consider adjusting the student's IEP mandates (see IHO Decision at p. 15). The parent argues the IHO's order for the CSE to reconvene was vague and incapable of being implemented and contends that rather than deciding the parent's claims the IHO deferred to the CSE, which had already been found to have failed to develop an appropriate program for the student for the 2023-24 school year. The parent requests an order that the district amend the student's IEP to include 30 hours per week of "push-in, 1:1 ABA instruction to be provided during the school day by an independent provider" of the parent's choosing; nine hours per week of BCBA supervision; three hours per week of "1:1, push in, [speech-language therapy] to be provided by [the district]"; two periods per week of "small group [speech-language therapy] to be provided by [the district]"; two periods per week of "feeding therapy to be provided by [the district] during lunch"; and "curb-to curb transportation with [limited travel time] of no more than 45-minutes each way on an air conditioned vehicle to be provided by [the district]" (Req. for Rev. pp. 9-10).

Generally, as the district points out, 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 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"]). However, concerns about circumventing the CSE process arise most prominently in matters where the school year challenged has ended and, in accordance with its obligation to review a student's IEP at least annually, the CSE would have already convened to produce an IEP for the following school year (see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at *7 [S.D.N.Y. Aug. 17, 2022] [acknowledging that "orders of prospective services are disfavored as a matter of law" and, in the matter at hand, indicating that "the CSE should have already convened for subsequent school years"]; M.F. v. N. Syracuse Cent. Sch. Dist., 2019 WL 1432768, at *8 [N.D.N.Y. Mar. 29, 2019] [declining to speculate as to the likelihood that the district would offer the student a FAPE "in the future" and, therefore, denying prospective relief]; Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current school year]).

Additionally, while prospective placement might be appropriate in rare cases (see Connors v. Mills, 34 F.Supp.2d 795, 799, 804-06 [N.D.N.Y. Sept. 24, 1998] [noting a prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate"]), the pitfalls of awarding a prospective placement have been noted in multiple State-level administrative review decisions, including that where a prospective placement is obtained by the parents through the impartial hearing, such relief could be treated as an election of remedies subject only to further judicial review, where the parents

assume the risk that future unforeseen events could cause the relief to be undesirable (see, e.g., Application of a Student with a Disability, Appeal No. 19-018; see also Tobuck v. Banks, 2024 WL 1349693, at *5 [S.D.N.Y. Mar. 29, 2024]). Thus it is not permissible to return to due process to enforce or relitigate the prospective relief requested in this proceeding. Here, I find that this matter presents one of the rare instances where prospective placement is warranted because despite the passage of three school years and prior impartial hearing proceedings, I am not convinced by the district's conduct that the district's administrative and CSE processes are sufficiently intact to effectuate the changes needed to remediate the student's situation without further direct intervention by the undersigned. Several factors in this case lead me to conclude that more extraordinary measures are appropriate.

First, the evidence shows that the district has had long standing, continuing difficulty meeting its obligations with respect to this student for a long period of time and has previously conceded that it did not offer the student a FAPE in a prior school year, nor has the district demonstrated that it has made any significant efforts in recent years to ensure that the student was comprehensively evaluated (see Parent Ex. C). Furthermore, while the alleged FAPE violations regarding the 2015-16 through 2020-21 school year are not before me for purposes of adjudication, the history is nevertheless relevant to the relief in this case as it reveals a very bleak picture. During its scant defense in this matter, the district did not so much as offer a different view of the parties ongoing disputes, namely that the district had failed to identify a nonpublic school for the 2015-16 school year, failed to convene a meeting of the CSE or offer an IEP for five years thereafter and apparently settled their disputes by paying for the student's unilateral placement at Cooke (or litigated them) and, upon the student's return to the district, failed to offer the student a FAPE again with little to no defense of its conduct similar to the previous impartial hearing (see Parent Exs. A; C). Nor, as noted above, did the district so much as offer the disputed IEPs into evidence to assist in the development of the hearing record regarding how it educated this student.

The neuropsychologist testified that the student required a "full-time ABA program" and that if a "1:1 ABA school" was not available for the student, then the student's current program should be supplemented by 30 hours per week of push-in ABA services in-school, with an additional 15-20 hours of home-based ABA on a "going forward" basis, and one hour of BCBA supervision for every five hours of direct ABA services (Tr. pp. 149-52).

