



# The University of the State of New York

## The State Education Department

State Review Officer

[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 24-376

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

### **Appearances:**

Law Offices of Nancy Rothenberg, PLLC, attorneys for petitioner, by Nancy Rothenberg, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from those portions of a decision of an impartial hearing officer (IHO) which denied her requests for specific relief upon finding that respondent (the district) failed to provide her son with an appropriate educational program for the 2021-22, 2022-23, and 2023-24 school years. The appeal must be sustained in part.

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

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

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

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

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

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the student has received a diagnosis of "mild" autism spectrum disorder, and received speech-language therapy, occupational therapy (OT), and applied behavior analysis (ABA) services through the Early Intervention Program (EIP) beginning in January 2021 (Parent Ex. Z at p. 2). In fall 2021, an agency conducted a Committee on Preschool Special Education (CPSE) evaluation of the student due to developmental concerns such as word production regression, difficulty with eye contact, social interaction, and play skills, and needs in the areas of expressive and receptive language skills, fine motor skills, sensory integration processing, cognitive development, adaptive development, social development and "visual reception" skills (see Parent Exs. U-AA).

A CPSE convened in October 2021 to discuss the student's educational needs (Dist. Ex. 1 at pp. 1-16). Finding the student eligible for special education as a preschool student with a disability, the CPSE recommended an 8:1+2 special class placement and related services of two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual OT, commencing on January 3, 2022 at the Block Institute (id. at pp. 1, 3, 11, 15-16).

In December 2021, the CPSE reconvened to amend the student's IEP and changed the special class placement recommendation to a 9:1+3 student to teacher ratio (compare Dist. Ex. 2 at pp. 1, 11, with Dist. Ex. 1 at pp. 1, 11). A CPSE reconvened in July 2022 and amended the student's IEP to include recommendations for a 1:1 health aide and special transportation with accommodations of a "1:1 on bus" and a route with fewer students (Parent Ex. H at pp. 1, 11, 14-16). During the 2022-23 school year the student attended preschool at the Block Institute (Dist. Ex. 9 at p. 3).

In November 2022, Lighthouse conducted an ABA initial assessment and developed a treatment plan (Parent Ex. T at pp. 1-22). In January 2023 the district conducted an assistive technology evaluation of the student (Dist. Ex. 9 at pp. 1-8). On May 12, 2023 a CPSE convened to recommend services for summer 2023, which in addition to the previously recommended programming, included assistive technology consisting of daily use of an i-Pad mini at school and home (compare Parent Ex. G at pp. 1, 3, 15, 19-20, with Parent Ex. H at pp. 1, 11, 14-16).<sup>1</sup>

On May 18, 2023, an initial CSE convened and determined that the student was eligible for school-age special education as a student with autism (Parent Ex. F at pp. 1, 18, 20; Dist. Ex. 5 at pp. 1-3).<sup>2</sup> The CSE recommended 12-month programming in a specialized school consisting of an 8:1+1 special class placement for math and English language arts (ELA), OT, speech-language therapy, full-time health paraprofessional services, an iPad mini for school and home, and special transportation accommodation of closest safe curb to school (Parent Ex. F at pp. 1, 13-14, 18-19).

Subsequently, the parent obtained a screening for the student, and, in a letter dated August 1, 2023, the parent was informed that the student was accepted at the Brooklyn Blue Feather Elementary School (Blue Feather), a State-approved school for the 2023-24 school year (Parent Exs. DD at p. 4; EE). The parent was informed that, if she was interested in the student attending Blue Feather, she needed to "contact [her] district for further consideration" (Parent Ex. EE). By letter dated August 9, 2023, the parent notified the district that she disagreed with the evaluations the May 2023 CSE relied upon and requested "comprehensive independent educational evaluations" (IEEs) of the student (Parent Ex. B at pp. 1-3).

