



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-337

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 Offices of Lauren A. Baum, P.C., attorneys for petitioners, by Lauren A. Baum, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, 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 a decision of an impartial hearing officer (IHO) which denied, in part, their request for compensatory education services and home-based applied behavior analysis (ABA) services for the 2023-24 school year. The Respondent (district) cross-appeals alleging that the IHO should have further reduced or denied relief in the form of a prospective placement and home-based ABA services. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the student has received diagnoses of autism spectrum disorder (autism), obsessive compulsive disorder (OCD), attention deficit hyperactivity disorder (ADHD), and an unspecified anxiety disorder (Dist. Ex. 5 at p. 1). The student previously received services through the Early Intervention Program (EIP) and was identified as eligible for special education as a preschool student with a disability (Parent Ex. KK ¶¶ 1-4; Dist. Ex. 5 at p. 3).

As part of a prior proceeding, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year and, in a decision dated

November 11, 2022, the IHO in the prior proceeding found that the district failed to meet its burden that it offered the student a FAPE for the 2022-23 school year (Parent Ex. G). As part of that proceeding, the IHO ordered the district to provide the student with a full-time individual paraprofessional who was either a registered behavior technician (RBT) or someone with "extensive training" in ABA under the supervision of a board certified behavior analyst (BCBA) (id. at pp. 22-23). Additionally, the IHO ordered the district to conduct a functional behavior assessment (FBA) by a BCBA and develop a new behavior intervention plan (BIP) for the student (id. at p. 23). The IHO also ordered the district to conduct a "comprehensive reevaluation" of the student and after completion of the ordered evaluations to reconvene a CSE and consider the results of the evaluations (id.).

As part of the district's evaluation of the student, the hearing record includes an FBA dated May 10, 2023, a May 25, 2023 classroom observation, a speech-language evaluation dated May 30, 2023, a June 8, 2023 occupational therapy (OT) and physical therapy (PT) clinical guide, and an OT evaluation dated June 9, 2023 (Dist. Exs. 6; 8-11).

On June 12, 2023, the CSE convened to develop an IEP for the student for the 2023-24 school year (see Dist. Ex. 1). The June 2023 CSE found the student eligible for special education as a student with a speech or language impairment (Dist. Ex. 1 at pp. 1, 35). The June 2023 CSE recommended the student attend a 12:1+1 special class in English language arts (ELA), math, social studies, and science and receive the following related services: one 30-minute session per week of individual counseling services, one 30-minute session per week of group counseling services, one 30-minute session per week of individual speech-language therapy, and two 30-minute sessions per week of group speech-language therapy, with the student's program to be delivered in a New York State approved nonpublic school (id. at pp. 29-30, 35-36). In addition, the June 2023 CSE recommended the student receive full-time, individual paraprofessional services for behavior support (id. at p. 30). The CSE also recommended that the parents receive one 60-minute session per month of parent counseling and training (id. at p. 29). Finally, the June 2023 CSE recommended 12-month services in the same special education program as recommended in the student's 10-month program (id. at pp. 30-31).

In a letter, dated August 23, 2023, the parents disagreed with the recommendations contained in the June 2023 IEP, as well as the June 2023 CSE's failure to recommend a New York Stated approved nonpublic school for the student for the 2023-24 school year (see Parent Ex. C).

For the 2023-24 school year, the student attended a district public school and received the support of ICT services (Parent Exs. E; Z at p. 1; AA at pp. 1-2). In addition, the student received the support of a full-time 1:1 behavior analyst at school and ten hours per week of supervision by a board certified behavior analyst (BCBA) (Parent Exs. I at p. 3; Z at p. 1; AA at p. 2).¹

The CSE convened on January 9, 2024 to review the student's program and recommended a 12:1 special class in ELA, math, social studies, and science in a district public school (Dist. Ex.

¹ As of October 31, 2023, when the parents filed the initial due process complaint notice in this proceeding, the student was entitled to pendency services consisting of a 10-month program with the support of ICT services, as well as 30 hours per week of 1:1 services provided by a licensed behavior paraprofessional and BCBA supervision (Parent Exs. B; F; see Parent Ex. G).

2 at pp. 35, 41-42). The recommendations in the June 2023 IEP for related services and full-time individual paraprofessional services continued to be recommended by the CSE in January 2024 (compare Dist. Ex. 1 at pp. 29-30, 35-36, with Dist. Ex. 2 at pp. 35-36, 42).

In an amended ten-day notice letter, dated February 1, 2024, the parents again stated their disagreement with the June 2023 IEP and expressed further disagreement to the January 9, 2024 IEP and an intent to seek home-based ABA services for the student (see Parent Ex. D). On February 14, 2024, the parent entered into an agreement with Project CaLi Licensed Behavior Analysis, PLLC (Project CaLi) for the delivery of home and community based 1:1 ABA services to the student beginning February 15, 2024 through the remainder of the school year (Parent Ex. U).

A. Due Process Complaint Notice

In an amended due process complaint notice, dated March 4, 2024, the parents alleged that the district failed to offer the student a FAPE for the 2023-24 school year (Parent Ex. A).²

In connection with the June 2023 IEP, the parents objected to the district's speech-language therapy and OT evaluations, as well as to what they described as a reduction in speech-language therapy and a discontinuation of OT services (Parent Ex. A at p. 6). Additionally, the parents alleged that the district failed to recommend ABA services to address the student's behaviors (id.). The parents further argued that the recommendation for an approved nonpublic school was not in the student's least restrictive environment (LRE) as the student benefitted from instruction with his nondisabled peers (id. at p. 6). Further, the parents asserted that the district failed to designate a school to implement both the 12-month program starting in July 2023 and the 10-month program starting in September 2023 for the 2023-24 school year (id. at pp. 6-7).