The district did not contest or rebut the evidence regarding the student's need for ABA services, and, based on the evidence in the hearing record, I find there is a clear "consensus" among those who evaluated the student regarding her needs, and that consensus should therefore be followed by the CSE (see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 543-46 [2d Cir. 2017] [referencing and following the proposition that when the reports and evaluative materials present at the CSE meeting yield a clear consensus, an IEP formulated for the child that fails to provide services consistent with that consensus is not reasonably calculated to enable the child to receive educational benefits]). Moreover, while it is apparent from the hearing record that the district has provided the student with special education services during the school years in question, there is no indication that the ABA methodology was a part of any of those district programs and it has not defended against the parent's ABA arguments with any factual information about the student at all. Accordingly, because the district did not provide any evidence to support its programming recommendations for the student's 2021-22, 2022-23 and 2023-24 school years

or provide evidence contesting the student's need for ABA services going forward, the evidence in the hearing record supports the consensus of the professionals who determined that the student needed ABA services.

Therefore, as relief I will order the district to convene the CSE and develop an IEP that places the student in a special class in a district school that primarily employs ABA programming, which the district must identify within the timeframes below. Due to the proximity of the end of the 2023-24 school year and the extent of the district's denial of a FAPE to the student for its protracted failures, an appropriate remedy for the student calls for prospective placement of the student in a district school providing ABA programming for the duration of the 2024-25 school year unless the parties otherwise agree to an alternative placement.⁷ In effecting this CSE recommendation for the student to attend a program that employs the ABA methodology, the CSE is not precluded from recommending that the student attend a State-approved nonpublic school placement if an in-district placement is unavailable to fulfill the requirements of this decision.⁸

C. Compensatory Education

In the request for review, the parent argues, among other things, that the IHO erred in denying her request for 3,780 hours of 1:1 ABA services and 756 hours of BCBA supervision as relief for the denial of a FAPE for the 2021-22 and 2022-23 school years, in addition to 45 hours of ABA services, and 9 hours of BCBA supervision for each week of the 2023-24 school year that the student was denied a FAPE.

I note that 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]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory education 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

⁷ This order of prospective placement does not preclude the CSE from convening periodically to discuss the student's needs and develop annual goals or management needs for the student based upon evaluative information and the student's progress.

⁸ I decline to order a specific special transportation remedy for the student for the reasons set forth by the IHO, as there was no evidence that special transportation was not provided to the student during the school years in question. Rather it appears the student successfully arrived at her public school placements, and therefore it appears that the district and the CSE are competent to recommend appropriate special transportation.

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"]).

As related to the parent's request for at least 30 hours per week of compensatory ABA services, with 15-20 hours of ABA services as home hours of compensatory education, it does not appear that any of the district's programming that was delivered was taken into account when making arguments for or fashioning equitable relief. The private recommendations for compensatory ABA services did not take into account that the student attended 6:1+1 or 8:1+1 special classes and received related services during the 2021-22, 2022-23 and 2023-24 school years.⁹ Although the district did not support or defend the district programs it provided, the parent's experts overreach in their assessment by presuming that any compensatory education award should be calculated as if the student had received no programming or services from the district at all, which is not supported by the evidence.

Instead the evidence shows that during the October 2022 classroom observation, the evaluator observed district personnel providing the student with many of the supports and strategies she recommended in the January 2023 neuropsychological evaluation report (compare Parent Ex. D at pp. 3-4, with Parent Ex. D at p. 12-13). Specifically, the neuropsychologist recommended a "small, highly structured classroom setting" and 1:1 instruction (Parent Ex. D at p. 12). Although the evaluator specified that the instruction be ABA based, the evaluator reported observing the student in a 6:1+1 special class setting in a district specialized school that included an adaptive physical education class with five students present, one teacher, one classroom paraprofessional, and three individual paraprofessionals, and observation of the student within her classroom with the teacher present, and peers during a group reading activity, followed by independent work and each student working 1:1 with an instructor (id. at pp. 2, 3, 4). The evaluator provided specific recommendations for the classroom that included: use of visual aids; a

⁹ The impartial hearing record indicated that the student attended district programs that included a 6:1+1 special class with related services for the 2021-22 and 2022-23 school years, and an 8:1+1 special class with related services for the 2023-24 school year (Parent Exs. A at pp. 2, 3; D at p. 2; L at p. 1). The hearing record also detailed evaluative observations of the student within district programming for the 2022-23 and 2023-24 school years (Parent Exs. D at pp. 3-4; L at pp. 4-7).

multisensory approach; cues and prompts; educators speaking in a clear, animated tone of voice; gestures to enhance the message; instructions broken down into smaller steps; and a less desirable activity followed by a more desirable activity (*id.* at p. 13). Additional strategies recommended by the evaluator included use of repetition and review, breaks, timers, stating rules in a positive manner, providing reinforcement for good behavior and task compliance, and opportunities to earn tangible reinforcers (*id.*). Similarly, the neuropsychologist reported that in October 2022, she observed that the district teacher used a visual model example of the activity, pecs like pictures, and a book with pictures; provided the student with redirection to complete a reading activity; and promised a requested snack following completion of the activity (*id.* at p. 4). In addition, the district teacher encouraged the student to use expressive communication, reading, and writing skills, and provided supports that included redirection, praise, encouragement, pauses, assistance, and reminders (*id.*).

Moreover, within the January 2023 neuropsychological report, the evaluator included an observation of the student within the district classroom that demonstrated her academic skills in reading and writing appeared to be more advanced than within the 1:1 testing environment (Parent Ex. D at pp. 4, 9, 11). Although the observation within the classroom setting and during the 1:1 testing session provided just a snapshot of the student, the evaluator described the student's in-classroom performance that included the student reading words "slowly and accurately," taking turns with peers reading from a picture book, and writing a sentence with teacher supports; whereas, during the 1:1 testing session, the evaluator reported that "contrary to what was seen during the classroom visit," the student "only demonstrated the ability to read single letters or letter blends" and "only was able to write single letters and did not demonstrate the ability to spell any words" (*id.* at pp. 3-4, 11).

Additionally, the evaluator reported within her neuropsychological evaluation report that the student's July 2021 psychological evaluation results—conducted when the student was attending a nonpublic school—were "comparable" to the evaluator's January 2023 evaluation results as related to the student's WISC-V FSIQ of 60 (<1st percentile), although the evaluator acknowledged that "due to significant and highly unusual discrepancies in [the students] current profile, the FSIQ was not deemed to be a valid indicator of her cognitive potential" (Parent Ex. D at pp. 1, 5). Further, the evaluator reported that on the Adaptive Behavior Assessment System, Third Edition (ABAS-3), rating summary, according to the parent's "pattern of item endorsements, [the student] exhibit[ed] [e]xtremely [l]ow adaptive functioning" on the global adaptive composite (GAC) and her score was below the first percentile, "which [wa]s comparable to results from the Vineland-3 in 2021" (*id.* at p. 10).¹⁰ The district teacher also rated the student's adaptive skills as

¹⁰ To this point, the IHO stated in his decision that compensatory services were not warranted as there was no evidence to support that the student "regressed" in the district's programs (IHO Decision at p. 12). While a finding of actual regression is not necessary to conclude that an award of compensatory education is appropriate, I note that the neuropsychologist concluded that the January 2023 cognitive and adaptive functioning assessment results remained "comparable" to previous July 2021 evaluative results, which, although the student continued to exhibit significant deficits, supports a finding that the student was making at least some progress commensurate with her abilities with the district's programming (Parent Ex. D at pp. 1, 5).

"[v]ery [l]ow" at less than the first percentile; however, indicated that the student had a relative strength in her self-care skills, which were in the "[l]ow [a]verage range" (*id.*).

Based on the foregoing, the hearing record contains evidence that the district provided the student with a special class placement and related services for the 2021-22, 2022-23 and 2023-23 school years (Parent Ex. D at p. 2). As detailed above, by the neuropsychological evaluator's own October 2022 observation, the district program provided the student with many of the recommendations she endorsed to support the student's needs that included, among other things, programming within a small classroom setting of 6:1+1 or 8:1+1 student to teacher ratio and 1:1 instruction (*id.* at pp. 2-4). Additionally, the evaluator reported throughout the observation that the district educators provided supports that were also included within her recommendations such as use of visual models, pictures, redirection, engagement in a preferred activity following a non-preferred activity, in addition to praise, encouragement, and prompting supports (*id.* at pp. 3, 4, 12-13). The evaluator's January 2023 report also provided an observation within the district program that found the student's reading and writing skills were more advanced in contrast to the 1:1 testing, with the student observed in the district program reading words, participating in reading during a group activity, and writing a sentence with support; whereas, the student only read letters and letter blends, wrote single letters and no words during 1:1 academic testing (*id.* at pp. 3-4, 11). Further, the evaluator reported within the January 2023 neuropsychological evaluation that the student's IQ and adaptive scores were comparable to the July 2021 evaluation from when the student attended a nonpublic school.

In light of the above, although the evidence shows that some compensatory education is warranted due to the multiyear denial of a FAPE to the student, the amount of compensatory ABA services requested by the parent far exceeds the scope of the denial of a FAPE. I will also take into account the directives stated above to prospectively place the student in school-based programming with ABA services. Additionally, as the hearing record supports a finding that the student received some benefit from the district's programming during the 2021-22, 2022-23, and 2023-24 school years, the amount of the compensatory ABA services award will be reduced accordingly. Specifically, I will award five hours of compensatory ABA services per week provided to the student over a 12-month school year, or 42 weeks, as a bank of hours for the denial of a FAPE for each of the 2021-22, 2022-23 and 2023-24 school years.

Lastly, with respect to the parent's request for compensatory home-based ABA programming for the student, I decline to order home-based ABA services as a specific form of compensatory education or prospectively in the revised IEP described above. SROs and 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, and I am not convinced that the student is unlikely to progress going forward in a school-based ABA program, and requiring district to add home-based programming to the student IEP would most likely lead to maximization, which is not required of school districts under IDEA (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]). However, I will not preclude any compensatory education services awarded in this matter from being delivered outside of school or in the home. The reason for allowing compensatory services to be delivered outside of the school-

based setting is that it may be impractical to fit a large amount of compensatory services into a well-designed school-based ABA program that is appropriate for the student, and if the day programming ultimately identified by the CSE is not also equipped to deliver the compensatory services from this decision as part of its regular programming, it may frustrate the parties' efforts to locate an appropriate school-based ABA program for the student.

1. Compensatory Speech-Language and Feeding Therapy

Next, in the request for review, the parent argues that the IHO erred in failing to order the district to develop a program including additional speech-language therapy and feeding therapy as well as erred in failing to order compensatory education for the same services. The parent requests 250 hours of speech-language therapy to compensate for the denial of a FAPE for the 2021-22, 2022-23 and 2023-24 school years and 84 hours of feeding therapy for the 2021-22 and 2022-23 school years, in addition to one additional hour of feeding therapy for each week of the 2023-24 school year.

A review of the student's speech-language needs as reported in the December 2023 speech-language evaluation is warranted in order to make a determination on the parent's request for compensatory speech-language and feeding therapy services.

In the September 2023 due process complaint notice the parent requested an interim order directing the district to fund an independent speech-language evaluation (Parent Ex. A at p. 10). In direct testimony by affidavit, a private speech-language pathologist opined that a June 2023 speech-language evaluation conducted by the district was insufficient because it did not formally assess the student's articulation, even though the parent's expert previously identified articulation as a significant concern (Parent Ex. K ¶ 6). Similarly, despite the areas of concern being identified, the private speech-language pathologist opined that the district evaluation did not sufficiently address oral motor and feeding skills, and she noted that a language sample was not obtained (*id.*).¹¹ The private speech-language pathologist testified that she would conduct a comprehensive speech-language evaluation that included articulation and phonology assessment, oral motor strength and movement, language sampling and analysis, observation of the student in the school environment, assessment of functional communication, and assessment of pragmatic language (*id.* at ¶¶ 7-8). As noted above, in an interim order dated December 4, 2023, the IHO ordered the independent evaluation (IHO Interim Order dated Dec. 4, 2023). A resulting December 2023 private speech-language evaluation assessed the student's needs in articulation and phonology, oral-motor and feeding, and oral and written language skills, which was made available for the parties' consideration as part of this proceeding and which is relevant to formulating relief (Parent Ex. L at pp. 7-14).¹²

¹¹ The district's June 2023 speech-language evaluation was not included in the hearing record (see Parent Exs. A-L).