In an August 9, 2023 email, the parent rejected the public school site the district assigned the student to attend for the 2023-24 school year, expressed her desire to have the student in a

---

<sup>1</sup> The student's May 2023 IEP refers to a prior IEP dated October 2022, which was not included in the hearing record (Parent Ex. G at p. 1; see Parent Exs. A-JJ; Dist. Exs. 1-12).

<sup>2</sup> 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]).

program which included daily, structured ABA services to address his maladaptive behavior, and requested a different assigned specialized school or a central based support team (CBST) referral to start the process of securing a placement for the student at Blue Feather or another nonpublic school (Parent Ex. DD at pp. 3-4).

In September 2023, Lighthouse completed an ABA reassessment of the student and developed a treatment plan (Parent Ex. R at pp. 1-42). An independent neuropsychological evaluation of the student took place in September and October 2023 (October 2023 neuropsychological evaluation), which indicated that the student was attending kindergarten at the district's specialized public school (Parent Ex. Q at pp. 1-16).

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

In a due process complaint notice dated October 3, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2021-22, 2022-23, and 2023-24 school years (see Parent Ex A). Without reference to any specific school year, the parent alleged that the district failed to recommend appropriate placements and programs for the student, failed to convene a properly composed CSE, denied the parent the opportunity to meaningfully participate in the CPSE and CSE processes and failed to provide the parent with prior written notice, failed to properly evaluate the student, failed to develop appropriate and measurable annual goals, failed to conduct a functional behavioral assessment (FBA) by a Board Certified Behavior Analyst (BCBA) and consequently failed to develop an appropriate behavioral intervention plan (BIP), failed to provide appropriate speech-language therapy, OT, feeding therapy, and counseling services, home-based ABA with BCBA supervision, assistive technology, parent counseling and training, and transition services for the student's transition to the district public school for kindergarten, failed to offer appropriate methodologies to address the student's needs, and failed to provide the student with a properly trained paraprofessional (*id.* at pp. 5-9). As relief, the parent requested that the IHO: (1) issue an interim order for the district to pay for IEEs; (2) order the district to complete an FBA and BIP with a BCBA; (3) upon completion of IEEs, order the district to hold a CSE meeting and develop an IEP for the student recommending a specific program to include 12-month services, an approved nonpublic school, home and school-based ABA, speech-language therapy, OT, assistive technology, feeding therapy, parent counseling and training, and special transportation; (4) order the district to provide full-day ABA pushed into the public school setting and BCBA supervision until an appropriate nonpublic school placement is located; and (5) order a bank of compensatory education services (*id.* at pp. 9-11).

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

On November 8, 2023, an impartial hearing convened and concluded on June 10, 2024, after nine days of proceedings (see Tr. pp. 1-356). The November 8, 2023 hearing date was devoted to addressing the parent's request for interim IEEs at district expense (Tr. pp. 1-10). The district failed to appear and the IHO granted the parent's request for district funding of the IEEs at the requested rates (Interim IHO Decision at pp. 4, 5).<sup>3</sup>

---

<sup>3</sup> The IHO ordered the district to fund IEEs including the October 2023 neuropsychological evaluation, and additional independent assessments including a speech-language evaluation, an OT evaluation, an assistive

By final decision dated August 1, 2024, the IHO determined that the district failed to meet its burden to prove that it offered the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years (IHO Decision at pp. 15-17, 24). In particular, the IHO found that, during the 2021-22 school year, a program was not offered and available to the student until April 2022, that, for all three school years, the district inappropriately failed to offer or provide ABA to the student, and that the district also failed to implement all services mandated by the student's IEPs (id. at pp. 15-17).

As relief, the IHO ordered the district to: (1) convene a CSE meeting to review and consider all of the student's verbal and written evaluations, documents, and relevant reports to determine an appropriate placement and program and to consider all of the student's diagnoses and deficits in order to determine whether the student requires placement in a State-approved nonpublic school with ABA services; (2) fund an FBA and a BIP prepared by a BCBA; (3) conduct the CSE meeting within 10 days of receipt of the completed FBA and BIP; (4) fund the following compensatory services: (a) 400 hours of home-based ABA services; (b) 40 hours of home-based BCBA services; (c) 40 hours of home-based parent counseling and training; (d) 50 hours of after-school OT services; (e) a bank of compensatory speech-language therapy services comprising the total number of speech-language service hours not implemented during the 12-month 2023-24 school year; (f) 50 hours of speech-language therapy, (f) 25 hours of assistive technology services for the student and 25 hours of assistive technology services for the parent; and (g) 20 hours of feeding therapy; and (5) provide the student with accessories and applications for his iPad mini (IHO Decision at pp. 17-25).

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

The parent appeals and argues that the IHO erred in (1) failing to order the district to provide the student with a program ensuring school-based ABA and 20 hours per week home-based ABA with eight hours per month home-based BCBA supervision and four hours per month home-based parent counseling and training, (2) denying an interim program of 30 hours per week of ABA pushed into the current school program and three hours per week BCBA supervision, while awaiting an appropriate educational setting with ABA, along with 20 hours of home-based ABA, eight hours per month BCBA supervision of the home-based ABA, and four hours per month 1:1 home-based parent counseling and training; and in (3) decreasing the requested compensatory hours for each service awarded (ABA, BCBA supervision, parent counseling and training, speech-language therapy, OT, sensory-based feeding, and assistive technology direct and indirect instruction).

As relief, the parent requests that the district be required to (1) reconvene the CSE to develop an IEP providing for full day 1:1 discrete trial ABA with BCBA supervision in a school setting designed for students with autism spectrum disorder (ASD), 20 hours per week of home-based ABA, eight hours per month of BCBA supervision, and four hours per month of 1:1 home-based parent counseling and training; (2) fund an interim program of 30 hours per week ABA pushed into the school day with three hours per week BCBA supervision until the district implements a full day school-based program for children with ASD and ensures that the student

---

technology evaluation, sensory integration and praxis testing, an autism skills assessment, and a sensory-based feeding therapy evaluation, which were conducted during December 2023 and February 2024 while the hearing was pending (Interim IHO Order at p. 5; see Parent Exs. I-O).

receives full day 1:1 discrete trial ABA with BCBA supervision, 20 hours home-based ABA, eight hours per month BCBA supervision of the home-based ABA and four hours per month 1:1 home-based parent counseling and training; and (3) fund compensatory education consisting of 690 hours of ABA, 69 hours of BCBA supervision, 138 hours of parent counseling and training, 138 hours of sensory-based feeding, 184 hours of speech-language therapy, 138 hours of OT, 92 hours of assistive technology instruction for the student and 92 hours of assistive technology instruction for the parent, 48 indirect assistive technology for the assistive technology provider and 48 hours of indirect assistive technology instructional hours for the speech-language therapist.

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

## V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and 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" (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]).<sup>4</sup>

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).

---

<sup>4</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).

## VI. Discussion

At the outset, the district has not appealed from the IHO's finding that it failed to offer the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years; therefore, this determination 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 (S.D.N.Y. March 21, 2013).

### A. Prospective/Interim Placement

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

Additionally, while prospective placement might be appropriate in rare cases (see Connors v. Mills, 34 F.Supp.2d 795, 799, 804-06 [N.D.N.Y. Sept. 24, 1998] [noting a prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate"]), the pitfalls of awarding a prospective placement have been noted in multiple State-level administrative review decisions, including that where a prospective placement is obtained by the parents through the impartial hearing, such relief could be treated as an election of remedies subject only to further judicial review, where the parents assume the risk that future unforeseen events could cause the relief to be undesirable (see, e.g., Application of a Student with a Disability, Appeal No. 19-018; see also Tobuck v. Banks, 2024 WL 1349693, at \*5 [S.D.N.Y. Mar. 29, 2024]). Thus, in the event prospective relief is awarded, it is not permissible to return to due process to relitigate the prospective relief obtained in a final decision of an administrative hearing officer in a due process proceeding.



