The University of the State of New York

The State Education Department
State Review Officer
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No. 24-342

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Lance Shopowich, 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 their request for respondent (the district) to reimburse them for their daughter's tuition costs at the Magen Israel School for the 2023-24 school year. The district cross-appeals from those portions of the IHO's decision which awarded compensatory education and required the district to develop a new individualized education program (IEP) for the student recommending specific services. The appeal must be dismissed. The cross-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 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 decision will not be recited in detail. The student has received a diagnosis of autism spectrum disorder (ASD) and began receiving special education, including applied behavior analysis (ABA) services, through the Early Intervention Program as a young child (Parent Exs. C at p. 8; M at pp. 1-2). In February and March 2020, the Committee on Preschool Special Education (CPSE) conducted a bilingual initial evaluation of the student, subsequently determined the student was eligible for special education, and recommended that she attend a

special class integrated setting in an early childhood program and receive related services including occupational therapy (OT), physical therapy (PT), and speech-language therapy (see Parent Exs. C-I; NN at pp. 1, 12; OO at pp. 1, 12). In August 2021, the CPSE recommended that the student receive 10 hours per week of special education itinerant teacher (SEIT) services, in conjunction with OT and speech-language therapy (Parent Ex. PP at p. 10).[1]

In spring 2022, the district conducted a classroom observation and a social history update in preparation for the student's transition from preschool to school-age special education services, at which time the parent indicated the student was English dominant (Dist. Exs. 2; 3). A CSE convened on May 25, 2022 and determined that the student was eligible for special education as a student with autism (Dist. Ex. 1).[2] At the May 2022 CSE meeting, the parent acknowledged the student was making progress but indicated concerns that her daughter needed "help primarily with the development of her social skills, emotional regulation, and overall expressive language" (id. at p. 19). The CSE recommended that, beginning in September 2022, the student receive eight periods per week of integrated co-teaching (ICT) services in math, 12 periods per week of ICT services in English language arts (ELA), two periods per week of ICT services in social studies, three periods per week of ICT services in science, and related services of two 30-minute periods per week of OT in a group of two, two 30-minute periods per week of speech-language therapy in a group of three, and two 30-minute periods per week of counseling services in a group of three (id. at pp. 13-14).

During the 2022-23 school year, the student attended kindergarten at Magen Israel in a classroom of nine students, one teacher, and an assistant (Parent Ex. M at p. 2). At that time, the student received 10 hours per week of SEIT services, but did not receive the "mandated" OT, speech-language therapy, and counseling services (id.).[3] Over multiple dates in spring 2023, a clinical neuropsychologist conducted a neuropsychological evaluation of the student, the results of which were memorialized in a report dated May 31, 2023 (2023 neuropsychological evaluation) (id. at pp. 1-18).

The parent enrolled the student at Magen Israel for the 2023-24 school year (first grade) on July 13, 2023 (see Parent Exs. X; CC at p. 1; CCC ¶ 5). The student attended a general education classroom with approximately 12 to 20 students and received 10 hours per week of SEIT services

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

[2] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] In the hearing record, at times the special education instruction the student received under pendency during the 2022-23 and 2023-24 school year is referred to as SEIT services, although the student was school-age at that time (see, e.g., Parent Exs. M at p. 2; see also Parent Ex. CC).

pursuant to pendency (Parent Exs. N at p. 2; P at p. 1; TT). In August and September of 2023, the parents obtained private speech-language, PT, and OT evaluations of the student (Parent Exs. N; O; P).

A. Due Process Complaint Notice

In a due process complaint notice dated December 19, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). The parents argued that, for the 2023-24 school year, the district failed to convene a CSE meeting, develop an IEP, or produce a school location letter informing the parents of the public school the student was assigned to attend for the 2023-24 school year (id. ¶¶ 93-94).