¹² The December 2023 private speech-language evaluation included parent and district speech-language therapist interviews, a school and home observation, an oral motor assessment, a non-standardized articulation and phonological assessment through the iPad app "Little Bee Speech's Articulation Test Center," a speech sample,

The independent speech-language evaluation report indicated that in December 2023, the private speech-language pathologist observed the student in her self-contained 8:1+1 program for approximately one hour and 15 minutes; present at the time with the student were her teacher, four assistant teachers and six other students (Parent Ex. L at p. 4). The private speech-language pathologist observed the student working one on one with a teacher on reading a short story and answering questions and observed that the student "often required multiple choice options in order to answer wh- questions" as well as "sentence completion prompts" to aid the student in using complete sentences in answering questions, and gesture prompts to increase the student's attention (*id.* at pp. 4-5). The private speech-language pathologist reported during observation of the student in art group, an art teacher as well as assistant teachers provided "intermittent assistance" to the student during the lesson (*id.* at p. 5). During the observation, the private speech-language pathologist included samples of the student's responses, noted the student remained quiet throughout much of the lesson, and although was "not consistently visually attending," followed the art teacher's model to paint reindeer antlers, eyes, and nose and followed multi-step directions provided gesture prompts (*id.* at pp. 5-6). The private speech-language pathologist reported that the student appeared to use longer sentences and phrases during routine, familiar contexts or to avoid nonpreferred situations such as finger painting (*id.* at p. 6). Additionally, the private speech-language pathologist reported observing only one peer interaction in which a peer approached the student following art class, touched her hair and the student did not verbally respond, with the teachers verbally redirecting the peer (*id.* at pp. 6-7).

The December 2023 independent speech-language evaluation, in addition to the school observation, included an oral motor assessment, and non-standardized articulation/phonological and literacy assessments (Parent Ex. L at pp. 7-14). The private speech-language pathologist reported during the oral motor assessment that the student presented with reduced range of motion in her jaw, reduced lingual range of motion, and according to her parent had many cavities (Parent Ex. L at p. 7). The private speech-language pathologist reported that the student "demonstrated a dumping motion" to place and chewed food in the front of the mouth, and used considerable compensatory strategies when eating; however, there were no coughing, choking or signs of aspiration (*id.* at p. 8). The parent reported the student took "an extremely long time to eat," did not eat raw vegetables, but did not report any choking or signs of distress (*id.* at p. 9).

The December 2023 speech-language evaluation, through informal articulation and phonological assessment, found that the student demonstrated a number of phonological processes such as deleting final consonant sounds and judged the student's intelligibility to be poor (Parent Ex. L at p. 9). The private speech-language pathologist reported taking a speech sample to analyze sound production and noted that the student's expressive language within the sample included pronouns, verbs, and nouns (*id.*). Included within the evaluation, was report from both the student's parent and district speech-language therapist that "[the student's] vocal volume ha[d] improved and that she [wa]s currently speaking in [two to three] word phrases" (*id.* at p. 2). The speech-language evaluation report included the student's production of one word responses and

and literacy testing using some subtests of the Test of Integrated Language and Literacy Skills (TILLS) that provided non-standardized qualitative information as the student did not achieve scores for the basal or ceiling requirements for the subtests administered (Parent Ex. L).

two to five word phrases as expressed at school and at home (*id.* at pp. 3, 5-6, 9-10).¹³ Additionally, the evaluation report provided descriptive information regarding the student's language and literacy skills on subtests from the TILLS, that included the student's limited ability to identify semantic relationships of two words provided a set of three, use phonemic awareness skills to manipulate sounds to express a new word, and retell a story read, answer yes/no questions related to short stories, follow directions, and repeat a four number sequence (*id.* at pp. 11-14).¹⁴

The December 2023 speech-language evaluation summary indicated that the student required direct intervention in a collaborative environment to improve her expressive language, intelligibility, social language, and feeding skills (Parent Ex. L at p. 14). The private speech-language pathologist described the student as hardworking, kind and motivated who used expressive language consisting of two-to-three-word phrases, exhibited errors in sound production that negatively impacted her speech intelligibility, used repetitive communication, and had difficulty with social interactions in addition to feeding difficulties that had not yet been addressed in therapy (*id.*). Based upon observations and the December 2023 speech-language testing, the private speech-language pathologist recommended that the student "receive significantly more intensive speech and language services in the school environment" and opined that the student's current mandate for the 2023-24 school year of two 30-minute individual speech-language therapy sessions and one 30-minute session provided in a group (2:1) to be "unequivocally inadequate" to meet her needs (*id.*).