Here, I find that this matter presents one of the rare instances where prospective placement is warranted. The IHO determined that the district denied the student a FAPE during the 2021-22, 2022-23, and 2023-24 school years in part due to the removal of ABA instruction from the student's programming, and, as noted, the district has not appealed that determination or countered the IHO's finding that the student required ABA to receive educational benefit (IHO Decision at pp. 15-17).

The parent reported that the student began receiving ABA services at 18-22 months of age, but services were interrupted in 2022 when the student was three years old due to a lack of providers (Parent Ex. J at p. 12). During the 2022-23 school year at the Block Institute, the student's program "reportedly incorporated ABA principles within a school structure, although learning [wa]s not individualized as it would [have] be[en] during a classic ABA direct treatment session" (*id.* at p. 3). The parent reported that during the 2023-24 school year the student's specialized public school did not utilize ABA instruction and that the student had inconsistently received home-based ABA services through insurance since November 2022 (Parent Ex. O at p. 4).

The evidence in the hearing record does not show that the district has delivered consistent instruction to the student using ABA methodology and such instruction has not been mandated in any of the student's IEPs, despite evidence available to each CSE that the student benefited from the use of ABA (compare Parent Exs. F-H, and Dist. Exs. 1-2, with Parent Exs. S at p. 3; T at p. 14; Z at p. 2; AA at p. 33). Moreover, taking into account additional evaluations conducted since the impartial hearing commenced, at this point, the evidence in the hearing record reflects a consensus among the evaluators that ABA services are required for this student (Tr. pp. 141-43; Parent Exs. O; Q at p. 3; R). For example, a December 2023 ABA skills assessment conducted by a BCBA from Kid Success included implementing "strategies typically observed and utilized in special education classes that d[id] not implement ABA" such as "verbal and physical prompting to effect behavior change"; however, those prompts "proved ineffective for changing behavior" (Parent Ex. O at pp. 1, 9). Observation where ABA instruction was implemented throughout the entire session utilizing evidenced-based interventions found the student's average duration of attending increased by approximately one minute and the average duration of the emittance of problem behavior decreased by approximately 14 minutes from the initial observation period without ABA instruction (*id.* at p. 10). The BCBA added that, when the student emitted problem behaviors during the ABA session, the percentage of availability for learning was significantly increased (*id.*). Overall, the BCBA reported that "the student was more available for learning with the implementation of ABA" instruction, including that his attention, ability to sit for longer periods of time, and his availability for skill acquisition increased, and the emittance of problem behaviors decreased (*id.* at p. 8). Additionally, with ABA instruction the student was observed using his device to communicate and following task-related directions (*id.*). The occupational therapist who conducted the student's December 2023 OT, assistive technology, and feeding evaluations testified that she assessed the student both with and without the presence of the ABA provider and reported that the student "demonstrated good engagement with his ABA provider's support and methodology" (Tr. pp. 204, 207, 217-18; Parent Ex. J at pp. 1, 31). According to the occupational therapist, the student's "ability to engage and to participate was without question completely enhanced with the ABA methodology" (Tr. p. 218). Further, the October 2023 neuropsychological evaluation cited to an interview with the student's preschool teacher who stated that the student "was helped by the ABA skills he was taught" (Parent Ex. Q at p. 3).

Additionally, the district did not contest or rebut the evidence regarding the student's need for ABA services; and, based on the evidence in the hearing record, I find there is a clear "consensus" among those who evaluated the student regarding his needs, and that consensus should therefore be followed by the CSE (see *A.M. v. New York City Dep't of Educ.*, 845 F.3d 523, 543–46 [2d Cir. 2017] [referencing and following the proposition that when the reports and evaluative materials present at the CSE meeting yield a clear consensus, an IEP formulated for the child that fails to provide services consistent with that consensus is not reasonably calculated to enable the child to receive educational benefits]).

In September 2021 the student was seen for a pediatric neurology evaluation and treatment consultation (Parent Ex. AA at pp. 1-3). The pediatric neurologist found that the student presented with "[a]utistic regression at 18 months of age" and recommended, among other things, continued ABA instruction (*id.* at p. 3). In a November 2022 follow up evaluation and consultation, the pediatric neurologist reported that the student had been receiving ABA services, speech-language therapy, OT, and special education and that the student followed directions, was not aggressive, did not throw toys anymore and was happy and enjoying school, but was very picky in terms of food (Parent Ex. S at p. 1). Recommendations included continuation of the aforementioned services, including ABA, with increased frequency (*id.* at p. 3).

A November 2022 Lighthouse initial assessment and treatment plan stated that due to the student's skill deficits it was "medically necessary for [the student] to receive ABA treatment at th[at] time, in order to attain the necessary skills to function within his family and alongside his peers," and the evaluator recommended that the student receive 40 hours per week of direct 1:1 ABA services, 4 hours per week of "[p]rotocol [m]odification," and 2 hours per week of parent training (Parent Ex. T at pp. 1, 14).

As for the evaluative information gathered leading up to and during the impartial hearing, a September 2023 Lighthouse reassessment and treatment plan found the student presented with significant delays in all areas of development including but not limited to expressive and receptive language, social awareness, daily living skills, extremely limited attention span, and repetitive behaviors (Parent Ex. R at p. 4). The treatment plan again stated that, due to the student's skill deficits it was medically necessary for the student to receive ABA services, and the evaluator recommended that the student receive 30 hours per week of direct 1:1 ABA services, 1 hour per week of treatment planning, 3 hours per week of "protocol modification," and 2 hours per week of parent training (*id.* at pp. 1, 23). The September 2023 treatment plan included the recommendation for services to be delivered consistently in multiple settings, with multiple adults, siblings, and/or typically developing peers under the supervision of a behavior analyst (*id.* at p. 2).

In an October 2023 neuropsychological evaluation report, the psychologist reported that the student presented as "largely nonverbal," with significant social and behavioral difficulties including a tendency toward aggression and other maladaptive behaviors, and challenges with nonverbal communication that limited his ability to consistently engage with others (Parent Ex. Q at pp. 1, 10, 14). The psychologist found the student met the criteria for diagnoses of autism spectrum disorder level 3, with language and intellectual impairment, requiring very substantial support; attention-deficit hyperactivity disorder, combined type; and developmental coordination disorder (*id.* at pp. 10-11). He recommended that the student receive "hands-on learning with 1:1 instruction," a school with a certified BCBA on staff, full day (30 hours per week) of push-in ABA

services with BCBA supervision, integration of related services, home-based ABA services, speech-language therapy, and OT (id. at pp. 11-13).

Following the December 2023 ABA skills assessment that identified the student's problem behaviors and skill deficits, the BCBA concluded that the student required "a full-day ABA program" with home-based (minimum of 20 hours per week) ABA services in order to increase appropriate and socially significant goals that encompassed academics, behavior, language, daily living skills, and social skills, and decreased problem behaviors (Parent Ex. O at pp. 1, 14-15). The BCBA further recommended that the student receive BCBA supervision of one hour per every 10 hours of home-based ABA services delivered (id.). Additionally, the BCBA recommended that until the student was "placed in an appropriate ABA school," ABA instruction "must be pushed into his current placement for 30 hours per week, full time" (id. at p. 14).

Within the February 2024 assistive technology evaluation, the occupational therapist noted her review of the October 2023 neuropsychological evaluation report and that she concurred with the professional findings and recommendations, which included ABA methodology at school and at home and 1:1 instruction (Parent Ex. J at p. 37). She recommended that the student "continue to engage in consistent, individualized ABA methodology and techniques in his academic, home and community environments to manage his behaviors" (id.).

Additionally, during the impartial hearing, the BCBA testified that the behaviors the student was emitting were so significant that he required a nonpublic school ABA program that utilized ABA throughout the day, including during academic tasks, transitions, related services, lunch, recess, and specials (Tr. p. 130). She recommended that until such a placement was found, the student should receive 30 hours per week of push-in ABA services and 3 hours per week of BCBA supervision at his then-current school program (Tr. pp. 130-31, 151-52). The BCBA also testified that the student had a very significant and severe emittance of problem behavior at a "very, very" early age and required significant ABA intervention both at school and at home, recommending a minimum of 20 hours per week of home-based ABA intervention along with 8 hours of BCBA supervision per month (Tr. pp. 131-32).

The psychologist, who conducted the October 2023 neuropsychological evaluation, testified that the student required a program with consistency of reinforcement across settings, and that "the best way and really the only way" for the district to do that, especially for students with severe autism, was with ABA services and 1:1 support, and that the student needed ABA instruction both at school and at home in order to have consistent reinforcement and avoid regression (Tr. pp. 183, 192, 194-96; see Parent Ex. Q). Further, the occupational therapist, who conducted February 2024 assessments of the student, testified that she agreed with the psychologist's recommendations and the student's continued engagement in ABA methodology as it was "key" for the student's continued engagement (Tr. p. 213; see Parent Exs. J; K; M).

Therefore, because the district did not provide any evidence to support its programming recommendations for the student's 2021-22, 2022-23 and 2023-24 school years, which did not include ABA services, or provide evidence contesting the student's need for ABA services going forward, and as a result of the consensus among the independent evaluators that ABA services are essential for the student's learning, I will order the district, to the extent it has not already done so, to locate a State-approved nonpublic day school placement for the student that provides full time

1:1 ABA instruction together with BCBA supervision for the remainder of the 2024-25 school year, leaving the specific contours to the CSE.

With that said, as there is no evidence whether the CSE has yet convened for the 2024-24 school year, what such CSE may have recommended for the student, or what placement or school the student is presently attending for the 2024-25 school year, I decline to order the district to deliver push-in ABA services until an appropriate nonpublic school is located. Given the substantial compensatory education awarded by the IHO, discussed below, and the directive for the CSE to identify an nonpublic school, I do not find that additional relief is warranted in this instance.

## **B. Compensatory Education**

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

According to the BCBA from Kid Success, the student required compensatory services in the form of 690 hours of intensive 1:1 ABA intervention (Tr. p. 133). She explained that this was not only necessary in order to work on "the emittance of problem behaviors that affect skill acquisition, . . . but . . . also to address other areas that behaviors interfere with, including toileting, community, elopement from the community, and other self-help skills" (Tr. pp. 133-34). The BCBA testified that the "minimum" of 690 hours was based on the student's significant emittance of severe problem behaviors, his "level of deficit," and the "years in the past that he just was not given the appropriate tools and interventions and programming and placement," and that the total number of hours was approximately one and a half hours per day of ABA services over five days

(Tr. p. 134; see Parent Ex. O at pp. 15-16). Further, she stated that the number of hours was the minimum required to make him whole again and to get him to a place where he should have been had he been provided with the appropriate placement and services (Tr. pp. 158, 174; see Parent Ex. O at p. 16). Regarding BCBA supervision, the BCBA testified that it would be 10 percent of the total ABA program or 69 hours, and she explained within the December 2023 ABA skills assessment that the BCBA supervision was to oversee the ABA program, to analyze data, make systematic changes to the programs, to ensure progress, and [to] make any necessary changes to interventions as needed (Tr. p. 135; Parent Ex. O at p. 16).

The BCBA recommended 138 hours of compensatory parent counseling and training, again due to the emittance of problem behaviors, in order to train the family in the interventions, in particular, the potentially life-threatening behavior of elopement, and to increase appropriate behaviors at home (Parent Ex. O at p. 16). The BCBA calculated the number of hours recommended by multiplying four hours per month by 11.5 months per year for each of the three school years (2021-22, 2022-23, and 2023-24) the services were not provided (id.).

The hearing record includes an April 2024 compensatory services plan, developed by an occupational therapist, a speech-language pathologist, and the executive director of Exceptional Learner Services (director) (Parent Ex. FF). The occupational therapist and speech-language pathologist conducted a review of the student's records and "determined a tailored recommendation for compensatory hours in their respective domains" of OT, speech-language and sensory-based feeding therapy, and assistive technology, which was generally consistent with the parent's requested compensatory award on appeal (compare Parent Ex. FF at pp. 1, 18-19, 33-34, with Req. for Rev. at p. 10).

Here, although the district did not propose an alternative compensatory remedy, an outright default judgment awarding compensatory education—or as in this case, any and all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005] [rejecting "lump sum" grant of tutoring as a compensatory remedy for a multi-year denial of FAPE]). Indeed, an award ordered so blindly could ultimately do more harm than good for a student (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at \*8 [S.D.N.Y. Mar. 30, 2017]). Moreover, if the sum and total of the compensatory education relief requested by the parent was ordered, including the monetization thereof, it could begin to resemble a punitive award (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] [noting that "[t]he purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]). Thus, an IHO by no means is required to merely adopt the relief proposed by parental experts.

As noted above, the IHO found the district's denial of a FAPE lay in its failure to timely provide the student with special education services until April 2022 for the 2021-22 school year, its failure to offer or provide ABA to the student, and its failure to recommend and/or provide sufficient OT, speech-language therapy, feeding therapy, parent counseling training, and assistive technology instruction (IHO Decision at pp. 15-17, 21-24).

While the IHO provided little explanation in her decision for how she calculated the amount of compensatory service hours awarded, the evidence in the hearing record supports the ultimate award taking into account certain factors. Regarding ABA, first, the hearing record demonstrates that the student was not completely without ABA instruction during the three school years (see Parent Ex. J at p. 3; O at p. 4). In addition, the IHO's award provides an appropriate balance between the student's identified needs, consideration of his full day school-based programming, and the diminishing returns resulting from an over-extended schedule (see M.M., 2017 WL 1194685, at \*8 ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). Case in point, the parent testified to the difficulty in using the 40 hours of ABA services recommended by Lighthouse in fall 2022, as she stated that it was hard to find another behavior therapist and that they did not have enough personnel to provide the 40 hours a week and plus "we were going to the school" (Tr. pp. 305-06). Finally, the IHO's award is particularly appropriate in light of the prospective relief awarded herein (see Demarcus L. v. Bd. of Educ. of the City of Chicago, 2014 WL 948883, at \*8 [N.D. Ill. Mar. 11, 2014] [denying compensatory education partially due to the prospective revisions to the student's IEP]).

The IHO did not adopt the recommendations of the private evaluators, which the IHO may have found excessive given the weekly hours recommended for each service (see Parent Exs. I; J; K; L; M; O; FF),<sup>5</sup> and the IHO noted that the student received some speech-language therapy and OT services during the disputed school years, albeit not at sufficient frequencies to allow the student to make progress (see IHO Decision at pp. 21-22). Indeed, taking into account the whole of the compensatory education, the recommendations appeared targeted to maximize the student's potential, which is not the purpose of compensatory education (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). 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"]).

For example, the IHO ordered 50 hours of compensatory OT services rather than the 184 hours requested by the parent (IHO Decision at pp. 21-22). For all school years at issue, the CSEs recommended two 30-minute sessions per week of individual OT (Parent Exs. H at p. 11; F at p. 13; Dist. Ex. 2 at p. 11), whereas, within the February 2024 OT evaluation report, the occupational therapist recommended that the student receive three 30-minute sessions per week of individual OT (Parent Ex. K at p. 24). Taking into account an apparent discrepancy of one 30-minute session per week of OT, the IHO's award of 50 hours of OT services was not unreasonable, and the IHO did not abuse her discretion in declining to adopt the parent's request for 184 hours, which was based on the occupational therapist's recommendation for 1.5 hours weekly compensatory OT for

---

<sup>5</sup> The parent's compensatory education requests were largely based on three 46-week school years, yet the student was not eligible for special education under the CPSE at the beginning of the 2021-22 school year, and, generally, a 12-month school year from June through July would consist of 42 weeks given the 180 instructional days in a 10-month school year, plus an additional 30 days during the 12-month portion of the school year that occurs over a summer, typically during a six-week program (see Educ. Law § 3604[7]; 8 NYCRR 200.1[eee]).

