The University of the State of New York

The State Education Department
State Review Officer
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No. 24-095

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

Appearances:
The Law Office of Elisa Hyman, P.C., attorneys for petitioners, by Erin O'Connor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their full request for compensatory education services to remedy respondent's (the district's) failure to offer their son an appropriate educational program and services for the 2022-23 school year. 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]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). 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 fully recited here. The student had received a diagnosis of autism spectrum disorder (ASD) (Parent Exs. D at pp. 2, 8, 12; S at p. 13; X ¶ 33). The student received speech-language therapy, occupational therapy (OT), and applied behavior analysis (ABA) instruction through the Early Intervention Program (EIP) (Parent Ex. D at p. 5). The CSE held a meeting in April 2022 to review the student's transition from preschool special

education services to school-aged special education services as the student would "age out" of preschool special education services in September 2022 (Parent Exs. Q at p. 1; U ¶ 41). According to the district's attorney, the April 2022 CSE recommended a 12:1+1 special class in a district specialized school with related services of OT, PT, speech-language therapy, and parent counseling and training (Tr. pp. 52-53).[1]

The CPSE convened on June 22, 2022, to formulate the student's IEP for July and August 2022 (see generally Parent Ex. B). The June 2022 CPSE recommended 15 hours per week of individual special education itinerant teacher (SEIT) services together with three 45-minute sessions per week of individual speech-language therapy, two 45-minute sessions per week of individual physical therapy (PT), and two 45-minute sessions per week of individual OT (id. at pp. 1, 18-19, 21).[2] With regard to assistive technology, the June 2022 CPSE recommended the student be provided with a communication application as needed for both school and home (id. at p. 18).

In a due process complaint notice, dated September 8, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year based on numerous procedural and substantive allegations pertaining to the April 2022 CSE and June 2022 CPSE meetings and resultant IEPs (see Parent Ex. A). The essence of the parents' claims was that the district failed to conduct appropriate evaluations of the student and that the CSE engaged in systematic predetermination and failed to recommend an appropriate program and related services (id. at pp. 1, 8-15). The parents requested pendency and a finding that the district denied the student a FAPE for the 2022-23 school year (id. at pp. 15-17). As relief, the parents requested compensatory education services for the denial of a FAPE and any deprivation of pendency, to include "at minimum a bank of 1:1 behavior therapy; 1:1 ABA; home-based services; 1:1 SEIT, 1:1 instruction, tutoring, [assistive technology], [assistive technology] training, OT, [speech-language therapy], PT, as well as any other services recommended as a result of independent evaluations" (id. at p. 16). Additionally, the parents sought funding for independent educational evaluations (IEE) in OT, PT, speech-language therapy, neuropsychological, assistive technology, and an "[e]ducational [o]bservation" by a board-certified behavior analyst (BCBA) or licensed behavior analyst (LBA) (id.).

After a prehearing conference on October 21, 2022, and status conferences on November 21, 2022 and April 3, 2023, an impartial hearing convened on May 10, 2023 and concluded on September 19, 2023, after five days of proceedings (Tr. pp. 1-10, 36-225). On March 8, 2023, a pendency hearing was held and in an interim order dated March 23, 2023, the IHO found and the parties agreed that pendency was found in an October 18, 2022 resolution agreement that included

[1] The April 2022 IEP was not entered into the hearing record (see Parent Exs. A-Y).

[2] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at https://www.nysed.gov/special-education/special-education-itinerant-teacher-seit-services-and-related-services-preschool. A list of New York State approved special education programs, including SEIS programs, can be accessed at: https://www.nysed.gov/special-education/approved-preschool-special-education-programs. SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; see Educ. Law § 4410[1][k]).

15 hours per week of individual SEIT services, three 45-minute sessions per week of individual speech-language therapy, two 45-minute sessions per week of individual OT, and two 45-minute sessions per week of individual PT all on a 12-month basis (Tr. pp. 11-35; March 23, 2023 Interim IHO Decision at pp. 3, 5).[3]

In a decision dated February 7, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year and found that the student was entitled to compensatory education services (IHO Decision at pp. 5, 10, 12-14). As relief, the IHO ordered the district to fund 400 hours of compensatory ABA services and for the district to calculate the number of mandated speech-language therapy, OT, and PT sessions that the student did not receive during the 12-month 2022-23 school year and issue a bank of compensatory services therefor, with all compensatory education services to be completed by June 30, 2026 (id. at pp. 13-14).

