



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-047

**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 [REDACTED]**

### **Appearances:**

Friedman & Moses, LLP, attorneys for petitioners, Alicia Abelli, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, 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 (IHO) which determined that the educational programs respondent's (the district's) Committee on Special Education (CSE) recommended for their son for the 2008-09, 2009-10, and 2010-11 school years were appropriate. The district cross-appeals from that portion of the IHO's decision which determined that the educational program recommended for the student for the 2011-12 school year was not appropriate. The appeal must be sustained in part. The cross-appeal must be dismissed.

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

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the

opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

The hearing record indicates that the student has received a diagnosis of autism and has exhibited significant developmental delays across multiple domains, including cognition, academics, speech-language, fine and gross motor, social/emotional/behavioral, and adaptive functioning (Parent Exs. I-M). By letter dated August 5, 2008, the parents notified the district that they had newly immigrated from another country, spoke "very little English," their son had

received a diagnosis of autism and was nonverbal, and requested "immediate evaluations to determine appropriate" special education services for the student (Parent Ex. C). By letter dated August 11, 2008, the parents requested a "CSE evaluation" of their son and indicated that their home language was other than English (Parent Ex. B).<sup>1</sup>

On November 19, 2008, the CSE convened to determine the student's initial eligibility for special education (see Parent Ex. O at p. 1). Finding the student eligible for special education and related services as a student with autism, the November 2008 CSE recommended a 12-month school year program in a 6:1+1 special class in a specialized school with the related services of speech-language therapy and occupational therapy (OT) (see id. at pp. 1, 16, 18).<sup>2</sup> On December 15, 2008, the November 2008 IEP was amended, by the addition of physical therapy (PT) services and annual goals (Parent Ex. P at pp. 2, 15-16, 18; see Tr. p. 120).<sup>3</sup>

On April 30, 2009, the student's then-current special education teacher recommended that the student receive the services of a 1:1 crisis management paraprofessional (Parent Ex. Q; see Tr. pp. 120-25). On October 29, 2009, the CSE reconvened and recommended the addition of a 1:1 crisis management paraprofessional (Parent Ex. R at pp. 1-2, 5, 18; see Tr. pp. 267-68).

On November 10, 2009, the CSE convened to conduct the student's annual review and recommended a program with services similar to those recommended by the October 2009 CSE (see Parent Ex. S at pp. 1, 2, 17). On November 9, 2010, the CSE convened to conduct the student's annual review and recommended a program with services similar to those recommended by the November 2009 CSE (see Parent Ex. T at pp. 1, 2, 15). On November 04, 2011, the CSE convened to conduct the student's annual review and recommended a program with services similar to those recommended by the November 2010 CSE (see Dist. Ex. 1 at pp. 1, 18-20, 22-23).

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

By amended due process complaint notice dated June 8, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2008-09, 2009-10, 2010-11 and 2011-12 school years (see Parent Ex. JJ at pp. 1-18).<sup>4</sup> Relevant to this

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<sup>1</sup> In a third, undated letter, the parents requested an evaluation and placement for the student "as soon as possible" (see Parent Ex. D; Tr. pp. 641-42, 685-86).

<sup>2</sup> The student's eligibility for special education and related services as a student with autism during all times relevant to this appeal is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>3</sup> The December 2008 IEP superseded the November 2008 IEP and became the operative IEP for purposes of the impartial hearing and subsequent State-Level Review (see *McCallion v. Mamaroneck Union Free Sch. Dist.*, 2013 WL 237846, at \*8 [S.D.N.Y. Jan. 22, 2013]). Consequently, this decision refers to the December 2008 IEP as the IEP at issue for the 2008-09 school year.

<sup>4</sup> The parents filed their original due process complaint notice on February 8, 2012, alleging that the district failed to offer the student a FAPE for the 2008-09, 2009-10, and 2010-11 school years (see Parent Ex. A at pp. 1-14). On March 6, 2012, the CSE convened but did not recommend any changes to the student's IEP (compare Dist. Ex. 6 at pp. 1-12, with Dist. Ex. 1 at pp. 1-24).

appeal, the parents alleged that the district failed to timely and appropriately evaluate the student upon his entry into the district in the 2008-09 school year (see id. at pp. 2-5, 12). The parents also alleged that the district failed to reevaluate the student prior to the November 2011 CSE meeting (id. at p. 8). The parents contended that for all four school years at issue the district and CSE: did not provide interpreters at CSE meetings; did not provide translated copies of evaluations, reports, and waivers; predetermined the recommendations; and failed to provide the parents with notice of their parental rights and prior written notices (id. at pp. 5-8, 11-13). The parents further alleged that for all four school years the IEPs failed to adequately describe the student; did not include appropriate annual goals; failed to address the student's interfering behaviors; did not include appropriate and sufficient related services; and failed to include parent counseling and training (id. at pp. 5-12). In addition, the parents alleged that the student did not make "meaningful progress in his program" and was not provided with the related services and 1:1 paraprofessional services mandated by his IEPs (id. at pp. 6-10, 14).

As relief, the parents requested compensatory education and additional services including 1:1 instruction using an applied behavior analysis (ABA) methodology, OT, speech-language therapy, PT, assistive technology, toilet training, parent counseling and training, and therapeutic recreation or leisure services (see Parent Ex. JJ at p. 16). The parents also requested that the district fund bilingual independent educational evaluations (IEEs) in the areas of speech-language, OT, PT, assistive technology, neuropsychological, psychoeducational, hearing, and behavior (id.). The parents further requested that the CSE be directed to reconvene and develop an IEP with specified services (id. at p. 17). Finally, the parents requested the district be directed to provide an interpreter at all district meetings regarding the student's educational services and needs; and translation into their native language of "all notices, meeting invitations, evaluations, safeguards, parent guides, IEPs, progress notes, report cards, and other documents concerning the [student's] educational services going forward" (id. at p. 18).<sup>5</sup>

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

After a prehearing conference held on March 15, 2012, the parties proceeded to an impartial hearing on April 13, 2012, which concluded on December 18, 2012 after six days of proceedings (see Tr. pp. 1-816). By interim order dated April 20, 2012, the IHO directed the district to fund independent OT, PT, bilingual speech-language, and behavioral evaluations, the district to conduct a bilingual social history, the district to provide translations of the reports of the PT, OT, and speech-language evaluations into the parents' native language, and the CSE to reconvene to consider the evaluations within two weeks of their completion and translation (Interim IHO Decision at pp. 2-3). On June 25, 2012, the IHO issued a second interim order, directing the district to immediately begin funding 10 hours per week of applied behavior analysis (ABA) services (see Second Interim IHO Decision at pp. 2-3). By third interim order dated October 26, 2012, the IHO ordered the district to immediately begin funding 15 hours per

