



The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 13-048

Application of the XXXXXXXXX for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorney for petitioner, Brian J. Reimels, Esq., of counsel

Goldman & Maurer, LLP, attorneys for respondent, Brian S. Goldman, 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. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational programs and services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) daughter for the 2009-10 through 2011-12 school years were not appropriate and directed the district to fund compensatory additional services for the student; ordered the district to reimburse the parent for his daughter's tuition costs at the Child School for the 2011-12 school year; and ordered the district to reimburse the parent for privately obtained independent educational evaluations (IEE). The parent cross-appeals from so much of the IHO's determination as denied in part his request for compensatory additional services. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

With regard to the student's educational history, she began exhibiting language, social and academic difficulties in her pre-kindergarten program, as well as auditory processing deficits in early elementary school (Tr. pp. 931-32; Parent Exs. A at p. 1; H at pp. 1-2). The student received special education services in a self-contained classroom during kindergarten, as well as speech-language therapy services (Parent Ex. H at p. 2). For first grade the student was placed in a district classroom with integrated co-teaching (ICT) services and continued to receive speech-language therapy services (Parent Ex. H at p. 2).¹ In August 2003, prior to the student's fourth grade year, the CSE referred the student for an auditory processing evaluation due to concerns about her poor academic performance, high levels of distractibility, and parental reports that she was sensitive to loud sounds (Parent Ex. A at p. 1). Results of the assessment indicated auditory processing deficits in the areas of tolerance-fading memory and phonemic decoding (Parent Ex. A at p. 2).

In an IEP developed in November 2008 and used during the remainder of the 2008-09 (ninth grade) school year and the beginning of the 2009-10 school year, the CSE recommended that the student be placed in a community high school and receive 14:1 ICT services, one 30-minute session per week of group counseling and two 30-minute sessions per week of group speech-language therapy, along with testing accommodations including extended time, separate location, and use of a calculator (Dist. Ex. 3 at pp. 1-2, 11).²

During the 2009-10 (tenth grade) school year, a district school psychologist conducted a psychoeducational evaluation of the student and a district speech teacher prepared a speech-language progress report in preparation for the student's triennial/reevaluation review CSE meeting that convened on December 17, 2009 (Tr. pp. 118, 306; Parent Exs. B; C; D at p. 2).³ The December 2009 IEP reflected the CSE's recommendation that the student be placed in 14:1 ICT classes for English language arts (ELA), history, and science instruction, a general education class for art, music, and physical education, and a 15:1 special class all other subjects (including math) (Dist. Ex. 1 at pp. 1, 11; Parent Ex. D at pp. 1, 11; see Tr. pp. 693-95).⁴ The CSE also

¹ Although the term "collaborative team teaching" or "CTT" was used on occasion in the hearing record to describe the services provided to the student in the general education classroom setting (see, e.g., Tr. pp. 118, 357, 416), for consistency with State regulations I refer to these services as ICT (see Parent Exs. D at p. 1; E at p. 1). ICT services are defined in State regulation as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to a classroom providing ICT services "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The State Education Department has issued a guidance document which further describes ICT services ("Continuum of Special Education Services for School-Age Students with Disabilities," VESID Mem. [Apr. 2008], at pp. 11-15 available at <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

² The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute in this appeal.

³ The hearing record refers to the district staff member who provided the student's speech-language therapy services using multiple titles (see Tr. pp. 214, 260; Parent Exs. C; D at p. 2). For consistency within this decision, I will refer to this person as the student's speech teacher.

⁴ The hearing record contains the student's December 2009 and December 2010 IEPs as both Parent and District

recommended that the student continue to receive twice weekly group speech-language therapy sessions and one session weekly of group counseling services (Parent Ex. D at p. 13). Testing accommodations included extended time, "special location," use of a calculator, and directions read and reread aloud (Parent Ex. D at p. 13). According to the parent, the CSE disregarded his request for a "smaller class size" for the student (Tr. pp. 956).