46 weeks per school year (*id.* at p. 25). The IHO again appeared to identify a lesser, reasonable compensatory award for speech-language therapy, assistive technology services, and feeding therapy, compared to the number of hours sought (*see* IHO Decision at pp. 22-23). As for the parent's request for indirect assistive technology services and allowance for a co-teaching model so the student could access compensatory hours simultaneous with the prospective relief sought, such an award is unwarranted where the hearing record is not developed regarding what nonpublic school or what providers will be delivering compensatory education.

Compensatory education services must strike an appropriate balance between the need to remedy the denial of a FAPE, with a tolerable/appropriate amount of direct instruction in conjunction with a full day ABA program. While I understand the experts' desire for the student to receive "total wrap-around services" (*see* Parent Ex. FF at pp. 15-16), I find the frequency and duration of the recommended compensatory services in this circumstance to be excessive and potentially counterproductive for this five-year-old student. When asked how the family would fit these hours into the student's schedule, the BCBA testified that they should be utilized when he was home from school, on weekends, and during school breaks, and that it was "really across seven days per week" (Tr. p. 136). The BCBA testified that the student "definitely d[id] not need down time," as unstructured activities would perpetuate the emittance of a problem behaviors (Tr. pp. 136-37). However, this opinion was somewhat contradicted by the psychologist who conducted the student's October 2023 neuropsychological evaluation, and recommended that the student should participate in extracurricular activities outside the school to help increase his socialization and provide a much-needed break from academic instruction (Parent Ex. Q at p. 13).<sup>6</sup> The Lighthouse evaluator who stated that ABA services were medically necessary for the student to attain the requisite skills to function within his family and alongside his peers also cited "limited access to peers" under "Barriers to Treatment" (Parent Ex. T at p. 14). When asked why she recommended 46 weeks and not 52 weeks of services in the Compensatory Services Plan, the executive director of Exceptional Learner Services noted that while they were available for 52 weeks of the year, they understood that families have obligations or summer or winter vacations, and 46 weeks would be consistent throughout the year and prevent regression (Tr. pp. 272-73).

In light of the above, although the evidence shows that some compensatory education is warranted due to the multi-year denial of a FAPE to the student, the IHO did not abuse her discretion in denying the amount of compensatory education services requested by the parent and, instead, crafting a reasonable equitable award to place the student in the position he would have been but for the district's denials of FAPE.

## **VII. Conclusion**

In summary, the IHO's determinations that the district failed to offer the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years are final and binding. The district shall be required to convene a CSE meeting within 30 days of the date of this decision in order to devise an appropriate placement and program for the student, which shall include placement in a State-approved nonpublic school with ABA services supervised by a BCBA; however, the evidence in

---

<sup>6</sup> The psychologist also recommended that the family seek services through the Office for People with Developmental Disabilities (OPWDD), which would "help connect [the student] and his family to community resources such as social groups and recreational activities" (Parent Ex. Q at p. 13).

the hearing record before me does not support an order for an interim placement until such school is identified. In addition, I find insufficient basis in the hearing record to disturb the IHO's award of compensatory education services. This relief, taken together, is appropriate equitable relief under the circumstances and any remaining aspects of the requested relief not otherwise specifically addressed herein are denied.

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

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

**IT IS ORDERED** that the IHO's decision, dated August 1, 2024, is modified by reversing that portion which found that the parent was not entitled to the student's prospective placement in a nonpublic day school that provides ABA services; and

**IT IS FURTHER ORDERED** that within 30 days of the date of this decision, the CSE shall convene, recommend, and locate an appropriate program and placement in a State-approved nonpublic day school that provides ABA services for the remainder of the 2024-25 school year, unless the parties otherwise agree to an alternative placement.

**Dated:**            **Albany, New York**  
                         **October 28, 2024**

\_\_\_\_\_  
**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**