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<sup>5</sup> To the extent the parent raised and continues to assert claims pursuant to section 504 of the Rehabilitation Act of 1973 (section 504), the New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and an SRO does not review section 504 claims (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012]; see also Educ. Law § 4404[2]).

week of ABA services, including four hours per month of supervision of the ABA providers and four hours per month of parent counseling and training, and for the district to pay for a translator to be present for the parent counseling and training sessions as necessary (Third Interim IHO Decision at pp. 3-4). By decision dated February 11, 2013, the IHO concluded that the district failed to offer the student a FAPE for the 2011-12 school year (see IHO Decision at pp. 13-18). Specifically, the IHO found that the parents were not entitled to compensatory educational services for the 2008-09, 2009-10 and 2010-11 school years (id. at pp. 13-16, 18). With regard to the 2008-09 school year, the IHO found that the student was properly and timely evaluated and the education services recommended for the student were appropriate (id. at p. 14). The IHO also found that the district offered the student a FAPE for the 2009-10 and 2010-11 school years (see id. at pp. 15-16).

With respect to the 2011-12 school year, the IHO found that by the time of the November 2011 CSE meeting, the CSE was "on notice" that the student required additional home-based services on the basis of evaluative information that indicated the student's slow rate of progress, unmet annual goals, and evidence of the student's continuing delays in attending skills, controlling his interfering behaviors, and mastering ADL skills (IHO Decision at p. 17). The IHO found that the recommendation for a 6:1+1 special class was not sufficient without additional 1:1 instruction outside of the school day (id.). The IHO determined that the student should receive 20 hours per week of home-based ABA services for as long as he was not receiving full-time ABA instruction in school (id.).

With regard to the parents' requested relief, the IHO found that the hearing record was insufficient to order the district to change the student's placement to a class with full-time ABA instruction (IHO Decision at p. 17). Regarding the parents' request for an assistive technology IEE, the IHO found that because an assistive technology evaluation was performed in April 2012, ordering another assistive technology evaluation would be premature prior to the end of the 2012-13 school year (id.). With respect to the parents' request for an order directing the district to provide translation of documents and interpretation services at meetings, the IHO found the issue was moot because the district had been providing such services since the beginning of the 2012-13 school year (id. at p. 18). For relief, the IHO ordered the district to begin funding 20 hours per week of ABA services, including four hours per month of supervision and four hours per month of parent counseling and training, along with the services of a translator for the parent counseling and training sessions (id.).

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

The parents appeal, asserting that the IHO erred in finding no denial of FAPE for the 2008-09, 2009-10, and 2010-11 school years and not awarding compensatory services for those school years. The parents further assert that the IHO erred in conditioning the award of ABA services on the student not receiving full-time instruction using an ABA methodology in school. Furthermore, the parents contend that the IHO erred in failing to order a change in the student's placement to a classroom with full-time ABA instruction, denying the parent's request for an assistive technology IEE, and finding the issue of translation and interpretation was moot. For relief, the parents request 4600 hours of compensatory ABA instruction and 644 hours of compensatory speech-language therapy.

In an answer, the district responds to the parent's allegations and argues to uphold the IHO's findings that the district offered the student a FAPE for the 2008-09, 2009-10, and 2010-11 school years. The district also interposes a cross-appeal, asserting that the IHO erred in failing to dismiss the parents' claims with respect to the 2008-09 and 2009-10 school years as time-barred, in ordering the district to fund the student's home-based services during the pendency of the proceeding, and in finding that the district failed to offer the student a FAPE for the 2011-12 school year and awarding home-based services.

In an answer to the district's cross-appeal, the parents respond to the district's allegations and argue to uphold the IHO's interim orders awarding home-based services during the impartial hearing and the IHO's finding that the district failed to offer the student a FAPE for the 2011-12 school year. Additionally, the parents argue that the district waived its ability to raise a statute of limitations defense by failing to raise it on the record during the impartial hearing or in a closing statement. The parents also argue that the district should be "estopped" from arguing that the student does not require ABA services, based on the district's placement of the student in an "ABA classroom."

In a reply, the district argues that it is not precluded from arguing on appeal that the parents' claims with respect to the 2008-09 and 2009-10 school years are time-barred and it is not estopped from arguing that the student does not require 1:1 home-based ABA services as part of his educational program.

## **V. Events Post-Dating the Request for State-Level Review**

Subsequent to the parents filing their answer to the district's cross-appeal, but prior to the district filing its reply, the parents initiated an action in the United States District Court for the Southern District of New York (M.G. v. New York City Dep't of Educ., No. 13 Civ. 04639 [S.D.N.Y.]). By decision dated August 1, 2013, the Southern District found that, because the parents had not yet exhausted their administrative remedies, it lacked jurisdiction to consider their request for additional services (M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 249-50 [S.D.N.Y. 2013]). However, the Court found that because the district began providing the student with 1:1 ABA services during the pendency of the impartial hearing pursuant to the interim orders issued by the IHO, those services became part of the student's current educational placement and the district was obligated to continue providing them (id. at 247-49).<sup>6</sup>

After the district filed a motion to dismiss the parents' complaint in M.G., the Court held that exhaustion of administrative remedies was excused based on the lengthy administrative delay with regard to the parents' appeal, finding that the administrative process had been

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<sup>6</sup> The Court noted "the potentially perverse incentives caused by ordering the ABA services under the stay-put provision," as the district had, by complying with the IHO's interim orders, taken on an obligation to the student pursuant to pendency it would not otherwise have owed; however, the Court held that "[t]he potential for increased reluctance by state and local educational agencies to provide desired services during pendency is not enough to overcome IDEA's clear intent to avoid undue disruption in [the student's] educational environment" (M.G., 982 F. Supp. 2d at 248-49).

rendered "futile or inadequate" (M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 300, 303, 305-06 [S.D.N.Y. 2014]). The Office of State Review was not notified of this decision by either party and neither party withdrew their appeal. After learning of the decisions issued by the District Court, I took judicial notice of the records and decisions in those proceedings and, by letter dated February 18, 2015, I contacted the parties and requested "information from the parties of their intentions with respect to the above-mentioned appeal in light of the decision of the United States District Court for the Southern District of New York (15 F. Supp. 3d 296, 13 Civ. 04639) finding that the requirement that administrative remedies be exhausted was excused." Specifically, the parties were asked to confer and respond with regard to whether they still desired that an SRO render an administrative decision on the merits of the appeal.

By letter from the district dated February 26, 2015, the parties indicated that they had engaged in preliminary settlement negotiations, and requested that the matter be held in abeyance until March 27, 2015, to permit further discussions. By letter dated March 27, 2015, the district indicated that the parties had been unable as of yet to reach a settlement and represented that the district held the position that an SRO should issue a decision on the merits, while the parents held the position that a decision on the merits should not be issued in light of the Court's decision. Although the District Court found that the parents' obligation to exhaust their administrative remedies was excused, the Court did not address whether an SRO continued to have jurisdiction over the matter or speak to an SRO's obligation to issue an independent decision upon review of the hearing record pursuant to the IDEA and State and federal regulations, which is independent of the obligation to issue a timely decision (20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). Finally, independent research by the undersigned has uncovered no basis on which to consider my jurisdiction over this appeal divested by the Court's order.<sup>7</sup>

## **VI. Applicable Standards**

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

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<sup>7</sup> Courts have not held that an SRO's failure to timely issue a decision affects the SRO's jurisdiction to render a decision (J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at \*14 n.12 [S.D.N.Y. Mar. 31, 2015]; J.W. v. New York City Dep't of Educ., 2015 WL 1399842, at \*6 n.3 [S.D.N.Y. Mar. 27, 2015]; E.E. v. New York City Dep't of Educ., 2014 WL 4332092, at \*6 [S.D.N.Y. Aug. 21, 2014]; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at \*7 n.3 [S.D.N.Y. July 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at \*13 [S.D.N.Y. Mar. 31, 2014]). However, having the proceeding pending simultaneously in two forums at the same time leaves the matter in an awkward posture. One course I considered was to abstain from making a decision on the merits and dismiss the matter in light of the District Court's decision that exhaustion was excused (see generally, Fogel v. Comm'r of Educ., 54 N.Y.2d 1004 [1981]), however, some authorities suggest that where there is jurisdiction or even concurrent jurisdiction, there may still be value in issuing a final administrative decision and, consequently, I have decided to proceed to the merits of the appeal (Brock v. Pierce Cnty., 476 U.S. 253, 259-60 & n.7, 266 [1986]; Shaw v. New York Dep't of Corr. Servs., 451 Fed. App'x 18, 21 [2d Cir. 2011]; 40 West 75th Street LLC v. Horowitz, 25 Misc. 3d 1230(A), at \*5 [Civ. Ct., New York County Nov. 19, 2009]). As of the date of this decision, the merits of the parties' dispute is also still pending in District Court, and under such circumstances there is little or no danger of my inadvertently issuing a decision in conflict with the Court's rulings and I see little prejudice to the parties before me in this proceeding because this administrative decision will ultimately remain subject to judicial review.

independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. 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., 394 Fed. App'x 718, 720 [2d Cir. 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156 [2d Cir. 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20 [2d Cir. 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, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]).

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]).

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]).

## **VII. Discussion**

### **A. Statute of Limitations**

The district argues that the parents' claims with respect to the 2008-09 and 2009-10 school years are barred by the IDEA's statute of limitations. The parents argue that the district

waived its ability to raise a statute of limitations defense by failing to raise it on the record during the impartial hearing or in a closing statement. The hearing record supports the parents' contentions and thus, the parents' claims with regard to the 2008-09 and 2009-10 school years are not barred by the statute of limitations.

The IDEA requires that a party must request a due process hearing within two years of the date the party "knew or should have known about the alleged action that forms the basis of the complaint" (20 U.S.C. § 1415[b][6][B], [f][3][C]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]). The evidence in the hearing record reveals that the district did not raise a statute of limitations defense on the record at any point during the impartial hearing (see Tr. pp. 1-816), despite that the parents explicitly raised the issue in their amended due process complaint notice (Parent Ex. JJ at p. 15). Accordingly, (and as already held by the District Court in this matter), the district waived its right to assert this defense (M.G., 15 Supp. 3d at 306 [holding that "[b]ecause the [district] did not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ., 2011 WL 4375694, at \*4-\*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requires parties to raise all issues at the lowest administrative level"]).

## **B. Parent Participation**

### **1. Provision of an Interpreter at CSE Meetings**

The parents argue that the district's failure to provide the parents with adequate interpretation services throughout the school years in question interfered with their ability to participate in the IEP development process and thus amounted to a denial of a FAPE. The district argues that the absence of an interpreter at the CSE meetings did not constitute a denial of FAPE for any of the four school years. The hearing record demonstrates that the absence of an interpreter from all of the CSE meetings for all four school years, with the exception of the November 2008 CSE meeting, constituted a procedural violation.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). In addition, the district "must take whatever action is necessary to ensure that the parent understands the proceedings of the [CSE] meeting, including arranging for an interpreter for parents [who are hearing impaired] or whose native language is other than English" (34 CFR 300.322[e]; 8 NYCRR 200.5[d][5]; see also Application of a Student with a Disability, Appeal No. 13-136).

The hearing record contains several documents provided to the district that listed the parents' native language as other than English (see Dist. Exs. 1 at p. 22; 6 at p. 11; Parent Exs. B; C; D; F; L at p. 1; N at p. 1; O at p. 1; P at p. 1; R at p. 1; S at p. 1; T at p. 1; see also Tr. p. 67). Additionally, in their first letter to the district dated August 5, 2008, the parents notified the district that they spoke very little English and the letter was written with the assistance of a

parent advocate (Parent Ex. C). All except one of the IEPs from the 2008-09 through the 2011-12 school years stated that the parent required an interpreter (see Tr. p. 124; Parent Exs. O at p. 1; P at p. 1; R at p. 1; S at p. 1; T at p. 1). However, the hearing record shows that although an interpreter attended the November 2008 CSE meeting, one was not present at any other CSE meeting during the four school years at issue (see Tr. pp. 29-31, 66-67, 84-85, 639-40, 689; Dist. Exs. 1 at p. 26; 6 at p. 13; Parent Exs. O at p. 2; P at p. 2; R at p. 2; S at p. 2; T at p. 2). The parents testified that they only requested an interpreter for the November 2008 CSE meeting, but they never told the district that they did not need a translator (see Tr. p. 689). Furthermore, review of the IEPs reveals no mention of any parental concerns or in any of the IEPs for the school years at issue (see Dist. Exs. 1 at pp. 2-3; 6 at pp. 1-2; Parent Exs. O-P; R-T).<sup>8</sup>

With the exception of one witness, the district witnesses were not asked—upon testifying that the parents spoke English during their telephone and in-person conversations outside of the CSE meetings and that the parents' responses in the student's communication book were written in English—how well the parents spoke or wrote English, or whether the witnesses believed the parents understood these communications (see Tr. pp. 229-31, 414, 444-45, 453-54, 483, 500-01, 543, 550-51).<sup>9</sup> In response to the IHO's question regarding the parents' ability to understand and communicate in English, the student's physical therapist for the 2010-11 and 2011-12 school years testified that the parents "seemed to understand" what was being said (Tr. p. 454). Additionally, two of the student's related service providers testified that when they wrote in the student's communication notebook the parents never or rarely responded (see Tr. pp. 434, 483).

Initially, an interpreter assisted the parents during the impartial hearing (see Tr. pp. 631-660; 681-99), as required by State regulation (8 NYCRR 200.5[j][3][vi]). The parents testified that the language primarily spoken and written in the student's home was a language other than English (see Tr. pp. 633, 681-83). The parents indicated that they had difficulty understanding English, specifying that their understanding of English, both spoken and written, was "very weak" (Tr. p. 634). The parents testified that they left much of forms that were sent home blank because they did not understand the content and had assistance in writing letters to the district and filling out the forms (see Tr. pp. 641-42, 685-88, 690). The parents also indicated that they did not call the school to speak to someone regarding their son because of the language barrier (see Tr. p. 660). In addition, the parents testified that when they received a comment from the teacher in the student's communication notebook they used a computer to translate the teacher's comment and then to translate their response, and that sometimes they did not respond to the comments in the student's communication notebook because the handwriting was not legible or the translation of the comments did not make sense to them (Tr. pp. 638-39). Furthermore, the parents' responses in the excerpts from the student's communication notebook for the 2011-12 school year demonstrate a difficulty with written English (see Ex. NN at pp. 1-3, 5-7, 9-13, 15, 17-18, 20, 23).

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<sup>8</sup> The IEPs for the 2008-09, 2009-10, and 2010-11 school years used an IEP form that did not have a specific section to list parental concerns (see Parent Exs. O-P; R-T).

<sup>9</sup> The student's teacher for the 2009-10 and 2010-11 school years testified that he asked the parents in the student's communication book if they needed a translator (Tr. 293). However, there is no written documentation of this attempt (see id.; Dist. Exs. 1-4; 6-14; Parent Exs. A-PP; RR-SS; UU-YY).

Additionally, the district itself used an interpreter at times to communicate with the parents. District witnesses testified that they relied upon an employee at the student's school, who spoke the parents' native language, to call and notify the parents of any important matters (see Tr. pp. 85-86, 147-48, 177-78). According to the parents, on one occasion during the course of the impartial hearing, the district provided the parents with an interpreter on the telephone about an incident that occurred to the student at school (see Tr. pp. 639-40).

The district did not establish that the parents understood the substance of the conversations that took place at the CSE meetings during the four school years at issue or that it complied with its obligations under the IDEA to provide interpretive services in this instance. Under these circumstances, the hearing record demonstrates that the district's failure to ensure the presence of an interpreter at the CSE meetings for the school years at issue, with the exception of the November 2008 CSE meeting, constituted a procedural violation. When the CSE next reconvenes to conduct a review of the student's program, the district is directed to consider whether the parents require an interpreter and, after due consideration, provide the parent with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE provided or elected not to provide such services (20 U.S.C. § 1415[c][1]; 34 CFR 300.503[b][1]-[2]; see 8 NYCRR 200.1[oo]).

## **2. Translation of Documents**

The parents argue that the district failed to provide them with translated copies of all consent forms, prior written notices, and procedural safeguards throughout the school years in question. The district argues that the IHO correctly found that the district's failure to provide translation of documents did not entitle the parents to compensatory services. The hearing record demonstrates that the district's failure to provide the parent with copies of the procedural safeguards notice and prior written notices in English or in their native language constituted procedural violations of the IDEA.

Both federal and State regulations require that a district provide parents with certain documents in their native language, ensure that consent and procedural notices are provided in the parents' native language, and provide a translator at all times during the impartial hearing process (see, e.g., 20 U.S.C. § 1415[b][4], [d][2]; 34 CFR 300.9[a]; 300.503[c], 300.504[d]; 8 NYCRR 154.3[b], 200.1[7][1], 200.4[a][9][ii], [b][6][xii], [g][2][ii], 200.5[a][4], [f][2]). Here, as discussed above, the hearing record shows that the parents' native language was not English (see Tr. pp. 633, 681-83; Dist. Exs. 1 at p. 22; 6 at p. 11; Parent Exs. B; C; D; F; L at p. 1; N at p. 1; O at p. 1; P at p. 1; R at p. 1; S at p. 1; T at p. 1).

The hearing record demonstrates that the only document that the district provided to the parents in their native language was a "blurb" the district would attach to certain documents the district "really wanted to make sure they get" that said "This is an important notice regarding the education of your child. Please have someone translate this document for you promptly" (Tr. pp. 86-87, 518, 635-36; Parent Ex. RR). The hearing record shows that the district did not provide the parents with a copy of the procedural safeguards notice in their native language until September 2012 (Tr. pp. 31-32, 87-89, 637-38, 684; see 34 CFR 300.504[d]; 8 NYCRR 200.5[f][2]). Furthermore, although required, there is no evidence in the hearing record that the

district provided a copy of a prior written notice or the results of any assessment of the student to the parents in their native language (Tr. pp. 31-32, 518, 635-38, 684; see 34 CFR 300.503[c]; 8 NYCRR 200.4[b][6][xii], 200.5[a][4]). However, neither federal nor State regulations require that a district provide parents with a copy of the IEP in their native language (Letter to Boswell, 49 IDELR 196 [OSEP 2007] [noting that while "[t]here is no requirement in IDEA or in its accompanying regulations that all IEP documents must be translated," districts are required to provide parents with full information, in their native language, of all information relevant to activities for which consent is sought]; see 34 CFR 300.9[a], 300.320; 8 NYCRR 200.1[7][1], 200.4[d][2]).<sup>10</sup>

The parent also asserts on appeal that the IHO should have found the district's failure to provide the parent with prior written notices a further basis for a finding of a denial of a FAPE. Prior written notice is specifically required by federal and State regulations whenever the district proposes or refuses to initiate or change a student's identification, evaluation, or educational placement, or the provision of a FAPE to the student (see 20 U.S.C. § 1415[b][3]; 34 CFR 300.503; 8 NYCRR 200.5[a]; Letter to Chandler, 112 LRP 27623 [OSEP 2012]). Under these circumstances, the hearing record supports a finding that the district's failure to provide the parent with copies of the procedural safeguards notice and prior written notices in their native language constituted a procedural violation of the IDEA (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

### **C. 2008-09 School Year**

While not addressed by the IHO, the parents allege that the December 2008 IEP did not address the student's most significant behaviors. The district argues that the December 2008 IEP appropriately addressed the student's behavioral needs. The hearing record supports the parents' allegation that the December 2008 IEP failed to address the student's interfering behaviors.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H., 361 Fed. App'x at 160-61; A.C., 553 F.3d at 172; J.A. v. E. Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at \*8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]).

In New York State, policy guidance explains that "[t]he IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address [among other things, a student's interfering behaviors,] in order for the student to receive a [FAPE]"

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<sup>10</sup> Although not required to provide parents with a copy of an IEP in their native language, doing so would be in keeping with the spirit of the IDEA and is one way to demonstrate that the parent has been "fully informed of the student's educational program" (Letter to Boswell, 49 IDELR 196 [OSEP 2007]).

("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP" and, if necessary, the "student's need for a [BIP] must be documented in the IEP" (*id.*). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i]; 200.22[a], [b]). The Second Circuit has explained that when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (*R.E.*, 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (*id.*).

The hearing record shows that the student frequently exhibited interfering behaviors such as aggressive, tantrum and self-injurious behaviors, elopement, and stereotypy throughout the 2008-09 school year (*see* Tr. pp. 146; 157-60; Parent Exs. L at p. 2; P at pp. 5, 7; Q; V; BB at pp. 2, 4; CC at pp. 2-4, 6; FF; HH at pp. 1, 5; II at pp. 1-19). The student's special education teacher during the 2008-09 school year testified that the student had a difficult time transitioning into the school environment and that she worked "a lot on behavior," with the main focus during the 2008-09 school year on managing the student's behavior so he could work more on academics (Tr. pp. 143, 146). She further testified that the student's behaviors included frequent tantrums during which he dropped to the floor and refused to get up, which she indicated occurred two to three times per day in November 2008 and increased to three to four times per day by April 2009 (*see* Tr. pp. 157-60). The assistant principal at the student's school testified that the student exhibited severe behaviors that included throwing himself on the floor when he began attending the school (*see* Tr. pp. 42-43, 129-30). Data collected during November 2008 indicated that the student engaged in aggressive behaviors towards adults and peers, as well as tantrum behaviors when he did not get what he wanted (*see* Parent Ex. FF at pp. 1-3). The December 2008 IEP indicated that the student interacted with his peers by physically grabbing or pushing them, had difficulty adjusting to the classroom, could not follow daily classroom routines, and dropped to the floor crying and screaming when he did not get what he wanted (Parent Ex. P at p. 5). The behavior plan described by the student's teacher for 2008-09 school year utilized "proactive strategies" to prevent behaviors, but when those did not work, the behavior plan used a "first-then" board (Tr. pp. 158, 197-98).

The teacher also testified that she began recording data on the student's behaviors because she felt the student needed more support and that he required a 1:1 paraprofessional (Tr. pp. 161-62). The data the teacher recorded from March 2009 through May 2009 indicated that the student engaged in biting, kicking, scratching, pinching, screaming, climbing on furniture, pushing or kicking over furniture, poking people in the eyes, running into other classrooms, biting himself, dropping to the ground and refusing to get up and throwing objects, and also showed that these behaviors would occur for five to 30 minutes in duration with the majority of occurrences lasting 10 to 20 minutes in duration (*see* Parent Ex. II at pp. 1-19; *see also* Tr. pp. 165-67). The student's teacher also indicated that tantrum behaviors occurred frequently in June

2009 and that the student continued to have a difficult time following the rules (Tr. p. 158). The assistant principal testified that the student had "a lot" of tantrums during the 2008-09 school year (Tr. p. 43). The student's teacher for the 2009-10 and 2010-11 school years testified that during the 2008-09 school year the student was in the classroom next to his and he remembered hearing that the student had a lot of "behavior issues" and his teacher needed assistance to calm him down (Tr. pp. 205-06).

The behavior plan for the 2008-09 school year described by the student's then-current teacher was not included in the hearing record, and a review of the December 2008 IEP shows that although it indicated the student's behavior "requires highly intensive supervision," it did not otherwise address the student's aggressive behavior and tantrums (see Parent Ex. P at pp. 1-18). Additionally, the hearing record shows that the student did not receive the support of a 1:1 crisis management paraprofessional during the 2008-09 school year despite data collected throughout that school year showing his need for additional behavioral support and the special education teacher's April 2009 request that a 1:1 paraprofessional be added to the student's program (see Tr. pp. 208-09, 214; Parent Exs. Q; R at pp. 2, 5, 18). Therefore, the hearing record demonstrates that district failed to address adequately the student's interfering behaviors during the 2008-09 school year, resulting in a denial of a FAPE.

#### **D. 2009-10 School Year**

While not addressed by the IHO, the parents allege that the November 2009 IEP did not address the student's most significant behaviors. The district argues that the November 2009 IEP appropriately addressed the student's behavioral needs. The hearing record supports the parents' allegation that the November 2009 IEP failed to address the student's interfering behaviors.

An October 2009 progress report indicated that the student continued to exhibit aggressive behaviors and had begun to act aggressively towards his classmates, which had not been observed before (see Parent Ex. GG). The November 2009 IEP indicated that the student would become very aggressive eight to ten times per day when he could not have something he wanted or if something was taken away from him (Parent Ex. S at p. 4; see also Tr. p. 220). The November 2009 IEP indicated that the student's behavior seriously interfered with instruction and required additional adult support (Parent Ex. S at p. 4). Although the November 2009 IEP indicated that a BIP had been developed and put into effect, a BIP was not attached to the November 2009 IEP nor was one included in the hearing record (see Parent Ex. S). The November 2009 CSE recommended that the student receive the services of a 1:1 crisis management paraprofessional, but other than identifying "praise, encouragement, and visual supports," failed to provide information in the IEP to personnel working with the student regarding how to address his interfering behaviors (see Parent Ex. S at pp. 1-18). Additionally, although the student's teacher for the 2009-10 school year testified that the classroom staff worked on improving the student's behaviors throughout the school day using positive behavior supports, visual support, first-then boards, and a lot of reinforcement (Tr. p. 208), the hearing record indicates that the student continued to exhibit aggressive and interfering behaviors throughout the 2009-10 school year (see Tr. pp. 208-09, 216, 220, 229, 311; Dist. Ex. 10 at p. 2; Parent Exs. S at p. 4; W; GG).

The hearing record demonstrates that the November 2009 IEP failed to adequately address the student's interfering behaviors and the district failed to offer the student a FAPE for the 2009-10 school year.

### **E. 2010-11 School Year**

While not addressed by the IHO, the parents allege that the November 2010 IEP did not address the student's most significant behaviors. The district argues that the November 2010 IEP included a BIP and a 1:1 crisis management paraprofessional, which adequately addressed the student's behavioral needs. However, a review of the hearing record supports the parents' allegation that the November 2010 IEP failed to address the student's interfering behaviors.

The November 2010 IEP indicated that the student became very aggressive towards others and self-abusive approximately eight times per day, either when he could not have something he wanted or if something was taken away from him (Parent Ex. T at p. 5). The student's special education teacher for the 2010-11 school year testified that the outbursts had lessened by June 2011; however the student still exhibited "very aggressive episodes" approximately four times per day in June 2011 (Tr. pp. 204-06, 220, 235, 239-40). The teacher further described the tantrums as "really bad," and as occurring four to five times per day during the 2010-11 school year (Tr. p. 321). The teacher testified that he had developed a behavior plan, which targeted "out-of-seat" behaviors and utilized proactive strategies to prevent out-of-seat behaviors along with visual and physical prompts when behaviors did occur (Tr. pp. 211-13, 317-18; Parent Ex. T at p. 17). The hearing record shows that the behavior support plan attached to the November 2010 IEP only targeted out-of-seat behaviors, and did not include strategies to decrease the student's aggressive, self-injurious, or tantrum behaviors, which continued to occur multiple times per day throughout the school year (Tr. pp. 204-06, 220, 235, 321; Dist. Ex. 9 at p. 1; Parent Ex. T at pp. 3, 5, 17; see also Tr. pp. 211-17, 239-40). Additionally, although the November 2010 CSE recommended that the student receive the services of a 1:1 crisis management paraprofessional, the IEP only referred to "a system of rewards to promote appropriate behavior" and an annual goal to address the student's out-of-seat behaviors, but did not otherwise include any specific strategies to decrease the student's aggressive, self-injurious, or tantrum behaviors (see Parent Ex. T).

The hearing record demonstrates that the November 2010 IEP failed to adequately address the student's interfering behaviors and the district failed to offer the student a FAPE for the 2010-11 school year.

### **F. 2011-12 School Year**

While not addressed by the IHO, the parents allege the district failed to conduct a required reevaluation of the student prior to the November 2011 CSE meeting. The hearing record supports the parents' assertion, and the district's failure to conduct a reevaluation prior to the November 2011 CSE meeting constituted a procedural violation, combined with the continued failure to address the student's interfering behaviors, contributed to a denial of a FAPE for the 2011-12 school year.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district must conduct a reevaluation at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][2]). The district conducted an initial evaluation of the student in September and October 2008 (see Parent Exs. I at p. 1, J at p. 1, L at p. 1, M at p. 1). It appears, therefore, that the district was required to complete a reevaluation of the student prior to the November 2011 CSE meeting (34 CFR 300.303[b][2]; 8 NYCRR 200.4[b][4]).

The district appeals the IHO's finding that by the time of the November 2011 CSE meeting, it had evaluative information indicating that the student required services outside of the school day to receive a FAPE. The parents argue that the IHO erred in finding the district was not on notice of the student's lack of progress until the November 2011 CSE meeting. The hearing record demonstrates that the student made little progress under the substantially similar November 2010 IEP and therefore the district failed to offer the student a FAPE for the 2011-12 school year.

A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]).

The program recommendations in the November 2011 IEP are substantially similar to those in the November 2010 IEP (compare Dist. Ex. 1 at pp. 4, 9-11, 14-19, with Parent Ex. T at p. 3, 9, 11-13, 15). Both the November 2010 and November 2011 IEPs recommended a 12-month school year program in a 6:1+1 special class in a specialized school with a 1:1 crisis management paraprofessional and identical related services recommendations for speech-

language therapy, OT, and PT (see Dist. Ex. 1 at pp. 18-20; Parent Ex. T at pp. 1-2, 15). The November 2010 and November 2011 IEPs both included annual goals to address the student's out-of-seat behaviors and his ability to follow one-step directives using body parts (compare Dist. Ex. 1 at pp. 9-11, with Parent Ex. T at pp. 9, 12). Descriptions of the behavior support plans used during the 2010-11 and 2011-12 school years indicate that they both targeted out-of-seat behaviors (see Tr. pp. 211-13, 369-71, 510-11; Dist. Ex. 14 at p. 3; Parent Ex. T at p. 17).<sup>11</sup>

The hearing record demonstrates that during the 2010-11 school year the student made limited progress in his behavioral skills, which impacted his ability to receive educational benefits. The student's teacher for the 2010-11 school year testified that although the student's outbursts lessened by June 2011 he would still exhibit "very aggressive episodes" approximately four times per day in June 2011 (Tr. pp. 220, 235). The November 2011 IEP indicated that the student was "constantly involved in self-stimulatory behaviors," walked or ran away from group and non-preferred activities, and was "highly motivated by playing with string and other sensory materials" (Dist. Ex. 1 at pp. 1-2, 4-5). A review of the November 2011 IEP shows that it failed to address the student's aggressive and self-stimulatory behaviors (see Dist. Ex. 1). Accordingly, as the district did not provide the student with additional support to address his behavioral needs or otherwise attempt to modify the IEP in a meaningful way given his lack of progress under the substantially similar November 2010 IEP, the hearing record provides no basis to depart from the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year.

### **G. Speech-Language Therapy**

Turning to parents' contentions regarding the speech-language therapy recommendations in the various IEPs, a review of the hearing record does not support a finding that the December 2008 CSE's speech-language therapy recommendation was adequate to meet the student's needs and indicates that the student made inconsistent progress thereafter.

The hearing record shows that due to the student's significant receptive and expressive language delays, the speech-language pathologist who conducted an October 2008 bilingual speech-language evaluation recommended that the student receive five individual one-hour sessions of speech-language therapy per week (Parent Ex. I at pp. 3, 5). The December 2008 CSE recommended that the student receive three individual 30-minute sessions of speech-language therapy per week (Parent Ex. P at p. 18). The student's speech-language pathologist during the 2008-09 and 2009-10 school years testified that she was not aware of the October 2008 evaluation report recommendation, and that she had "never seen that kind of mandate" (Tr. pp. 564-65). The hearing record is devoid of any additional evidence related to the October 2008 evaluation recommendation, or how—given the evaluative information before it describing the student's significant communication deficits (Parent Exs. I; L at pp. 1-2; M at pp. 1-3)—the December 2008 CSE determined that a recommendation for a lesser amount of speech-language therapy was appropriate to meet the student's needs.<sup>12</sup> Therefore, a review of the hearing record

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<sup>11</sup> The hearing record does not contain the behavior plan for 2011-12 school year.

<sup>12</sup> The hearing record contains a second bilingual speech-language evaluation, conducted in June 2012 by the same speech-language pathologist, which continued the same recommendation of five hours of individual

does not support the December 2008 CSE's speech-language therapy recommendation, at the time it was formulated in that IEP.

Additionally, the hearing record shows that the student made minimal progress in his communication skills during the 2008-09, 2009-10, 2010-11 and 2011-12 school years—while receiving three individual 30-minute sessions of speech-language therapy per week—and the evidence of the student's progress in speech, including using the Picture Exchange Communication System (PECS), is conflicting (Dist. Exs. 1 at p. 19; 6 at p. 8; 12 at pp. 2-4; Parent Exs. O at p. 18; P at p. 18; R at p. 18; S at p. 17; T at p. 15; V; W; X; see Tr. pp. 82-83, 135-36, 460, 464-65, 549-50, 552-54).<sup>13</sup> The IEPs for the 2008-09, 2009-10, 2010-11, and 2011-12 school years indicate that the student made inconsistent progress toward his speech-language annual goals (see Dist. Ex. 1 at pp. 10, 15; Parent Exs. O at p. 10; P at p. 9; R at p. 9; S at p. 7; T at p. 12).<sup>14</sup>

## H. Relief

Next, it is necessary to determine an appropriate remedy for the denial of a FAPE for the 2008-09, 2009-10, 2010-11, and 2011-12 school years.

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]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to 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]). Likewise, SROs have awarded compensatory "additional services" to students who have been denied appropriate services, if such deprivation can be remedied through the provision of additional services before the student becomes ineligible for special 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]; see, e.g., Application of the Dep't of Educ., Appeal No. 13-048; Application of a Student with a Disability, Appeal No. 11-091).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C.

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speech-language therapy per week (see Parent Ex. XX at p. 3).

<sup>13</sup> The IHO noted in her decision that the hearing record was confusing as to the student's communication skills using PECS (see IHO Decision at p. 16).

<sup>14</sup> However, the student made progress toward some of the speech-language short-term objectives included on the IEPs and met at least one annual goal (Parent Exs. P at p. 9; R at p. 9; S at p. 9; T at p. 12).

Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]. Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at \*7 [E.D.N.Y. Mar. 30, 2014] [noting that an award of compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

### **1. Parent Counseling and Training**

The parents assert that the district failed to include parent counseling and training in all of the student's IEPs for the four school years at issue, and in their due process complaint notice requested a "bank" of compensatory parent counseling and training services (Parent Ex. JJ at p. 16). State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, courts have held that a failure to include parent counseling and training on an IEP, standing alone, will rarely rise to the level of a denial of a FAPE and the Second Circuit has explained that "because school districts are required by 8 NYCRR 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP" (R.E., 694 F.3d at 191; see R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at \*2 [2d Cir. Mar. 19, 2015]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 169-70 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]).

Here, it is undisputed that the CSEs did not recommend parent counseling and training as a related service in any of the student's IEPs at issue as required by State regulation (see Dist. Ex. 1 at pp. 1-26; Parent Exs. O-P; R-T).<sup>15</sup> However, the district has been required to provide the parents with four hours per month of parent counseling and training since October 2012 pursuant to the IHO's third interim order (see Third Interim IHO Decision at p. 3). Given that the parents have received a substantial amount of services pursuant to the interim order, it is not necessary to award additional compensatory parent counseling and training. However, the district is directed, when next it convenes a CSE to develop an IEP for the student, to provide for parent counseling and training in accordance with State regulations and the student's needs (8 NYCRR 200.4[d][2][v][b][5]; 200.13[d]).

## **2. 1:1 Instruction**

On appeal, the parent requests 4600 hours of compensatory ABA services.<sup>16</sup> Alternatively, the parents request that 25 hours per week of after-school 1:1 ABA services be included in the student's IEP for an initial period of two years with his progress to be thereafter evaluated.

The hearing record reveals that beginning in July 2012, the student received 10 hours of ABA services per week pursuant to the second interim order (see Second Interim IHO Decision at p. 2; Tr. pp.763-64; Parent Exs. SS at p. 1; YY at pp. 1, 3). In October 2012, the student began receiving 15 hours of ABA services per week pursuant to the third interim order (see Third Interim IHO Decision at p. 3; Tr. pp. 764-65; 789-91).<sup>17</sup> In her decision, the IHO determined that the student should receive 20 hours of ABA services per week for as long as the student was not receiving full-time ABA instruction in school (IHO Decision at p. 17).

The hearing record demonstrates that the student made progress while receiving ABA services from July 2012 to December 2012 under the IHO's second interim decision. In particular, the evidence in the hearing record demonstrates that during this period, the student made progress in vocalization, toileting, eye contact, use of PECs, and attending (see Tr. pp. 778-81, 783, 794-95, 797-98; Ex. YY at pp. 2-9). The supervisor of the student's ABA providers recommended that the student receive 25 hours per week of 1:1 ABA (Tr. pp. 797-98). She further testified that the student would benefit from being in a structured ABA setting for the entire school day (Tr. pp. 798, 800-02).

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<sup>15</sup> The November 2009, November 2010, and November 2011 IEPs indicated that parent counseling and training "are provided," "are available," and "is available" (Dist. Ex. 1 at p. 4; Parent Exs. S at p. 3; T at p. 3). These statements are insufficient to meet the district's obligations pursuant to State regulations (8 NYCRR 200.4[d][2][v][b][5]; 200.13[d]).

<sup>16</sup> The parent requests 25 hours of services per week for 46 weeks for four school years.

<sup>17</sup> As noted above, the Court found that these services became part of the student's pendency placement based on the district's compliance with the interim orders (M.G., 982 F. Supp. 2d at 247-49).

Given the foregoing, to compensate the student for the denials of FAPE found herein, the student should receive 10 hours per week of 1:1 instruction for a period of one 12-month school year. The evidence demonstrates that the student was able to make meaningful progress at this level of services and is the best approximation that can be made of what would put the student in the position he would have been in had the student received adequate instruction with proper behavioral supports. The purely mechanical hour-for-hour approach requested by the parents at a 25-hour per week level is not supported by the evidence and appears to represent what the parents believe would have been an optimal level of services instead of an appropriate level for all of the years in question. However, as a further cautionary measure, after the 12-month school year, I will direct the district to fund an independent evaluation of the student's progress and, in consultation with the parents, determine whether the student requires 1:1 instruction to receive educational benefits.<sup>18</sup> The district should ensure that detailed documentation regarding the student's progress is maintained in the student's file from the student's various special education services and the evaluator should take care to carefully consider and distinguish those benefits derived from the compensatory 1:1 instruction versus the benefits derived from the student's services under his IEPs during the 12-month period.

By failing to provide the parents with an interpreter at the CSE meetings from December 2008 until the 2012-13 school year, the district prevented the parents from being able to voice their concerns regarding the student's behaviors at home or to request extended day, home-based ABA services. When the district next convenes a CSE meeting to develop an IEP for the student, the CSE must determine whether 1:1 instruction, home-based services, extended day services, or the provision of instruction using ABA methodology are necessary to enable the student to benefit from instruction and, after due consideration thereof, provide the parent with prior written notice in their native language, on the form prescribed by the Commissioner, specifically indicating whether the CSE recommended or refused to recommend such services and methodologies on the student's IEP and explaining the basis for the CSE's recommendation therein, as well as the evaluative information relied upon in reaching these determinations (8 NYCRR 200.5[a]; see 34 CFR 300.503[b]).<sup>19</sup>

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<sup>18</sup> The 1:1 instruction provided pursuant hereto shall be with a professional appropriately certified to provide instruction, such as a teacher or teaching assistant. Additionally, while this decision specifically identifies 1:1 instruction as a compensatory remedy in light of the years in which the student missed instruction due to a lack of behavioral supports, it does not constitute an endorsement of the argument that with appropriate behavioral supports the student also requires 1:1 instruction or services provided at home or after school, to receive educational benefit. Thus these compensatory remedies, which are enforceable as an administrative order, do not need to be placed on the student's IEP going forward, which should continue to be reviewed by the CSE at least annually in compliance with and as envisioned by the procedures under the IDEA and State regulations to determine an appropriate educational program. While it is understandable that the parent may desire greater educational benefits through the auspices of special education, a district is not obligated to pay for services to maximize a student's educational opportunity (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). A district's obligation to place students in their LRE will often preclude provision of such services when a student can receive educational benefit from in-school instruction, as State regulations provide that home instruction "shall only be recommended if such placement is in the least restrictive environment" (8 NYCRR 200.6[i]; see, e.g., A.K. v. Gwinnett County Sch. Dist., 556 Fed. App'x 790, 792-93 [11th Cir. 2014] [noting the preference set forth in the IDEA for educating children in a school setting]; Walczak, 142 F.3d at 132 [noting that "[t]he norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families"]).

<sup>19</sup> To the extent that the prior written notice directives set forth in this decision may be interpreted as exceeding

### 3. Speech-Language Therapy

On appeal, the parents request 644 hours of compensatory speech-language therapy based upon the district's failure to implement the recommendation in an October 2008 bilingual speech-language evaluation for five hours per week of individual speech-language therapy.<sup>20</sup> The student's inconsistent progress with respect to his speech and language skills is discussed above.

Given the inconsistent progress the student made with regard to his speech-language skills during the 2008-09, 2009-10, 2010-11, and 2011-12 school years, the district is directed to provide one hour per week of compensatory speech-language therapy for each week in those school years. Instead of a one-for-one award, the compensatory speech-language services award should provide the services necessary to place the student in the position he should have been. Additionally, the ABA services the student has received pursuant to the IHO's interim orders along with the additional 1:1 instruction awarded in this decision should have a beneficial effect on the student's speech abilities such that a one-for-one award is not necessary.

#### I. Assistive Technology IEE

Finally, addressing the parents' request for an IEE in the area of assistive technology, the IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at \*5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]).

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the requirements of federal and State regulations, it is intentionally awarded as appropriate remedial relief designed to address the parties' recurring disagreement evidenced in this case and the district's continuing failures to comply with its obligation to provide the parents with prior written notice.

<sup>20</sup> The parent requests 5 hours of speech-language therapy per week for 46 weeks for four school years, less the 276 hours received pursuant to the amount recommended in the student's IEPs for the four school years.

The parents assert that the April 2012 assistive technology evaluation conducted by the district was inappropriate; however, their primary arguments are that the evaluation was impermissibly short and the failure to include the parent in the assistive technology evaluation "necessitates a finding that it was procedurally infirm." To the contrary, although parents are required to be involved in the evaluation process (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]), the IDEA does not require that parents be consulted with regard to every assessment conducted of their child, and the parents' disagreement with the district's decision not to recommend additional assistive technology devices or services does not relate to the appropriateness of the district assistive technology evaluation. Although the parents' concerns regarding the thoroughness of the evaluation appear to be well-founded (Dist. Ex. 2; Parent Ex. MM), an IHO in a separate proceeding involving school years subsequent to those at issue here already "directed the [district] to conduct a new [assistive technology] evaluation; th[e] report [of which] recommended an augmentative communication device, which was provided" (Third Amended Complaint ¶ 308, M.G. v. New York City Dep't of Educ., No. 13 Civ. 04639 [S.D.N.Y.]). Accordingly, to the extent it appears the district has conducted an assistive technology evaluation that superseded the April 2012 evaluation, any request for an IEE in the area of assistive technology is better deliberated upon with reference to the subsequent evaluation, which is not at issue in this proceeding.<sup>21</sup>

### **VIII. Conclusion**

For the reasons stated above, the student is entitled to receive compensatory 1:1 instruction and speech-language therapy. In light of the foregoing, I need not address the parties' remaining contentions.

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

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated February 11, 2013, is modified by reversing those portions which denied the parent's request for compensatory additional services; and

**IT IS FURTHER ORDERED** that the district shall provide the student with additional services in the form of 10 hours per week of 1:1 instruction for a period of 12-months; and

**IT IS FURTHER ORDERED** that after the above-mentioned 1:1 instructional services have been provided the district shall fund an independent evaluation of the student's progress and, in consultation with the parents, determine whether the student requires additional 1:1 instruction to compensate for the district's failure to provide him with an appropriate educational program for the four years at issue; and

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<sup>21</sup> It does not appear that the parents continue to request an IEE in the area of assistive technology in their federal court action; rather, they have requested "training in the use of [the student's] augmentative communication device" (Third Amended Complaint at pp. 83-84, M.G. v. New York City Dep't of Educ., No. 13 Civ. 04639 [S.D.N.Y.]), a claim not raised in the impartial hearing at issue and thus not before me.

**IT IS FURTHER ORDERED** that the district shall provide the student with additional services in the form of one hour per week of speech-language therapy for each week in the 2008-09, 2009-10, 2010-11, and 2011-12 school years; and

**IT IS FURTHER ORDERED** that upon next reconvening the CSE to conduct an annual review of the student's IEP, the parties shall discuss the topics as directed in the body of this decision, and the district shall within 10 days thereafter provide prior written notice in conformity with State and federal regulations and the body of this decision.

**Dated:**            **Albany, New York**  
                      **April 10, 2015**

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