The student passed all of her classes during tenth grade, as well as the Global History and Physical Setting/Earth Science Regents examinations, although the parent stated that he was "baffled" by her grades based upon his experience with the student's "struggles" with homework (Tr. pp. 958, 960-61; Dist. Ex. 9).

On December 1, 2010, the CSE convened for the student's annual review to develop an IEP for the remainder of her eleventh grade year (Dist. Ex. 2; Parent Ex. E). The CSE recommended that the student be placed in 14:1 ICT classes for ELA, history, and science instruction, and 15:1 special classes for math, Spanish, and "lab" instruction (Parent Ex. E at pp. 1, 5). The CSE continued to recommend the same testing accommodations of extended time, separate location, use of a calculator, and directions read and reread aloud, and the same type, frequency, and duration of speech-language therapy and counseling services as it had on the December 2009 IEP (compare Parent Ex. D at p. 13, with Parent Ex. E at p. 7). The parent stated that the CSE "largely ignored" his request that the student be placed in a smaller, quieter environment where she would receive "more attention" (Tr. p. 969).

In January or February 2011 the parent contacted an education consultant due to his concerns regarding the student's education and, upon the recommendation of the consultant, had the student's academic skills privately assessed by EBL Coaching (Tr. pp. 1017-21; Parent Ex. F). In March 2011 the parent began looking at nonpublic school options because of his concerns that the district was not planning for the student's future and visited the Child School on the consultant's recommendation (Tr. pp. 998, 1017, 1056). In April 2011, a Child School psychologist interviewed the student to determine whether to recommend the student for admission (Tr. pp. 1056-60). According to the admissions director of the Child School's high school program (the admissions director), the Child School granted admission to the student in April 2011 and the parent was notified of that decision shortly thereafter (Tr. pp. 1065-66).⁵

In June 2011, with the assistance of the education consultant, the parent obtained a private psychoeducational evaluation of the student to determine her abilities and receive recommendations regarding her educational placement (Tr. pp. 987-88, 1020; Parent Ex. H). Also in June 2011, the parent obtained a private speech-language evaluation and a private audiological/auditory processing evaluation (auditory processing evaluation) of the student conducted by a university speech and hearing center (Parent Exs. I; J). The parent forwarded the

Exhibits (Dist. Exs. 1-2; Parent Exs. D-E). Due to legibility and completeness issues with the exhibits, when referring to the IEPs I cite variously to the Parent and District exhibits as necessary.

⁵ The Child School is described in the hearing record as nonpublic school for students with disabilities from kindergarten through twelfth grade which follows a Regents diploma program in its high school (Tr. pp. 1055, 1085, 1144, 1337). The Child School has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 63, 1055-56, 1085, 1337; see 8 NYCRR 200.1[d], 200.7).

private auditory processing and psychoeducational evaluation reports to the district by letter dated July 29, 2011, indicating that he had "urged [the student's] school to provide additional services and help to her[but that t]he school ha[d] continuously refused to assist her and ha[d] recommended placement within her same class" (Parent Ex. K). The letter related certain of the results and recommendations of the evaluations and informed the district of the parent's intention to unilaterally place the student at the Child School and seek public funding for the costs of her tuition (id.).