During the impartial hearing, the private speech-language pathologist testified that the student was mandated to receive speech-language services through the district for the 2021-22 school year that consisted of two individual 40-minute sessions and one 40-minute session per week in a group, and for the 2022-23 and 2023-24 school years, two 30-minute individual sessions and one 30-minute session in a group of two per week or, in more general terms, three sessions per week each year (Tr. p. 112).¹⁵ When asked about the amount of speech-language therapy, the student should have received during the three school years in dispute, the private speech-language

¹³ The independent speech-language evaluation report included a partial transcript of the student's speech sample obtained as observed at home related to videos and at school during art such as: "[w]hat's that"; "[a]nother train"; "[g]oing to fast"; "yes"; "I can follow directions"; "[b]lend"; "[h]i Sven"; "I don't like the finger"; "I need help"; [d]on't like hands dirty"; and "[d]og" (Parent Ex. L at pp. 3, 5-6, 9-10).

¹⁴ The private speech-language pathologist provided qualitative information during literacy testing that indicated on subtests of the TILLS, as related to vocabulary awareness the student was able to identify the two words "cat and dog" that went together stating they were "friends," and although not able to accurately engage in phonemic awareness tasks, the student was attentive and focused and tried to repeat words (Parent Ex. L at pp. 11-12). On a story retell subtest in the twelve plus age group, that did not provide visuals, the student accurately answered one question and recalled one part of the story (*id.*). On additional subtests, the private speech-language pathologist reported that the student listened carefully, maintained attention, repeated one to two nonword syllables, accurately followed two-step directions, and repeated two number sequences (*id.* at pp. 12-13).

¹⁵ In review of the available hearing record, the weight of the evidence shows that the student was mandated to receive two 40-minute sessions per week of individual speech-language therapy, and two 40-minute sessions per week of speech-language therapy in a group for the 2021-22 school year; and two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group for the 2022-23 and 2023-24 school years (Parent Exs. A at pp. 2, 3; D at p. 2; L at p. 1).

pathologist opined that the student "should have received speech therapy daily"; in addition, the neuropsychologist testified that it was appropriate for the student to receive daily speech-language therapy services to address her needs (Tr. pp. 112-14, 149-50). I accept that the student should have received speech-language therapy at least daily instead of only three times per week and will award compensatory education on that basis. For compensatory services, the private speech-language pathologist opined that the student "didn't receive the level and type of services over the past three years [] that she should have," calculated the amount of services she determined was necessary, and requested the student receive 250 hours of speech-language therapy and 84 hours of feeding therapy "to make up for lost time" (Tr. pp. 115-16). The private speech-language pathologist clarified that the 250 hours of recommended speech-language therapy was calculated as compensatory services for all three school years "to date"; however, the 84 hours of feeding therapy were to compensate for the 2021-22 and 2022-23 school years, and the student required an additional one hour per week of feeding therapy for each week that she did not receive feeding therapy for the 2023-24 school year (Tr. pp. 117-18). The speech-language pathologist did not provide a clear rationale for calculating the compensatory education totals, and therefore I do not accept that aspect of her testimony related to the hourly totals.

Instead, the evidence shows that the December 2023 speech-language evaluation established the student's needs as related to oral-motor/feeding, articulation/phonology, language/literacy, and social/pragmatic skills and determined that the district mandates for speech-language services were inadequate. As the district did not defend itself or argue the sufficiency of the district's speech-language services, compensatory services as relief are warranted for the denial of a FAPE for the 2021-22, 2022-23 and 2023-24 school years. As the student's oral-motor/feeding needs were newly identified in the December 2023 evaluation relief related to feeding services for the 2023-24 school year is addressed below.

In view of the forgoing evidence, the recommendations the private speech-language pathologist made for compensatory services must be weighed in light of the speech-language therapy that the district already provided, and in conjunction with the progress the student made as described within the private speech-language pathologist's evaluation report (see Parent Ex. L). As stated previously, the student's identified needs in the area of oral-motor and feeding were not identified until the December 2023 independent speech-language evaluation and, therefore, as compensatory education, I find the district must provide the student with one 30-minute session of feeding therapy per week from the date of the December 13, 2023 speech-language evaluation IEE ordered by the IHO until the date that a new IEP directed in this decision is put in place for the student as directed in this decision. Furthermore, having accepted the evidence that the student should have received daily speech-language therapy rather than three times per week, the district will be required to provide two individual 30-minute sessions of compensatory speech-language therapy per week calculated over a 12-month school year (42 weeks), for the denial of a FAPE for each of the 2021-22, 2022-23 and 2023-24 school years, which is a total of 126 hours.