IV. Appeal for State-Level Review

The parents appeal. The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be fully recited here. The essence of the parents' appeal is that the IHO erred in failing to award all of the requested 1:1 ABA compensatory services. More specifically, the parents assert that the IHO improperly shifted the burden of proof with respect to the compensatory award, that the reduction of compensatory services was not warranted based upon equities, and the parents were denied "full compensation" for the denial of FAPE to the student (Req. for Rev. ¶¶ 1-3). In addition, the parents argue that the IHO erred in placing limitations of the compensatory awards by requiring the services to be conducted at school or at an ABA center-based program and placing an "expiration date" on the awards (id. ¶¶ 4-5). The parents also assert that the IHO erred in failing to find that the district violated Section 504 of the Rehabilitation Act (section 504) by adopting "discriminatory policies" and predetermining the student's recommended program (id. ¶ 6).[4] Accordingly, the parents seek a compensatory award

[3] The Interim IHO Decision on pendency was not paginated. For the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see March 23, 2023 Interim IHO Decision at pp. 1-7).

[4] The IHO specifically found in her decision that the district did not violate section 504 (IHO Decision at p. 14). This finding is not reviewable in this forum because an SRO lacks jurisdiction to consider a parent's challenge to an IHO's finding or failure or refusal to rule on section 504, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO does not have jurisdiction to review any portion of the IHO's decision or the parents' claims regarding section 504, and accordingly such claims will not be further addressed.

of 1,150 hours of 1:1 ABA services and a reversal of the limitations placed by the IHO on the compensatory awards.[5]

In an answer, the district generally denies the material allegations contained in the request for review. The district asserts that the award of compensatory education services was properly limited by the IHO as the IHO "carefully considered and explained valid reasons for limiting the ABA services award" (Answer ¶¶ 8-10). Additionally, the district argues that the limitations placed on the compensatory awards were appropriate as the IHO "seems" to have concluded that the student would benefit from the services in an academic setting rather than at home (id. ¶ 11). The district further argues that the IHO had "broad equitable authority" to limit the time frame for the compensatory services to remediate the deprivation of a FAPE (id. ¶ 12).

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

[5] The parents submit proposed SRO Ex. A which is the September 8, 2022 due process complaint notice that is already a part of the hearing record as Parent Ex. A. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). There is no need for me to accept a duplicate exhibit as additional evidence.

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]).[6]

[6] 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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Relief – Compensatory Education Services

Initially, neither the parent nor the district appealed the IHO's determination that the district denied the student a FAPE for the 2022-23 school year or the IHO's award of compensatory speech-language therapy, OT, or PT services.[7] Accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). As a result, the issues on appeal are confined to the amount of ABA services awarded by the IHO and the location of their delivery, and the expiration date set for use of the entire compensatory education award.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case where a denial of FAPE has occurred (see Doe v. East Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; L.O. v. New York City Dep't of Educ., 822 F.3d 95, 125 [2d Cir. [2016] [remanding to District Court to determine what, if any, relief was warranted for denial of FAPE]; Wenger v. Canastota Cent. Sch. Dist., 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 & n.12 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a 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

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).

[7] As further discussed herein, the parents appeal the time limitation placed on the totality of the compensatory education awarded.

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"]).

As a result of the district's conceded failure to offer the student a FAPE for the 2022-23 school year, the IHO found that the "student's deficits" warranted an award of compensatory education services (IHO Decision at p. 12). The IHO found the parents' evidence credible with respect to the student's need for "additional 1:1 special education services" throughout the school day and further found that the student required a "full-time special education program" (id.). The IHO found that the district failed to rebut the parents' "abundant" evidence that the recommended 15 hours per week of SEIT services was not appropriate for the student (id.). Accordingly, the IHO found that the parent's requested "compensatory in-school ABA services" should be granted (id.). Despite these findings, however, the IHO only awarded 400 hours of compensatory ABA services to place the student in the same position as if he received a full-time special education program for the 2022-23 school year (id. at p. 13).

Additionally, the IHO was not "persuaded" that the compensatory award should address a lack of appropriate home-based ABA services (IHO Decision at pp. 12-13). The IHO found that during the 2022-23 school year the student was receiving 14-17 hours per week of home-based ABA paid for by the parents' insurance, but the hearing record lacked any evidence regarding the home-based ABA services (id. at p. 12). Despite the testimony of the student's father that the home-based ABA did not meet the student's needs, the IHO pointed to testimony in the hearing record that the student did benefit from the home-based services and determined that no compensatory education was warranted to remedy any alleged insufficiency of the services (id. at pp. 12-13).

The parents assert that the IHO failed to provide "sufficient compensatory relief" to place the student in the position he would have been had the district offered him a FAPE for the 2022-23 school year (Req. for Rev. at p. 3). The parents argue that the student "required full-time 1:1 instructional support to access the curriculum in his general education program for the" 2022-23 school year (id. at p. 4). The parents claim that the evidence in the hearing record supported an award of 1,150 hours of 1:1 ABA services for the denial of a FAPE for the 2022-23 school year.

The requested compensatory services in the amount of 1,150 hours were calculated by the parents as 25 hours of 1:1 ABA services per week for 46 weeks (id. at p. 6).

Furthermore, the parents argue that the IHO improperly reduced the award because of the student's receipt of approximately 15 hours per week of insurance funded ABA instruction (Req. for Rev. at p. 6). The parents also assert that the IHO incorrectly found that the student should not receive home-based ABA (id. at p. 7). Moreover, the parents contend that the IHO arbitrarily awarded 400 hours of compensatory ABA (id.). Although the parents argue that the student should receive compensatory ABA in the home, in the alternative if it is determined that the student is not entitled to home-based ABA services, the award should be at a minimum of 690 hours (15 hours per week for 46 weeks) of compensatory in-school ABA (id. at pp. 7-8). Contrary to the arguments by the parents, the district asserts that the IHO's award of compensatory services be upheld based upon the IHO's broad authority to determine an award for relief and the IHO "carefully considered and explained valid reasons for the limiting" the award (Answer ¶¶ 7-8, 10).

Turning briefly to the facts of this matter, for the 2022-23 school year, the student was enrolled in a regular education nonpublic preschool program by his parents (Parent Exs. L at pp. 1, 11; Q at p. 1; S at pp. 1, 11; T ¶¶ 27, 31; U ¶ 44). The student received 15 hours per week of individual SEIT as per his June 2022 IEP which was pushed into his regular preschool program (Parent Ex. T ¶¶ 31, 33; U ¶ 45).[8] The 15 hours per week of SEIT were provided by a special education teacher who was a BCBA and LBA and provided the student 1:1 ABA instruction (Parent Exs. L at p. 1; U ¶ 28). Additionally, the student received 14-17 hours a week of ABA through the parents' private insurance, which was also pushed into the student's regular education class (Tr. p. 174; Parent Exs. T ¶ 33; U ¶¶ 79-84).

The June 2022 IEP present levels of performance were based upon assessments from June 16, 2021; a June 2021 evaluation from the student's ABA therapist; and physical therapy notes from June 2022 (Parent Ex. B at pp. 2-5). According to the evaluative information in the June 2022 IEP, the student had "severe overall deficits" in adaptive behaviors, and delayed language skills (id. at pp. 2-3). The student was described as having "strong pretend and imaginative play skills" but had "fleeting and inconsistent eye contact with repetitive movements" (id. at p. 3). The student was found to communicate using 2-3 words with his SEIT but not yet with peers (id. at pp. 3-4). His gross motor skills were reported to be improving, however, he needed to increase his balance and coordination, and the student demonstrated weaknesses in some fine motor skills, e.g., unable to use scissors (id. at pp. 4-5).

A comprehensive private neuropsychological evaluation was conducted of the student on December 20, 2022 (see generally Parent Ex. S). The student's cognitive functioning was found to be within the very low range with "strengths on measures of counting and number concepts" (id. at p. 11). The evaluation report indicated that, academically, the student was performing below age and grade level expectations (id. at p. 12). However, the neuropsychologist noted that the student demonstrated strengths in recognizing shapes and colors, recognizing letters, and "emergent decoding skills" (id.). The student demonstrated challenges with his executive

[8] The student's father testified that the district did not implement the recommended SEIT services, and therefore, the parents sought services from a private agency for the SEIT services (Parent Exs. T ¶¶ 28-29; U ¶ 47).

functioning skills and his "greatest challenge" was in processing language (id.). The neuropsychologist confirmed the student's previous diagnosis of ASD (id. at p. 13).

An ABA progress report dated March 8, 2023 stated that the student demonstrated "strengths in concrete tasks, such as counting with 1:1 correspondence, [and] acquiring new tacts and letter sounds with a relatively quick skill acquisition rate" (Parent Ex. L at p. 11). The progress report indicated that the student had deficits in the areas of executive functioning, i.e.., attention and organization, and flexible thinking (id.). The progress report further indicated that the student made "consistent progress" with his 1:1 SEIT/ABA sessions in acquiring skills and using the skills across environments (id.). However, the student continued to exhibit "significant delays" in all areas including social communication and play skills and engaging in appropriate behaviors (id.).

The parents rely on the recommendations of the BCBA and neuropsychologist for the number of compensatory 1:1 ABA services the student required to access his curriculum in the regular education classroom for the 2022-23 school year (Req. for Rev. at p. 7). The BCBA that worked with the student during the 2022-23 school year reported that the student continued to "demonstrate severe deficits" and required "full-time ABA support in school" (Parent Exs. L at p. 11; U ¶ 95). She also stated that the student needed home-based ABA to provide "repetition/practice" to acquire new skills to "fulfill his potential at independence" (Parent Exs. L at p. 11; U ¶ 96). The BCBA recommended a "small, specialized classroom" and 40 hours per week of 1:1 ABA instruction to be provided in both school and home settings (Parent Ex. L at p. 12). In addition, the neuropsychologist recommended that based upon the student's "considerable cognitive and language delays with significant weaknesses in social learning" the student should be placed "in a small, structured, specialized education program" with 1:1 ABA services (Parent Exs. S at p. 13; X ¶¶ 35-37). The neuropsychologist's recommendation for 1:1 ABA services included 30 hours per week in the school setting and 10 hours per week outside of school (Parent Exs. S at p. 13; X ¶ 37). The neuropsychologist testified by affidavit that based upon research "a 40 hour program of 1:1 ABA can elicit significant and meaningful progress" for children with autism (Parent Ex. X ¶ 39). Further, the neuropsychologist stated that based upon the student's academic loss due to a lack of an appropriate program, the recommended ABA hours should be provided for a full 12-month school year and compensatory services should be considered (Parent Exs. S at p. 13; X ¶ 41). These recommendations were not disputed, and no contrary evidence was presented by the district.

Generally, compensatory services are not designed for the purpose of maximizing a student's potential or to guarantee that the student achieves a particular grade-level in the student's areas of need (see Application of a Student with a Disability, Appeal No. 16-033; cf. Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Rather, an award of compensatory education should place the student in the position that he would have been in had the district acted properly (see Parents of Student W., 31 F.3d at 1497 [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

Moreover, an IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]).

Initially, the parents argue that although the IHO found the evidence in the hearing record supported an award of compensatory education for a denial of FAPE for the 2022-23 school year, the IHO failed to hold the district to its burden of proving an appropriate remedy. According to the parents, as the district submitted no evidence to support its burden, the IHO erred by shifting the district's burden to the parents to prove the appropriateness of the requested remedy. Here, the district conceded that it denied the student a FAPE because it failed to provide the parents with a school location letter (see IHO Decision at p. 10; Tr. pp. 45-47, 50).

Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district, it is not an SRO's responsibility to craft the district's position regarding the appropriate compensatory education remedy. During the impartial hearing, the district failed to offer any documentary evidence, witnesses, or a closing brief. The district was required under the due process procedures set forth in New York State law to address its burdens by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; see also E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524).

However, the IHO was by no means required to merely adopt the relief proposed by the parents. An outright default judgment awarding compensatory education is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005] [rejecting "lump sum" grant of tutoring as a compensatory remedy for a multi-year denial of FAPE]).[9] Indeed, an award ordered so blindly could ultimately do more harm than good for a student (see M.M., 2017 WL 1194685, at *8 ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). Moreover, if the sum and total of the compensatory education relief requested by the parent was ordered, including the monetization thereof, it could potentially amount to a punitive award (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] [noting that "[t]he purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]).

Here, the IHO properly weighed the evidence and found that the student required "1:1 special education services during the school day" and the district's failure to recommend an appropriate program for the 2022-23 school year warranted an award of "in-school ABA services"

[9] Authority specific to the issue of a parents' request for a default judgment due to a school district's failure to comply with provisions requiring a response to due process complaint notices tends to lean against entry of a default judgment in the absence of a substantive violation, and that the remedy is a due process hearing (G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 Fed. App'x 698, 699 [9th Cir. 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]). However, here, an impartial hearing, along with a full and fair opportunity to be heard, has been afforded to the district already, rendering such authority inapposite.

(IHO Decision at p. 12). However, without any basis in the hearing record or explanation the IHO deviated from the requested compensatory hours sought and arbitrarily reduced the amount of the recommended in-school ABA. I agree with the IHO's finding that to remedy the denial of a FAPE, the student is entitled to in-school compensatory ABA services. Therefore, as requested by the parents, to place the student where he should have been but for the denial of a FAPE, I am awarding compensatory education services of 1:1 in-school ABA services in the amount of 690 hours. Furthermore, I concur with the IHO's finding that there was a lack of information pertaining to the home-based or insurance-based ABA services and therefore, uphold the IHO's determination not to award home-based ABA services.[10]

B. Limitations on the Award

The parents assert that the IHO ordered a completion date of all compensatory services by June 30, 2026 and that the 1:1 ABA compensatory services be provided "at the student's school or provided at an ABA center-based program location" (IHO Decision at pp. 13-14). The parents claim that these limitations on the compensatory award deny them "the freedom to use the compensatory services as necessary" for example on school breaks or at home which may result in the student not being able to use all of the relief that is necessary to remediate for the district's failure to offer a FAPE for the 2022-23 school year (Req. for Rev. at pp. 8-9).

Here, I find no reason in the hearing record to disturb the IHO's determination that the compensatory awards be limited as to location or date of completion. As noted above, the purpose of compensatory services is to place the student in the position he would have been in had the district complied with its obligations under the IDEA, not to continuously carry forward a balance of compensatory services that remain unused. Also, an IHO generally has broad authority to fashion relief. While I acknowledge the parents' concerns regarding the student's ability to utilize the compensatory education award within the allotted timeframe, there is no indication that the June 30, 2026 deadline was untenable. Furthermore, there is no evidence that the awarded compensatory hours are not compatible with the student's program or that the hours cannot be implemented in the student's program. Accordingly, I find the limitations ordered by the IHO with respect to the location of services and the June 26, 2026 expiration date for the delivery of the awarded services to be reasonable and I shall uphold these IHO's findings.

[10] Several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (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]; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13-*14 [S.D.N.Y. Jul. 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *11 [S.D.N.Y. Mar. 31, 2014]; see also Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]). While the Second Circuit has not specifically ruled on the issue of a district's obligations, or lack thereof, under the IDEA to provide for the generalization of skills outside of school as part of an educational program, in considering whether certain home-based services provided for the purpose of generalization should be funded by the district, the Second Circuit has held that "parents are not entitled to reimbursement for services provided in excess of a FAPE" (L.K., 674 Fed. App'x at 101).

VII. Conclusion

Based upon the foregoing, although the IHO erred as to the number of hours for an appropriate ABA compensatory award, the hearing record supports an award of compensatory education for the district's denial of a FAPE for the 2022-23 school year and thus the IHO's awarded compensatory education shall be modified as indicated above.

I have considered the parties' 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 February 7, 2024, is modified by awarding the amount of 690 hours of 1:1 ABA compensatory education services; and,

IT IS FURTHER ORDERED that the awarded 1:1 ABA compensatory services shall in accordance with the IHO's February 7, 2024 decision be provided in the student's school or at an ABA center-based program; and,

IT IS FURTHER ORDERED that the awarded compensatory education services including 1:1 ABA services, speech-language therapy, and OT and PT services, shall in accordance with the IHO's February 7, 2024 decision be completed by June 30, 2026.

Dated: **Albany, New York**
May 31, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER