



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-121

### **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 Mark Gutman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nate Munk, 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 those portions of a decision of an impartial hearing officer (IHO) which denied certain compensatory education relief and declined to modify the student's IEP upon a finding that respondent (the district) failed to provide her daughter with an appropriate educational program for the 2021-22, 2022-23, and 2023-24 school years. The appeal must be sustained in part.

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

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, 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. Briefly, the student has a history of developmental delays and received diagnoses of intellectual disability – moderate; autism spectrum disorder with social communication level 1 requiring support, repetitive behavior level 1 requiring support, and with accompanying intellectual and language impairments; disruptive mood dysregulation disorder; and attention deficit/hyperactivity disorder (ADHD): combined type (Parent Exs. F at p. 4; I; J; K; L). As a younger child the student received related services through the Early Intervention Program (EIP) and Committee on Preschool Special Education (CPSE) (Parent Exs. I at p. 4; L at p. 4). Both English and Spanish are spoken in the home, and the student is considered bilingual; according to the February 2019 IEP, December 2020

IEP, and December 2021 IEPs the language of service for the student's special education and related services was English (Parent Exs. C at pp. 15-16, 20-21; D at pp. 17-18, 24, 25-26; E at pp. 20-21, 27; L at p. 2). However, in January 2023 a CSE, recommended that the student's speech-language therapy services be provided in Spanish (Parent Ex. B at pp. 23, 31-32).

At the outset of the 2020-21 school year (seventh grade), the student was receiving a special education program and related services under a December 2020 IEP with an implementation date of January 4, 2021 (Parent Ex. D at pp. 1, 17-18, 24). At that time, the CSE had recommended that the student receive 12-month services consisting of placement in an 8:1+1 special class in a specialized school in the district, with weekly related services including one 30-minute session of counseling in a group of three, one 30-minute session of individual occupational therapy (OT); one 30-minute session of physical therapy (PT) in a group of two, one 30-minute session of individual speech-language therapy in English, one 30-minute session of speech-language therapy in a group of three in English, and full-time 1:1 paraprofessional services for behavioral support and for transportation (*id.* at pp. 17-19, 24). The CSE also recommended one 60-minute session per month of parent counseling and training (*id.* at p. 18).

On December 1, 2021, the CSE convened to develop the student's IEP for the remainder of the 2021-22 school year (eighth grade) and the beginning of the 2022-23 school year (ninth grade) (Parent Ex. E at pp. 1, 20-21, 27).<sup>1</sup> The CSE determined that the student remained eligible for special education as a student with autism and recommended 12-month services consisting of continuing the placement in an 8:1+1 special class in a specialized school in the district, with weekly related services including one 30-minute session of counseling in a group of three, one 30-minute session of individual OT; one 15-minute session of PT in a group of two, two 30-minute sessions of speech-language therapy in a group of three in English, and 1:1 paraprofessional services for behavior support (*id.* at pp. 20-21).<sup>2</sup>

By email dated October 6, 2022, the parent wrote to the district and attached a letter which reportedly included a request for an independent educational evaluation (IEE) (Parent Ex. H at p. 23).<sup>3</sup> Beginning in December 2022 and continuing through March 2023, the parent wrote to the district to report that the student's overall functioning—and particularly her behavior—had deteriorated since the student had moved from middle school to her then-current public school placement (*id.* at pp. 1-28).

On January 19, 2023, the CSE convened to develop the student's IEP for the remainder of the 2022-23 school year (ninth grade) and the beginning of the 2023-24 school year (tenth grade)

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<sup>1</sup> The December 2021 IEP had an implementation date of December 7, 2021, and an annual review date of December 1, 2022 (Parent Ex. E at p. 1).

<sup>2</sup> The December 2021 IEP notes the duration of the student's 1:1 paraprofessional services as "0.8" (Parent Ex. E at p. 21). Although not further explained in the hearing record, it is assumed that this recommendation stands for eighty percent of the school day.

<sup>3</sup> The hearing record included an exhibit consisting of 28 pages of email correspondence in no particular order ranging from October 6, 2022 through March 7, 2023 (Parent Ex. H). The emails also indicated there were attachments to the emails, which were not offered as evidence into hearing record. Some of the emails in the exhibit were duplicative, while others that the parent offered were partially omitted.

(Parent Ex. B at pp. 30).<sup>4</sup> The CSE recommended that the student receive 12-month services consisting of continued placement in an 8:1+1 special class in the district with adapted physical education and weekly related services including one 30-minute session of individual counseling services, one 30-minute session of counseling in a group of three, two 30-minute sessions of OT in a group of two, two 30-minute session of speech-language therapy in a group of three in Spanish, and 1:1 paraprofessional services for behavioral support (*id.* at pp. 22-24, 31-32).<sup>5</sup> The CSE also recommended four sessions per year of parent counseling and training (*id.* at p. 23).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated July 31, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22, 2022-23, and 2023-24 school years (Parent Ex. A at pp. 1, 3). Without reference to any specific school year, the parent asserted that the district denied the parent the right to meaningfully participate in the development of the student's educational program; failed to comprehensively evaluate the student; failed to appropriately respond to the parent's request for independent educational evaluations (IEE); failed to develop meaningful and measurable annual goals that addressed all areas of the student's needs; failed to include appropriate present levels of performance on the student's IEP; failed to implement the student's IEP; failed to provide an appropriate program for the student; failed to provide appropriate related services to the student; and failed to address the student's behavioral needs (*id.* at pp. 3-4). As relief, the parent sought district funding for an independent neuropsychological evaluation, an independent speech-language therapy evaluation, an independent assistive technology evaluation, an independent OT evaluation, an independent PT evaluation, an independent applied behavior analysis (ABA) "skills assessment," and an independent functional behavior assessment (FBA) (*id.* at pp. 4-5). The parent also requested an order for the CSE to reconvene within 14 days of the IHO's decision and to recommend placement of the student at a State-approved nonpublic school with "an appropriate educational program and related services in accordance with the [s]tudent's needs" or "if an appropriate private school is located by the [p]arent prior to the substantive hearing" an order directing the district to fund the cost of the student's attendance "in such program upon a showing of appropriateness to remedy the denial of FAPE" (*id.* at p. 5). Next, the parent requested that the IHO order funding for home-based services, "if determined to be necessary," and compensatory education services to be provided outside of school hours, consisting of "ABA therapy, academic tutoring, and any additional services to remedy the [d]istrict's failure to provide an appropriate educational program and methodologies that could allow for meaningful educational progress" (*id.*). In addition, the parent requested funding for transportation to and from all compensatory education services sessions (*id.*). Lastly, the parent requested funding for the cost of an appropriate assistive technology device (*id.* at p. 6).

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<sup>4</sup> The January 2023 IEP had an implementation date of January 20, 2023, and an annual review date of January 19, 2024 (Parent Ex. B at p. 1).

<sup>5</sup> Similar to the December 2021 IEP, the January 2023 IEP indicated that the duration of the recommended 1:1 paraprofessional services was "0.8" without further explanation (Parent Ex. B at p. 24).

## **B. Impartial Hearing and Impartial Hearing Officer Decision**

The parties convened for a prehearing conference before an IHO with the Office of Administrative Trials and Hearings (OATH) on September 5, 2023 (Tr. pp. 1-4). During the prehearing conference, the parties advised the IHO that the district had agreed to fund the parent's requested IEEs during the resolution meeting (Tr. p. 2).<sup>6</sup> An independent speech-language therapy evaluation was completed on September 24, 2023, an independent OT evaluation was completed on October 30, 2023, an independent neuropsychological evaluation was completed on November 16, 2023, and an independent PT evaluation was completed on December 11, 2023 (Parent Exs. I-L). The parties reconvened for an impartial hearing on February 1, 2024, which concluded on March 22, 2024, after five days of additional proceedings (Tr. pp 38-116). By decision dated March 30, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years (IHO Decision at p. 4). As relief, the IHO awarded compensatory education services consisting of 160 hours of speech-language therapy, 92 hours of OT, and 69 hours of PT (*id.* at p. 10). The IHO denied the parent's requests for a prospective placement and for compensatory ABA, Board Certified Behavior Analyst (BCBA) supervision, parent counseling and training, and social skills training (*id.* at p. 8). The IHO also ordered the CSE to reconvene to consider all of the evaluations the student has had and all available information to develop a new IEP for the student (*id.* at p. 11). The IHO also directed the CSE to consider ABA therapy and placement in a nonpublic school and if the CSE did not recommend them to "articulate evidence based reasons as to why they were not implemented" (*id.*).

## **IV. Appeal for State-Level Review**

The parent appeals and argues that the IHO erred in failing to order a number of compensatory services for a three-year denial of FAPE, erred in failing to order ongoing home-based ABA therapy, and erred in failing to order "specific IEP-mandates and ongoing interim services in light of the egregious denial of FAPE" (Req. for Rev. at p. 1). As relief, the parent requests that the district be directed to recommend placement for the student in a nonpublic school which utilizes ABA; to fund 20 hours per week of push-in ABA therapy until the district places the student in a 1:1 ABA school placement; to fund on an ongoing basis ten hours per week of home-based ABA therapy and to fund compensatory services consisting of 2,760 hours of school-based ABA, 1,380 hours of home-based ABA, 276 hours of BCBA supervision, 276 hours of parent counseling and training, and 276 hours of social skills training.

In an answer, the district responds to the parent's claims with general denials and argues that the IHO's decision should be upheld in its entirety.

## **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

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<sup>6</sup> Additional status conferences were held while the IEEs were completed on September 20, 2023, September 21, 2023, October 12, 2023, November 21, 2023, November 28, 2023, December 15, 2023, January 11, 2024, and January 17, 2024 (Tr. pp. 5-37).

independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations

omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew 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]).<sup>7</sup>

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**

At the outset, the district has not appealed from the IHO's finding that it failed to offer the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years or from the IHO's award of compensatory related services, therefore, those 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

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<sup>7</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).

M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

During the impartial hearing, the district failed to offer any documentary evidence or witnesses to defend the appropriateness of its recommended programs (Tr. pp. 31-33, 39-42). The hearing record does not indicate whether the IHO ever requested that the parties state their positions, claims, or requested relief on the record. Immediately upon receiving the parent's documentary evidence, the IHO asked the district which witnesses it would like to cross-examine and the first witness was called (Tr. pp. 42-44). No opening or closing statements were given by either party, but both parties submitted closing briefs. In its closing brief, the district conceded that it "did not put up a prong I defense" (IHO Ex. II at p. 2). The district further asserted that if the IHO found a compensatory award was warranted, the award should consist of 46 hours of OT, 35 hours of PT, 46 hours of social skills training, and 46 hours of parent counseling and training (id. at p. 6). The district further contended that any award should expire after two years or at the latest before the student graduates or ages out of special education (id.).

In the parent's post-hearing brief, she requested that the district create a new IEP for the student that included a deferment for placement in a nonpublic school, along with recommendations for home-based ABA therapy, counseling, parent counseling and training, OT, PT, and speech-language therapy (IHO Ex. I at p. 12). The parent further requested an order directing the district to fund 30 hours per week of push-in ABA therapy until the district places the student "in a 1:1 ABA school placement" as well as an order directing the district to fund 10 hours per week of home-based ABA therapy, on an ongoing basis, regardless of whether it is placed on the student's IEP (id.). Finally, the parent requested a specific award of compensatory education consisting of the compensatory services the parent continues to seek on appeal (2,760 hours of school-based ABA, 1,380 hours of home-based ABA, 276 hours of BCBA supervision, 276 hours of parent counseling and training, 276 hours of social skills training) as well as the compensatory services ordered by the IHO (160 hours of speech-language therapy, 92 hours of OT, and 69 hours of PT) (id. at pp. 12-13; see IHO Decision at p. 10).

On appeal, the parent contends that the IHO erred in failing to order all of her requested compensatory education, in failing to order at a minimum the hours offered by the district, and in failing to order ongoing home-based ABA therapy. The parent further seeks "specific IEP-mandates and ongoing interim services in light of the egregious denial of FAPE" (Req. for Rev. at p. 1). In addition to prospective placement in a nonpublic school which utilizes ABA, the parent seeks interim funding for 20 hours per week of push-in ABA therapy until the district places the student in a 1:1 ABA school placement; funding on an ongoing basis for ten hours per week of home-based ABA therapy and funding for all of the compensatory services recommended in the independent neuropsychological evaluation, which consisted of 2,760 hours of school-based ABA, 1,380 hours of home-based ABA, 276 hours of BCBA supervision, 276 hours of parent counseling and training, and 276 hours of social skills training (Parent Ex. I at p. 18).<sup>8</sup>

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<sup>8</sup> The independent neuropsychological evaluation included a recommendation for compensatory education (Parent Ex. I at p. 18). In particular, the recommendation was for "per year" totals based on a weekly breakdown for a 46-week school year (id.). I also note that the neuropsychologist's recommendations for compensatory education, at least in terms of school-based and home-based ABA, BCBA supervision, parent counseling and training, and



The district asserts that the IHO correctly denied the parent's requests for ABA therapy, BCBA supervision, parent counseling and training, and social skills training because the recommendations were based on literature and not based on an ABA skills assessment, which had yet to be completed. The district further argued that the IHO correctly refrained from awarding prospective relief as it would usurp the authority of the CSE. Lastly, the district argues that the amount of requested compensatory education was designed to maximize the student's potential.

Given the nature of the parent's claims and requested relief, the fact that the student had changed schools between the filing of the due process complaint notice and the completion of the IEEs, and that the most recent IEP in the hearing record was from January 2023 and the CSE should have reconvened for an annual review, the undersigned requested additional information from the district pursuant to State regulation (see 8 NYCRR 279.10[b]). Specifically, the district was directed to provide "[a] copy of any IEPs developed by the CSE after January 2023 to date, along with prior written notice and any documentation relied on by the CSE in developing such IEP(s), such as a functional behavioral assessment or behavioral intervention plan, that was not included in the hearing record before the IHO," as such information may be relevant to a determination in this matter. Both parties were given the opportunity to object to the consideration of additional evidence but did not. In response to the request from the undersigned, the district submitted an enumerated exhibit list identifying 11 documents, four of which were already part of the hearing record as parent exhibits.<sup>9</sup> Information that was not already part of the impartial hearing record was a March 4, 2023, social history update, a March 7, 2023 psychoeducational evaluation, an April 20, 2023 IEP, a November 3, 2023 social history assessment, a November 28, 2023 assistive technology evaluation, a March 8, 2024 functional behavioral assessment (FBA), and a May 6, 2024 IEP, which will be considered, have been marked for identification, and are cited as "SRO Exs. 1-4; 7; 9; 11."

The hearing record indicates that in the parent's view, the student had not exhibited behaviors that required intensive support while attending a district middle school and that it was the student's then-current placement for the 2022-23 school year that had exacerbated the student's behavioral needs (Parent Ex. H at pp. 23-24). The evidence also reflects that although the student began the 2023-24 school year at one district school she transferred to a different school in or around November 2023 and attended the second school for 15 days between November 17, 2023 and December 14, 2023 (Parent Ex. L at p. 4; SRO Ex. 2 at pp. 1, 5). Thus, the student had attended two different district schools as of the completion dates of the IEEs (see Parent Exs. I-L; SRO Exs. 7 at p. 1; 9 at p.1).

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social skills training, was the same recommendation for an educational program going forward as it was for compensatory education—a prospective remedy to make up for past harms (compare Parent Ex. I at pp. 17-18, with Parent Ex. I at p. 18); accordingly, it is unclear how the neuropsychologist envisioned the student receiving the recommended services, i.e. if the neuropsychologist intended for the student to receive the recommended educational program or if the neuropsychologist intended for the student to receive the recommended program and additional educational services to be provided around the recommended program. The parent extrapolates her request for compensatory education based on the neuropsychological evaluation but multiplied by three school years.

<sup>9</sup> Documents 5, 6, 8, and 10 were before the IHO as parent exhibits and thus need not be considered as additional evidence on appeal.

With regard to the additional evidence received from the district, it tends to show that events relevant to relief occurred after the January 2023 IEP was developed for the student. Review of the documents indicates that on March 4, 2023, the district conducted a social history update as part of a that was reevaluation requested by the parent, which indicated that the student was attending ninth grade (SRO Ex. 3 at p. 1). The March 2023 social history update reflected that the parent requested a reevaluation because she was concerned with the student's progress and wanted to review the current services and placement (*id.*). Next, on March 7, 2023, the district conducted a bilingual psychological evaluation as part of the reevaluation process requested by the parent (SRO Ex. 4 at p. 1). On April 20, 2023, the CSE reconvened to add information obtained from the March 2023 psychological evaluation to the student's IEP (SRO Ex. 2 at pp. 2,31).<sup>10</sup> A social history assessment, conducted by the district on November 3, 2023, indicated that the student was attending a different school for tenth grade than she had for ninth grade (SRO Ex. 7 at p. 1; *see* Parent Ex. L at p. 4). The assessment also indicated that there were no significant changes from the last eight months reported by the parent (*id.*). The district conducted an assistive technology evaluation on two dates in November 2023; one to obtain background information and one to conduct an in-person evaluation, which was completed on November 28, 2023 (SRO Ex. 9 at pp. 1, 8). The district completed an FBA on March 8, 2024 using data collected from November 17, 2023 through December 14, 2023 (SRO Ex. 11 at p. 1).<sup>11</sup>

The CSE convened again on May 6, 2024, to develop the student's IEP with May 7, 2024 set as the implementation date for the recommended services and a projected annual review date of May 6, 2025 (SRO Ex. 2 at pp. 1, 18-20, 30). The CSE recommended the student receive 12-month services including placement in an 8:1+1 special class, but the CSE ceased recommendation of a specialized school in the district and modified its proposal to place the student in a State-approved nonpublic day school with the related services of one 30-minute session per week of individual counseling services, one 30-minute session per week of counseling in a group of three, one 30-minute session per week of individual OT, one 30-minute session per week of OT in a group of two, one 30-minute session per week of individual "interim [m]onolingual [s]peech pending available bilingual provider" and two 30-minute sessions per week of "interim [m]onolingual [s]peech pending available bilingual provider" in a group of three, one 30-minute session per week of PT in a group of two, one 30-minute session per week of individual speech-language therapy in Spanish, two 30-minute sessions per week of speech-language therapy in a group of three in Spanish, , 1:1 paraprofessional services for behavioral support for eighty percent of the school day, and an assistive technology device consisting of a tablet and software (SRO Ex.

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<sup>10</sup> The student's January 2023 IEP indicated that her progress toward meeting annual goals would be provided to her parents four times per year, when report cards were issued (Parent Ex. B at p. 1). Although the April 2023 IEP was developed three months later, it included between two and four reports of progress toward individual annual goals (*compare* Parent Ex. B at pp. 14-22, 30, *with* SRO Ex. 1 at pp. 13-21).

<sup>11</sup> The data collection dates were noted in the March 2024 FBA as November 17, 2023, through "December 14, 2024"; however, as the report was dated March 2024, the end date appears to be a typo and it is assumed that the correct ending date would have been December 14, 2023 (*see* SRO Ex. 11 at p. 1).

2 at pp. 19-20, 26).<sup>12</sup> The CSE also recommended that the parent be provided with four hours per year of parent counseling and training (*id.* at p. 19).

Review of the May 2024 IEP indicates that the CSE had initially convened on April 17, 2024 and was the result of the IHO's decision in this matter (SRO Ex. 2 at p. 2; *see* IHO Decision at p. 11). As included on the May 2024 IEP, the April 2024 CSE discussed that the student's attendance since transferring to the then-current school site "had impacted the team most in obtaining new information" and that "[a]ll information discussed w[as] based on the limited time the team had spent with [the student] and from her previous IEP and consultation with previous staff" (SRO Ex. 2 at p. 2). In addition, the May 2024 IEP indicated that the April 2024 CSE developed "goals and mandates... as appropriately as possible," further stating that during the April 2024 CSE, "it came to light that all of [the student]'s independent evaluations were done in the months of her absence" (*id.*). As a result, "the team decided to postpone any final decisions until the new information was reviewed and considered" (*id.*). According to the May 2024 IEP, the CSE "reconvened on May 6th where changes to goals and mandates were made" and "[i]n addition, due to the high level of need, frequency of mandates, and [the student]'s attendance, the team felt that a non-public school placement was warranted" (*id.*).<sup>13</sup> The May 2024 IEP also reflected that the parent and her attorney were in agreement (*id.*).

Thus, a significant step has been made in modifying the student's programming to place the student in a nonpublic school, which was among the forms of requested relief by the parent before the IHO. Notably, there is no further information about whether the student returned to school, or what, if any services were provided to the student after December 14, 2023. Based on the district's response, the most current information reflects that the parties agree that the student should attend a State-approved nonpublic day school; however, there is no information describing whether or not a school has been located, whether or not the student has been accepted, or whether applications were actually sent out to prospective schools. To further complicate matters, the student is recommended to receive 12-month services consisting of the same special education program/services as recommended for the academic school year in the May 2024 IEP, which should be implemented at the start of the 2024-25 school year on July 1, 2024 (SRO Ex. 2 at p. 20).

### **A. Interim Prospective Relief**

Despite the efforts of the undersigned to ascertain what special education and related services the student is currently receiving, if any, the hearing record before the IHO and as supplemented by the district to the Office of State Review is woefully silent on this important issue, especially when the parties are requesting prospective relief that is very different. With regard to the parent's requested relief, there does appear to be some consensus among the independent specialists that the student requires ABA therapy (Parent Exs. F at pp. 1, 2; G at p.

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<sup>12</sup> The May 2024 IEP indicated that the "interim [m]onolingual [s]peech pending available bilingual provider" and speech-language therapy in Spanish both have a beginning service date of May 7, 2024 (SRO Ex. 2 at p. 19).

<sup>13</sup> The May 2024 IEP also indicated the student "has been approved for OPWDD services" and that the student is working with a case manager.

10; I at pp. 17-18; L at p. 27; Q at ¶¶9, 10, 12, 14-15).<sup>14</sup> In January 2023, a private psychologist indicated that "at present, she is in need of ABA therapy/Behavioral therapy" (Parent Ex. F at p. 1). Also in January 2023, a psychiatrist indicated in medical notes that the student would benefit from weekly ABA therapy (*id.* at p. 2). In a January 2023 doctor report, a developmental behavioral pediatrician recommended ABA therapy for treatment and noted "[c]ounseling/[b]ehavior [t]herapy, especially ABA, is known to help" (Parent Ex. G at pp. 1, 11). The developmental pediatrician "[a]gree[d] with the parents and the other mental health care providers that [the student] neede[ed] ABA [t]herapy" and noted that a prescription was provided (*id.* at p. 10). The November 2023 neuropsychological evaluation report included a recommendation indicating the student needed "daily instruction that is infused with ABA principles and methodology, and teaches organizational skills, . . . as ABA has a robust research foundation that supports its use in children with autism" (Parent Ex. I at p. 17). Additionally, the evaluator recommended an ABA skills assessment be completed prior to beginning ABA, stating the purpose of the assessment as determining "the appropriateness of [the student's] current IEP goals as they relate to her attention, communication, stereotyped behaviors, socialization, and self-regulation skills" (*id.*). He further recommended that the student receive ten hours of home-based ABA therapy and 20 hours of in-school ABA therapy each week, along with BCBA supervision for two hours per week to be provided in the home setting (*id.*). The report indicated that the ABA services would target the student's "repetitive behaviors, inattention, and social and communication deficits" (*id.*).

In her direct testimony by affidavit, the clinical director of the private psychology practice that conducted the November 2023 neuropsychological evaluation stated that she concurred with the evaluator's recommendation that the student be placed in a small class in a special education program that utilizes ABA methodology throughout the day (Parent Ex. Q at ¶ 9).<sup>15</sup>

On cross-examination, the clinical director testified that the amount of hours recommended for ABA therapy was based on the student's level of functioning and needs at the time of the evaluation (Tr. p. 51). She clarified that the literature recommends a minimum of 20 hours; however, 20 to 40 hours of ABA is often required per week in order for a student to progress (Tr. p. 52). She further testified that based on gaps noted at the time of testing, recommendations for 20 hours in school and 10 hours at home were made (Tr. pp. 51-53). The clinical director explained that 10 hours of ABA therapy was recommended in the home because "learning doesn't begin and end when a student enters into the school" and opined that "in order for [students with autism] to appropriately access education, they need to have support not only at school but also at home so that they are able to learn in school" (Tr. pp. 53-54). The clinical director reported that the evidence from peer-based research states that at least 20 hours of ABA therapy are needed in order for it to be implemented in an evidence-based way (Tr. p. 52). The clinical director further testified that the skills assessment was not necessary before recommending a specific amount of ABA therapy

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<sup>14</sup> Parent exhibit F appears to include pages from parent exhibit G (compare Parent Ex. F at pp. 4-6, with Parent Ex. G at pp. 1, 6, 8).

<sup>15</sup> The clinical director is the clinical director of psychology at the private psychology practice that conducted the November 2023 neuropsychological evaluation (Tr. p. 44; Parent Ex. Q at ¶1). She indicated that she oversaw the neuropsychological evaluation and reviewed it with the psychologist who conducted it prior to the hearing (Tr. p. 45-46; Parent Ex. Q at ¶¶6-8).

and that it should be conducted prior to initiating ABA therapy, because it would identify what the goals of ABA therapy would be, based on the student's functioning at the time ABA is started (Tr. pp. 103-04). The clinical director also explained that the recommendations for ABA services and social skills did not overlap and the goal of ABA would be to address social deficits in terms of social readiness skills and the interfering behaviors that impact social readiness and social behavior (Tr. pp. 104-05).

In her ordering clause, the IHO directed the CSE to consider all available information when developing a new IEP and to consider ABA therapy and a nonpublic school placement (IHO Decision at p. 11). The IHO also ordered the district to "articulate evidence based reasons as to why," if they did "not implement[]" ABA therapy and a nonpublic school placement at the ordered CSE meeting (*id.*). As noted above, the CSE convened on April 17, 2024 and May 6, 2024 and recommended placement in a State-approved nonpublic day school (SRO Ex. 2 at pp. 2, 26, 29). However, the May 2024 IEP does not mention ABA therapy.

As interim prospective relief, the parent requests that the district be directed to recommend placement for the student in a nonpublic school which utilizes ABA and to fund 20 hours per week of push-in ABA therapy until the district places the student in a 1:1 ABA school placement.

Generally, as the district points out, an award of prospective relief in the form of IEP amendments and the prospective placement of a student in a particular type of program and placement, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (*see Adams v. Dist. of Columbia*, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; *see also Student X v. New York City Dep't of Educ.*, 2008 WL 4890440, at \*16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). However, concerns about circumventing the CSE process arise most prominently in matters where the school year challenged has ended and, in accordance with its obligation to review a student's IEP at least annually, the CSE would have already convened to produce an IEP for the following school year (*see V.W. v. New York City Dep't of Educ.*, 2022 WL 3448096, at \*7 [S.D.N.Y. Aug. 17, 2022] [acknowledging that "orders of prospective services are disfavored as a matter of law" and, in the matter at hand, indicating that "the CSE should have already convened for subsequent school years"]; *M.F. v. N. Syracuse Cent. Sch. Dist.*, 2019 WL 1432768, at \*8 [N.D.N.Y. Mar. 29, 2019] [declining to speculate as to the likelihood that the district would offer the student a FAPE "in the future" and, therefore, denying prospective relief]; *Eley v. Dist. of Columbia*, 2012 WL 3656471, at \*11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current school year]).

Additionally, while prospective placement might be appropriate in rare cases (*see Connors v. Mills*, 34 F.Supp.2d 795, 799, 804-06 [N.D.N.Y. Sept. 24, 1998] [noting a prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no

approved schools that would be appropriate"]), the pitfalls of awarding a prospective placement have been noted in multiple State-level administrative review decisions, including that where a prospective placement is obtained by the parents through the impartial hearing, such relief could be treated as an election of remedies subject only to further judicial review, where the parents assume the risk that future unforeseen events could cause the relief to be undesirable (see, e.g., Application of a Student with a Disability, Appeal No. 19-018; see also Tobuck v. Banks, 2024 WL 1349693, at \*5 [S.D.N.Y. Mar. 29, 2024]). Thus, in the event prospective relief is awarded, it is not permissible to return to due process to relitigate the prospective relief obtained in a final decision of an administrative hearing officer in a due process proceeding.

Here, I find that this matter presents one of the rare instances where prospective placement is warranted. Despite the passage of three school years, for which the district has not even argued that it made a FAPE available to the student, the additional evidence requested after the appeal shows that there has been minimal effort by the CSE to engage with the IHO's directive to reconvene the CSE to consider ABA therapy for the student. The resulting IEP appears to show that ABA for the student was not considered at all for the student by the CSE in April or May 2024, as it is not even mentioned (SRO Ex. 2). Thus, the district's argument on appeal that the issue of ABA programming should be left to the remedy chosen by the IHO, that is, for the CSE to "consider ABA therapy" has now obviously been rendered inadequate by the CSE's own inaction. Accordingly, I am not convinced by the district's and the CSE's responsiveness thus far that the district's administrative and CSE processes are sufficiently intact to effectuate the changes needed to remediate the student's situation without further direct intervention. Several factors in this case lead me to conclude that more extraordinary measures are appropriate.

First, the evidence shows that the district has had long standing, continuing difficulty meeting its obligations with respect to this student in that it continued to recommend the same programming for the student for a long period of time, which it now concedes resulted in a three-year denial of a FAPE. The prior IEPs also demonstrate that prior to agreeing to the parent's requested IEEs during the resolution period, the district had not made any significant efforts in recent years to ensure that the student was comprehensively evaluated (Parent Exs. B at pp. 1-2; C at p. 1; D at pp. 1-2; E at pp. 1-2).

Additionally, the district did not contest or rebut the evidence regarding the student's need for ABA services, rather it argued that the skills assessment should be completed first and, based on the evidence in the hearing record, I find there is a clear "consensus" among those who evaluated the student regarding her needs, and that consensus should therefore be followed by the CSE (see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 543–46 [2d Cir. 2017] [referencing and following the proposition that when the reports and evaluative materials present at the CSE meeting yield a clear consensus, an IEP formulated for the child that fails to provide services consistent with that consensus is not reasonably calculated to enable the child to receive educational benefits]). Moreover, at this time, there is no information about what special education services the student has received since December 2023 and despite being ordered to discuss ABA therapy at the student's next CSE meeting and for the CSE to provide an explanation of why ABA therapy was not recommended, as noted above, there is no indication that ABA methodology was even discussed at either the April 2024 or May 2024 CSE meetings. Further, the district has not defended against the parent's ABA arguments with any factual information about the student at all. Accordingly, because the district did not provide any evidence to support its programming

recommendations for the student's 2021-22, 2022-23, and 2023-24 school years or provide evidence contesting the student's need for ABA services going forward, the evidence in the hearing record supports the consensus of the professionals who determined that the student needed ABA services. Instead, it appears that the district staff within the student's CSE were trying to evade consideration of both the ABA recommendations in the IEEs that have been conducted as well as the IHO's directive for the CSE to specifically consider ABA programming for the student and provide an explanation.

Therefore, as the result of the relative persuasiveness of the independent evaluators reasoning and the refusal of the CSE to even engage in the issue, as relief I will order the district to fund 10 hours per week of ABA therapy to be implemented in a location of the parent's choosing until such time as the student is placed in a State-approved nonpublic school. Due to the proximity of the end of the 2023-24 school year and the extent of the district's denial of a FAPE to the student for its protracted failures, an appropriate remedy for the student is prospective placement of the student for the duration of the 2024-25 school year in a State-approved nonpublic day school that provides ABA programming unless the parties otherwise jointly agree to an alternative placement.<sup>16</sup>

## **B. Compensatory Education**

In the request for review, the parent argues, among other things, that the IHO erred in denying her request for 2,760 hours of school-based ABA services, 1,380 hours of home-based ABA services, 276 hours of BCBA supervision, 276 hours of parent counseling and training, and 276 hours of social skills training as relief for the denial of a FAPE for the 2021-22, 2022-23 and 2023-24 school years.

I note that compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory education services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the 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

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<sup>16</sup> This order of prospective placement does not preclude the CSE from convening periodically to discuss or review the student's needs and develop annual goals or management needs for the student based on evaluative information and the student's progress.

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"]).

The psychologist who conducted the November 2023 independent neuropsychological evaluation recommended that the student receive compensatory education in the form of 20 hours per week of school-based 1:1 ABA (920 hours per year), 10 hours per week of home-based 1:1 ABA (460 hours per year), two hours per week of BCBA supervision (92 hours per year), two hours per week of parent counseling and training (92 hours per year), and two hours per week of social skills training (92 hours per year) (Parent Exs. I at p. 18; Q ¶ 12). The annual amounts recommended were based on a 46-week school year.<sup>17</sup> In its closing brief, the district contended that an appropriate award of compensatory education would include 46 hours of OT, 35 hours of PT, 46 hours of social skills training, and 46 hours of parent counseling and training (IHO Ex. II at p. 6). The IHO awarded 160 hours of speech-language therapy, 92 hours of OT, and 69 hours of PT (IHO Decision at p. 10). The district did cross-appeal from the IHO's compensatory education directives, and thus I will not consider reducing the amounts awarded by the IHO; however, it does appear that the parties agree that an appropriate calculation would include an award of compensatory social skills training for the student and parent counseling and training.<sup>18</sup>

Given that the district did not provide additional evidence describing what services the student has received between December 14, 2023 and the present date, it is not possible to know what if any programming was delivered to the student and accordingly the effect of any such services cannot be considered. Notwithstanding the fact that the district did not support or defend the district programs it provided—or did not provide as the case may be—during the school years

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<sup>17</sup> Pursuant to State regulation, a 10-month school year from September through June consists of at least 36 weeks, and a 12-month school year from June through July would generally consist of 42 weeks. This is based on the 180 instructional days in a 10-month school year, plus an additional 30 days during the 12-month portion of the school year that occurs over a summer, typically during a six-week program (see Educ. Law § 3604[7]; 8 NYCRR 200.1[eee]).

<sup>18</sup> As it is apparent that some compensatory services are required in this matter to make up for the three-school year denial of FAPE, the district will be held to its own proposed amounts of compensatory services as stated in its post hearing brief. In particular, although I may not have awarded parent counseling and training and social skills training for the student under the facts presented in this matter, since the district suggested that the student receive 46 hours of compensatory parent counseling and training and 46 hours of compensatory social skills training if it was determined that compensatory education was warranted, the district shall be ordered to deliver those services that it proposed (see IHO Ex. II at p. 6).



at issue, of concern are the amounts of compensatory education recommended by the parent's experts and the student's capacity to tolerate the frequency and duration of the services recommended. In addition, the hearing record indicates that the student has never received ABA therapy and the ABA skills assessment has not been completed.

In light of the above, although the evidence shows that some compensatory education is warranted due to the multiyear denial of a FAPE to the student, the amount of compensatory ABA services requested by the parent is excessive. In particular, it is worth noting that the hearing record does not clarify how the proposed compensatory award would be delivered to the student, particularly how such an award will be delivered to the student when the student is to be placed in a nonpublic school providing ABA services to the student throughout the school day, which was also requested by the parent and awarded as relief in this matter. Of particular concern on this point, as noted above, there appears to be little differentiation between the educational program recommended by the evaluator who conducted the independent neuropsychological evaluation on a going forward basis, and the requested prospective relief for the denial of FAPE (see Parent Ex. I at pp. 17-18). The clinical director testified that the recommendation for compensatory services was based on a consideration of "how the student was functioning based on testing now, what her prior IEPs looked like, and making a determination as to what kind of services she should have been receiving if the [district] had created a program that would have allowed her to progress" and that the compensatory education was "necessary in order to ensure [the student] c[ould] close the gaps made during the time that she was in an inappropriate program" (Parent Ex. Q at ¶ 13). However, lacking from that interpretation of the evaluator's recommendation was any indication that the evaluator considered the programming that the student would be placed in going forward and any explanation as to how the proposed compensatory award could be used to benefit the student while the student is attending an ABA school. This is especially problematic considering that a sizeable chunk of the proposed compensatory award, 2,760 hours, is being requested as school-based 1:1 ABA services. When asked to explain how the compensatory award was computed, the clinical director testified that the student needed both the ongoing services and the recommended yearly compensatory award, which the director testified was needed to close the student's gaps, gaps between where the student was functioning as of October 2023 and "where the average range would be for a child this client's age" (Tr. pp. 57-58, 102-03). But even if the district had offered the student a FAPE for the school years in dispute, I find it would be extremely improbable, given the severity of the student's deficits, that the student would have achieved educational performance in an average range for her age even if the district had provided appropriate programming (see Tr. pp. 102-03). Achievement of educational skills in the average range would have represented maximization of the student's potential, which is considerably more than the district would have been required to provide under the IDEA. Thus, I do not accept the proposed compensatory education calculation as explained by the clinical director.

Based on the directives stated above to provide interim prospective ABA therapy while a State-approved nonpublic day school is located, the student's prospective placement will be considered in awarding any compensatory services. Additionally, as the hearing record supports a finding that the student received some benefit from the district's programming during the 2021-22, 2022-23, and 2023-24 school years, the amount of the proposed compensatory ABA services award must be reduced accordingly. Specifically, I will award five hours of compensatory ABA services per week provided to the student over a 12-month school year, or 42 weeks, as a bank of hours for the denial of a FAPE for each of the 2021-22, 2022-23, and 2023-24 school years. Such

an award will total 630 hours of ABA services, an award that is not insignificant considering that the district is also being directed to place the student in a nonpublic school that will provide her with ABA services throughout the school day and the student has also been awarded 321 hours of compensatory related services.

Lastly, with respect to the parent's request for compensatory home-based ABA programming for the student, I decline to order home-based ABA services as a specific form of compensatory education or as interim prospective relief. SROs and courts have indicated that school districts are not required, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, and I am not convinced that the student is unlikely to progress going forward in a school-based ABA program, and requiring the district to add home-based programming to the student's IEP would most likely lead to maximization, which is not required of school districts under IDEA (see, e.g., F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at \*11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at \*8-\*10 [S.D.N.Y. Mar. 1, 2016], *aff'd* in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]). However, I will not preclude any of the compensatory education services awarded in this matter from being delivered outside of regular the school day or in the student's home if the student can so tolerate. The reason for allowing compensatory services to be delivered outside of the school-based setting is that it may be impractical to fit a large amount of compensatory services into a well-designed school-based ABA program that is appropriate for the student, and if the day programming ultimately identified by the CSE is not also equipped to deliver the compensatory services from this decision as part of its regular programming, it may frustrate the parties' efforts to locate an appropriate school-based ABA program for the student.

## **VII. Conclusion**

In sum, the IHO's determinations that the district failed to offer the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years was not appealed by the district and has become final and binding. With respect to relief, the IHO's decision is modified to provide that the district shall fund or provide the student with 10 hours per week of 1:1 ABA therapy, until such time as the student has been accepted in a State-approved nonpublic day school. Additionally, the district must fund or provide the student with 630 hours of compensatory 1:1 ABA services. In accordance with the apparent concession by the district, the district must also fund or provide 46 hours of social skills training and 46 hours of parent counseling and training to remedy the denial of a FAPE. This relief, taken together is appropriate equitable relief under the circumstances and any remaining aspects of the requested relief not otherwise specifically addressed herein are denied. I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated March 30, 2024, is modified by reversing those parts which denied the parent's requests for interim prospective relief, and compensatory 1:1 ABA therapy, parent counseling and training, and social skills training; and

**IT IS FURTHER ORDERED** that within 14 days of the date of this decision, the district shall fund or provide the student with 10 hours per week of 1:1 ABA therapy until such time as the district locates and places the student in a State-approved nonpublic day school that provides ABA services, which placement shall continue for the duration of the 12-month 2024-25 school year unless the parties otherwise agree to an alternative placement; and

**IT IS FURTHER ORDERED** that within 45 days of the date of this decision, the district shall locate, identify and place the student in a State-approved nonpublic day school that provides ABA services, which shall continue for the duration of the 12-month 2024-25 school year unless the parties otherwise agree to an alternative placement; and

**IT IS FURTHER ORDERED** that the district shall fund or provide the student with 630 hours of compensatory ABA services for the denial of a FAPE for the 2021-22, 2022-23, and 2023-24 school years; and

**IT IS FURTHER ORDERED** that the district shall fund or provide the student with 46 hours of compensatory social skills training; and

**IT IS FURTHER ORDERED** that the district shall fund or provide the parent with 46 hours of compensatory parent counseling and training, and

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

**Dated:**            **Albany, New York**  
                         **June 10, 2024**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**