Turning to the January 2024 IEP, the parents argued that the 12:1 special class recommended for the student was inappropriate to meet his needs (Parent Ex. A at p. 7). They alleged that the recommendation made by the January 2024 CSE was predetermined as the CSE did not consider updated evaluations or consider the concerns presented by the parents (id. at pp. 7-8). The parents alleged, among other things, that the January 2024 IEP present levels of performance failed to accurately describe the student's needs and behaviors, the management needs failed to include the use of visuals, prompting, modeling, repetition, and extra time to complete class work, the annual goals were too vague to address the student's "academic, social/emotional, and executive functioning needs," and there was no BIP in place for the student (id. at pp. 8-11). In addition, the parents alleged that the January 2024 IEP failed to recommend ABA services or 12-month services for the student (id.).

As relief, the parents requested a finding that the district failed to offer the student a FAPE for the 2023-24 school year (Parent Ex. A at p. 14). Further, the parents requested that the student's IEP be amended to include a full-time individual ABA provider for the student in "his ICT classroom" together with 10 hours of home-based ABA services provided by a BCBA, two hours of BCBA supervision, and one hour of weekly parent counseling and training (id.). Further, the

² The parents filed the initial due process complaint notice on October 31, 2023; however, only the amended due process complaint notice shall be discussed (Parent Exs. A; B).

parents requested an FBA to be conducted by a BCBA and an OT evaluation (id.). Lastly, the parents requested a change in the student's speech-language therapy services to one 30-minute session per week individually in class, one 30-minute session per week individually in the related service provider's office, and two 30-minute sessions per week of group speech-language therapy (id.).

The district submitted a due process response generally denying the allegations contained in the due process complaint notice.

B. Impartial Hearing Officer Decision

The parties appeared for a prehearing conference before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on February 7, 2024.³ After two status conferences on February 15, 2024 and March 4, 2024, an impartial hearing convened on May 28, 2024, and concluded on June 28, 2024 after eight days of proceedings (Tr. pp. 1-862).⁴ In a decision dated July 2, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at p. 7).

The IHO found that the June 2023 IEP was not implemented as the district did not provide the student with 12-month services or identify a school to implement the recommendation for a nonpublic school (IHO Decision at pp. 5-6). Additionally, the IHO noted that both the June 2023 and January 2024 IEPs recommended parent counseling and training which the parents testified was not provided during the 2023-24 school year (id. at p. 7). The IHO also found that based on the evidence in the hearing record the management needs contained in both IEPs were "not entirely or consistently implemented" and testing accommodations were not provided to the student (id.). Lastly, the IHO found that it was "undisputed" that the student required an FBA and BIP, but the FBA was not completed until April 15, 2024 and a BIP was not developed for the student for the 2023-24 school year (id.). Based on the foregoing, the IHO found that the district denied the student a FAPE for the 2023-24 school year (id.).

Next, the IHO addressed the parents' requested relief (IHO Decision at pp. 8-17). First, the IHO discussed the request for individual ABA services in school full-time by a BCBA, home-based ABA services by a BCBA, and supervision of the ABA program by a BCBA (id. at pp. 9-12). The IHO discussed the evidence pertaining to the student's progress during the 2023-24 school year including the student's improvement in writing and decreased disruptive behaviors (id. at p. 11). The IHO found that the evidence in the hearing record established that the district should fund individual ABA services by a BCBA in school on a full-time basis for the 10-month 2023-24 school year at a rate not to exceed \$250 per hour (id. at pp. 12, 17). The IHO found that the district's failure to offer the student 12-month services warranted a compensatory award of 36 hours of ABA services by a BCBA for the six-week summer portion of the 2023-24 school year at a rate not to exceed \$250 (id. at pp. 12, 17-18). In connection with the parents' request for ABA program supervision, the IHO found the parents' request "excessive" and directed the district to fund one hour of BCBA supervision per week for the 2023-24 school year (id. at pp. 12, 18).

³ The IHO issued a Prehearing Conference Summary and Order on February 7, 2024.

⁴ The IHO issued a second Prehearing Conference Summary and Order on April 11, 2024.

Finally, with respect to the request for home-based ABA, the IHO found that although "there [wa]s undoubtedly a benefit," the primary purpose of the home-based ABA services was to "generalize" the student's skills outside the classroom and the IHO denied the parents' requested relief for home-based ABA services on that basis (id. at p. 12).

The IHO discussed speech-language therapy services and found that the June 2023 CSE reduced the recommended speech-language therapy services from four sessions per week to three sessions and that the reduction was inconsistent with the evidence in the hearing record (IHO Decision at pp. 12-14). As relief, the IHO ordered the district to fund 18 hours of compensatory speech-language therapy services which was "calculated at 30 minutes per week, over 36 weeks of a 10-month school year" (id. at pp. 14, 18).

In connection with parent counseling and training, the IHO found that the recommendation in the IEPs for parent counseling and training one-hour every month was sufficient; however, because the district failed to provide the parents with the mandated services, the IHO awarded 12 hours of compensatory individual parent counseling and training services to remediate the harm caused by failing to provide the services to the parents during the 2023-24 school year (IHO Decision at pp. 15, 18).

Lastly, the IHO addressed the parents' request for an independent educational evaluation (IEE) (IHO Decision at pp. 15-17). The IHO found that since an FBA was completed in April 2024 the parents' request for a second FBA was denied (id. at p. 15). In connection with the development of a BIP, the IHO found that if the district had not yet completed one that the district shall fund an independent BIP developed by an independent BCBA (id. at pp. 15-16, 18-19). For the OT evaluation, the IHO found that the OT evaluation conducted by the district in 2023 was based solely on observation of the student without any formal assessments, and therefore, the IHO ordered the district to conduct an OT evaluation "with an emphasis in the area of executive functioning" (id. at pp. 16-17, 19).

IV. Appeal for State-Level Review

The parents appeal. First, the parents claim that the IHO failed to identify the specific program, i.e., ICT services, in which the ABA services were to be provided to the student during the 2023-24 school year. Next, the parents state that although the IHO found that the student regressed without 12-month services, he failed "to explicitly determine that a 12[-]month program was appropriate" for the student. The parents contend that the IHO properly found that the district failed to implement the 12-month June 2023 IEP, but assert that the award of 36 hours of ABA services "to compensate for the [district's] failure to implement a program of 240 hours" was not sufficient to place the student "in the same position he would have been in, had the [district] properly implemented the twelve[-]month June 2023 IEP." Lastly, the parents appeal the IHO's denial of home-based ABA services, asserting that the IHO erred in finding it was only required to support generalization of skills across environments (id.).

In its answer, the district generally denies the material allegations contained in the request for review.⁵ The district argues that the IHO's failure to specify a program in which the student's

⁵ Although the district served and filed a document labeled "Verified Answer and Cross Appeal," review of the

full-time individual ABA program should be provided was proper. The district asserts that it is improper for an IHO to award prospective relief in the form of an IEP amendment and circumvent the CSE process. Further, the district asserts that ICT services were not appropriate for the student and that the in-school ABA services were not sufficient to overcome the pace and size of the ICT setting. The district asserts that if it is found that the IHO should have determined the appropriate program for the student for the 2023-24 school year, the matter should be remanded for further proceedings. Next, the district asserts that the IHO properly calculated the compensatory education award for ABA services and the award of 36 hours of ABA compensatory hours should be upheld. The district then argues that the IHO properly denied the parents' request for home-based ABA services.

V. Applicable Standards

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

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

document as a whole shows that it does not contain a cross-appeal in that it does not identify any precise rulings, failures to rule, or refusals to rule of the IHO of which the district seeks review (see 8 NYCRR 279.8[c][2]), accordingly, for purposes of this decision, the pleading will be referenced as the district's answer. The parents submit an answer to the district's answer acknowledging that the district's filing does not contain a cross-appeal.

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" (Andrew 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]).⁶

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

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 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).

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

The district does not appeal the following portions of the IHO's decision: that the district denied a FAPE to the student for the 2023-24 school year; that the district fund individual ABA services by a BCBA in school on a full-time basis for the 10-month 2023-24 school year; that the district fund one hour of BCBA supervision per week for the 2023-24 school year; that the district provide 18 hours of compensatory speech-language therapy services and 12 hours of compensatory individual parent counseling and training services; that the district fund an independent BIP developed by an independent BCBA; and that the district conduct an OT evaluation of the student. Accordingly, these findings 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]).

Accordingly, this decision shall be focused on the parents' assertion on appeal that the IHO failed to award home-based ABA services, awarded an insufficient amount of compensatory education services, and failed to award prospective relief.

A. Relief

1. Unilaterally-Obtained Services

Prior to reaching the substance of the parties' arguments, a brief discussion of the appropriate legal standard to apply must first be discussed. In determining whether the district was required to fund the home-based ABA services privately obtained by the parents, the IHO noted that the home based services provided a benefit to the student, the IHO concluded that because the services were provided for the purpose of generalizing the student's skills to the home and community environment, the district was not obligated to fund the ABA services that were provided at home (IHO Decision at p. 12).⁷ The parents argue that the IHO erred by finding that

⁷ In discussing generalization of skills, 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, particularly where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (see, e.g., F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June

the ABA services were used solely to generalize the student's skills and that the home-based ABA provided to the student was appropriate to address his educational needs.

The parties' arguments in this instance offer little analysis as to the parents' burden of establishing that the unilaterally obtained educational program was appropriate to address the student's needs. It is worth noting here, that the Second Circuit has held that consideration must be given to "the totality of the circumstances in determining whether [a unilateral] placement reasonably serves a child's individual needs" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65). One of the troubling aspects of the parties' arguments on appeal is the district's contention that the student's educational program for the 2023-24 school year was not appropriate to meet his needs. In fact, the district contends that ICT services were not working for the student, specifically noting that the student's teacher testified that ICT services were inappropriate due to the pace of instruction and that the student's counselor testified that even in conjunction with the 1:1 ABA services the student received in school, the ICT setting was not an appropriate placement for the student (Req. for Rev. at ¶¶6-20). However, the district's arguments regarding ICT services were limited to addressing the parent's request for prospective placement (*id.*). In addressing the parent's request for home-based ABA services, the district asserts that the need for at-home ABA services suggests that an ICT setting is not supportive enough by itself; however, the district noted that the "[p]arents had to cobble together supplemental services to render ICT even remotely acceptable," a concession that the home-based ABA services supported the student in his placement during the 2023-24 school year (*id.* at ¶¶ 17, 27). The remainder of the district's arguments related to the parents' request for home-based ABA services focuses on whether the home-based services were duplicative of what was taught at school or were provided for generalization of skills (*id.* at ¶¶ 25-32).

Accordingly, while a more proper analysis of the parents' unilateral placement would involve a closer look at the totality of the services provided to the student during the 2023-24 school year, including the parents' choice to continue the student's pendency program consisting of ICT services and in-school ABA services with the parents bearing the burden of proving the appropriateness of the program as a whole, based on how the parties have presented this appeal, the focus is on the home-based ABA services and whether they were appropriate to address the student's needs.

Turning to a review of the appropriateness of the unilaterally-obtained services, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate

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]).

education under the IDEA"). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

a. Student's Needs

In order to address whether the IHO erred by failing to award the relief requested by the parents, a review of the student's needs is necessary.

The home-based ABA progress report provided a description of the student, showing that he demonstrated delays between the time a direction was given and the time he began a task (latency), and benefitted from supports such as being provided with questions, statements, or written strategy suggestions to help him organize his thoughts and engage in starting a task (Parent Ex. Z at pp. 4, 6-7). Regarding the student's reading, the progress report indicated the student

continued to work on reading short stories and chapter books of 8-11 pages and recalling information after reading independently (id.). He benefitted from being told to read a specific number of pages rather than being asked to read for a specific length of time and was more successful with answering comprehension questions when text was broken into smaller sections (id. at pp. 4-5). According to the progress report, the student had difficulty independently identifying important information in the text and identifying overall themes not specifically stated, such as the main idea (id. at p. 5). He also struggled with identifying character's emotions and the reasons behind them (id.).

In connection with writing, the home-based ABA progress report indicated the student had difficulty writing full sentences to summarize information and often asked for help figuring out what he needed to write down (Parent Ex. Z at p. 5). He benefitted from redirection back to the text to identify key information and verbal prompts to think about what to write, and "oftentimes" could form a correct sentence after being redirected back to the text (id. at p. 6). According to the progress report the student demonstrated strength with spelling familiar words but was less confident when sounding out the spelling of unfamiliar words and would seek adult encouragement (id.). To help the student with reading unfamiliar words, spelling and using punctuation, the ABA provider used encouragement, partial vocal prompts, visual cues, textual cues, and gestural prompts (id.).

Speaking to the student's math skills, the home-based ABA progress report related that the student demonstrated strength with one and two-digit addition, subtraction, and multiplication problems (Parent Ex. Z at p. 6). When working on more advanced math problems with an increased number of steps, the student had difficulty lining numbers in their correct place value locations and responded well to the use of graph paper to support this difficulty, however, this strategy was not allowed in school according to the ABA provider (id.).

In terms of the student's social/emotional skills, the home-based ABA progress report noted that when home-based sessions began in February 2024, the student's behavior was observed to "escalate when frustrated during a challenging academic task" (Parent Ex. Z at p. 7). He required "extra repetition and practice of academic skills at home in order to acquire the skills to be successful within his school setting, and this include[d] his need[] to increase his overall compliance to and flexibility with directives set by adults in various settings" (id.). The student benefitted from the use of a visual schedule that "include[d] clear expectations of skills programs and activities" to be completed, along with embedded breaks, and proactive reminders to use coping skills such as taking a deep breath, requesting a break, verbalizing his feelings, and requesting a fidget object (id.).

According to the home-based ABA progress report, the student also demonstrated difficulty "engaging and attending appropriately to difficult, nonpreferred, or novel tasks," and would engage in inappropriate behaviors such as laughing, making inappropriate silly comments, attempting to put his feet on the table, and repeatedly asking why he needed to complete the task (Parent Ex. Z at p. 7). Redirection was used to address these behaviors (id.). The student "often engage[d] in emotional responses such as verbally protesting, yelling, and banging on the table" when he was asked about "maladaptive behaviors" exhibited at school or at home, and with the parent, this behavior "often escalate[d] to pinching, hitting, and punching" (id. at p. 8). The student

could deescalate by taking deep breaths and taking a pause before reacting but often needed reminders to do so (id.).

Socially, the student had difficulty with turn-taking for games and activities, with knowing there was a possibility of losing, and with actually losing a game, and according to the home-based ABA report, he avoided social interactions that involved situations where he might lose, limiting his areas of interest and opportunities to engage with peers (Parent Ex. Z at p. 8). The student responded to prompting, differential reinforcement, and modeling to support him to engage in novel turn-taking activities, and proactive strategies, such as conversation about losing and coping strategies for losing, prior to playing a game (id.). The student was also working on sharing preferred items through prompting, practice, repeated exposure, reinforcement, and modeling, and had "shown increased willingness to share" with his home provider (id. at p. 9).

Turning to the student's speech-language skills, the home-based ABA progress report related that the student spoke with low volume and a monotone cadence (Parent Ex. Z at p. 9). When in comfortable settings, such as at home with familiar people, the student spoke at a more appropriate volume, however his volume and mean word utterance decreased with unfamiliar people or in less familiar or comfortable locations (id.). In these situations, he would often beg his mother to speak for him, exhibited resistance, expressed that he was not ready and did not want to participate, sometimes accompanied by stomping his foot (id.). In situations in which the student's mother was present but not the ABA provider, the student would "escalate to pinching or hitting unless [his mother] [spoke] for him" (id.). The progress report indicated that even with "encouragement, verbal modeling, and the outcome of receiving a preferred item (i.e., the food he is ordering), he [spoke] by using as few words as possible and require[d] support to speak using a volume that [could] be heard by others" (id.). The progress report noted that, at home, the student talked a lot and had difficulty when others were engaged in conversation in which he was not included (id.). He interrupted to ask questions and asked multiple questions without letting the speaker respond (id.). With his ABA provider, the student responded to prompts to pause and listen; however, when the student's mother redirected him, the student became frustrated and raised his voice (id. at pp. 9-10).

The home-based ABA progress report indicated that when engaging in social interactions, the student used appropriate pronouns and frequently asked questions about the environment around him (Parent Ex. Z at p. 10). At times these inquiries "transition[ed] into inappropriate perseverations that required[d] redirection" (id.). When redirected or told that this would be discussed later, sometimes the student would not respond, and would get frustrated and exhibit behaviors such as "grunting, protesting, and insisting on obtaining specific information immediately" (id.).

In terms of the student's daily living skills, the home-based ABA progress report indicated he was capable of completing household tasks but often exhibited an emotional response such as yelling and questioning the need for chores when asked to do them (Parent Ex. Z at p. 11). In the community, the student used his scooter for travel and stood on the scooter while a family member pulled him along rather than walking (id.). If the student was told he could not bring his scooter, this resulted in "emotional responses ranging from yelling to tantrums" (id.). The student benefitted from gradually increasing the distance he walked without his scooter but continued to express a "perceived need for his scooter" (id. at pp. 11-12).

Lastly, the home-based ABA progress report noted the student demonstrated a "combination of sensory sensitivity towards certain foods, a general lack of interest in food or eating, and a fear that if eating around other people, he may be exposed to their oral germs," and had developed a routine of "rarely eating, only eating particular foods/brands, and rarely eating within the presence of others" (Parent Ex. Z at p. 12). He displayed "an aversion to a variety of foods consumed by others ... [and] express[ed] disgust towards the smells of foods when in close proximity to him" (*id.*). At home, the student also refused to eat in the same room as his family and instead ate in his bedroom and refused to eat in the presence of the ABA provider (*id.*).

b. Home-Based ABA Services

According to the May 2024 ABA progress report, Project CaLi began delivering six hours per week of individual ABA services to the student in his home and community settings on February 15, 2024 (Parent Ex. Z at p. 1).

The student's home-based ABA provider testified that she saw the student twice per week for three hours per session (Tr. p. 815). Sessions focused on increasing compliance and decreasing non-compliance, increasing the student's functional communication skills in the absence of maladaptive or non-desired behaviors, and supporting academic skills (Tr. p. 816). The BCBA supervisor from Project CaLi testified that the student's home ABA program was "in part an extension ... whatever the homework [was] ... it [was] not just homework for him ... it [was] extra practice" (Tr. pp. 557-58). She testified that the school-based ABA provider would communicate if the student was having difficulty with a math task and the home-based ABA provider would target that, so there was "some overlap on that ... [an]d there [were] some academic pieces" (Tr. p. 558). The BCBA supervisor testified that home-based ABA instruction worked on the student's eating, "because the eating [was] a really big issue that really [did not] get worked on much at school," daily living skills, including walking rather than being dragged along on his scooter, and brushing his teeth, which affected his social interactions at school (Tr. pp. 558-59).

According to the home-based ABA progress report, "home and community ABA sessions target[ed] a variety of skills, including academics to support the curriculum being taught in school," such as: increasing the student's stamina for completing independent reading and reading comprehension; grade level math skills such as long division (with and without remainders), multiplying fractions, and estimating products; increasing appropriate reactions when frustrated; increasing social-pragmatic communication skills; and adaptive daily living skills, such as eating various foods both independently and with others, completing his morning routine skills more independently, and walking within his community (Parent Ex. Z at p. 2). This was "done in collaboration with [the student's] school-based providers" (*id.*).

Home-based ABA sessions used shaping combined with differential reinforcement to "promote changes in existing behavioral repertoires" (Parent Ex. Z at p. 2). Breaks from adult chosen activities, and independent breaks, during which the student could draw, play with figurines, use his Switch or iPad, play tic-tac-toe, visit with his pet cat, or relax on his Yogibo served as reinforcement (*id.* at p. 3). Typically, breaks were earned after the student completed academic activities, community outings, or non-preferred activities and varied in length from three to five minutes (*id.*). Strategies such as modeling, visual cues, and verbal and gestural prompts were faded once the student had acquired a skill, and visual schedules, offering choices of order

of activity completion, and timers were used to increase on-task behavior, help with transitions, and help the student complete not-preferred tasks (*id.*). Home-based ABA sessions also used high-probability response sequencing, during which the ABA provider presented several easy tasks before the student was given a more challenge task, and "forced choice," where the student had several non-preferred choices from which to choose (*id.* at p. 4).

The home-based ABA progress report indicated that shaping was used to increase the distance the student was required to walk without his scooter (Parent Ex. Z at p. 11). This involved breaking down a complex behavior into smaller steps and reinforcing success toward the target behavior (*id.*). To address the student's refusal to eat, the ABA provider used pairing, during which the student engaged in his favorite play activity while being presented with preferred foods (*id.* at p. 12). Pairing was combined with vocal and gestural prompts to "take a bite" before the student proceeded with his turn during the highly preferred play activity (*id.*). The home-based ABA provider testified that she worked on the student's compliance and non-compliance by presenting non-preferred tasks and allowing the student to practice coping skills, such as deep breathing or asking for a break, and reinforcing him when he used these skills rather than engaging in maladaptive behavior or non-compliance (Tr. pp. 816-17). She used sentence starters, practiced phrases, and role-playing to increase the student's functional communication with the hope that these skills would transfer into the school and community (Tr. p. 817).

According to the home-based ABA provider's testimony, she typically began each session by making a visual schedule, which varied from session to session and involved completing an academic task (Tr. p. 821). She started the session with pairing, engaging in some type of preferred activity then moved on to a more non-preferred task, which was typically an academic task, followed by a reinforcement period (Tr. p. 822). Reinforcement was offered more often for tasks that were more challenging and less often for tasks in which the student was more fluent (*id.*). After academic tasks, the session typically moved into the community and focused on increasing how far the student walked and his social interactions within the community (*id.*). If time allowed, the session included work on some daily living skills (Tr. p. 823). The home-based ABA provider testified that she kept "anecdotal data" on sessions through a communication application that was available to the student's providers from Project CaLi (Tr. p. 823-25).

The home-based ABA progress report showed the student's progress in home-based ABA sessions (Parent Ex. Z). At the start of home-based services, when asked a comprehension question about a text he had just read, the student would say he did not know the answer; however, at the time of the report, the student was "able to locate most information in the text independently and answer comprehension questions about the passage read," but still had difficulty identifying the themes that were not specifically stated, such as the main idea (*id.* at p. 5). With repetition and practice, and differential reinforcement, the student made progress in identifying the cause and effect of a character's emotions (*id.* at p. 6). He also demonstrated progress reading unfamiliar words, spelling, and using punctuation (*id.*).

The student also made behavioral progress; according to the home-based ABA progress report, the student demonstrated progress completing academic work and no longer yelled or banged the table, and the frequency of redirection required throughout sessions and the duration of his off-task behaviors decreased (Parent Ex. Z at p. 7). The home-based ABA progress report related that by implementing the "safe [versus] unsafe identification program," the student had

demonstrated a noticeable decrease in the frequency of inappropriate comments and drawings (*id.* at p. 8). The student responded to "prompting, differential reinforcement, and modeling to support him to engage in various novel turn-taking activities," and when playing board games, the intensity of the student's response to losing a board game decreased and his willingness to share preferred items with his ABA provider increased (*id.* at pp. 8-9). The student also demonstrated progress in speech-language skills and made "significant progress" in his ability to say "excuse me" when he wanted to speak while others were speaking rather than interrupting (*id.* at p. 9). As rapport between the student and his ABA provider progressed, the student was "more willing to share information about his school day and weekend events" (*id.* at p. 10).

The home-based ABA progress report further showed that the student made progress in daily living skills, was able to walk longer distances without being pulled on his scooter, which improved from about 500 feet to "walking three blocks up, across an avenue block, back down, and back across (about 30,000 feet total distance)" and, required "fewer and less restrictive prompting" to eat with his provider present while engaged in highly preferred activities (Parent Ex. Z at pp. 11-12).

Based on the above, the parents demonstrated that the home-based ABA program offered specially designed instruction to meet the student's unique educational needs. Although it would have been preferable for the parties to have discussed the student's educational programming as a whole for the 2023-24 school year, the evidence of the home-based ABA services was sufficient to show that the home-based services provided the student with specially designed instruction related to the student's academic, communication, and behavioral needs. Accordingly, without an argument that the student's program consisting of ICT services, in school ABA services, and ABA supervision was not appropriate for the student with the addition of the home-based ABA services, the home-based ABA services must be found to be appropriate.

c. Equitable Considerations

The next criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; *see* Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting

that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA").

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding any components of the unilateral placement that are segregable costs that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced").

Additionally, in discussing generalization of skills, 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, particularly where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (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]).

Turning to the IHO's finding that the primary purpose of the home-based ABA services was for generalization of skills outside of the classroom (IHO Decision at p. 12), the evidence in hearing record does not support this finding but shows that the home-based ABA services provided to the student during the 2023-24 school year focused on reducing the student's non-compliance and maladaptive behaviors, improving the student's functional communication skills, and improving his academic skills. The fact that the home-based ABA services also focused on daily living skills, including walking in the community, food refusal, and morning routine skills, does not, without more, show that the services were for the sole purpose of generalizing skills to the home or otherwise exceeded what the student required to receive a FAPE. Additionally, to the extent that some of the home-based ABA services did provide generalization of skills, those portions of the home-based ABA services directed at those skills could be considered in excess of what was required to provide the student with a FAPE; however, the district does not provide any

argument, or cite to any evidence, that would indicate what portion of the home-based ABA services should be reduced. Accordingly, the hearing record supports the parents request for the full six hours per week of ABA services the student was provided from February 15, 2024 through the end of the 2023-24 school year.

Furthermore, the parents provided the district with a ten-day notice and amended ten-day notice of their disagreement with the June 2023 and January 2024 IEPs and intent to seek reimbursement/direct funding for the home-based ABA services (see Parent Exs. C; D).⁸

Accordingly, there are no equitable considerations that would warrant a reduction or denial of an award of reimbursement to the parents of the out-of-pocket costs of the private home-based ABA services.

2. Compensatory Education

The parents argue that the IHO's award of 36 hours of ABA services as compensatory education for the district's failure to implement 12-month services was insufficient to place the student in the same position he would have been if the 12-month program was implemented. The parents reference guidance from the New York State Education Department about the length of time for which 12-month services must be provided.⁹ According to the parents the student should have received 150 hours of instruction during summer 2023. The parents assert that the student received nine hours of speech-language therapy during summer 2023 leaving a balance of 141 hours of instruction not provided to the student. Therefore, the parents assert that the award of 36 hours of compensatory education was without any reasoned basis by the IHO and was insufficient to compensate the student for the 141 hours of lost instruction. Moreover, the parents contend that since the student demonstrated progress with ABA support, "this was the only form of compensatory education supported by the record, and at a minimum, [the student] should have been granted 141 hours of compensatory ABA" (Req. for Rev. at p. 9). The district argues that the award of 36 hours of compensatory education for the denial of FAPE for the 12-month services should be upheld.

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., 758 F.3d at 451; 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 Bd. of Educ., 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

⁸ Although the parents indicated they would seek a home-based ABA program consisting of ten hours per week, the ABA progress report indicates that the student received six hours per week of home-based ABA services (Parent Exs. D; Z).

⁹ According to New York State guidance, a 12-month program "must operate for at least 30 days, five days/week, during the months of July and August" and the length of the school day "shall be not less than five hours of instruction" for students in kindergarten through grade six ("Extended School Year Special Education Programs," Office of Special Educ. Mem. [June 2023], available at <https://www.nysed.gov/special-education/extended-school-year-programs-and-services-questions-and-answers>).

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]). 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 purpose of compensatory education is not to maximize the student's potential (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), which for this student might be bringing regression to a minimum rather than eliminating it. Instead, 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"]).

Here, the IHO found that for the district's failure to implement and offer the student 12-month services, the district must fund 36 hours of compensatory ABA services provided by a BCBA for the six-week portion of the 2023-24 school year (IHO Decision at p. 12). However, the IHO offered no explanation for how he arrived at the 36 hours of compensatory ABA services.

For the 2023-24 school year, the June 2023 CSE recommended that the student attend a 12-month 12:1+1 program in a State approved nonpublic school, with speech-language therapy, counseling, and parent counseling and training beginning on July 1, 2023 (Dist. Ex. 1 at pp. 29-31, 35). With regard to the recommendation for placement in a nonpublic school, the building principal of the public school the student attended and who also participated in the June 2023 CSE meeting as the district representative, testified that the student's parents "did not want to agree to anything until the evaluations were complete," which was not scheduled to happen until November 2023, so the June 2023 IEP was never implemented (Tr. pp. 85-86; Dist. Ex. 1 at p. 39). The building principal testified that "if the parent [had] agreed and signed and we moved forward, then the [June 2023] IEP would [have been] the standing IEP" and noted that "nonpublic school recommendations are 12-month recommendations" (Tr. p. 88). However, as the IHO noted, the district school psychologist testified that the district did not identify a school for the student because the psychoeducational evaluation had not yet been completed (IHO Decision at pp. 5-6; see Tr. pp. 439-41). Accordingly, the IHO found that the district failed to identify a school to implement the June 2023 IEP and that the failure to do so was not caused by the actions of the parents (IHO Decision at pp. 5-6).

According to the building principal and June 2023 CSE district representative, the June 2023 IEP was "not enacted" and the student remained in the district and "the nonpublic school recommendations along with the 12-month recommendation did not happen, so then that IEP was ... null and void at that point" and the student remained in an ICT setting as his pendency program (Tr. pp. 88-89). She testified that the IEP in place for July and August 2023 did not provide summer services (Tr. pp. 89-90). In her direct testimony by affidavit, the parent testified that they requested that the student receive speech-language therapy and special education teacher support services (SETSS) to prevent the student from regressing over the summer but SETSS was denied "because [the student] was in a ten month program, even though [they were] told the recommendation was for a 12-month NYS approved nonpublic school" (Parent Ex. KK ¶ 43). For the summer portion of the 2023-24 school year the student received three sessions of speech language therapy per week (*id.*). The student returned to his pendency placement in September 2024 (Tr. p. 90; Parent Exs. F at p. 1; KK ¶ 44).

The hearing record reflects that the student struggled behaviorally during the 2023-24 school year. The January 2024 IEP reflected that the student "generally want[ed] to participate in [] learning," continued to need support to complete daily routines, required an "obvious and consistent" spot in the classroom, and that changes to the student's seating or routine often prompted physical outbursts, such as stomping or punching the air, or verbal shouting outbursts so that he needed a warning about any upcoming change (Dist. Ex. 2 at p. 3).

The student's special education teacher testified that the student's behaviors during the 2023-24 school year included spitting, grabbing his shirt, echoing something he heard or saying things he was thinking, such as "stinky" and "stinky foot," and being "fresh" when upset about something (Tr. p. 136). He would also pound the desk or scream, "I'm not doing it," and "I don't want to," or stomp his feet (*id.*). The student also had difficulty sitting in a chair that someone else had previously sat in and had to wipe the seat before sitting down (*id.*). The special education teacher testified that while some of the student's behaviors, such as spitting, had carried over from the previous school year, some of the behaviors he exhibited during the previous school year "were much bigger" and "more aggressive" (Tr. p. 138). She testified that she could not say his behavior had improved since the prior school year, but during the 2023-24 school year he didn't scream, there was no "aggressive behavior" toward other students, and he was "always able to be calmed down" (Tr. pp. 138-39). According to the special education teacher's testimony, the student made "some level of progress" behaviorally between September 2023 and the January 2024 CSE meeting in that he had begun to understand what was expected when prompted, which "took away some of the behaviors, but they weren't all gone" (Tr. pp. 139-40). The student's BCBA paraprofessional also testified that the student made progress behaviorally through the 2023-24 school year as he took fewer breaks during each period, he "understood his rules," and his scheduled reinforcement was not as "dense" than at the beginning of the school year (Tr. p. 749).

The hearing record also reflects that the student struggled academically during the 2023-24 school year. The January 2024 IEP noted that the student's performance levels for the first marking period of the 2023-24 school year in ELA, reading, writing, and listening, speaking and language were "well below standards," and his performance in mathematics and social studies was "below standards" (Dist. Ex. 2 at p. 1). The January 2024 IEP further indicated that the student's then-current independent reading level of K/L indicated that he had regressed from his reading level N at the end of the 2022-23 school year, and, at that point in the marking period, the 5th grade

benchmark was a level T (*id.* at p. 4). The student's special education teacher testified that during the period from September 2023 to January 2024 the student struggled in reading and math, and his reading level dropped from the previous year going down from a level N in June 2023 to level L in September, and a level K in January 2024 (Tr. pp. 141, 230-31). She further testified that a March 2024 assessment of the student's reading skills showed that the student was then at a level L, and although final assessments had not yet been completed, she did not feel the student had regressed below the level L and hoped he had improved (Tr. pp. 230-33). According to the special education teacher, the student had made "some improvement" in writing, with his writing skills falling in the grade 2.5 range and math, where he progressed from the "end of 1st grade or 2nd grade" level in September to the 2nd grade level "with pockets of 3rd grade" at the time of the impartial hearing (Tr. pp. 235-38).

Speaking further to the student's academic abilities at the end of the 2023-24 school year, the June 2024 psychoeducational evaluation report related that, on the Wechsler Individual Achievement Test-Fourth Edition (WIAT-IV), the student obtained the following standard scores: reading composite 90 (average range); mathematics composite 90 (average); reading comprehension 88 (low average); math problem solving 91 (average); word reading 97 (average range), pseudoword decoding 111 (high average); numerical operations 91 (average); and spelling 111 (high average) (Parent Ex. LL at p. 5). While the June 2024 psychoeducational evaluation report showed that the student's standard scores on the WIAT-IV ranged from the low average to high average ranges, the evaluator also found that the student's reading and math skills were below his expected grade level with calculation and math reasoning abilities "approaching expected grade level" (*id.* at p. 6).

Here, the hearing record supports finding that while the student made some gains in his behavior, he still required one-to-one support from his BCBA paraprofessional to support both his behavior and academics. Although the student's academic performance on the WIAT-IV was generally in the average range, his demonstration of academic skills in the classroom remained below grade level expectations. Further, the hearing record shows that the student experienced notable regression in his reading skills from June 2023 to September 2023, and even by a March 2024 reading assessment the student's performance had not returned to his June 2023 reading level.

Accordingly, I shall uphold the IHO's award of 36 hours of compensatory ABA services, and in addition the district will be required to provide the student with 105 hours of 1:1 instruction by a special education teacher for the district's failure to offer the student a 12-month program for the 2023-24 school year. Because an award of compensatory education should place the student in the position that he would have been in had the district acted properly, and since the denial of FAPE in this matter is the result of the district's failure to implement the 12-month program during the summer 2023, an hour for hour order is appropriate under the circumstances.

3. Prospective Relief

The parents assert on appeal that although the IHO directed the district to fund full-time ABA support for the 2023-24 school year, the IHO failed to specify the program in which the ABA hours would be provided. The parents also argue that the IHO failed to determine whether the 12-month program recommended by the district for the 2023-24 school year was appropriate. In addition, the parents assert that the least restrictive environment for the student is a general

education class with the support of ICT services. The district argues that the IHO did not err in not specifying a prospective placement for the student. According to the district, the CSE has the ultimate responsibility to make recommendations for the student's program and services and should be given another opportunity to address the student's needs.¹⁰

Here, the parents filed a due process complaint notice on October 31, 2023 and later amended it on March 4, 2024 (see generally Parent Exs. A; B). A pendency implementation form was electronically signed by the district on November 20, 2023 in which it was agreed that pendency consisted of a 10-month "ICT Program" together with a 1:1 licensed behavior paraprofessional (either RBT or someone with "extensive training in" ABA) 30 hours per week by a private provider and BCBA supervision ten hours per weeks by a private provider (see Parent Ex. F). Although, according to the pendency implementation form, pendency was to start on October 31, 2023, the principal from the public school in which the student attended testified that beginning in September 2023 the student received ICT services together with the 1:1 ABA paraprofessional support (Tr. p. 90; Parent Ex. F at p. 1). The decision in this matter was not rendered until July 2, 2024 after the conclusion of the 2023-24 school year (see generally IHO Decision).

At the time of the IHO decision in July 2024, the 2023-24 school year at issue had ended and presumably the CSE had an opportunity to craft an IEP to address the student's needs for the 2024-25 school year (see also 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 year]). Although the March 2024 IEP may be effective for a portion of the 2023-24 school year, and the parents challenged the March 2024 IEP in this proceeding, the parents' due process complaint notice limited the allegations to the 2023-24 school year (Parent Ex. A at pp. 6-14). Further, based on the student's needs as identified in detail above, the hearing record does not support finding that ICT services, along with 30 hours per week of in-school ABA services, and additional home-based services, ABA supervision, and related services are an appropriate manner of addressing the student's needs going forward. Rather, the district should reconvene the CSE and consider the parent's requests and develop a program for the student for the 2024-25 school year to the extent that it has not already done so. In the event that the parents disagree with the recommended programming for the 2024-25 school year, the appropriate course is to challenge the district's recommended programming for the 2024-25 school year. Accordingly, the hearing record does

¹⁰ Generally, a parent's request to prospectively place students in a particular type of program and placement through IEP amendments can, under certain circumstances, have 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"]). This is particularly so when the school year at issue is over and, in accordance with its obligation to review a student's IEP at least annually, a CSE should have already produced an IEP for the following school year, which has not been the subject of a due process proceeding (see also 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 year]).

not support modifying the student's educational program for the current school year based on the parent's allegations related to the 2023-24 school year.

Additionally, in this instance, the student has received pendency for the entirety of the 2023-24 school year and, as such, there is no basis to modify the student's 2023-24 educational program. In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because the requested relief can no longer be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]).

VII. Conclusion

Based upon the foregoing, the parents met their burden of demonstrating the appropriateness of the unilaterally obtained home-based ABA services delivered by Project CaLi for the 2023-24 school year. In addition, the IHO's award of compensatory education in the amount of 36 hours of ABA services shall be upheld and the student is entitled to an additional 105 hours of compensatory 1:1 special education instruction for the district's failure to offer the student 12-month services.

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.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated July 2, 2024, is modified by reversing those portions which denied the parents' request for district funding of home-based ABA services provided by Project CaLi during the 2023-24 school year; and

IT IS FURTHER ORDERED that the district shall fund the costs of the home-based ABA services delivered to the student by Project CaLi for the 2023-24 school year; and

IT IS FURTHER ORDERED that, in addition to compensatory education awarded by the IHO in the amount of 36 hours of ABA services, the district shall provide an additional bank of 105 hours of compensatory education in the form of 1:1 instruction by a special education teacher.

Dated: Albany, New York
October 3, 2024

STEVEN KROLAK
STATE REVIEW OFFICER