



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-089

**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:**

Gutman Vasiliou, LLP, attorneys for petitioner, by Anthoula Vasiliou, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Toni L. Mincieli, 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 education services for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's determination that the Burlington-Carter standard did not apply to the parent's requested relief. The appeal must be sustained. The cross-appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

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

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

### **III. Facts and Procedural History**

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

In a prior impartial hearing decision dated September 3, 2022, an IHO (IHO 1) ordered the district to reconvene and develop a new program for the student and placement in a non-public school (NPS) (Dist. Ex. 4 at pp. 9, 11). IHO 1 found that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20, 2020-21, and 2021-22 school years (id. at pp. 7-8). IHO 1 ordered compensatory education services in a bank of 92 hours of occupational therapy (OT), 1,500 hours of applied behavior analysis (ABA) therapy, 208 hours of supervision

by a board-certified behavior analyst (BCBA), 52 hours of parent counseling and training, and 207 hours of speech-language therapy (*id.* at p. 10).<sup>1</sup>

The student started the 2022-23 school year in the district's recommended public school program; however, the parent reported that she began getting calls to pick up the student early due to "unmanageable behaviors" (Parent Ex. A at p. 3).

A CSE convened on September 19, 2022 and after finding the student eligible for special education as a student with autism, formulated an IEP for the student with an implementation date of September 20, 2022 (*see generally* Dist. Ex. 2).<sup>2</sup> The CSE recommended a 12-month 6:1+1 special class in a State approved nonpublic school (NPS)<sup>3</sup> with related services of three 30-minute sessions of individual OT per week, three 30-minute sessions of individual speech-language therapy sessions per week, two 30-minute sessions of group speech-language therapy per week, and one 60-minute session of parent training and counseling per month (*id.* at pp. 23-24). Additionally, the CSE recommended full-time, individual paraprofessional services for behavioral support (*id.* at p. 24). Among other things, the management needs section of the September 2022 IEP indicated that the student required 15 hours of home-based ABA therapy and 1:1 full-time ABA therapy (*id.* at p. 8).

In November 2022, the parent unilaterally placed the student at the Foundry Learning Center (Foundry) for the remainder of the 2022-23 school year (Parent Ex. A at p. 3; *see also* Parent Ex. H).<sup>4</sup>

In a May 11, 2023 letter, the district notified the parent that it had secured a placement for the student at QSAC (Bronx) (Dist. Ex. 17 at pp. 3-4).<sup>5</sup> A SESIS log entry of the same date stated "Parent has confirmed if this approved non-public school placement offer will be accepted" (Dist. Ex. 20 at p. 4). The parent indicated that she submitted a ten-day letter to the district on June 20, 2023 which noted that she had not received a school placement for the 2023-24 school year (Parent Ex. A at p. 3). A CSE convened on August 16, 2023, at which time the parent rejected the QSAC

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<sup>1</sup> IHO 1 also ordered the district to fund additional evaluations (Dist. Ex. 4 at pp. 10-11).

<sup>2</sup> Two other IEPs dated September 19, 2022 were also entered into the hearing record (*see* Parent Ex. G; Dist. Ex. 1).

<sup>3</sup> The CSE noted that the NPS was recommended per a decision made as part of an impartial hearing (Dist. Ex. 2 at p. 30).

<sup>4</sup> According to the parent, she "subsequently obtained an impartial hearing decision," which found that the student "had been denied a FAPE for the 2022-2023 school year" and ordered the district "to fund the cost of the unilateral placement [Foundry]" (Parent Ex. A at p. 3). A copy of that decision was not admitted into evidence and is not part of the hearing record.

<sup>5</sup> In a letter to the district's central based support team (CBST) dated October 28, 2022, QSAC had indicated it was opening a new class and that it could provide the student with a 6:1+3 special class and 1:1 paraprofessional, along with the student's recommended related services in January 2023 (Dist. Ex. 17 at p. 4).

placement but informed the district of other schools that she was interested in (Parent Ex. A at p. 3; Dist. Ex. 20 at pp 3-4).