I also find that it is appropriate for the CSE to continue this level of speech-language services and feeding therapy in the revised IEP directed in this decision through the conclusion of the 2024-25 school year. Accordingly, the CSE shall, at a minimum provide the student with three individual 30-minute sessions and two group 30-minute sessions per week of speech-language services on the student's IEP resulting from the CSE meeting directed herein, unless the parties

otherwise agree. In the revised IEP, the CSE must provide the student with one 30-minute session of feeding therapy per week through the conclusion of the 2024-25 school year, unless the parties otherwise agree.

2. Other Relief

As touched on above, the parent also requested in the due process complaint notice an order for the district to fund "an appropriate ABA school-based program either . . . at [a] non-public or independent school of [p]arent's choosing," and on appeal requests an order that the district must provide 30 hours of ABA "during the school day," 15 hours of home-based ABA with additional BCBA services, among other relief including a tremendous amount of compensatory ABA and speech-language therapy services going forward (Req. for Rev.; Parent Ex. A at p. 10). However, given the relief ordered herein for compensatory ABA, feeding therapy, and speech-language therapy services and for prospective placement of the student in a program providing ABA methodology, speech-language services, and feeding therapy for the remainder of the 2023-24 school year and the duration of the 2024-25 school year, these additional requests by the parent are either duplicative or superfluous and they are accordingly denied.

VII. Conclusion

In sum, the IHO's finding that the district failed to provide a FAPE to the student was unappealed and has become final and binding. With respect to relief, the IHO's decision is modified to provide that the district shall convene the CSE, recommend a special class placement in a district setting or a State-approved nonpublic school which must feature ABA as the primary aspect of its programming. Additionally, the district must provide compensatory ABA services, feeding therapy, and speech-language therapy to remedy the denial of a FAPE. This relief, taken together is appropriate equitable relief under the circumstances and any remaining aspects of the requested relief not otherwise specifically addressed herein are denied. 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 January 31, 2024, is modified by vacating those portions that ordered the CSE to reconvene to review the independent speech-language evaluation and consider adjusting the student's IEP mandates; and

IT IS FURTHER ORDERED that the IHO's decision, dated January 31, 2024, is modified by reversing that portion which denied the parent's request for compensatory education in full; and

IT IS FURTHER ORDERED that, within 14 school days of the date of this decision, the district shall convene the CSE and develop an IEP for the student that includes one individual 30-minute feeding therapy session per week, and five 30-minute speech-language therapy sessions per week; and

IT IS FURTHER ORDERED the CSE shall also specify that the educational placement in the student's IEP shall be in a special class that provides primarily ABA programming at a public school or, if unavailable, a State-approved nonpublic school; and

IT IS FURTHER ORDERED that within 45 days of the date of this decision, the district shall locate and place the student in such a program pursuant to the student's IEP, which shall continue for the remainder of 2023-24 year and the duration of the 12-month 2024-25 school year unless the parties otherwise agree to an alternative placement; and

IT IS FURTHER ORDERED that the district shall fund and provide a bank of compensatory services for the student in the form of compensatory ABA services calculated on the basis of five hours per week of 1:1 ABA services provided over a 12-month school year, or 42 weeks, for the denial of a FAPE for each the 2021-22, 2022-23 and 2023-24 school years for a total of 630 hours; and

IT IS FURTHER ORDERED that the district shall fund and provide a bank of compensatory services for the student in the form of compensatory speech-language therapy calculated on the basis of two individual 30-minute session of speech-language therapy provided over a 12-month school year, or 42 weeks, for the denial of FAPE for each the 2021-22, 2022-23 and 2023-24 school years for a total of 126 hours; and

IT IS FURTHER ORDERED that the district shall fund and provide a bank of compensatory services for the student in the form of compensatory feeding therapy calculated at a rate of one 30-minute session per week from December 13, 2023 through the date that the new IEP required in this decision is put in place, and

IT IS FURTHER ORDERED that the compensatory education services awarded to the student in this decision may be provided outside of a school-based setting, may include provision at the student's home, and shall expire three years from the date of this decision if the student has not used them by such date.

Dated: Albany, New York
May 2, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER