



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-179

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the  
XXXXXXXXXXXXXXXX**

### **Appearances:**

Law Offices of H. Jeffrey Marcus, P.C., attorneys for petitioners, H. Jeffrey Marcus, Esq., of counsel

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., attorneys for respondent, Susan T. Johns, Esq., of counsel

## **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 which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their son for the 2010-11 and 2011-12 school years was appropriate and any problems with implementation were not the fault of the district. The district cross-appeals from that portion of the impartial hearing officer's decision which found that the CSE failed to implement its recommendation of a residential placement during the 2010-11 school year. The appeal must be sustained in part. The cross-appeal must be dismissed.

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

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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**

At the time of the impartial hearing, the student had been determined eligible to receive special education programs and services as a student with an Other Health Impairment (OHI) (Dist. Ex. 44 at p. 1). The student's eligibility for special education and related services as a student with an OHI is not in dispute in this proceeding (see 34 CFR § 300.8[c][9]; 8 NYCRR 200.1[zz ][10]). At the time of the impartial hearing, the student was receiving home instruction and counseling at home as a related service and one 30-minute session of occupational therapy (OT) per week at a district school (Tr. pp. 288, 365-66; Dist. Exs. 51 at pp. 34-40; Parent Ex. K).

This case involves a complex factual history. The student had been previously diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) Combined Type, as well as Pervasive Developmental Disorder Not Otherwise Specified (PDD-NOS) (Dist. Ex. 6 at p. 4). The student's history includes difficulties with fine and gross motor coordination, with notable difficulty with handwriting (id.). In addition, the hearing record reflects that the student had a history of social difficulties, as he had no close friends, and a "rigid way of interacting with others" (Dist. Ex. 6 at pp. 4-5). The hearing record reflects that the student's academic achievement was commensurate with his "very superior" range of cognitive abilities (Dist. Ex. 28 at p. 32).

The student entered the district in September 2006 when he was in fourth grade (Tr. p. 206; Dist. Ex. 9 at p. 1). A January 2007 CSE determined the student eligible for special education programs and services as a student with an OHI and developed an IEP for the remainder of the 2007-08 school year (Dist. Ex. 13 at pp. 3-9). The student attended regular education classes in a district elementary school and then in its middle school from fourth through eighth grades.<sup>1</sup> (Dist. Exs. 13 at p. 3; 15 at p. 3; 17 at p. 4; 18 at p. 1; 19 at p. 1; 21 at p. 1; 22 at p. 2; 23 at p. 1; 24 at p. 2; 26 at pp. 1-11; 27 at p. 1; 28 at p. 2). During this period, depending on the school year, the student received special education programming in either a district resource room (8:1+1) or a BOCES special class (8:1+1) for part of the day; related services including counseling and occupational therapy consultation; a 1:1 aide or teaching assistant and multiple program modifications, accommodations and supplementary aids (see Dist. Exs. 13 at pp. 1-10; 15 at pp. 1-9; 17 at pp. 1-10; 18 at pp. 1-9; 19 at pp. 1-3; 20 at pp. 1-15; 21 at pp. 1-7; 22 at pp. 1-3; 23 at pp. 1-7; 24 at pp. 1-2; 25; 26 at pp. 1-11; 26 at pp. 1-11; 27 at pp. 1-12).

A school psychologist completed a "Triennial Reevaluation Report" dated May 15, 2010 (see Dist. Ex. 28). The report notes that the student's cognitive level is in the "very superior" range and that his achievements are consistent with this (id. at p. 32). The student's personality was noted to be a factor to impact his academic performance due to his rigidity and inflexibility as related to his diagnosis of PDD-NOS (id.). The student's relative weakness and need for accommodation in the area of processing speed, even though his processing speed was in the average range, was noted (id. at pp. 32-33). It was recommended for the student to use a computer to prevent him from becoming fatigued from school tasks requiring interplay between processing speed and visual-motor coordination (id. at p. 33). The student's areas of deficit were noted to include self-monitoring and self-regulation, although he had improved with increased positive peer interactions and class participation (id.). It was recommended that the student continue his placement in the 8:1:1 setting to meet his emotional needs, and continue with a teaching assistant for transition to high school, but reconsider the need in the future if the student continues to evidence improved peer interaction and self-monitoring (id. at pp. 34-35).

On June 3, 2010, prior to the end of the 2009-10 school year, the CSE met for the student's annual review (Dist. Ex. 30 at p. 1). The minutes of the June 2010 CSE indicate, among other things, that the student generally performed well during the 2009-10 school year (id. at p. 17). The minutes note that the student's GPA attested to his success in his mainstream

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<sup>1</sup> The student was accelerated from fourth grade to sixth grade to address the fact that adverse behaviors resulted when the student faced academically unchallenging instruction (Tr. pp. 42-43, 206-07; Dist. Exs. 12; 13 at pp. 1-2, 6; 14; see also Dist. Ex. 9 at p. 2).

classes; that he seemed to not leave his regular education classes much until recently and that he used the BOCES 8:1+1 class as a safe room (id.). The minutes also indicate that the student frequently arrived to school late because it was difficult to get him up (id.). Although the student was functioning well until about six weeks prior to the June 3, 2010 CSE meeting, the parents felt that the student had "shut down" (id.). The parents indicated that the end of the school year was historically not a good time for the student and that he tended to shut down at that time (id.). For the remainder of the 2009-10 school year, through June 24, 2010, at the parent's request, the June 3, 2010 CSE recommended home instruction in only earth science and French to prepare the student for the earth science Regents and the French proficiency examinations (id. at pp. 1, 3, 7, 20). The June 3, 2010 CSE decided to hold another meeting later in June to determine the student's placement and services for the 2010-11 school year (id. at p. 7).

The CSE met on June 23, 2010 to develop the student's IEP for the 2010-11 school year, when the student would be in the ninth grade and transitioning into the district's high school (Dist. Ex. 31 at p. 1). There was significant discussion about the student's difficulties and needs, and the parents' concerns about the student and his transition to the high school building for ninth grade (id.). The resultant June 23, 2010 IEP contained information relative to present levels of performance and needs with respect to academic achievement, functional performance, and learning performance; social development; physical development; as well as management needs (see id. at pp. 5-7). The June 23, 2010 CSE recommended that the student attend a district 8:1+1 class two times a day for 40 minutes and receive a fulltime teaching assistant from BOCES, small group (5:1) adapted physical education (APE) three times a week for 30 minutes; individual counseling for 30 minutes per session, once per six-day cycle; small group (4:1) counseling for 20 minutes per session, also once per six-day cycle; and an individual OT consultation two times per month for 30 minutes "for keyboarding and learning to type" (id. at pp. 1-2, 6, 18). As had the June 2009 IEP, the June 23, 2010 IEP also included as a need that the student have access to a quiet space when he left the classroom as a result of frustration with the lesson or a teacher, and this was the primary purpose of the recommended 8:1+1 class (Tr. p. 219; Dist. Ex. 31 at p. 5). The June 23, 2010 CSE recommended program modification and accommodations similar to a number of those recommended in the June 2009 IEP (compare Dist. Ex. 31 at pp. 2-3 with Dist. Ex. 27 at p. 2). It also recommended that the student not be scheduled for classes first period and not be considered tardy; and be granted access to a word processing program for math homework, tests, and quizzes (Dist. Ex. 31 at pp. 2-3). The June 23, 2010 IEP included a set of transition activities for the purpose of facilitating the student's movement from school to post-school activities (id. at p. 7). Annual goals included in the June 23, 2010 IEP targeted study skills needs, social/emotional/behavioral needs, and keyboarding needs (OT) (id. at pp. 8-10). The June 23, 2010 IEP attached a behavioral intervention plan (BIP) and advised that it "must be followed at all times" (id. at p. 3; see also id. at p. 11).

The student began ninth grade at the district high school in September 2010 (Tr. p. 401). Quickly thereafter the student's attendance in his mainstream educational classes suffered, as did his attendance at school (Tr. pp. 227-28, 233-34, 238, 402; Dist. Exs. 35 at pp. 2-3; 51 at p. 4; 52 at pp. 21, 35, 36, 97-98, 99).

The CSE reconvened on October 22, 2010 in response to one or more requests by the parents to schedule a CSE meeting (Dist. Ex. 34 at pp. 1, 4; Parent Ex. S at pp. 1, 3, 10; see Tr. pp. 234, 402; Dist. Ex. 52 at pp. 11, 100-101; Parent Ex. O). The hearing record reflects that the October 2010 CSE determined that an appropriate residential placement should be pursued (Dist.

Ex. 34 at p. 3; Parent Ex. S at pp. 4, 10). The October 2010 CSE determined that until such time as the student was accepted into a residential facility and such placement was secured, the student would receive home instruction if he were not able to or refused to attend school (Dist. Ex. 34 at p. 3; Parent Ex. S at pp. 4, 10; see also Tr. pp. 246-47, 403-404). The October 2010 CSE recommended that the student's previously recommended program of regular mainstream classes in academic subjects, an 8:1+1 special class twice a day for 40 minutes per session, a full time 1:1 BOCES teaching assistant, access to a "quiet space" when necessary, individual counseling two times per month for 30 minutes per session, counseling in a group of four once per six day cycle for 20 minutes per session, an OT consult twice a month for 30 minutes per session for keyboarding and learning to type, and adapted physical education three times a cycle for 30 minutes per session would continue (Dist. Ex. 34 at p. 3; Parent Ex. S at pp. 3-4, 7, 9, 10). The October 2010 IEP also maintained the program modifications and accommodations, including the need for and use of a BIP; the testing accommodations; and the assistive technology services that were included and specified in the June 23, 2010 IEP (compare Parent Ex. S at pp. 2-6 with Dist. Ex. 31 at pp. 2-4). The October 2010 IEP also continued the transition activities set out in the June 23, 2010 IEP (compare Parent Ex. S at pp. 9-10 with Dist. Ex. 31 at p. 7).

The student did not attend school after October 29, 2010 during the remainder of 2010 (Dist. Exs. 35 at p. 2; 36 at p. 4; 51 at p. 4). Because of the student's cessation in attending school, by e-mail dated November 4, 2010, the parents requested that the district provide the student with home instruction beginning on November 7, 2010 (see Dist. Ex. 52 at p. 110). The record also reflects, however, that the student continued to attend 1:1 counseling sessions at the district's middle school with his assigned counselor, who was a school psychologist at the middle school (Dist. Ex. 35 at p. 2).

The district completed an FBA "to determine the relationship between [the student's] school refusal and variables that contribute to its expression" on November 29, 2010 (see Dist. Ex. 35; see also Dist. Ex. 52 at p. 105). Among other things, the FBA recommended that the district "[a]ddress sleep issues with [the student's] physician, with possible referral to the [sleep clinic affiliated with a local hospital]," the possible referral to a residential school, and continued tutoring (Dist. Ex. 35 at p. 4).

The student's home instruction by the district began on November 23, 2010 and continued through January 19, 2011 (see Dist. Ex. 51 at pp. 21-25; see also Tr. pp. 244, 296-98, 414).<sup>2</sup> During the period March 9, 2011 to the end of the 2010-11 school year, a different home instructor provided the student with home instruction (see Dist. Ex. 51 at pp. 26-33; see also Tr. pp. 244-45, 298, 414-15). The student did not receive any home instruction during the period January 20 through March 8, 2011 (see Tr. p. 245; Dist. Ex. 51 at pp. 21-40).

Over the course of the 2010-11 school year, the CSE also convened on February 4, 2011, March 25, 2011, and April 8, 2011 (see Dist. Exs. 36 at p. 1; 37 at pp. 1, 8, 12; 39 at pp. 1, 8, 11). At its February 4, 2011 CSE meeting, among other things, the CSE determined that (1) a residential school that had accepted the student was "not an acceptable residential placement," (2) the emergency interim placement process needed to be pursued as an option, (3) the school

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<sup>2</sup> I note that the minutes of the February 4, 2011 CSE meeting indicates that home instruction for the student began on November 29, 2010 and, as of that date, had ended on January 22, 2011 (see Dist. Ex. 36 at p. 4).

psychologist would explore whether "environmental, staffing, and scheduling changes" would make it possible for the student to return to the district's high school, (4) based on the parents' interest, the school psychologist would contact an adjacent school district to see what options would be available at their high school, which had fewer students and smaller class sizes, and (5) reflecting that at the time of that CSE meeting that the student was not receiving home instruction, it would "try to find a tutor" for the student (Dist. Ex. 36 at p. 5; see also Tr. pp. 149-50; 249-50, 429; Dist. Ex. 52 at p. 133).

The CSE convened on March 25, 2011 to discuss the parents' request that the student be evaluated and treated by an occupational therapist who specialized in sensory processing disorders (see Dist. Ex. 52 at pp. 139-40, 147; see also Dist. Ex. 37 at p. 12). The March 25, 2011 CSE recommended an OT evaluation for the student and that the CSE meet to discuss the results of that evaluation when completed (Dist. Ex. 37 at pp. 8, 13). Among other things, the resultant March 2011 IEP also included the reference that the district would pursue a residential placement (id. at pp. 2, 8). The March 2011 IEP also included the recommendation in the October 2010 IEP that, until such time as the student was accepted into a residential facility and such placement was secured, the student would receive home instruction if he were not able to or refused to attend school (id.).

As provided for by the March 2011 IEP, on March 29, 2011, a BOCES occupational therapist conducted an OT evaluation of the student with an emphasis on sensory integration (see Dist. Ex. 38).

The CSE reconvened on April 8, 2011 to discuss the results of the March 29, 2011 OT evaluation and the modification of the student's program and IEP (Dist. Ex. 39 at pp. 1, 8, 11; see also Dist. Ex. 38). Reflecting the results of the March 29, 2011 OT evaluation, among other things, the resultant April 2011 IEP provided that the OT consult services "would assist with the education of teachers on sensory processing and to problem solve as [the] need arises" (Dist. Ex. 39 at p. 7). Also reflecting the results of that OT evaluation, the resultant April 2011 IEP made recommendations to address the student's touch sensitivity, light sensitivity, and tendency to get overwhelmed (id.). The April 2011 IEP also included the reference that the district would pursue a residential placement (id. at pp. 2, 8-9). The April 2011 IEP also included the recommendation first set out in the October 2010 IEP that until such time as the student was accepted into a residential facility and such placement was secured, the student would receive home instruction if he were not able to or refused to attend school (id.).

Subsequent to the February 4, 2011 CSE meeting, the district followed up with the adjacent school district regarding the student's possible attendance at that district's high school and whether that district could provide an appropriate placement for the student (Tr. pp. 148-53, 247-48; Dist. Ex. 52 at pp. 153, 155). The school psychologist and the student visited that district's high school in May 2011 (Tr. pp. 153-55, 428-29; see also Dist. Ex. 52 at pp. 155-64). Later that month, the school psychologist visited the school again, this time with the student's mother as well as with the student (Tr. pp. 157-59; 428-29; see also Dist. Ex. 52 at pp. 155-64, 167).

The district attempted to schedule a CSE meeting with the parents during August 2011 (Dist. Ex. 52 at p. 183). By facsimile transmission dated August 29, 2011, the parents advised the district that they had decided to privately place the student at an out-of-state, nonpublic school because the district had "failed to provide the student with an appropriate program for a

very long time" (Ex. 40). Later that day, the district advised the parents that it had scheduled a CSE meeting for September 2, 2011, which the parents indicated they would attend (Dist. Exs. 41; 52 at p. 186).

The CSE convened on September 2, 2011 for the student's annual review and to develop the student's IEP for the 2011-12 school year when the student would be in the tenth grade (Dist. Ex. 42 at pp. 15, 24). The resultant September 2011 IEP contained information relative to present levels of performance and needs with respect to academic achievement, functional performance, and learning performance; social development; physical development; as well as management needs (*id.* at pp. 1-4). The September 2011 CSE recommended that the student attend 10th grade at the high school in the adjacent school district that the school psychologist, the student's mother, and the student had visited earlier that year (Tr. pp. 249, 428-29; Dist. Ex. 42 at pp. 16, 20; see also Tr. pp. 153-55, 157-59, 428-29; Dist. Ex. 52 at pp. 155-64, 167).

The parents stated a number of concerns at the September 2011 CSE meeting (see Dist. Ex. 42 at pp. 2-6). After extensive discussion, the parents advised the other members of the September 2011 CSE that they would reject the recommended placement and that, among other things, they would enroll the student in the out-of-state, nonpublic school, of which they had previously given the district notice (*id.* at p. 6).

The student began attending the out-of-state, nonpublic school on September 15, 2011 (Dist. Ex. 43 at pp. 2, 9-15). The student attended the out-of-state, nonpublic school until October 14, 2011, when his parents removed him (Tr. p. 439; Dist. Ex. 43 at p. 2). The student's mother testified that the student was removed for a number of reasons (Tr. pp. 439-41). The student's mother testified that upon his return home, the student was admitted to a psychiatric center for approximately one week (Tr. pp. 251-52, 441-42).

Subsequent to the student's discharge from the psychiatric center, on October 25, 2011, the parents requested home instruction, and the district indicated that it would begin working on that, but the parents and the district instead worked out details of a draft IEP for the student to attend the district's high school as a tenth grader (Tr. pp. 263-66, 268-69; Dist. Ex. 52 at pp. 211-20, 222-26, 259, 267-89).

The CSE reconvened on November 7, 2011 to develop the student's educational program for the next 12 months (Tr. p. 266; Dist. Ex. 44 at pp. 1, 20, 24).<sup>3</sup> The resultant November 2011 IEP contained information relative to present levels of performance and needs with respect to academic achievement, functional performance, and learning performance; social development; and physical development; as well as management needs (see id. at pp. 2-6). The November 2011 CSE recommended that the student be provided with a resource room nine times per 6 day cycle, which was equivalent to twice a week, for 40 minutes per session (Tr. p. 81; Dist. Ex. 44 at pp. 1, 10, 20, 23). The November 2011 CSE also recommended individual counseling once a six day cycle for 30 minutes per session; counseling in a group of 4, once every six day cycle for 20 minutes per session; and individual adapted physical education three times a six day cycle for 40 minutes per session (Tr. p. 81; Dist. Ex. 44 at pp. 1, 10, 23). Additionally, the November 2011 CSE recommended that the resultant IEP set forth that the student receive OT twice per

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<sup>3</sup> I note that the meeting was originally scheduled for November 4, 2011, but was rescheduled when the student's mother was in an automobile accident (see Dist. Ex. 52 at pp. 219, 275, 285-89).

week, for 30 minutes per session but that such services would only be available and provided once a week, reflecting the fact that the district had a waiting list for students to receive OT because the district did not have enough occupational therapists (Dist. Ex. 44 at pp. 21-22, 23; see Dist. Ex. 44 at pp. 1, 5, 10). The November 2011 CSE also recommended that the student receive the services of a behavioral consultant once per month, for 60 minutes a session (id. at pp. 1, 16, 22, 23). Additionally, the November 2011 IEP provided for an OT consultation twice a month to assist with the education of the student's teachers on sensory processing and to problem solve as the need arises (id. at pp. 4, 16). The November 2011 IEP also included 18 specific program modifications and accommodations (see id. at pp. 10-16). These included a number which were the same or similar to those set forth in the June 23, 2010, October 2010, and September 2011 IEPs as well as additional specific items (compare Dist. Ex. 44 at pp. 10-16 with Dist. Exs. 31 at pp. 2-3; 42 at pp. 7-10; Parent Ex. S at pp. 4-5). The November 2011 IEP also included as physical development needs the program modifications that had been recommended in the March 2011 OT evaluation and which had also been included in the April 2011 and September 2011 IEPs (see id. at p. 5; see also Dist. Exs. 39 at p. 7; 42 at p. 4; 38 at pp. 3-4). The November 2011 IEP also included a set of testing accommodations, which included virtually the same accommodations as those delineated in the September 2011 IEP but with additional accommodations (compare Dist. Ex. 44 at p. 17 with Dist. Ex. 42 at pp. 11-12). As did previous IEPs, the November 2011 IEP included a set of transition activities for the purpose of facilitating the student's movement from school to post-school activities (Dist. Ex. 44 at pp. 12-13). The annual goals included in the November 2011 IEP targeted study skills needs, social/emotional/behavioral needs, and motor skills/deficits (id. at pp. 7-10). Similar to the September 2011 IEP, the November 2011 IEP also indicated that the student needed a BIP; referenced a BIP developed on November 29, 2010; indicated that the BIP was attached to the IEP; and advised that the BIP "must be followed at all times" (id. at pp. 5-6, 12).<sup>4</sup>

According to the district's attendance record, during the two weeks following the November 7, 2011 CSE meeting, the student attended school four days, arrived at school late on five days, and was absent on one day (see Dist. Ex. 51 at pp. 7, 8-9). The student did not attend school the Monday and Tuesday before Thanksgiving (id. at p. 7). In the week after Thanksgiving, the student was absent three days, arrived late and left early on one day, and arrived late one day (id. at pp. 7, 8). Attendance records mark the student "absent-medical/sick" for the six days the student was absent from November 14 through December 2, 2011 (see id. at p. 7). I note here that the parents indicated on November 30, 2011, that the student had been "quite ill for the last few days, but [was] on antibiotics and seem[ed] to be improving" (see Dist. Ex. 52 at p. 294).

On December 5, 2011, the student's mother sent an e-mail to the district stating that it did not seem like the student's IEP was working and that the student was back to not attending school (Dist. Ex. 52 at p. 293). The student did not attend school four days that week and arrived late and left early on the fifth day (see Dist. Ex. 51 at pp. 7, 8-9). On December 12, the principal sent an e-mail advising that the parents would like to meet with the principal, the student's counselor, and his resource room teacher on December 22, which was the day before the Christmas vacation (Tr. p. 279; Dist. Ex. 52 at pp. 307, 310). On the next day, the parents' advised the district that it seemed likely that the student would not be in school until that meeting

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<sup>4</sup> As was the case with the September 2011 IEP, I note that the referenced BIP is not attached to the November 2011 IEP and was not otherwise made part of the hearing record (see Dist. Ex. 44).

(Dist. Ex. 52 at p. 311). According to the district's attendance records, between December 12 and December 22, the student was out six days, came in late and left early on two days, and attended school on one day, which was December 21, 2011 (see Dist. Ex. 51 at pp. 7, 8-9). The student did not attend the district's high school after December 21, 2011 (see id. at pp. 5-9).

The parents and the district met with the principal on December 22, 2011, at which time the parents proposed and the district agreed, among other things, that they investigate whether the student could take two or three classes at a local college and receive home instruction for the balance of his high school academic program (Tr. pp. 280-81; Dist. Ex. 52 at pp 312, 315). However, because of the lack of availability of particular courses, the parents advised the principal on December 31, 2011 to provide the student with home instruction for all his subjects (Tr. p. 282; Dist. Ex. 52 at p. 312). Thereafter, the parents were advised that a request for home instruction would be considered in accordance with the district's policy on homebound instruction, which required a referral from the school physician (Tr. p. 283; see also Dist. Exs. 47; 52 at pp. 312, 315). By letter dated February 1, 2012, the school physician advised the principal that she would recommend home tutoring for the student until June, 2012, advising a reevaluation for the next school year (see Dist. Ex. 46). The student's home instruction commenced that day and continued during the balance of the 2011-12 school year (Tr. pp. 285-87; see also Dist. Ex. 51 at pp. 34-40).

With respect to the student's related services for the 2011-12 school year, starting in November 2011, the district provided the student with OT once per week for 30 minutes per session (Tr. pp. 365-66). The district also provided the student with counseling during the time that the student received home instruction (see Tr. p. 288; Dist. Ex. 52 at p. 327).

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

The parents submitted a due process complaint notice and request for a hearing to the district on or about March 8, 2012 (see Parent Ex. A). The parents submitted an amended due process complaint notice and request for a hearing on or about April 17, 2012 (see Dist. Ex. 1 at pp. 1, 5).

With respect to the 2010-11 school year, the parents contended that the aide who had been initially assigned to the student was not appropriately trained to work with him, that the district failed to identify an appropriate residential placement despite agreeing it was required, and that home instruction and occupational therapy services were inconsistently delivered (Dist. Ex. 1 at pp. 1-2).

With respect to the 2011-12 school year, the parents argue that the district improperly recommended a neighboring school district rather than a residential placement after being unable to secure a residential placement, that inappropriate home instruction was provided, after a long break in the student's instruction, by a teacher without appropriate training, and that the student was only receiving one session of occupational therapy per week despite being mandated to receive two sessions (Dist. Ex. 1 at p. 3).

In general, the parents asserted that the district failed to provide the student with an appropriate IEP for the 2010-11 and 2011-12 school years, specifically arguing that the present levels of performance, goals and transition plan were inaccurate or insufficient (Dist. Ex. 1 at p.

4). Finally, the parents asserted that the district was "requiring" things that were "not possible" (id.). In particular, the parents contended that the student was being told that he must take his Regents exams at the high school instead of being allowed to take them at home (id.).<sup>5</sup> The parents additionally contended that the district had not made arrangements for the student to begin work on his "Capstoner" project nor discussed necessary modifications so that the student could complete that project (id.). The parents also contended that the district had required the student to receive services in the morning rather than at a time he could "access" them (id.).

The parents requested findings that the student had been deprived of a free appropriate public education (FAPE) for the two school years in question, and that the district's actions significantly impeded the parents' opportunities to participate in the decision-making process regarding the provision of FAPE and caused a deprivation of educational benefits (Dist. Ex. 1 at p. 5). The relief sought by the parents included specific provisions for future IEPs, and additional services including additional OT services and additional academic instruction hours (id. at p. 6).

By letter dated May 10, 2012, the district responded to the parent's April 2012 amended due process complaint notice (Dist. Ex. 2; see also 34 CFR 300.508[e]; 8 NYCRR 200.5[i][5]). Among other things, the district denied many of the parents' allegations and made a number of affirmative statements in its defense (see Dist. Ex. 2 at pp. 1-5).

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

The impartial hearing began on June 13, 2012 and concluded on June 14, 2012, after two days of proceedings (see Tr. pp. 1, 354, 500). In a decision dated July 30, 2012, the IHO found that the student was not denied a FAPE (IHO Decision at p. 2). The IHO found that the district "made timely, appropriate, and reasonable efforts in all respects to educate [the student] and to satisfy his parents' wishes during all years at issue" (id. at p. 15).

Regarding the 2010-11 school year, the IHO held that the IEP was properly implemented (IHO Decision at p. 15). The IHO held that the student's refusal to attend school disrupted the implementation of his occupational therapy services (id. at p. 16).

Regarding the 2011-12 school year, and the parents' contention that the student's home instruction during the 2011-12 school year commenced in February 2012, which was more than five weeks after the student last attended the district's high school on December 22, 2011, the IHO found that such instruction was for medical reasons pursuant to a physician's statement in accordance with school district policy, not a result of a CSE recommendation; and as such, was not a special education service under the IDEA (IHO Decision at p. 16; see Dist. Ex. 47). With respect to the appropriateness of the home instruction provided to the student during the 2011-12 school year, the IHO found that it was "disingenuous" for the parents to complain that the student's tutor was not a certified special education teacher when the parents sought a tutor with general education certification, the tutor worked with teachers certified in mathematics and science to prepare the student's instruction in those curricular areas, the student was tutored in all core curriculum areas, and the parents were satisfied with the tutoring for the 2011-12 school

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<sup>5</sup> I note here that the parents state that at the impartial hearing, they withdrew their claim as it related to the administration of Regents exams (see Pet. ¶ 60 n.5).

year (IHO Decision at p. 16, citing Tr. p. 446). Regarding the parents' claim that the student should be provided with additional OT services because he received only one 30 minute session of OT a week and not two as recommended in the November 2011 IEP, the IHO found that it was understood at the November 2011 CSE meeting that the student would not receive OT twice a week (IHO Decision at p. 16).

With respect to the adequacy of the student's IEPs, the IHO found that the June 23, 2010 IEP was appropriate (IHO Decision at p. 15). She further found that this IEP, as well as all subsequent IEPs, "provided complete information about [the student] in all respects as well as extensive services, supports, modifications, accommodations, and strategies to support [the student's] success in school" (*id.* at p. 3). The IHO also found that the IEPs "very accurately" described the student's present levels of performance, that the parents "were actively involved in drafting all parts of [them]," and that the parents withheld information regarding the reason for the student's psychiatric hospitalization and the student's current emotional condition when the November 2011 IEP was prepared (*id.* at p. 16). With respect to the student's annual goals, the IHO found that the student's needs were in the area of social skills and, most recently, adaptability; that his November 2011 IEP annual goals "have focused on social and emotional skills and class attendance and participation;" and that the November 2011 IEP addressed the student's attendance in class and other needs (*id.* at pp. 16, 17).

Consistent with her findings rejecting the parents' claims that the district had failed to offer the student a FAPE and that the district had made "timely, appropriate, and reasonable efforts in all respects to educate" the student during all years at issue, the IHO did not grant the parents' request for additional services (*see* IHO Decision at pp. 15-17).

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

The parents appeal, requesting reversal of the IHO's decision and an order (a) that the student's pendency placement is home instruction, (b) that the failings and violations asserted in their appeal deprived the student of a FAPE, (c) that the failings and violations asserted in their appeal significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE and caused a deprivation of educational benefits, (d) awarding additional services in the amount of 463 hours of tutoring and 32 sessions of OT services, and (e) that the CSE reconvene to develop and provide the student with an appropriate IEP.

The parents also allege that the IHO failed to make a pendency determination, that this was error, and that the student's pendency placement is home instruction. With respect to the 2010-11 school year, the parents contend that, among other things, at the beginning of that school year, the student's assigned teaching assistant was not in place, that the student had difficulties with the aide who temporarily filled in for that person, and that the IHO erred in concluding that the June 23, 2010 IEP was appropriate and properly implemented at the beginning of that school year. The parents also assert that the October 2010 CSE, as well as subsequent CSEs during the 2010-11 school year, recommended that the student be placed in a residential facility but that at no point during that school year was the district able to locate, recommend, or provide a particular and appropriate residential placement for the student. With respect to this, the parents contend, among other things, that the IHO's findings relating to the

district's failure to implement a residential placement for the student during the 2010-11 school year were in relevant part inconsistent and erroneous.<sup>6</sup>

With respect to the parents' claim in their due process complaint notice that the student was denied a FAPE on the basis that the student was not provided with appropriate home instruction during the 2010-11 school, the parents allege that at the October 2010 CSE meeting, as well as at subsequent CSE meetings during the course of the 2010-11 school year, the CSE recommended that the student be provided with home instruction as a fallback placement but that the district failed to provide the student with appropriate home instruction during the 2010-11 school year. The parents assert that the district did not receive home instruction in earnest until November 29, 2010 and that further, the student did not receive any home instruction during a period between January and March 2011. The parents also allege that the student did not receive any math or science home instruction for the better part of the 2010-11 school year and that the student therefore dropped these courses. The parents assert that the IHO erred in not awarding additional services to the parents to compensate for the failure to provide for home instruction.

With respect to the 2011-12 school year, the parents assert that the IHO erred in rejecting the parents' contentions that the district failed to provide the student a FAPE. The parents assert that the CSE had not convened by August 15, 2011 and that it convened in September 2011 subsequent to their August 29, 2011 letter that they were going to place the student at an out-of-state, nonpublic school because, among other things, the district had failed to secure a residential placement for the student. With respect to the September 2011 IEP and the September 2011 CSE's recommendation that the student attend a smaller high school in a neighboring school district, the parents allege, among other things, that the plan to transition and maintain the student at the adjacent school district was vague and that other issues remained unresolved, that they disagreed with the recommended placement, and that as a consequence they privately placed the student in the out-of-state, nonpublic school.

With respect to the November 2011 IEP, which was developed subsequent to the student's return to the district from the out-of-state, nonpublic school, and which recommended that the student be placed at a district high school, the parents assert, among other things, that they agreed to attempt the recommended program set forth in that IEP because there were no other options available to them. The parents also assert that the November 2011 IEP did not adequately address the student's sensory needs and was inadequate in other ways, the IHO erred in concluding that the November 2011 IEP was appropriate, and the IHO did not address specific issues that the parents had raised with respect to that IEP.

The parents further assert that the student's home instruction, which began on February 1, 2012 subsequent to the student's placement at the district's high school under the November 2011 IEP, was delayed. The parents assert that the delay was caused by the district's request for specific medical documentation to justify the student's absence from school which had not been requested or required when home instruction had been previously provided to the student by the district. The parents allege that the district knew by December 5, 2011, at the latest, that the

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<sup>6</sup> The parents also allege that the IHO erred in determining that neither a residential placement nor an emergency placement was ever recommended by the CSE during the 2010-11 school year. While the IHO decision did include such a statement, a review of that statement in context indicates that the IHO decision was reciting the fact that the CSE did not recommend a particular or specific school; which the parents do not dispute (see IHO Decision at pp. 9-11; Pet. ¶¶ 18-24, 26, 34).

student needed to be receiving home instruction but that the district did not provide home instruction to the student until February 1, 2012.

With respect to the IHO's finding that the home instruction provided to the student during the 2011-12 school year was pursuant to a school district policy and physician's statement and was not a CSE recommendation, the parents assert that this finding was error. The parents further assert that the district wrongfully deprived the student of a FAPE because it did not engage the CSE process and did not treat the student's need for special education as a special education matter. The district contends that as a result of this, the student missed seven weeks and two days of instruction and that, based on the level of home instruction that the district provided once home instruction started in February 2012, the student was deprived of 148 hours of home instruction. With respect to the home instruction the student did receive, the parents allege that the student did not receive appropriate instruction in math and science, that the home instructor's training and certification was not in science or math and that he struggled in teaching these subjects to the student, that the student's parent supplemented the teacher's instruction and assisted in his teaching, and that the student did not receive foreign language instruction or any electives. The parents also assert that the home instructor was never provided with the student's IEP.

With respect to the November 2011 IEP, including the services provided to the student under that IEP during his period of home instruction, the parents assert that the IHO erred in finding that the district had adequately addressed the student's sensory issues. The parents also contend that the district did not effectively address the student's executive functioning disability, that the IHO failed to address this concern, and that this was error. The parents further contend that notwithstanding that the student had profound social skills deficits, the student received no appropriate formal social skills training. The parent's also assert that the IHO erred in finding that the district had adequately addressed the student's social skills. With specific regard to the student's OT services, the parents allege that the student's occupational therapist during the 2011-12 school year did not develop a sensory diet for the student. The parents further assert that the IHO failed also to address their concerns relating to the inadequacy of the transition plan in the November 2011 IEP and that this was error. The parents additionally allege that the IHO's decision is devoid of any analysis supporting the adequacy of counseling once per week to address the student's social skills. Relating to the district's "Capstoner" project, the parents assert that the IHO failed to address their concerns relative to the "Capstoner" project and that this was error. The parents further allege that, contrary to the testimony of district witnesses, the student had neither completed the personal narrative associated with the "Capstoner" project nor performed the research component for it. The parents also alleged that the district had not discussed with the parents how this project could be modified for the student or how the student could complete it.

In an answer and cross-appeal, the district requests that the petition be dismissed, that the district's cross-appeal be granted, and that the IHO's decision be otherwise upheld. The district also attaches for review additional documentary evidence in the form of an affidavit. The district cross-appeals the IHO's finding of fact that the March 2011 CSE recommended a residential placement (see IHO Decision at p. 11). The district sets forth that so much of the IHO's decision that concluded that the March 2011 CSE developed an IEP providing for the student to receive a residential placement and that the CSE failed to implement its recommendation of a residential placement during 2010-11 should be annulled.

The parents have answered the district's cross-appeal and objected to additional evidence submitted by the district with their answer. In their answer to the district's cross-appeal, the parents, among other things, deny that the IHO erred in finding that the March 2011 CSE recommended a residential placement. The parents further deny that this finding, as well as the IHO's finding that the CSE failed to implement its recommendation of a residential placement during 2010-11, should be annulled.

## 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 v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. 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; 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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at \*15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Additional Evidence**

I initially address the district's request to submit additional evidence, which the parent objects to on the basis that, among other things, much of it could have been offered at the impartial hearing and that the information is not necessary in relevant part. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 12-103; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, 10-047; Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, the additional evidence proffered by the district relates to the parents' contention that the student's pendency placement for the 2012-13 school year is home instruction and the district's objection to the reentry-plan requested by the parents in their petition as relief relative to the 2011-12 school year. In this case, I find that the additional evidence was either available at the time of the impartial hearing or is not necessary in order to render a decision in this case. Regarding pendency, I note that such evidence relates to the student's pendency placement and a "re-entry plan" with respect to the 2012-13 school year. These, however, are not issues set forth in the parent's due process complaint notice or otherwise properly an issue to be decided at the impartial hearing in accordance with applicable regulations (see 20 U.S.C. § 1415[c][2][E][i][II]; [f][3][B]; 34 C.F.R. §§ 300.508[d][3][i], [ii]; 300.511[d]; 8 NYCRR 200.5[i][7][b]; [j][1][ii]; see Application of a Student with a Disability, Appeal No. 11-073; Application of the Bd. of Educ., Appeal No. 10-067; Application of the Bd. of Educ., Appeal No. 10-020; see also Dist. Ex. 1). Further, at the time of the impartial hearing, the issue of the student's pendency placement for the 2012-13 school year was premature and was not ripe for review (see Application of the Bd. of Educ., Appeal No. 11-122). I therefore decline to accept the proffered evidence annexed to the district's answer.

#### **2. Scope of Impartial Hearing**

I will now consider the parents' allegation that the IHO's decision was devoid of any analysis supporting the adequacy of counseling once per week to meaningfully address the student's social skills. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][iii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][III]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at \* 4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at \* 23 [S.D.N.Y. Jan. 2, 2013]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at \*4-\*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*12-\*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6-\*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at \*8; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at \*3, \*6 [2d Cir. July 24, 2013). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at \*7-\*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review of the parent's April 2012 amended due process complaint notice, I find that it may not be reasonably read to raise the allegation that the frequency of counseling services provided to the student was insufficient to meaningfully address the student's social skills (see Dist. Ex. 1). Additionally, upon review, the hearing record does not indicate that the district agreed to expand the scope of the impartial hearing to include this issue (Application of the Bd. of Educ., Appeal No. 10-073). Therefore, the IHO properly did not consider this issue and I decline to review this argument of the parents on appeal.

## **B. Pendency**

I turn now to the parents' allegation that the IHO failed to make a pendency determination, that this was error, and that the student's pendency placement is home instruction. The pendency provisions of the IDEA are invoked with the filing of a parent's due process complaint notice (Application of a Student with a Disability, Appeal No. 08-050; Application of a Child with a Disability, Appeal No. 07-136; Letter to Winston, 213 IDELR 102 [OSEP 1987]; accord K.D. v. Dept. of Educ., 665 F.3d 1110, 1118 [9th Cir. 2011]; see 20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; Zvi D., 694 F.2d at 905-06; Weaver v. Millbrook Cent. Sch. Dist., 812 F.Supp.2d 514, 526 [S.D.N.Y. Sept. 6, 2011]). The

student's pendency placement was not raised in the parents' April 2012 amended due process complaint notice (see Dist. Ex. 1). The parents did not assert during the impartial hearing that the student's pendency placement was not being observed or was otherwise in dispute. The hearing record does not contain evidence that the IHO ignored a request by the parents for a pendency ruling. A student's right to a pendency placement is automatic and runs for the duration of the pending proceedings (see 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]). In this case, in the absence of a request by the parent for an interim determination of pendency from the IHO and an appeal thereof, which is not the case here, there is no IHO pendency decision to review, and moreover, the resolution of this particular appeal as further described below obviates the need for a determination with respect to the issue of the student's pendency placement. I thus find no error by the IHO and no further reason to address the parents' contention regarding the student's pendency placement.

### **C. 2010-11 and 2011-12 IEPs**

The IHO found that the IEPs at issue over the two school years were appropriate and offered the student a FAPE (Dist. Exs. 31, 37, 39, 42, 44; Parent Ex. S). I concur with the IHO's findings in this regard.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

The IHO found that the IEPs at issue provided complete information regarding the student and accurately reflected the student's present levels of performance (IHO Decision, pp. 3, 16). The IEPs accurately reflected the evaluative information that the CSE had before it, including the student's 2010 triennial evaluation. Upon review of the IEPs at issue, I concur with the IHO that the student's academic, developmental, functional and management levels, abilities and needs were thoroughly set forth on the IEPs at issue (Dist. Exs. 31 at pp. 4-7; 37 at pp. 5-7; 39 at pp. 5-8; 42 at pp. 2-4; 44 at pp. 3-6; Parent Ex. S).

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The IHO also held that the IEP goals for the student were appropriate to address his needs, noting that there were goals in the areas of social and emotional skills and class participation and attendance (IHO Decision, at p. 17). I concur with the IHO that the multiple annual goals on the IEPs in question were appropriate to address the student's areas of need, which include study skills, social, emotional and behavioral skills and motor skills (Dist. Exs. 31 at pp. 8-10; 37 at pp. 8-9; 39 at pp. 9-10; 42 at p. 6; 44 at pp. 7-10; Parent Ex. S).

In addition, the IEPs at issue also contained transition plans for the student to transition to post-school life and included activities and considerations such as instruction, related services, community experience, acquisition of daily living skills, and vocational assessment (Dist. Exs. 31 at p. 7; 37 at pp. 7-8; 39 at p. 8; 42 at p. 5; 44 at pp. 6-7; Parent Ex. S). I find that the transition planning as set forth on the student's IEPs was appropriate for the his ninth and tenth grade years and set forth relevant considerations and activities to meet the student's needs (id.).

With respect to the parent's contention that the district has not discussed accommodations for the student relative to the "Capstoner" project, a graduation requirement which involves different components during different school years, I note that the high school principal testified that the district was "very open to accommodations" for that project and that it had made accommodations relative to that for other students (Tr. p. 305; see also Tr. pp. 290, 304).

With respect to the recommended placement of the student at a high school located in an adjacent district, I note that the November 2011 CSE did not recommend the student's placement at this school when it developed the superseding November 2011 IEP for the balance of the 2011-12 school year. Moreover, while the CSE is not constrained from considering this high school as a placement for the student in the future, at this point such a placement would be mere speculation. The parents are also not seeking tuition reimbursement for the out-of-state school the student attended at the beginning of the 2011-12 school year.

The parents allege that the student was denied a FAPE which impeded their ability to participate in the decision making process. The hearing record evidences the parents' extensive involvement with the district staff on a continuous basis, including by requesting CSE meetings and advocating for changes and amendments to the student's program and accommodations (Dist. Ex. 52). With respect to the parents' allegations regarding parent participation and the development of the November 7, 2011 IEP, the hearing record shows that the parents participated in the November 7, 2011 CSE meeting and had extensive involvement in the development of that IEP (see e.g., Tr. pp. 263-74, 277, 389-93, 442-43, 470-72, 476-77; Dist. Exs. 44 at pp. 20-24; 52 at pp. 215-20, 222-26, 259, 267-68, 285-88; see also Dist. Ex. 44 at pp. 1-19). A parent's disagreement with a recommended IEP does not amount to a denial of meaningful parental participation in the development of a student's IEP. In other words, "[m]eaningful participation does not require deferral to parent choice" (Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006]). Further, the IDEA's requirement that the district provide a parent with meaningful participation in the development of an IEP does not equate to the right of a parent to dictate the provisions of a student's IEP (Doe v. East Lyme Bd. of Educ., 2012 WL 4344301, at \* 4 [D. Conn. Sept. 21, 2012]; New Fairfield Bd. of Educ., 2011 WL 1322563, at \*16 [D. Conn. Mar. 31, 2011]). I do not find that the district significantly impeded the parents' ability to participate in the decision-making process under the circumstances of this case and I concur with the IHO that the parents were "actively involved in drafting all parts of [the student's] IEPs" (IHO Decision, at p. 16).

#### **D. 2010-11 IEP Implementation**

A party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at \*3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007) [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

##### **1. Teaching Assistant**

Regarding the teaching assistant, the hearing record reflects that on September 7, 2010, the first day of the school year, BOCES did not provide the student with the 1:1 teaching assistant recommended by the June 23, 2010 IEP (Tr. pp. 221, 293, 401; Dist. Exs. 31 at p. 1; 52

at pp. 10-11, 18; see Parent Ex. S at pp. 4, 10). Therefore, on that day, as an interim measure, the district reassigned one of its classroom aides to the student (Tr. p. 221). The hearing record reflects that later that week, the student felt that the aide who had been assigned to the student on an interim basis had embarrassed him at least twice (Tr. p. 231; Dist. Ex. 52 at p. 12). Additionally, the student reported that the following Monday, the interim aide had "yelled" at the student and "ordered" him to make eye contact with a teacher (Dist. Ex. 52 at p. 18; see also Tr. pp. 222-23, 402). The district responded to these new difficulties by temporarily assigning the classroom teacher who had been assigned to the student's 8:1+1 special class to be the student's teaching assistant on a temporary basis and making arrangements to obtain and train a replacement teaching assistant for the student (Tr. pp. 224-225, 234; Dist. Ex. 52 at pp. 22, 24, 25, 39). By the second week of school, a trained teacher assistant was working with student (Tr. p. 225).

The IHO considered whether the student was denied a FAPE because the teaching assistant required by the June 23, 2010 IEP was not in place at the beginning of the 2010-11 school year (IHO Decision at p. 15). The IHO found that the substitute steps taken by the district were such as to properly implement that IEP (id. at pp. 15-16). With respect to the parents' claim that when the student's aide did start, she was not appropriately trained, the IHO found that there was no evidence of anyone engaging in a practice of reprimanding the student as alleged by the parents (id.; see also Dist. Ex. 1 at pp. 1-2).

For the reasons set forth by the IHO, I concur with the IHO that the issue with the student's aide at the inception of the 2010-11 school year, which was quickly remedied by the district by the second week of school, and was not material to the point of rising to the level of depriving the student of a FAPE.

## **2. Lack of Instruction/Residential Placement**

On September 8, 2010, the parents requested a CSE meeting and restated that request on September 23, 2011, when one was not forthcoming (Dist. Ex. 52 at p. 11; Parent Ex. O). In response to the parent's communications, the principal of the district's high school, along with the district's CSE chairperson, met with the parents on September 14, 2010 to discuss their concerns (Tr. pp. 232, 234; Dist. Ex. 52 at pp. 12, 21, 25-29, 34). The principal and CSE chairperson met with the parents again on September 27, 2010 (Tr. p. 234; Dist. Ex. 52 at p. 47). At this meeting, among other things, the parents reported that they were experiencing "great difficulty" in getting the student to come to school in the morning and that it was "nearly impossible" to get the student up in the morning (Dist. Ex. 52 at p. 47). District staff and the parents also discussed home instruction and residential placement at the meeting (id.). Additionally, the principal, the CSE chairperson, and the parents met with an educational specialist from BOCES on October 5, 2010 to discuss the student's needs (Tr. pp. 235-36, 403; Dist. Ex. 52 at pp. 39, 48, 99, 100).

On or about October 12, 2010, the parents requested for the third time that the district schedule a CSE meeting for the student and asserted that the student was "being denied FAPE" (Dist. Ex. 52 at p. 101). As a result of the parents' third request, the CSE met on October 22, 2010 (Tr. p. 402; Dist. Exs. 34 at p. 1; 52 at p. 108; Parent Ex. S at p.3). At that meeting, among other things, the CSE recommended a program of regular mainstream classes for academic subjects, also noting that a residential placement was appropriate for the student and determined to pursue an appropriate residential placement (Parent Ex. S at pp. 4, 10; Dist. Ex. 34 at p. 3).

The October 2010 CSE also determined that until such time as the student was accepted into a residential facility and such placement was secured, the student would receive home instruction if he were not able to or refused to attend school (Parent Ex. S at pp. 4, 10; Dist. Ex. 34 at p. 3; see also Tr. pp. 246-47, 403-404).

Thereafter, the student's attendance in his mainstream classes and at school suffered, and the student fell behind in his academic program (Tr. pp. 227-28, 233-34, 238, 402; Dist. Exs. 35 at pp. 2-3; 51 at p. 4; 52 at pp. 21, 35, 36, 97-98, 99). The student missed four school days in the last two weeks of September; two of which, however, were due at least in part to a sinus infection (Tr. p. 233; Dist. Exs. 51 at p. 4; 52 at p. 35, 36). From October 7 to the date of the October 22, 2010 CSE meeting, the student was absent 9 days (Dist. Ex. 51 at p. 4). The student did not return to school after the final week of October (Dist. Exs. 35 at p. 2; 36 at p. 4; 51 at p. 4).

In light of the above circumstances and the student's attendance at school, I find that subsequent to October 7, 2010, the June 23, 2010 IEP ceased being implemented and that the student effectively received no educational services under that IEP from October 7, 2010 to October 22, 2010, the date the June 23, 2010 IEP was superseded by the October 22, 2010 IEP. With respect to the October 22, 2010 IEP, in light of the fact that the student attended school at least part of every school day during the week ending Friday, October 29, 2010, I find that that the student received educational services under that IEP during that week and that therefore that IEP was implemented during this week. As the student attended school at least some part of every day during that week, there was no reason for the district to provide the student with home instruction in accordance with the October 22, 2010 IEP.

With respect to the second period, from October 29, 2010 to November 29, 2010, the hearing record indicates that the student left school in the morning on October 29 and was not in school at all through the balance of this period (Tr. p. 402; Dist. Exs. 35 at p. 2; 36 at p. 4; 51 at p. 4). The student's father advised the district on November 4, 2010 that the student "was currently refusing to attend school again" and that the parents wished the student would begin to receive home instruction ("tutoring") if he were not able to be in school by Monday, November 8, 2010 (Dist. Ex. 52 at p. 110). On November 5, the student's mother reported to the district that the student "was not going to school again," that he was not in school that day, and that at that point in time the parents could only assume that he would "need to be home tutored" (id. at p. 111).

Upon review, I also find that the IHO erred in relevant part with respect to this period. In particular, the IHO's decision does not acknowledge the October 2010 IEP's placement recommendation that until such time as the student was accepted into a residential facility and such placement was secured, the student would receive home instruction if he were not able to or refused to attend school (Parent Ex. S at pp. 4, 10; see IHO Decision at pp. 9, 16). Further, with respect to the IHO's conclusion that the parents constrained home instruction by requesting that such take place during the school day, by a tutor whose personality would "connect" with the student and that the parent rejected a possible tutor (see IHO Decision at p. 16, citing Tr. pp. 241, 242, 243; Dist. Exs. 37 at p. 13; 51 at p. 21), I note that the relevant question is whether during the October 29, 2010 to November 29, 2010 period, the district offered to provide the student with home instruction by a certified teacher and if so, whether the parent refused to allow the

student to receive such home instruction.<sup>7</sup> Upon careful review, I find that the hearing record does not show this to be the case (see Tr. pp. 241-45; Dist. Ex. 52 at pp. 114, 116, 117).<sup>8</sup> To the contrary, the hearing record indicates that during this period, neither of the two persons suggested by the district as possible tutors for the student were certified teachers (see Dist. Ex. 52 at pp. 114, 116, 117).

I find that effective November 9, 2010, the district was on notice that the student was not attending the district's high school. I further find that under the terms of the October 2010 IEP, which explicitly provided that until such time as the student was accepted into a residential facility and such placement was secured, the student would receive home instruction if he were not able to or refused to attend school, the district was required to provide the student with home instruction from November 9, 2010 through November 29, 2010. I also find that the district did not provide the student with such services and that as a consequence, during the period November 9, 2010 through November 29, 2010, the district failed to implement the October 2010 IEP.

With respect to the third period, from January 2011 to March 2011, the hearing record shows that the student continued to be out of school during this period (Dist. Exs. 35 at p. 2; 36 at p. 4; 51 at p. 4). During this period, the hearing record also shows that the CSE did not secure a residential placement for the student (see Dist. Exs. 1 at p. 2; 36 at pp. 1, 5; 37 at pp. 2, 8, 14).<sup>9</sup> The hearing record also shows that the student did not receive home instruction during the period commencing the week of January 24, 2011 through the week of February 28, 2011 (see Tr. pp. 245, 414; Dist. Exs. 36 at p. 4; 51 at pp. 24-29).

Further, and like the October 29, 2010 to November 29, 2010 period, the IHO's decision fails to acknowledge the placement recommendation in the October 2010 IEP that if the student is unable to attend regular classes or refuses to attend school, home instruction would be provided to the student until a residential placement is secured (Parent Ex. S at pp. 4, 10; see IHO Decision at pp. 9, 16). Further, and with respect to the IHO's conclusion that the parents constrained home instruction by requesting that such instruction take place during the school day, by a tutor whose personality would "connect" with the student and that the parent rejected a possible tutor (see IHO Decision at p. 16, citing Tr. pp. 241, 242, 243; Dist. Exs. 37 at p. 13; 51 at p. 21), and also like the October 29, 2010 to November 29, 2010 period, the IHO's decision did not focus on whether, during this period, the district offered to provide the student with home instruction by a certified teacher and whether the parents refused to allow the student to receive such home instruction. With respect to this question, upon careful review of the evidence in the hearing record specific to this period, I find that while the parents expressed preferences about when home instruction should be given, expressed that it was important that particular home

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<sup>7</sup> I note here that State guidance with respect to homebound instruction provides that home instruction should be provided by "[a] teacher holding certification at the appropriate level" (see "Handbook on Services to Pupils Attending Nonpublic Schools, Section II: Homebound Instruction," Questions and Answers, Question 2, NYSED, available at <http://www.p12.nysed.gov/nonpub/handbookonservices/homeboundinstruction.html>).

<sup>8</sup> I note that the exhibits and testimony relied on by the IHO are not specific to the October 29, 2010 to November 29, 2010 period (see IHO Decision at p. 16, citing Tr. pp. 241, 242, 243; Dist. Exs. 37 at p. 13; 51 at p. 21).

<sup>9</sup> While one nonpublic school accepted the student during this period, the February 4, 2011 CSE determined that this placement was not an appropriate placement for the student (Dist. Ex. 36 at p. 5).

instructors get along with the student and requested feedback from the school psychologist with respect to this, the hearing record does not show that during this period the district offered to provide the student with home instruction that the parents refused to accept (see Tr. pp. 241-45; Dist. Ex. 52 at pp. 125, 131, 135, 137, 139, 141, 142). Additionally, I note that the minutes of the February 4, 2011 CSE meeting indicate that at that time the CSE also felt that it was appropriate for the student's tutoring to be during the regular school day (Dist. Ex. 36 at p. 5). Further, the minutes of the February 2011 CSE meeting also indicate that the CSE felt that it was appropriate to take into account the personality of potential tutors (*id.*; see also Dist. Ex. 52 at p. 139). Regarding the parents' request that the school psychologist provide feedback regarding the appropriateness of possible home instructors, the hearing record indicates that the district was in agreement with, and did not object to, this (Tr. pp. 143-46; Dist. Ex. 52 at pp. 133, 135, 137, 140, 142, 149).

In view of the foregoing, and in light of the fact that 1) the student was not attending the district's high school during the period commencing the week of January 24, 2011 and extending through the week of February 28, 2011, 2) the October 22, 2010 IEP explicitly provided that until such time as the student was accepted into a residential facility and such placement was secured, the student would receive home instruction if he were not able to or refused to attend school, and 3) that the February 2011 CSE recommended the continuation of the student's program, including the need to try and find a tutor for the student, I find that the district was required to provide the student with home instruction with respect to this period. I further find that the district did not provide the student with such services and that as a consequence it failed to implement the educational program recommended by the October 2010 IEP and which was continued at the February 4, 2011 CSE meeting.<sup>10</sup>

As discussed above, the failure in the implementation of the 2010-11 IEPs resulted in the student's losing approximately two weeks of educational services during the period October 7, 2010 to October 22, 2010; three weeks of home instruction during the period November 9, 2010 through November 29, 2010; six weeks of home instruction during the period commencing the week of January 24, 2011 and extending through the week of February 28, 2011. Taken as a whole, during the 2010-11 school year, the district's failure to implement its IEPs resulted in the loss to the student of nine weeks of home instruction and two weeks of regular instruction. I further find that this loss of instructional time was a substantial and material failure in the implementation of the student's educational programming during the 2010-11 school year and therefore a denial of a FAPE.

Regarding the failure of the district to secure a residential placement, I do not find that the district's failure to provide a residential placement constituted a denial of FAPE based upon the circumstances, including the efforts of the district and the IEPs in question, which set forth the student's recommended program as mainstream classes in academic subjects.

### **3. Lack of Math and Science Instruction**

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<sup>10</sup> I note that both the March 25 and April 8, 2011 IEPs also provided that until such time as the student was accepted into a residential facility and such placement was secured, the student would receive home instruction if he were not able to or refused to attend school (see Dist. Exs. 37 at pp. 2, 8, 14; 39 at pp. 2, 9, 12).

The hearing record shows that during the 2010-11 school year, the student did not receive any significant amount of home instruction in science and math and that he dropped those two courses (Tr. pp. 411-13, 415; compare Dist. Ex. 49 at p. 13 with Dist. Ex. 49 at p. 14; see also Tr. p-p. 298-99).<sup>11</sup> However, the evidence does not support ascribing these particular losses solely to the student's lack of instruction during the October 7 – October 22, 2010 and November 9 – November 22, 2010 periods and from the period commencing the week of January 24, 2011 through the week of February 28, 2011. It appears, as noted by the IHO, that the plan for the student was for him to forego science labs and be taught geometry in the 8:1:1 class (IHO Decision, at p. 9; Dist. Ex. 34 at pp. 2-3). The student received no home instruction in math or science and the student's mother noted that he had passed 9<sup>th</sup> grade science in his 8<sup>th</sup> grade year and was already advanced in math and tested out of algebra in the summer following 9<sup>th</sup> grade (Tr. pp. 411-15). In any event, the failure of the student to obtain math and science instruction during home instruction or otherwise to the extent that he was not able to receive credit for such classes based on work during the student's 9<sup>th</sup> grade year evidences that the student was denied a FAPE based upon this lack of math and science instruction and the circumstances of this case.

## **E. 2011-12 IEP Implementation**

### **1. Lack of Instruction/Residential Placement**

First I note, with respect to the parents' claims regarding lack of instruction and the period from November 10, 2011, three days after the CSE's approval of the November 7, 2011 IEP, to December 5, 2011, the date the parents assert was the latest that the district should have known that the student needed home instruction, the hearing record shows that during this period, the student attended school for one full day (November 11), missed six days of school, and arrived late/"excused" to school on the remaining seven days (Dist. Ex. 51 at pp. 7-9). The hearing record also shows that on December 5, 2011, the last day of the above period, the student's mother sent an e-mail to the principal that "[i]t doesn't seem like [the student's] IEP is working and [that the student] is back to not attending school" (Dist. Ex. 52 at p. 293). The hearing record also indicates that on this day, the student's mother stopped into the district's high school and restated her belief that the November 2011 IEP was "not working" as well as that there needed to be "another CSE meeting to change [the student's] IEP," (id. at p. 302). The student's mother also stated to the district when she stopped in at that time that she thought the student needed to "go back to home instruction" (id.).

The November 2011 IEP recognized that the student might be tardy due to his sleep disorder as it included an accommodation that the student would not be penalized for being tardy (Dist. Ex. 44 at p. 15). Further, regarding the six full days that the student missed school, the hearing record indicates that the reason given to the school for these absences was illness (see Dist. Exs. 51 at p. 7, 52 at p. 294). Additionally, the hearing record does not indicate that prior to December 5, which was the last day of this time period, the student was having difficulties under the November 2011 IEP such that the student was not attending school.<sup>12</sup> Therefore, based

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<sup>11</sup> The hearing record indicates that at the end of the 2010-11 school year, the student had received credit for English 1, Latin 1, and Global Studies 1 and had received final average grades in those classes of 96, 92, and 92, respectively (Dist. Ex. 49 at p. 14).

<sup>12</sup> I note that in an e-mail dated November 10, 2011, the parents reported that the student "was upset and overtired" the night before (Dist. Ex. 52 at 299). A question relating to transportation and an assignment was raised in an e-

on the hearing record, I find that the district's IEP continued to be implemented during this period and that the student's absences from school during this period did not involve a denial of a FAPE.

Regarding the period from December 5, 2011 to February 1, 2012, according to the district's attendance record, in the two and one-half weeks between December 5 and the beginning of the Christmas vacation, the student was in school for only one complete day (December 20) and for an hour or less on three other days (Dist Ex. 51 at pp. 7-9; see also Dist. Ex. 52 at pp. 292, 298, 302-303, 305, 308, 311). Further, as indicated above, on December 5, 2011, the student's mother sent an e-mail to the district stating that it did not seem like the student's IEP was working and that the student was back to not attending school (Dist. Ex. 52 at p. 293). At that time, the student's mother also stated to the district that she thought the student needed to "go back to home instruction" (id.). Additionally, on December 6, 7, 8, 9, and 12, the parents sent the district daily e-mail notifications that the student would not be attending school (see id. at pp. 302-303, 304, 305, 308). Further, on December 12, 2011, the parents also advised the district that they believed that the November 2011 IEP was not able to meet the student's needs (id. at p. 309). On December 12, the parents contacted the school and requested a meeting on December 22, 2011 with the principal, the student's counselor, and his resource room teacher in lieu of a full CSE meeting (Tr. p. 279; Dist. Ex. 52 at pp. 307, 310). The very next day, on December 13, the parents advised the district that it seemed "likely" that the student would not be in school until the parents met with the school to "figure out something that [would] make school less stressful" (Dist. Ex. 52 at p. 311). Further, according to the student's mother, which the district did not dispute, the parents and the school representatives agreed at the December 22, 2011 informal meeting that the student's current placement was not working (id. at p. 312). At this informal meeting, the parents and the district agreed that the parents would investigate the possibility of the student taking one or more courses at a local college, with the balance of the student's educational program being provided through home instruction by the district (Tr. pp. 280-82; Dist. Ex. 52 at pp. 312, 315). By December 31, 2011, the parents had decided not to proceed with the college courses and requested that the district provide the student with home instruction for all of his classes (Tr. pp. 281-82; Dist. Ex. 52 at pp. 312). On January 2 and 3, 2012, at the direction of the Superintendent, and after also speaking with the district's CSE chairperson, the principal advised the parents that their request for home instruction would be reviewed pursuant to the district's policy on homebound instruction, which required a referral from the school physician (Tr. p. 283; Dist. Ex. 52 at pp. 312, 315; see also Dist. Ex. 47). Homebound instruction began on February 1, 2012 and continued for the balance of the school year, subsequent to the school physician's review of information provided to her by the parent with respect to the student (Tr. pp. 285-87; Dist. Ex. 46; see also Dist. Ex. 51 at pp. 34-40).

With the above in mind, I find that the district was on notice no later than Monday, December 12, 2011, that the student was not attending school, that at that time it was unclear when the student would be returning to school, and therefore that as of that date the November 7,

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mail from the parents dated November 16, 2011 (id. at pp. 290-91). In an e-mail dated November 30, 2011, in addition to advising the district that the student had been "quite ill for the last few days," the parents raised a question relating to a test and reported that the student was "rather stressed out about the work [the student had] missed due to his absence" (id. at p. 294). The district responded reasonably to the parents' correspondence (see id. at pp. 291, 295, 299). I note also that this correspondence was not such as to suggest a material failure in the implementation of the November 2011 IEP (see A.P., 2010 WL 1049297, at \*2).

2011 IEP was no longer being implemented. Further, as a consequence of the student's continuing absence from school during this period, I find that the student was without educational services of any kind from December 12, 2011 through the last day of January, 2012, a period of approximately six weeks, exclusive of Christmas vacation. I further find that this was a substantial period of time and a material failure in the implementation of the student's November 2011 IEP and therefore a denial of FAPE (see A.P., 2010 WL 1049297, at \*2).<sup>13, 14</sup>

Regarding the failure of the district to secure a residential placement, I do not find that the district's failure to provide a residential placement constituted a denial of FAPE based upon the circumstances, including the efforts of the district and the IEPs in question, which set forth the student's recommended program as mainstream classes in academic subjects.

## 2. Inadequate Instruction

Additionally, with respect to the 2011-12 school year, the hearing record establishes that the student's course load did not include, as it otherwise would have, any electives or a foreign language (Tr. pp. 310, 450-51).<sup>15, 16</sup> The hearing record does not allow me to ascribe this diminution in the student's educational program during this school year as solely the result of the loss of instruction during the period December 12, 2011 through the end of January 2012. As noted by the IHO, the student was tutored in all core curriculum areas and the tutor was certified

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<sup>13</sup> Under the facts and circumstances here, a CSE meeting should have been scheduled to, among other things, discuss why the student was not attending school, to determine whether additional evaluations were necessary, and to discuss the student's placement (see 34 CFR 300.303[a][1], [2], 300.324[b][1], [2]; 8 NYCRR 200.4[b][3], [4], 200.4[e][4], 200.4[f][1], [2]; Letter to Borucki, 16 IDELR 884 [OSEP 1990]). The fact that the parents preferred to have a meeting limited to the principal and the student's counselor and resource room teacher was insufficient to excuse the district from its independent responsibility to convene a CSE meeting under these circumstances (id.).

<sup>14</sup> With respect to the district's decision to address the student's educational placement in accordance with its policy on homebound instruction, I note that the provision of such services are for students "unable to attend school because of physical, mental or emotional illness or injury" (see "Handbook on Services to Pupils Attending Nonpublic Schools, Section II: Homebound Instruction," NYSED, available at <http://www.p12.nysed.gov/nonpub/handbookonservices/homeboundinstruction.html>). Further, the purpose of such instruction is to provide temporary instruction for students suffering a short term illness or injury (Appeal of a Student Suspected of Having a Disability, 40 Educ. Dep't Rep. 75, Decision No. 14,425; Appeal of Douglas and Barbara K., 34 Ed. Dep't Rep. 214, Decision No. 13,286; Appeal of Anthony M. and D.M., 30 Ed. Dep't Rep. 269, 271, Decision No. 12,461). With respect to this, I note that the hearing record does not support a conclusion that the student's lack of attendance at school subsequent to the November 2011 CSE meeting was the result of a short term illness or injury (see Tr. pp. 62, 83, 94-95, 104, 106, 199, 227-28, 238-40, 278-79, 402, 443-44; Dist. Exs. 28 at p. 5; 30 at pp. 17, 19; 38 at pp. 2, 3; 35 at p. 2; 51 at pp. 4, 7-9). I also note here that homebound instruction is not a substitute placement for a student with a disability (see Appeal of Carol M., 32 Ed. Dep't Rep. 146, Decision No. 12,786; Appeal of Anthony M. and D.M., 30 Ed. Dep't Rep. 269, 271-72, Decision No. 12,461).

<sup>15</sup> That the parents do not assert that the student failed any courses during the 2011-12 school year and the hearing record reflects that at the time of the impartial hearing the student was passing English 2, Geometry, Adaptive PE, Living Environment, and Global Studies 2, with grades of 96, 93, 90, 95, and 96, respectively (see Dist. Ex. 50).

<sup>16</sup> I note that the student's academic program at the district's high school for the 2011-12 school year included Latin II (Dist. Ex. 44 at p. 21).

in history (IHO Decision, at pp. 14, 16). While it was the mother's opinion that the tutor struggled with math and science instruction, there was no evidence that the home instruction was not appropriate in core curriculum areas (Tr. pp. 285-87, 446-50). I do not find evidence that the student was provided with inadequate instruction during the 2011-12 school year (Dist. Ex. 50; Tr. pp. 285-87, 446-50).

### **3. Occupational Therapy Services**

The November 2011 CSE and the resultant IEP recommended that the student receive individual OT twice per week, for 30 minutes per session (Dist. Ex. 44 at pp. 1, 23). However, because of a shortage of occupational therapists, the district was only able to provide the student with one, 30 minute session of OT per week (Tr. pp. 272-73, 287-88, 305, 341-42; Dist. Ex. 44 at p. 21; see also Tr. pp. 377, 454).<sup>17</sup> As one of its goals, the November 2011 IEP recommended that the student "learn strategies and techniques that will help calm him and reorganize his system for learning activities" (Dist. Ex. 44 at p. 8). The November 2011 IEP also contained detailed and specific information relating to the student's OT needs (see id. at pp. 4-5).

The IHO denied the parents' request for additional services in the form of OT on the basis that (1) it was understood at the November 2011 CSE meeting that the student would not receive OT twice a week, (2) the November 2011 IEP reflected OT two times per week "solely" at the parents' and the student's insistence, "without any consideration of its need," (3) the purpose of the student's OT was to allow the student to access his education in a school building, but the student was receiving home tutoring pursuant to a doctor's note for medical reasons (IHO Decision at p. 16). Upon review, and as discussed below, I find that the IHO's reasons for denying the parents' request for OT as additional services are insufficient to support a denial of that request. First, the fact that the November 2011 CSE understood that the student would be receiving only one session of OT per week and not two is of no relevance in light of the fact that the CSE determined that the student required and needed two sessions of OT per week (see Dist. Ex. 44 at p. 5). Second, while the parents and the student did request and urge the November 2011 CSE to provide the student with two sessions of OT per week, the hearing record reflects that the November 2011 CSE recommended that level of OT services on the basis of an October 2011 private evaluation and its determination that the student needed and required that level of service (Tr. at pp. 272-73; Dist. Ex. 44 at p. 2; see also Dist. Ex. 43 at pp. 3-4). Third, with respect to whether it was appropriate for the student to continue to receive OT as recommended by the November 2011 CSE when the student began to receive home instruction, I note that the February 1, 2012 letter of the district's physician agreeing to home instruction specifically stated that the student "should continue with occupational therapy ... at school" (Dist. Ex. 46). I also note that the CSE's recommendation for individual OT twice per week remained in place over the course of the 2011-12 school year and the CSE did not reconsider that question.

Upon review of the hearing record and under the circumstances set out above, I find that the failure of the district to provide the student with the amount of OT the November 2011 CSE recommended and stated that the student needed and required denied the student a FAPE.

### **F. Cross-Appeal**

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<sup>17</sup> At all times during the 2011-12 school year, the student received OT at a district school building (Tr. p. 365; Parent Ex. K).

The district's cross appeal asserts that the IHO erred by finding that a residential program was recommended by the district. I note that the IHO noted in her decision that, in 2011-12, the CSE, consistent with prior years, recommended mainstream classes for the student (IHO Decision, p. 13). The IHO therefore appeared to concur with the district that a residential program was not recommended as the special education program for the student in the school years in question when the full decision is read together. In any event, the district was not aggrieved by the IHO's decision and therefore the cross-appeal is dismissed as only an aggrieved party may appeal to the SRO (Educ. Law § 4404[2]).

### **G. Remedy**

I now turn to the parents' request for additional services in the form of 463 hours of tutoring and 32 sessions of OT. The parents request additional services in the form of 463 hours of tutoring to compensate for five specific periods of time during the 2010-11 and 2011-12 school years when the parents assert the student received less educational services than he should have. With respect to the 2010-11 school year, the parents request additional services for three periods: (1) the period between September 2010, when school started, and October 29, 2010, the date the district's November 29, 2010 FBA stated the student had stopped attending school altogether, (2) the period from October 29, 2010, after the October 22, 2010 CSE meeting, to November 29, 2010, the date the parents' allege that the student's home attendance began in earnest, and (3) the period between January 2011 and March 2011, during which the student did not receive any home instruction. With respect to the 2011-12 school year, the parents request additional services for two periods: (1) the period from November 10, 2011, three days after the CSE's approval of the November 7, 2011 IEP, to December 5, 2011, the date the parents assert was the latest that the district should have known that the student needed home instruction, and (2) the period from December 5, 2011 to February 1, 2012, the date the student's home instruction began for the 2011-12 school year.

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]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];<sup>18</sup> 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008];

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<sup>18</sup> If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student shall be entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever shall first occur (Educ. Law § 4402[5][a]).

Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at \*23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd. of Educ., 2008 LEXIS 113149, at \*38-40 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

When considering the 2010-11 and 2011-12 school years as a whole, as described above, the hearing record establishes that implementation failures relating to the student's IEPs during these two school years resulted in a loss to the student of 8 weeks of regular instruction and nine weeks of home instruction. In addition to the amount of instructional time lost during both school years represented in this appeal, the student also was lacking appropriate math and science instruction during the 2010-11 school year. I find that the hearing record supports a finding that an appropriate grant of additional services is to award the student additional services comprised of tutoring and OT services. With respect to additional tutoring services, I find that the student is appropriately compensated with additional tutoring services, calculated by considering that the district was required to provide 10 hours of tutoring per week for home instruction (8 NYCRR 175.21), and multiplying that number by the 17 weeks of lost instruction, for 170 hours of tutoring, with an additional 170 hours to compensate the student for lost

instruction with respect to math and science classes not provided over 2010-11 school year as detailed above. With respect to additional OT services, I agree with the parents that the student should be provided with 32 sessions of individual OT, each session lasting for 30 minutes, as additional services.<sup>19</sup>

## **VII. Conclusion**

In summary, for the reasons set forth above, in light of the implementation failures of the 2010-11 and 2011-12 IEPs that denied the student a FAPE, I find that the IHO erred by failing to grant additional services in response to the parents' request for additional tutoring and OT services. The student is entitled to compensatory additional educational services as set forth herein.

I have considered the parties' remaining contentions and find that they are without merit and I need not address them in light of the determinations made herein.

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

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated July 30, 2012, is modified by reversing the determination that the district provided the student with a FAPE during the 2010-11 and 2011-12 school years, for the reasons set forth above; and

**IT IS FURTHER ORDERED** that the impartial hearing officer's decision, dated July 30, 2012, is modified by reversing those portions which did not grant the parents' request for additional services, as set forth herein; and

**IT IS FURTHER ORDERED** that the district shall provide additional services to the student for 340 hours of tutoring; alternatively, if both parties agree, the parents may provide the additional tutoring services by an appropriately certified private provider and the district shall, upon satisfactory proof of payment thereof, reimburse the parents for their expenditures for such services; and

**IT IS FURTHER ORDERED** that the district shall make arrangements for the provision of additional services to the student in an amount equal to 32 sessions of individual OT, each session lasting for 30 minutes; alternatively, if both parties agree, the parents may provide the additional OT services by an appropriately certified private provider and the district shall, upon satisfactory proof of payment thereof, reimburse the parents for their expenditures for such services.

**Dated: Albany, New York  
June 10, 2014**

  
**JUSTYN P. BATES  
STATE REVIEW OFFICER**

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<sup>19</sup> The parents' request for 32 sessions of OT is based on the number of weeks in the 2011-12 school year, commencing from the date of the student's reenrollment in the district in November 2011 (Pet. ¶ 57; Parents' Br. at p. 11). I note that the district does not challenge the basis of this calculation.