In an amended due process complaint notice, dated August 23, 2023, the parent alleged that the district failed to offer the student a FAPE for the 2023-24 school year (see Parent Ex. A).<sup>6</sup> The parent asserted that the district failed to provide an appropriate program for the student, failed to offer a placement where the IEP could be implemented, failed to address the student's behavioral needs, and failed to provide parent counseling and training (id. at pp. 4-5). The parent indicated that she reenrolled the student at Foundry in July 2023, but that Foundry informed the parent that at the conclusion of the summer session, the student "would benefit from a program going forward that could provide more challenging academics with an emphasize [sic] on therapeutic counseling services" (id. at p. 3). The parent indicated that she requested a new CSE meeting on August 14, 2023 to identify an appropriate NPS for the remainder of the 2023-24 school year and although the CSE had met she had not yet received a copy of the student's new IEP nor had she been informed of any appropriate placement option for the student for September 2023 in either a public school or an NPS (id. at pp. 3-4). The parent requested funding for the full cost of tuition, related services, and transportation for Foundry for July and August 2023 (id. at p. 6). Additionally, the parent requested an order directing the district to locate an appropriate NPS that could implement the student's IEP, provide a full school day of 1:1 ABA services, and, until such program was located require the district to fund 30 hours per week of push-in 1:1 ABA therapy in the student's then-current placement or a center-based program (id.). The parent requested an order for 15 hours per week of home-based ABA therapy for the entire 2023-24 school year and an order for compensatory ABA, speech-language therapy, OT, parent counseling and training, counseling services, and any other additional services to remedy the district's failure to timely provide an appropriate educational program for the student (id.).

#### **IV. Facts Subsequent to the Due Process Complaint Notice**

On September 19, 2023, the parent notified the district that, following the summer session, the student was discharged from Foundry and needed a placement for the upcoming school year (Dist. Ex. 20 at p. 3).

By letter dated September 26, 2023, the district advised the parent that it had secured a placement for the student at Ferncliff (Dist. Ex. 17 at p. 1). Attached to the district's letter was a September 21, 2023 letter from Ferncliff which indicated that the student had been accepted to the Ferncliff school program "pending the removal of 1:1 and change to Alternative Assessment/Skills and Achievement Commencement Credential" (id. at p. 2).

A CSE reconvened on October 5, 2023 (Dist. Ex. 13).<sup>7</sup> The October 2023 CSE meeting minutes indicated staff from Ferncliff attended the meeting (id.). The meeting minutes further indicated that the parent did not feel Ferncliff was an appropriate placement for the student due to the lack of verbal models and Ferncliff's requirement that 1:1 paraprofessional services be removed

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<sup>6</sup> The initial due process complaint notice was dated July 5, 2023 (Jul. 5, 2023 Due Proc. Compl. Not).

<sup>7</sup> Although the hearing record includes minutes of an October 2023 CSE meeting, the hearing record does not include an October 2023 IEP (see Dist. Ex. 13).

from the student's IEP (*id.* at p. 1). The parent also indicated that she wanted a school setting that would allow the student to have her ABA specialist inside the school alongside her paraprofessional (*id.*). The parent rejected the proposed Ferncliff placement (Dist. Ex. 14).

An impartial hearing convened on August 11, 2023, before a new IHO (IHO 2) and concluded on January 5, 2024 after seven days of proceedings (*see* Tr. pp. 1-194). In a decision dated February 6, 2024, IHO 2 determined that the district failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at pp. 7, 9). However, despite the denial of a FAPE, IHO 2 found that the parent "did not make any arguments in support of tuition-funding relief at the hearing" (*id.* at p. 8). IHO 2 found that, even if the parent had made such an argument, the parent failed to meet her burden under Burlington-Carter as she failed to demonstrate the unilateral placement was appropriate and, therefore, IHO 2 declined the request for tuition reimbursement (*id.*). Turning to the issue of compensatory education, the IHO held that compensatory relief was unwarranted (*id.* at p. 9). Specifically, IHO 2 determined that compensatory education is prospective relief intended to remedy a past deprivation of FAPE, but that the student had been receiving the requested ABA, BCBA, and parent training services from a bank of previously ordered compensatory services, and therefore, "the proposed hours of services [we]re not reasonably calculated to bring the [s]tudent to a level where she should have been but for any FAPE deprivation" (*id.*). As such, IHO 2 denied all requested relief (*id.*).

## V. 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, the district's answer and cross-appeal, and the parent's answer to the district's cross-appeal is also presumed and, therefore, the specific allegations and arguments will not be repeated. The gravamen of the parties' dispute on appeal is whether the parent is entitled to her requested relief of 30 hours of school-based ABA services per week, 15 hours home-based ABA services per week, two hours of BCBA services per week, and one hour of parent counseling and training per week for the duration of the 2023-24 school year.

## VI. Applicable Standards

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (*see* 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];<sup>8</sup> 8 NYCRR 100.9[e], 200.1[zz]; *see* 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation

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<sup>8</sup> If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student is entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever first occurs (Educ. Law § 4402[5][a]).

only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], *aff'd on reconsideration sub nom. Burr v. Sobol*, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

## **VII. Discussion**

In her appeal, the parent argues IHO 2 erred in failing to order the parent's request for prospective funding of services, including 30 hours per week of school-based push-in ABA therapy, 15 hours per week of home-based ABA therapy, one hour per week of parent counseling

and training, and two hours per week of BCBA supervision, despite finding a denial of FAPE for the 2023-24 school year. The parent asserts that the student would not be able to attend the public-school placement without in school ABA services. Regarding at-home ABA services, the parent contends that without the home-based ABA services the student becomes dysregulated, which increases her maladaptive behaviors that interfere with her learning. The parent asserts that the BCBA supervision is to "ensure treatment fidelity across therapists and environments" and the parent counseling and training is "necessary to teach the Parent how to implement evidence-based strategies that will address [the student's] significant maladaptive behaviors that carry over into the home and community settings." The parent argues it was inappropriate for IHO 2 to deny these services. The parent contends this requested relief is necessary because the district has not only failed to develop an appropriate IEP for the student, but the district has also been unable to locate an appropriate NPS which has left the student with no choice other than to attend a public-school placement. The parent asserts the district must prospectively fund the ABA services that the student requires for the remainder of the school year.

Moreover, the parent argues that the IHO 2 erred by denying relief because the student has been receiving services currently as part of a compensatory award from a prior due process proceeding. The parent argues that the IHO 1's decision awarded compensatory education services to remediate a past harm and "cannot be used as a basis to excuse the District's ongoing responsibility to ensure that [the student] receives the services and supports that she requires as part of her IEP." The parent contends that IHO 2's decision leaves the student in a deficient program and takes no action to address any of the parent's claims. The parent asserts that there was an error in the calculation of when the bank of previously awarded compensatory hours would run out, as they will run out in April 2024, not June or September 2024 and that this only further emphasizes the need for such services as the student will effectively be left without a program if she is unable to receive the services.

The parent requests an order that the district "fund the cost of the following services as part of [the student's] program, until an appropriate NPS is located, for the remainder of the 2023-2024 school year: 30 hours per week of push-in ABA therapy in [the student's] public school placement at a rate of \$300 per hour; 15 hours per week of home-based ABA therapy at a rate of \$300 per hour; two hours per week of BCBA supervision at a rate of \$250 per hour; one hour per week of parent counseling and training at a rate of \$250 per hour; an order the District to fund 120 hours of compensatory ABA therapy at a rate of \$300 per hour; and an order the District to fund eight hours of compensatory parent counseling and training at a rate of \$250 per hour."

In its cross appeal, the district argues that IHO 2 correctly denied the parent's requested relief; however, IHO 2 used an improper analysis. According to the district, IHO 2 should have held that the parent failed to meet her burden under the Burlington/Carter standard. The district contends that it offered the student a placement at Ferncliff, but the parent chose to instead place the student at a public school and unilaterally obtain ABA services. The district concedes that some analysis of a compensatory award is required for the portion of September and October 2023, when the student attended a public school but did not receive additional ABA services provided as part of the prior compensatory award, and requests a remand to make a determination as to an appropriate award for that period of time. However, the district argues that equitable considerations do not favor the parent because the parent did not notify the district that the student

was discharged from Foundry until September 19, 2023 and the parent was not credible at the impartial hearing.

Initially, it is noted that there is no dispute that the student is attending a district public school. While the parent created a hybrid program by using the previously awarded compensatory education services to augment the student's placement in the district and provided the student with services to address her special education needs, the student nonetheless remained in a public, as opposed to a unilaterally-selected private placement, for the 2023-24 school year and the district conceded it did not offer the student a FAPE for that school year.<sup>9</sup> The district does not argue that the school placement within the district is sufficient for the student. Its assertion that Ferncliff would have been appropriate had the parent accepted it is not at issue, because the IHO's determination that the district denied the student a FAPE for the 2023-24 school year is not at issue on appeal.<sup>10</sup>

In this instance, the parent's use of the prior compensatory award as a form of self-help to remedy a new violation committed by the district is unusual and creates some degree of confusion in terms of the nature of the relief sought and bears. Certainly, it does bear some semblance to the type a request for reimbursement of privately-obtained services under the Burlington-Carter framework. However, the hearing record demonstrates that the student attends a public school for the 2023-24 school year. 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]). The Burlington-Carter test requires that a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14) but parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate,

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<sup>9</sup> As neither party appealed the IHO's decision that the district failed to offer the student a FAPE for the 2023-24 school year, that finding is final and binding on the parties and will not be further discussed (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]). Accordingly, the remaining issue to be addressed relates solely to relief sought by the parent.

<sup>10</sup> Notably, the IEP following the October 5, 2023 CSE meeting was never entered into the hearing record. Further, the meeting minutes from that meeting do not establish that Ferncliff was an appropriate placement for the student (see Dist. Ex. 13). In those minutes, the parent expressed concerns that Ferncliff lacked verbal peer models for the student and that she would not agree to remove the 1:1 paraprofessional for the student (id. at p. 1). The minutes indicated that Ferncliff countered that there was a misconception that their students are all non-verbal as the students had a range of verbal abilities; and that, no students at Ferncliff have a 1:1 paraprofessional (id. at p. 2). Ferncliff indicated that they did not believe that a paraprofessional was needed because of their low staff ratios and that Ferncliff believed it would be a good fit for the student (id.). Ferncliff only accepted the student pending the removal of the recommendation for a 1:1 paraprofessional (Dist. Ex. 16 at p. 2). However, the IEP in evidence included a recommendation for 1:1 paraprofessional services for the student (Dist. Ex. 2 at p. 24), indicating that the service was necessary for the student. If the CSE made a later recommendation to remove 1:1 paraprofessional services and place the student at Ferncliff, it is not in the hearing record.



even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). Where a Burlington-Carter analysis has been applied to unilaterally obtained services, part of the reasoning behind using that framework is that the parent has the information regarding the privately obtained services; however, in this instance, the student attended a public-school setting, a setting which the district has conceded was inappropriate for the student. Under these circumstances, the appropriate analysis is to determine a compensatory award for the district's failure to deliver an appropriate educational program to the student, the same analysis utilized by IHO 2.

As discussed above, the purpose of a compensatory education award is to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Where, IHO 2 went wrong in his analysis is that in assessing an appropriate compensatory award for the district's denial of FAPE, the IHO should not have taken into account the compensatory educational services awarded to the student by IHO 1 in the prior proceeding. Those services were awarded to the student to compensate for "the failure to provide the Student with a FAPE for the 2019-2020, 2020-2021, and 2021-2022 school years" (Dist. Ex. 4 at p. 10). To the extent that the compensatory services were not being used to remedy this past denial of a FAPE to the student, but were instead being used in order to make the district's current programming, for the 2023-24 school year, appropriate for the student, the parents may be entitled to additional compensatory educational services.

Although the parent is not responsible for proving an appropriate compensatory education award and the district has not presented an argument as to what an appropriate compensatory education award would be for this student, in order to determine a compensatory education award, a discussion of the student's needs as demonstrated in the hearing record is necessary to determine what relief would place the student in the position she would have been in had the district offered her a FAPE for the 2023-24 school year.

The June 2022 neuropsychological evaluation report offered the following diagnoses of the student: intellectual disability, moderate; autism spectrum disorder, requiring substantial support in social communication and in restricted interests and repetitive behaviors, with accompanying intellectual and language impairment; language disorder with mixed expressive and receptive language difficulties; and, attention deficit hyperactivity disorder, combined presentation (Parent Ex. B at p. 1).<sup>11</sup> Speaking to the student's cognitive abilities, the evaluation report indicated that the student received a standard score of 80 (9th percentile) on the Test of Nonverbal Intelligence-Fourth Edition, and a full-scale IQ (FSIQ) of 57 (<1st percentile) on the Wechsler Intelligence

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<sup>11</sup> Parent Exhibit B is identified in the Parent Exhibit list as a June 22, 2022 neuropsychological evaluation report; however, the document itself is titled "Independent Educational Evaluation" dated June 22, 2022, and the header date on the pages of the report is June 1, 2021 (Parent Ex. B at p. 1). This document appears to be an update of a prior neuropsychological evaluation completed by the same evaluator in May 2021, as Appendix II of the report notes that "scores in red represent scores from the May 2021 evaluation" (id. at p. 5). Causing further confusion, the narrative section of the June 2022 neuropsychological evaluation report indicates the WISC-V was used to assess the student's cognitive abilities, but the Appendix II score chart identifies the Wechsler Preschool and Primary Intelligence Scale for Children-Fifth Edition (WPPSI-IV) as the cognitive assessment (id. at pp. 2, 5).

Scale for Children-Fifth Edition (WISC-V) (id. at p. 2). The student's strongest subtest scores on the WISC-V were on verbal subtests, rather than non-verbal subtests (id.).

The June 2022 psychoeducational evaluation included assessment of the student's academic performance using the Weschler Individual Achievement Test-Fourth Edition (WIAT-IV), on which student received a total achievement standard score of 45 (<0.1 percentile) (Parent Ex. B at p. 6). The student scored below the first percentile on all subtests except for numerical operations, on which she scored in the 3rd percentile (id.). The student's September 2022 IEP noted that the student struggled with reading, writing, math, and focusing and required additional classroom support (Dist. Ex. 2 at p. 5). The September 2022 IEP noted that on the Test of Early Reading Ability-Fourth Edition (TERA-4), the student's early literacy skills were "significantly below the average range" in the areas of alphabet and phonology, conventions, and deriving meaning from print (id. at p. 4). The September 2022 IEP related that during an assistive technology evaluation, the student knew some but not all letters and did not know any letter sounds (id. at p. 3). On the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP), administered as part of the June 2022 autism skills assessment, the student did not identify sight words, letters given a group of five, her last name, 10 uppercase letters on demand, or match item to item or item to picture (Parent Ex. C at pp. 2, 8). On writing items, the student engaged in noncompliance and elopement, and required multiple attempts, prompts, and access to reinforcement to write her name (id.). She was unable to trace shapes and engaged in verbal protest and elopement when prompted to try (id.). The student was unable to select and label numbers 5, 10, 25, and 50, receptively identify comparisons of measurement (i.e., tall/short, big/small), or discriminate between "more" or "less" (id.). She was unable to add numbers without prompting (id.).

Regarding the student's communication needs, the September 2022 IEP reported that the student had "significant" delays in receptive and expressive language skills, pragmatic language, literacy skills, articulation skills, and oral motor abilities (Dist. Ex. 2 at p. 6). On the Oral and Written Language Scales (OWLS-II), the student demonstrated significant delays in listening comprehension, oral expression, reading comprehension, and writing which impacted the student's ability to express herself and to be understood by and form relationships with others (id. at p. 4). The June 2022 psychoeducational evaluation report related that on the Peabody Picture Vocabulary Test-Fifth Edition, Form A, the student received a standard score of 77 (6th percentile) (Parent Ex. B at p. 6). On the Expressive Vocabulary Test-Third Edition, Form B, the student received a standard score of 73 (4th percentile) (id.). During the evaluation, the student demonstrated echolalia; however, the evaluator noted that the student's verbal skills were notably stronger than on the previous neuropsychological evaluation and at times, the student spoke in full sentences (id. at p. 8). The June 2022 psychoeducational evaluation report indicated that the student's communication was "typically" related to a request and noted that if the evaluator did not respond to the student's request, the student would repeat her request or add more information (id.). According to the June 2020 speech-language evaluation report, the student's picture sequencing skills and narrative generation skills were informally assessed to be "significantly below" age expectations (Parent Ex. F at pp. 8-9). The June 2022 speech-language evaluation report also noted that the student exhibited oral motor weakness, difficulties with oral motor coordination, and articulation skills that were below age expectations (id. at pp. 11-14).

Concerning the student's social/emotional and adaptive skills, the September 2022 IEP noted that "per social history dated July 2021," the student did not socialize often with peers and was described as "selectively mute" (Dist. Ex. 2 at p. 6). The September 2022 IEP stated that the student's performance on the VB-MAPP Barriers Assessment revealed that the student's lack of attention and limited social reinforcers impacted her learning from observation during play or group activities and as a result, she had impaired functional communication and social skills (*id.* at pp. 6-7). The June 2022 neuropsychological evaluation report related that the student's parents reported "significant difficulty" with the student's behavior at home (Parent Ex. B at p. 2). The student engaged in sensory seeking behaviors, struggled with emotional and behavioral self-regulation that often resulted in yelling, crying, kicking, and throwing things, had difficulty self-soothing and going to sleep, and demonstrated selective food and drink preferences (*id.*). The June 2022 neuropsychological evaluation report noted that according to the student's teacher, if she did not get her way, the student would tantrum, yell, swear, hit, and strip her clothing (*id.*). Her adaptive skills were "significantly delayed" and she required assistance with activities of daily living at home and at school, and the student's safety was a concern, as she would engage in unsafe sensory seeking behaviors such as climbing and jumping off tall objects, run away from adults, had a lack of fear of strangers or awareness of potential danger, and stripped her clothes in front of others (*id.*). The June 2022 autism skills assessment noted that, based on parent report, the student could not brush her teeth independently and required assistance with toileting and cleaning up after toileting (Parent Ex. C at p. 8). She needed physical prompting to wash her hands and support with dressing and bathing (*id.* at pp. 8-9).

In terms of the student's behavior, the September 2022 IEP reflected that the parent was concerned about the student's behaviors, and noted that the student was often non-compliant, off task, had tantrums and eloped when asked to do something she was not interested in or when she had to stop an activity she preferred (Dist. Ex. 2 at p. 8). The September 2022 IEP identified the student's management needs as including 15 hours per week of home-based ABA services and full-time, one-on-one ABA therapy, and further noted that the student required positive behavioral interventions, a behavioral intervention plan, "[s]pecific and systematic intervention" to "decrease interfering behaviors and teach appropriate replacement skills," and a one-on-one behavior paraprofessional (*id.* at pp. 8-10, 24). The June 2022 autism skills assessment report further related that the student engaged in "frequent" physical aggression toward her father and others when her demands were not met (Parent Ex. C at p. 1). The report indicated that during the at-home portion of the assessment, the student was easily distracted and required frequent breaks and constant reinforcement to increase motivation: however, she had difficulty ending breaks and returning to work (*id.*). Off task behavior was the most prominent behavior observed during the at-home observation (*id.*). During the school observation, the student displayed multiple instances of elopement, throwing objects, tantrums, and noncompliance (*id.* at pp. 1-2). The student refused to engage in class work, threw herself on the floor, cried, and ran out of the classroom four times (*id.* at p. 2). She was also observed to throw/push a chair down seven times, and threw a book at a classmate, and these behaviors were observed to be in response to being asked to engage in a nonpreferred activity (*id.*). The June 2022 autism skills assessment report noted that the student's teacher reported that these behaviors were typical of the student (*id.*).

The September 2022 IEP also stated that the student had delays in sensory processing, adaptive skills, fine motor skills, visual motor integration, motor planning, muscle grading, and overall coordination (Dist. Ex. 2 at p. 7). Her sensory profiled scores showed sensory modulation

dysfunction related to social/emotional factors, and behavioral reactions to sensory input that "negatively impact[ed]" her overall motor performance, attention, behavior, and conduct (id.).

Turning to the special education program recommended for the student for the 2023-24 school year, the September 2022 CSE recommended that the student be instructed in a 12-month extended school year 6:1+1 special class in an approved nonpublic school with full-time paraprofessional services for behavioral support (Dist. Ex. 2 at pp. 23-24, 55-56).<sup>12</sup> The September 2022 CSE also recommended that the student receive three 30-minute sessions of individual OT per week, three 30-minute sessions of individual speech-language therapy per week, two 30-minute sessions of group speech-language therapy (3:1) per week, and the parent be provided with one 60-minute session of individual parent counseling and training per month (id. at p. 23-24, 55).

The student began the 2023-24 school year at Foundry, an approved nonpublic school, but was discharged in August 2023 (Tr. pp. 85, 168). The parent testified that she called the district "looking for a nonpublic private [school] that would be able to address [the student's] academics and her needs that [we]re on her IEP" (Tr. p. 85). The parent then registered the student to attend her neighborhood public school where she was placed in a 12:1 special class with the support of a 1:1 paraprofessional (Tr. pp. 76, 93; Dist. Ex. 20 p. 3). According to the parent's testimony, the student received ABA services in the district program from "an outside provider" based on compensatory hours awarded in a prior impartial hearing, and she "was supposed to get her speech[-language] and her OT mandates" (Tr. p. 76). The parent additionally testified that none of the staff members in the student's classroom were trained in ABA (Tr. p. 76). The BCBA who supervised the student's ABA program testified that a Registered Behavior Technician (RBT) from his agency was providing the student with "just a little over 30 ... maybe 32" hours per week of ABA services in the public school through a compensatory bank of 1,500 hours awarded in a prior impartial hearing as well as 12-16 hours per week at home (Tr. p. 113-14, 118).

Speaking to the student's progress in the public school classroom, the parent testified that she had to pick the student up from the district school twice since the student started at the end of September/beginning of October 2023, due to behavioral outbursts, and stated that the other students in the classroom also had to leave the classroom "a few times" due to the student's behaviors (Tr. pp. 93-94). According to the BCBA supervisor's testimony, "based off of [the providers'] data, [the student] [was] able to stay on task for longer periods of [the] day ... [the] [f]requencies of maladaptive behaviors such as tantrums ha[d] reduced," and "noncompliance ... and off-task behaviors [we]re reduced all across the board" (Tr. p. 140). He added that when the student "first came on board," for the first two weeks they were "only able to get three assignment sheets completed"; however, in "the last two weeks," the student had completed 12-14 work sheets and "due to the ABA, she [was] able to stay on task for longer periods of time" (Tr. p. 141). The BCBA supervisor testified that the student could attend to other programs, was able to transition without throwing tantrums, and demonstrated a decrease in stripping off her clothes (id.). The BCBA further testified that the student had begun taking medication, "but as a whole ... based off ... implementation and ...data ... the behaviors ha[d] been streamlining down" (id.).

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<sup>12</sup> Again, it is noted that no IEP post-dating September 2022 was entered into the hearing record.

Considering the above, the hearing record supports granting the parent's request for compensatory education to place the student in the position she would have been in had the district offered her an appropriate program and placement in the first instance. As the district failed to provide the student with a program and placement to address her special education needs, with the district's own IEP indicating the student required a 6:1+1 special class placement with related services and behavioral supports for the 2023-24 school year, the student is entitled to a compensatory remedy to make up for the student's placement in a district 12:1 special class. Additionally, considering the information as to the ABA support made available to the student as part of the prior compensatory education award, the hearing record demonstrates that the special education services sought by the parent as compensatory education represent the types of services and supports the student should have received in the first place from the district (Reid, 401 F.3d at 518). As discussed above, the parent was compelled to utilize the compensatory education award from a prior due process proceeding to provide the student with the special education services she should have received from the district during the 2023-24 school year. Accordingly, in this instance, it is an equitable outcome to, in effect, replenish the "bank" of compensatory education that the parent was awarded initially to make up for FAPE denials which occurred during the 2019-20, 2020-21 and 2021-22 school years. . Therefore, the parent is granted her request for up to 30 hours per week of ABA services at the rate of \$300 per hour, up 15 hours per week of home-based ABA services at the rate of \$300 per hour, up to two hours per week of BCBA supervision at the rate of \$250 per hour, and up to one hour per week of parent counseling and training per week at the rate of \$250 per hour for the entirety of the 2023-24 school year, or until the student is placed in an approved nonpublic school to accommodate her special education needs. Further, the district must provide compensatory services for related services listed on the IEP: individual OT, individual speech-language therapy, and group speech-language therapy, unless it can demonstrate that it provided those services during the 2023-24 school year.

### **VIII. Conclusion**

Having determined that IHO 2 erred in the analysis of compensatory relief, the parent's requested relief is granted. IHO 2's decision, dated February 6, 2024, is modified to reflect that the parent is entitled to her requested relief and the district is ordered to fund a bank of services of up to 30 hours per week of ABA services at a rate of up to \$300 per hour, up to 15 hours per week of home-based ABA services at a rate of up to \$300 per hour, up to two hours per week of BCBA supervision at a rate of up to \$250 per hour, and up to one hour per week of parent counseling and training per week at a rate of up to \$250 per hour for the 2023-24 school year. Additionally, the district must provide compensatory education services for the related services listed on the September 2022 IEP including individual OT and individual and group speech-language therapy, unless the district can demonstrate that it provided those services during the entire 2023-24 school year.<sup>13</sup>

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

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<sup>13</sup> It is noted that this award is granted for the entire 2023-24 school year, including the months of September and October 2023.

**IT IS ORDERED** that the IHO decision dated February 6, 2024 is modified to reflect that the district must fund a bank of services of up to 30 hours per week of ABA services at a rate of up to \$300 per hour, up to 15 hours per week of home-based ABA services at a rate of up to \$300 per hour, up to two hours per week of BCBA supervision at a rate of up to \$250 per hour, and up to one hour per week of parent counseling and training per week at a rate of up to \$250 per hour; and

**IT IS FURTHER ORDERED** that the district must provide compensatory education services for related services listed on the September 2022 IEP including individual OT and individual and group speech-language therapy, unless it can demonstrate that it provided those services during the 2023-24 school year.

**Dated:**           **Albany, New York**  
                          **May 6, 2024**

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**