Therefore, the parents asserted that they "ha[d] no choice but to engage in self-help by returning the [s]tudent to Magen Israel" for the 2023-24 school year (Parent Ex. A ¶ 95). The parents argued that Magen Israel combined with the individual SEIT services the student received as part of pendency was an appropriate program for the student (id. ¶ 96).[4] As relief, the parents sought a "declaratory judgment" that the district denied the student a FAPE, immediate implementation of pendency, and a bank of compensatory education including: 1:1 ABA, supervision by a board certified behavior analyst (BCBA), OT, speech-language therapy, parent counseling and training, physical therapy (PT), counseling, and social skills training (id. ¶ 145). Additionally, the parents sought an order determining that the student was eligible for a program of 35 hours per week of individual ABA services, one hour per week of BCBA supervision, one hour per week of parent counseling and training, two 45-minute periods per week of counseling, two 30-minute sessions per week of OT, special education transportation services, and a 12-month extended school year (id.).

B. Impartial Hearing Officer Decision

After prehearing and status conferences (Tr pp. 1-59), an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on March 13, 2024 and concluded after three days of hearings on May 10, 2024 (Tr. pp. 60-316). The parties submitted written post-hearing briefs (IHO Exs. I, II). In a decision dated July 2, 2024, the IHO found that the district explicitly conceded that it failed to offer the student a FAPE for the 2023-24 school year and noted that the district did not present any evidence or witnesses or argue that it provided the student with a FAPE (IHO Decision at p. 6).

Turning to relief, the IHO summarized the testimony of the Magen Israel's school principal, and found that the principal's testimony both on direct and cross-examination could not provide any insight into "what if any" specialized education program the private placement offered the student (IHO Decision at p. 7). The IHO found that Magen Israel's program description was vague as to how the school tailored its educational program and relied on general platitudes which he found could have applied to any school whose interest was in educating children irrespective of whether or not they were disabled (id.). Moreover, the IHO found the hearing record was devoid

[4] The parent asserted that the student was previously placed at Magen Israel during the 2022-23 school year (Parent Ex. A at ¶¶ 54-55).

of evidence that Magen Israel offered any related or specialized service to the student (id. at p. 8). The IHO noted the principal's testimony that the student was only receiving SEIT services pursuant to a pendency agreement and found that the private placement was not providing any special education services to the student (id.). Ultimately, the IHO concluded that there was insufficient evidence in the record to support the parent's burden of showing that the unilateral placement was appropriate (id.).

The IHO found that despite his finding that the unilateral placement was inappropriate, the parent was entitled to an equitable award given the undisputed fact that the student was denied a FAPE for the 2023-24 school year (see IHO Decision pp. 9, 11). The IHO held the hearing record contained substantial testimony of the student's need for services, including witness observations and evaluations indicating the student's weaknesses in communication, social skills, and repetitive and maladaptive behaviors (id at p. 12). The IHO cited the recommendations of the private neuropsychologist, BCBA, speech-language pathologist, occupational therapist, and physical therapist in awarding a "hybrid quantitative-qualitative" compensatory education award of 1,470 hours of individual ABA, 126 hours of BCBA supervision, 42 hours of parent counseling and training, 42 hours of speech-language therapy, 42 hours of OT, 42 hours of PT, and 63 hours of student counseling (id. at pp. 14-15, 17).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in denying their request for tuition reimbursement on the basis that the unilateral placement was inappropriate for the student and that the IHO "erroneously focused" on the fact that the unilateral placement did not offer related services.[5] The parents argue that the hearing record indicates that the student performed well academically and behaviorally and that the evidence of progress was evidence of the educational benefits she was receiving and that the private placement did not need to provide all of the special services the student required to be deemed "appropriate."

In an answer and cross-appeal, the district asserts the IHO correctly found that the parents failed to demonstrate the unilateral placement was appropriate. The district cross-appeals from the IHO's decision to the extent it awarded relief, arguing that the IHO erred by awarding ABA services for the student as such services pertained to generalization of skills. Moreover, the district cross-appeals that portion of the IHO's decision that required the district to develop an IEP

[5] The parents also allege several errors regarding the IHO's decision as it relates to the parents claims under section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a). An SRO lacks jurisdiction to consider a parent's challenge to an IHO's finding or failure or refusal to rule on section 504, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO does not have jurisdiction to review any portion of the parent's claims regarding section 504, and accordingly such claims will not be further addressed.

recommending specific services, arguing that the order improperly usurps the CSE's role and responsibility.

V. Applicable Standards

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

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

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

(Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

[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" (Endrew F., 580 U.S. at 402).

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 2023-24 school year, therefore, that determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. The Student's Needs

In order to make a determination regarding the parents' request for relief, a discussion of the student's needs is warranted. A January 2023 SEIT progress report indicated that the student's social and academic delays made "it hard for her to have success in the classroom setting," and that in the kindergarten classroom, the student required constant redirection to concentrate on the assignment at hand (Parent Ex. SS at p. 1). According to the report, the student often got distracted and was unable to follow the routine, which affected her classroom performance and disrupted her peers (id.). Furthermore, the student had difficulty listening to instructions, and she needed reminders to refocus (id.). The SEIT reported that the 1:1 SEIT services gave the student the support she needed to do her work in a systematic fashion (id.). The student also presented with social/emotional delays, including delays in social interaction and emotional regulation skills, and difficulty appropriately handling and expressing her emotions (id.). The SEIT recommended that the student continue to receive 1:1 SEIT services as well as 1:1 ABA services to address the student's delays so she could continue to advance (id.).

The neuropsychologist who conducted the student's 2023 neuropsychological evaluation reported that formal testing suggested the student's intellectual functioning was "at least in the [a]verage range" and overall, her verbal and nonverbal abilities appeared to be equally well-developed (Parent Ex. M at p. 11). The neuropsychological report "noted that some of the test scores within the same domain ranged widely," as the student's "performance was likely influenced by variability in attention and her level of engagement" (id.). The report indicated it was therefore important to view those test scores as a snapshot of the student's then-current level of intellectual development, and not as a representation of her potential (id.).

Formal academic skills assessment showed that the student had acquired many foundational skills in reading, writing, and math, and she showed strengths on writing measures (Parent Ex. M at p. 11). Additionally, the student showed an excellent capacity for learning with strong memory ability and an interest in many academic tasks (id. at pp. 8, 13). At the same time, it was difficult for the student to shift from a preferred activity (e.g. ., writing letters) to other tasks (id. at p. 11). It was also reported that for the student to demonstrate her skills, she required repeated prompts to sustain attention, and that she missed some information due to inattention, even when working 1:1 in a setting with minimal distractions (id.). The student also needed help to stay motivated when tasks seemed uninteresting to her, and she "needed encouragement when perceiving difficulty and frustration" (id.). Other testing revealed the student had difficulty with

maintaining focus, sustained attention, engagement, and self-control without support (id. at p. 12). The student demonstrated difficulties with executive functioning, most notably in behavioral inhibition, emotional control, and mental flexibility (id.). According to the neuropsychological evaluation report, the student's "teacher noted that she tend[ed] to get "stuck" in her thinking and ha[d] trouble putting breaks on her actions" (id.). She also had trouble getting started on work, often needed help from an adult to stay on task, and had trouble with tasks that had more than one step (id.).

The neuropsychological evaluation report further noted that measures on the student's receptive and expressive language skills fell generally in the average range (Parent Ex. M at p. 12). She showed weaknesses in comprehension with increased grammatical complexity and weakness in pragmatic/social language (id.). While the student's "pencil grip [wa]s immature, she demonstrated generally normal visuomotor integration and graphomotor abilities" (id.).

With regard to the student's "autistic features," parent and teacher reports reflected in the neuropsychological evaluation report indicated problems with social interaction and communication, repetitive behaviors, and sensory sensitivities, which were also observed during the evaluation (Parent Ex. M at p. 12). The student demonstrated deficits in social reciprocity and social communication including inconsistent eye contact, use of pragmatic language, and ability to initiate or sustain social interactions and respond to social initiation from others (id.). The student's symbolic play had been limited but was improving (id.). She had difficulty with peer relationships and making friends; she wanted to play with others when she felt comfortable; however, her social skills remained immature, with awkward turn-taking (id.). Additionally, the student was reported to become overwhelmed, overexcited, or upset when there was a lot going on and, at times, she exhibited maladaptive, odd, and repetitive movements (id.). Significant concerns were expressed about the student's difficulties with flexibility and with emotional regulation in that she had difficulty with changes, often demonstrated inflexible behavior, had a hard time moving on when she was upset, and had trouble getting her mind off something she wanted (id.). Further, the report indicated that the student tended to become overwhelmed, frustrated, and worried, and reacted by crying, shutting down, or acting silly (id.). The student showed a range of emotions, and she appeared able to understand emotional expressions in others (id.). While there was no one clearly expressed strong interest, the student tended to spend a lot of time coloring and writing letters (id.). The neuropsychologist concluded that that the student met the criteria for diagnoses of autism spectrum disorder, attention-deficit hyperactivity disorder, predominantly inattentive presentation, and unspecified anxiety disorder (id.).[7]

Consistent with the recommendations included in the neuropsychological evaluation report, in her testimony by affidavit, the neuropsychologist indicated that the student needed a

[7] The neuropsychological evaluation report indicated that there were concerns about the student's psychological symptoms, including her level of anxiety manifested at home and at school, as well as her difficulties with mood and emotion-regulation (Parent Ex. YY at p. 12). The student's anxiety appeared to further exacerbate her difficulties with social interactions and socializing, and other neurodevelopmental problems were likely increasing her anxiety (id.). The evaluator noted in the neuropsychological evaluation report that the student's psychological symptoms needed to be further evaluated and supported in counseling (id.).

small, structured, and supportive mainstream classroom that would be stimulating for her, consisting of classmates with a similar or higher level of social and cognitive development who did not have behavioral problems and who could serve as good role models (compare Parent Ex. M at p. 13, with Parent Ex. YY ¶¶ 3, 26). The neuropsychologist testified that the student needed 1:1 special education instruction using ABA throughout the school day (full time i.e. seven hours per day) to provide the student with modeling and support for her social/emotional development, including focusing on promoting appropriate behavior, decreasing maladaptive behavior, and increasing her attention, stamina, and frustration tolerance (via prompting and redirection, among other things), and helping her social/emotional development and the language demands of the classroom (Parent Ex. YY ¶ 26; see Parent Ex. M at p. 13). Recommended related services included two 45-minute sessions of counseling per week to address the student's difficulties with mental flexibility and emotional regulation; continued weekly speech-language therapy and OT, at least one hour per week of parent counseling and training from a BCBA, a dual home-based program consisting of direct ABA services, BCBA supervision, and parent counseling and training, and services on a 12-month basis to prevent regression (Parent Ex. YY ¶ 26; see Parent Ex. M at pp. 13-14).

On August 29, 2023 a private bilingual speech-language evaluation was conducted in the student's home with the assistance of a translator (Parent Ex. N at pp. 1, 4). After administering a number of assessments, the speech-language pathologist concluded that "it [wa]s evident that [the student] present[ed] with moderate delays in oral motor skills" characterized by atypical strength, movement, and coordination and below age expectancy articulation skills (id. at pp. 5, 12, 13). According to the evaluation report, when participating in a preferred or easy task, the student presented with appropriate language and pragmatic skills; however, when presented with a difficult or non-preferred task, the student's skills were impacted by her non-compliant behaviors (id. at p. 12). Results of measures of the student's receptive language, expressive language, reading comprehension, picture sequencing, and narrative generation abilities indicated average skills (id. at p. 13). The speech-language pathologist indicated that speech-language therapy was "necessary to support the student's progress," and recommended, among other things, that the student receive two 30-minute sessions per week of individual speech-language therapy with a speech-language pathologist trained in oral motor therapy and/or myofunctional therapy in a location separate from the classroom (id. at p. 14).

On September 8, 2023, the student participated in a private PT evaluation (Parent Ex. O at p. 1). Formal testing and informal observation revealed that the student presented with mildly delayed skills including in the areas of balance, coordination, and several areas of strength (id. at p. 10). On a participation checklist, the student's score was in the far below-average in the home observation and below average in the classroom, which made it difficult for her to participate in age-appropriate gross motor activities in school with her peers (id.). According to the evaluation report, this combination of factors; scattered below average gross motor skills, challenges with coordinating her movements, and difficulty engaging with peers during movement-based school activities, decreased the student's overall level of safety in her school and community environments (id.). Recommendations included two individual 30-minute PT sessions per week over a 10-month school year (id. at pp. 10-11).

On September 12, 2023, the student participated in a private OT evaluation (Parent Ex. P at p. 1). Evaluation results revealed the student's weakness in hand strength, which affected her overall fine motor skills, and weakness in visual motor skills (id. at p. 11). According to the OT evaluation report, the student became easily frustrated with activities that appeared to be difficult and she either shut down and refused or rushed through the activity (id.). Based on the student's behavior during testing, the occupational therapist concluded that the student presented with deficits in maintaining attention, task initiation, following directions, and completing multi-step activities (id.). Results of testing indicated deficits in the areas of sensory processing and regulation, handwriting skills, motor coordination skills necessary for fine motor control and accuracy, manual dexterity skills, upper-limb coordination skills, executive functioning skills within the home and school environment, and instrumental activities of daily living skills (id. at pp. 13-14). Recommendations included two 45-minute sessions of OT per week on a 12-month basis to address delays in sensory processing and regulation, handwriting skills, fine motor precision skills, fine motor integration skills, manual dexterity skills, and executive functioning skills (id. at p. 15).

A March 5, 2024 OT progress report indicated that the student began receiving OT services on December 31, 2023, to address her executive functioning, sustained attention, problem-solving, sensory regulation, and gross and fine motor deficits (Parent Ex. QQ at p. 1). According to the report, the student required many prompts and frequent redirection each step of the way while attending to tasks (id.). She presented with a "decline" in her self-care skills such as grooming hygiene, bathing, and dressing independently (id.). The occupational therapist reported that the student was making progress with holding her pencil the correct way, yet she still required prompts for correct letter formation (id.). Additionally, the student required many prompts to stay focused and attend to tasks, and she did not present with the ability to initiate tasks and solve problems as they arose (id.). Recommendations included increasing OT services from two 30-minute individual sessions per week during the 10-month school year, to two 45-minute individual sessions per week on a 12-month basis (id.).

B. Unilateral Placement

On appeal the parents assert that the IHO erred in finding that the parents' unilateral placement of the student at Magen Israel was not appropriate, and erroneously focused his analysis on the fact that Magen Israel did not provide the student with related 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 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).

Testimony by affidavit by the Magen Israel general studies elementary principal (principal) indicated that all of the classrooms in the elementary school were "inclusion general education classrooms comprised of both typically developing" students and students with disabilities "who require[d] a general education curriculum due to their average cognitive capabilities" (Parent Ex. BBB ¶¶ 3, 5). The principal testified that Magen Israel offered a nurturing environment with a small student body size, and the school day ran from 8:45 am to 4:00 pm Monday through Thursday and 8:45 am to 12:00 pm on Friday (id. ¶¶ 5, 10). During the dismissal period from 3:45 pm to 4:00 pm on Monday through Thursday students were tasked with gathering their homework and belongings to get ready for their transportation home (id. ¶10).

According to the principal, the student began attending Magen Israel in September 2022, and she was familiar with the student's schedule for the 2023-24 school year (Parent Ex. BBB ¶¶

7-9; see Parent Ex. Z). The principal testified that the student received religious prayer, text study, and non-religious Hebrew language and Hebrew reading instruction in the morning from a Hebrew studies teacher (Tr. pp. 186, 188; Parent Ex. BBB ¶ 10). General studies occurred in the afternoon and included ELA (reading, writing, and phonics instruction), ELA work time, math instruction, and science instruction delivered by a regular education teacher (Tr. p. 188; Parent Ex. BBB ¶ 10). With regard to the special education support delivered to the student at Magen Israel, the principal testified that the student received approximately two hours per day of individual, push-in SEIT services during the 2023-24 school year and, to her knowledge, that was the only special education support the student received at the unilateral placement (Tr. pp. 188, 190; Parent Ex. BBB ¶ 12).[8] The evidence in the hearing record shows that a private company, EdZone, LLC, provided the student's SEIT services pursuant to pendency at Magen Israel during the 2023-24 school year (Parent Exs. TT; DDD ¶ 10).[9]

The principal testified that the 1:1 SEIT services delivered to the student were "essential to target [the student's] behavioral and socialization delays that accompan[ied] her disability" (Parent Ex. BBB ¶ 14). According to the principal, the student needed more SEIT services than what she was receiving at the time because when the SEIT was not working with the student, the student could not appropriately play with peers, fully engage in classroom lessons, complete independent classwork, or appropriately engage in center-based instruction (Tr. p. 190; Parent Ex. BBB ¶ 14). The principal opined that full-time SEIT services for the student would "help a lot," and that only having SEIT services for two hours of the day was "a very small percentage of the school day" (Tr. p. 190).[10]

As discussed above, the evidence shows that the student exhibited difficulty with attention, as well as academic, communication, and motor needs (see Parent Exs. M; N; O; P; QQ; SS). Under the totality of the circumstances, the hearing record does not support finding that placement of the student in a general education classroom with 10 hours of SEIT services provided pursuant to pendency was an appropriate placement for the student. In particular, the hearing record lacked evidence showing how Magen Israel provided the student with specially designed instruction to meet her unique needs during the portion of the school day the student was not receiving her pendency SEIT services. It is particularly difficult to find the chosen general education classroom met the student's special education needs, where there seems to be consensus that the special education instruction the student did receive (10 hours per week of SEIT services) was not sufficient to meet her needs and there is a lack of information as to the instruction provided in the general education setting. At the very least, to be reimbursable, the private placement must offer

[8] The Magen Israel program description does not indicate that the school provided special education services (see Parent Ex. Y).

[9] The student received SEIT services from a different company, Special Edge Inc., during the prior 2022-23 school year (Parent Ex. SS). According to the affidavit testimony of a BCBA who worked as a clinical director for both Special Edge and EdZone, Special Edge was "a related agency" which closed (Parent Ex. XX at ¶3).

[10] The student's first trimester report card indicated that she received designations of excellent or good in ELA, math, science, and character development/work habits, and teacher comments indicated that she was making progress (Parent Ex. CC).

educational instruction specially designed to meet the unique needs of the student for it to be appropriate under the Act (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65). Therefore, there is insufficient reason to disturb the IHO's finding that the parents did not meet their burden of proof with regard to their request for tuition reimbursement to Magen Israel for the 2023-24 school year.[11]

C. Compensatory Education

I now turn to the district's argument on appeal that the IHO erred in awarding compensatory education in the form of individual ABA services on a 12-month basis.[12] The district argues that the requested ABA services were to generalize the student's skills outside of the educational environment, which was beyond the district's obligation to provide the student a FAPE.

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 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

[11] Although there is evidence that the student made progress, as shown in her report card (Parent Ex. CC), progress evidence of progress at the private school alone is not sufficient because when seeking tuition reimbursement from a public school in a special education dispute, parents are not free to select a private school in which the "chief benefits of the chosen school are the kind of ... advantages ... that might be preferred by parents of any child, disabled or not" (Gagliardo, 489 F.3d at 115; Fragnito v. Bd. of Educ. of the Suffern Cent. Sch. Dist., 2020 WL 4194804, at *12 [S.D.N.Y. July 21, 2020] [finding that services were offered to all of the students whether disabled or not and a lack of services by special education professionals was insufficient to support reimbursement for a private school]).

[12] As the district has not appealed from the IHO's awards of compensatory speech-language therapy, OT, PT, counseling, and parent counseling and training services, the IHO's awards are deemed final and binding (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z., 2013 WL 1314992, at *6-*7, *10).

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"]).

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

Here, the IHO intended to remedy the district's denial of a FAPE to the student during the 2023-24 school year (see IHO Decision p. 11). The IHO found that the neuropsychologist who evaluated the student recommended that she receive individual special education instruction using ABA methodology in school and at home; the IHO did not make a finding with regard to whether or not those services were for the purpose of generalization (see IHO Decision at p. 12). The district's argument against the award of individual ABA instruction rests on the testimony of the neuropsychologist, which when read objectively, only states that ABA methodology could contribute to generalization of skills among other benefits (see Answer with Cross-Appeal ¶ 11; see also Tr. pp. 279-80). The evidence in the hearing record does not support the district's argument but shows that the home-based ABA services could reduce the student's non-compliance and maladaptive behaviors, improve the student's functional communication skills, and improve her academic skills (Tr. pp. 279-81). The fact that the neuropsychologist recommended home-based ABA services that also focus on daily living 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 would 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 district has not provided a convincing basis to modify the IHO's compensatory award.

D. Prospective Relief

Finally, I turn to the district's remaining argument on appeal that the IHO erred in awarding prospective relief by requiring the district to convene the CSE to develop an IEP with specific programing for the student.

Generally, as the district points out, an award of prospective relief in the form of IEP 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"]). 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]).

Here, a CSE did not convene for the 2023-24 school year and, in the answer to the cross-appeal, the parents claim that a CSE has not yet convened to develop an IEP for the student for the 2024-25 school year. Under the circumstances, an order requiring the district to convene the CSE is appropriate. However, to the extent the IHO's order requires a CSE to recommend a specific program, such order is not supported by the hearing record. The IHO's decision did not include a detailed discussion of a prospective award and the ordering clause to which the district objects requires the CSE to recommend the services included in the IHO's compensatory award on a prospective basis in an IEP. Specifically, the IHO ordered "that the CSE shall reconvene and develop an appropriate IEP for Student which includes a special education program including the services listed" in the paragraph setting for the compensatory education awarded (IHO Decision at p. 17). However, the compensatory award was crafted to place the student in the position she would have been but for the district's failure to offer a FAPE for the 2023-24 school year (see Reid, 401 F.3d at 518), whereas a CSE would be tasked with determining an appropriate program for the student going forward that is reasonably calculated to enable the student to make progress in light of her circumstances (see Endrew F., 580 U.S. at 402). The IHO relied on recommendations in private evaluations to calculate the compensatory award, as discussed above, but noted that the "sheer quantity of weekly program hours," totaling 47.5 hours per week, sought by the parents were "trouble[ing]" and "excessive (IHO Decision at p. 14). Taking these concerns into account,

as the IHO prescribed a program of services for the student's next IEP consistent with the compensatory education award, this portion of the decision must be reversed and the CSE should be allowed to consider and recommend an appropriate program for the student.

VII. Conclusion

Having determined that the parents failed to establish the appropriateness of the student's unilateral placement at Magen Israel for the 2023-24 school year, there is no need to reach the issue of whether equitable considerations support an award of tuition reimbursement (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]). Regarding compensatory education, there is insufficient basis to disturb the IHO's award of ABA services and the district has not appealed the remaining portions of the compensatory award. Finally, as discussed above, although the IHO did not err in requiring the district to convene a CSE to engage in educational planning for the student, the order inappropriately required a resultant IEP to include services underlying the compensatory award.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determination above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the IHO's decision, dated July 2, 2024, is modified by reversing that portion which required a CSE to develop a special education program consisting of the services listed in the compensatory education award.

Dated: **Albany, New York**
October 21, 2024

STEVEN KROLAK
STATE REVIEW OFFICER