A. Due Process Complaint Notice

By due process complaint notice dated August 15, 2011, the parent requested an impartial hearing (Parent Ex. N). The parent asserted that the district had failed to offer the student a FAPE for the 2009-10 through 2011-12 school years (id. at p. 4). In particular, with respect to the 2009-10 school year, the parent asserted that the December 2009 CSE was improperly composed because no additional parent member was present; the general education teacher was present in three separate roles, including one (district representative) for which she was not qualified; and the student was not included in the CSE despite "transitional issues" being presented (id. at pp. 2, 5-6). The parent argued that the CSE "failed to address" his concerns regarding the student's failure to make progress in basic academic skills and her need for a small classroom (id. at p. 6). The parent contended that the IEP failed to indicate the student's social/emotional management needs (id. at p. 2). Additionally, although evaluative data available to the CSE indicated that the student was functioning on a fourth grade level, the parent asserted that student was inappropriately expected to follow the tenth grade curriculum, creating pressure and causing her to spend an "enormous" amount of time on homework (id. at p. 4). The parent next argued that the district failed to ensure that the December 2009 IEP reflected the results of an auditory processing evaluation conducted in August 2003 (id. at pp. 4-5). With respect to the annual goals contained on the December 2009 IEP, the parent asserted that certain of them were "nonspecific," "incapable of objective measurement," did not address "all identified academic and functional deficits" and were "inadequate and insufficient for the student's needs," were "impermissibly vague," and did not indicate how the student's progress would be measured or when reports of progress would be provided (id. at pp. 5-6). The parent further contended that the December 2009 IEP did not provide a program that would "effectively address[]" the student's need to "improve her basic academic skills" (id. at pp. 4, 6). Furthermore, the parent asserted that "there [were] some serious questions about how the school administered [the student's] testing accommodations" (id. at p. 4). The parent next alleged that the "IEP failed to provide any academic intervention services, failed to provide any direct services to this student, and failed to provide any additional services to address [the student's] identified significant academic deficits" (id.). The parent next asserted that the recommended placement of part-time ICT services provided in a general education classroom and a part-time special classroom was insufficient to address the student's need for "a small class" (id. at p. 5). The parent also argued that he was not notified of the student's progress toward meeting her annual goals and that the student made "little progress" (id.). Finally, the parent asserted that the "substantive and procedural errors in the development of the IEP seriously infringed on the parent[']s right to participate[] in the development of the IEP and constituted a loss of educational opportunity," constituting a denial of a FAPE (id. at p. 6).

With respect to the December 2010 CSE meeting and IEP, the parent again alleged that the CSE was improperly composed because no additional parent member was present (Parent Ex. N at p. 2). The parent asserted that his concerns were ignored by the CSE and that his requests for additional services and a smaller class size "were dismissed" (id. at p. 8). The parent also contended that the CSE "ignored, disregarded, and minimized" the results of evaluations by not recommending a full-time special class placement (id. at p. 6). Additionally, the parent asserted that the district failed to obtain updated evaluations in all areas of suspected disability (id. at p. 8). As with the December 2009 IEP, the parent asserted that the December 2010 IEP contained some goals that were "nonspecific," "incapable of objective measurement," did not address "all identified academic and functional deficits" and were "inadequate and insufficient for the student's needs," and were "impermissibly vague" (id. at p. 7). Additionally, despite the student having made little progress toward her annual goals, the parent asserted that the CSE did not "take corrective action" (id. at p. 6). The parent again argued that the district failed to provide him with periodic reports of the student's progress toward her goals (id.). Finally, the parent again asserted that the "substantive and procedural errors in the development of the IEP seriously infringed on the parent[']s right to participate[] in the development of the IEP and constituted a loss of educational opportunity," constituting a denial of a FAPE (id. at pp. 7-8). The parent specifies that "the failure to include the parent's input in [the] IEP development process" constituted an infringement of his right to participate in the development of the IEP (id. at p. 8).

Regarding the 2011-12 school year, the parent asserted that the continuation of the student's program from the 2010-11 school year was inappropriate as she had made little progress toward her academic, speech-language, and counseling goals (Parent Ex. N at p. 7). Additionally, the parent contended that the district's failure to respond to his requests—and the recommendations contained in the private evaluations—for additional "academic support services" and a "small class" led to the student remaining "stagnant or regress[ing] in her basic academic skills since November 2009" (id.).

For relief, the parent requested direct payment of the student's Child School tuition for the 2011-12 school year; public funding of 400 hours of 1:1 "intensive specialized instruction" in areas relating to academic and executive functioning, provided by EBL Coaching, along with transportation to and from tutoring; and reimbursement for other costs including, as relevant here, for "evaluation and assessment fees" (Parent Ex. N at p. 9).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on December 9, 2011 and continued for 13 nonconsecutive hearing dates before concluding on December 14, 2012 (Tr. pp. 1-1407). In a decision dated February 21, 2013, the IHO found that: the district failed to offer the student a FAPE for the 2009-10 through 2011-12 school years; the Child School was an appropriate placement for the student for the 2011-12 school year; equitable considerations supported the parent's request for tuition reimbursement; the student was entitled to compensatory additional services for the district's failure to provide her with a FAPE during the 2009-10 and 2010-11 school years; and the parent was entitled to reimbursement for the privately obtained IEEs (IHO Decision at pp. 30-40).

Initially, the IHO noted that neither the December 2009 nor December 2010 CSEs included an additional parent member as required by State law (IHO Decision at p. 32).⁶ She went on to find that the December 2009 IEP did not reflect the recommendations made in the 2003 auditory processing evaluation, "which was critical to the student's success academically, emotionally and socially," and that the district failed to conduct a reevaluation despite the recommendation that it do so (*id.* at pp. 33-34). Furthermore, the IHO found that the goals contained in the December 2009 IEP were inadequate to meet the student's needs by failing to address her: auditory processing disorder; reading, writing, and math deficits; and her poor attention skills (*id.* at p. 34). The IHO also found that the speech goals contained in the IEP were not adequate and noted that the speech teacher never conducted any formal assessments of the student, did not maintain notes on the student, and did not provide more than two sessions weekly despite the student's "problem" (*id.* at p. 35). The IHO indicated that the student's counselor determined the student's academic deficits not to be of concern and focused primarily on her social/emotional needs (*id.* at pp. 34-35). With regard to the recommendation for placement in a general education classroom with ICT services, the IHO noted that at the end of the student's ninth grade year, two of her teachers requested that placement in a self-contained special class be considered and that one of them restated that opinion in a report prepared in October 2009 (*id.* at p. 35). The IHO indicated that the student's English special education teacher was not aware of the manner in which the student's auditory processing disorder affected her (*id.* at pp. 35-36). "Based on the foregoing," the IHO found that the district failed to provide the student with a FAPE for the 2009-10 school year (*id.* at p. 36).

Addressing the December 2010 IEP, the IHO noted that the recommended placement and services remained the same, making it "as flawed as was the previous IEP" (IHO Decision at p. 36). The IHO noted that one of the student's counseling goals was repeated from the December 2009 IEP because the student had made no progress on that goal, and that the student's counselor indicated that the student had made minimal progress toward her other annual counseling goal (*id.* at p. 37). The IHO noted that the speech teacher also repeated goals from the December 2009 IEP because the student had not reached the goal (*id.* at p. 36). The IHO found that the failure to increase the level of speech services the student received despite her lack of progress and regardless of her needs contravened the IDEA (*id.*). Additionally, the IHO noted the speech teacher's testimony that the student made little progress in writing during the 2010-11 school year (*id.*). The IHO also indicated that the student's English special education teacher was not aware of her diagnosis with an auditory processing disorder or how it affected her (*id.* at pp. 36-37).

After her discussion of the preceding issues, the IHO found that it was "abundantly clear from the record that there were numerous procedural and substantive errors made by the [district] as cited above, these errors collectively resulted in a blatant denial of FAPE and were pervasive for the 2009-2010, 2010-2011 and 2011-2012 school years" (IHO Decision at p. 37).

⁶ Subsequent to this proceeding, the State legislature amended the Education Law, effective August 1, 2012, so that a parent member is no longer a required member of the CSE unless specifically requested in writing by the parent, the student, or another member of the CSE at least 72 hours prior to the meeting (L. 2012, ch. 276; *see* Educ. Law § 4402[1][b][1][b]). Conforming amendments, effective January 2, 2013, were thereafter made to State regulation (N.Y. Reg., Sept. 26, 2012, at pp. 14-15; *see* 8 NYCRR 200.3[a][1][viii]). As all relevant events herein took place prior to the enactment of chapter 276, my analysis does not reflect the subsequent change in law.

Specifically, the IHO found that the district recommended "the same program, related services and essentially the same goals" while the student continued to struggle academically and emotionally, that the IEPs did not reflect the available evaluative data, and that the student's teachers were unaware of how her auditory processing disorder affected her performance in school (*id.* at pp. 37-38). The IHO went on to find that the unilateral placement of the student at the Child School was appropriate based on the modification of the curriculum by the student's teachers to meet her needs, the small class size available, and her social/emotional and academic progress (*id.* at p. 39). The IHO next found that equitable considerations supported the parent's request for reimbursement based on his cooperation with the district, attendance at CSE meetings, and the district's failure to address the student's needs over a three-year period (*id.* at pp. 39-40). The IHO then awarded reimbursement for the four privately obtained evaluations, "which provided the basis for an appropriate placement to be made," because of "the [district]'s consistent failure to provide the student with a FAPE over three academic years, its failure to update the central auditory processing evaluation and to refer the student for additional necessary evaluations, so that an appropriate placement could have been recommended" (*id.* at p. 40). Finally, the IHO ordered the district to fund 100 hours of 1:1 instruction with EBL, rather than the 400 hours requested, "since the student is in private school with a 12 month program" (*id.*).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in finding that the student was not provided a FAPE for the 2009-10 through 2011-12 school years, that the Child School was an appropriate unilateral placement, that equitable considerations favor the parent, that the parent was entitled to reimbursement for privately obtained evaluations, and that the student was entitled to compensatory additional services. Initially, with regard to the IHO's finding that the required additional parent member was not present for either the December 2009 or December 2010 CSE meetings, the district asserts that the absence of a parent member did not constitute a denial of FAPE because the parent was able to participate fully in the December 2009 meeting and the December 2010 meeting could have been convened as a validly constituted subcommittee on special education (CSE subcommittee) without an additional parent member.

The district contends that the December 2009 IEP was based on sufficient evaluative data and sufficiently described the student's deficits, noting that the IEP incorporated aspects of the November 2009 psychoeducational evaluation. Furthermore, the district argues that the IHO provided no reason why the recommendations contained in the 2003 auditory processing evaluation were more relevant to the development of the December 2009 IEP than the psychoeducational evaluation conducted one month prior. The district also asserts that the December 2009 IEP addressed the student's auditory processing deficits, with an auditory processing goal and accommodations including extra time, counseling and speech-language therapy, and directions read and reread aloud on examinations. With regard to the IHO's findings regarding the adequacy of the goals contained in the December 2009 IEP, the district asserts that the IEP contained measurable goals to address the student's auditory processing, reading, writing, and math needs. The district also argues that, to the extent the IHO found that it did not properly implement the December 2009 IEP, she erred in so finding. Addressing the counselor's focus on the student's social/emotional needs, the district argues that the counseling goals would benefit the student academically by increasing her ability to work with others. With

respect to the speech-language therapy provided to the student, the district contends that there is no requirement that the student be formally assessed by the speech teacher, speech goals were included on the IEP, and the student received two sessions of speech-language therapy because additional sessions would have interfered with her academic instruction. Finally, the district asserts that the student's placement in a general education classroom with ICT services in English for the 2009-10 school year was appropriate because the student was capable of completing her coursework, made progress during the school year, and passed the class, indicating that her special education teacher was correct in opining that the student's auditory processing disorder did not adversely impact her ability to make progress.

With regard to the December 2010 IEP, the district asserts that the student's progress during the 2009-10 school year justified the CSE's recommendation for continuing the prior year's program. Specifically addressing the repetition of goals, the district contends that it was appropriate to continue the particular goals on which the student had not made progress or not completed through the next school year. Respecting the level of speech-language therapy provided to the student, the district asserts that additional sessions would have interfered with academic instruction and that the student had made progress with the level of services provided prior to the drafting of the December 2010 IEP. Although the student's special education teacher in English was not aware of the student's auditory processing disorder, the district argues that she was aware of the student's needs, implemented the IEP appropriately, and the student made progress.

Addressing the 2011-12 school year, the district notes that the IHO made no particular findings regarding that school year and asserts that, had the parent sent the student to the assigned district public school placement, the IEP would have been appropriately implemented. Accordingly, the district asserts that the parent's speculation otherwise does not support a finding that it did not offer the student a FAPE. Furthermore, the district asserts that because the December 2010 IEP was "procedurally and substantively sufficient," the IHO erred in finding a denial of FAPE for the 2011-12 school year.

The district notes that the IHO did not address the parent's allegations relating to the administration of the student's testing accommodations, the qualifications of the district representative at the December 2009 CSE meeting, the absence of the student from the same meeting, the failure of the CSE to recommend a full-time special class for the 2010-11 school year, or "any specific objections concerning the 2011-2012 school year that were raised in the [due process complaint notice]." The district asserts that each of these allegations is without merit.

The district next contends that the Child School was not an appropriate placement for the student because it is a school exclusively for students with disabilities and provides no opportunities for mainstreaming with regular education students. With respect to equitable considerations, the district asserts that the parent decided not to return the student to a public school placement "well before the beginning" of the 2011-12 school year, as evidenced by his enrolling the student in the Child School during spring 2011, before relaying his concerns with the student's IEP to the district. Accordingly, the district claims that the hearing record does not support the conclusion that the parent "ever seriously considered sending [the student] to a public

school" for the 2011-12 school year, precluding an award of tuition reimbursement. Furthermore, the district contends that the notice of unilateral placement provided by the parent was insufficient as a matter of law for failing to identify with specificity the defects with the December 2010 IEP that occasioned his unilateral placement of the student at the Child School.

The district additionally asserts that the IHO erred in awarding the student compensatory additional services because the IEPs were fully implemented and the student made "significant educational progress" under them. Finally, the district contends that the IHO should not have awarded reimbursement for the IEEs privately obtained by the parent because he never objected to any district evaluation, obtaining them on advice from the education consultant to assist in locating a new school placement for the student.

In an answer and cross-appeal, the parent denies the district's allegations material to the IHO's findings and contends that the IHO properly found denials of FAPE for the 2009-10 through 2011-12 school years. The parent asserts that the IHO properly found that the failure to have an additional parent member present at the December 2009 CSE meeting constituted a denial of a FAPE by "depriving [the parent] of the ability to have an advocate present to assist him in making sure that the CSE members listened to and appreciated all of the deficits that [the student] presented and how to best meet those deficits." The parent also contends that his participation in the December 2009 CSE meeting was impeded by the district's failure to review the 2003 auditory processing evaluation, include recommendations from that evaluation in the December 2009 IEP, and consider his concerns regarding the student's classroom placement. The parent next asserts that the IHO properly determined that the district denied the student a FAPE for the 2009-10 school year because it failed to conduct a reevaluation of the student's auditory processing needs and did not provide her with a small class size. The parent also asserts that the goals contained in the December 2009 IEP "failed to provide a viable remedial program to improve [the student]'s basic academic skills," as identified in the evaluative materials available to the CSE. With regard to the December 2010 CSE meeting, the parent asserts that the failure to include an additional parent member "specifically contributed to [the parent]'s inability to present contrary evidence and opinions sufficient to demonstrate to the [CSE] that [the student] was being mis-programed [sic] and mis-placed [sic] for the academic year in question," constituting a denial of FAPE. The parent contends that the placement with ICT services was inappropriate for essentially the same reasons as asserted with respect to the December 2009 IEP. The parent further argues that the recommended placement in a general education classroom with ICT services was insufficiently supportive, leading to increased anxiety and a lack of progress toward the student's annual goals. The parent next contends that the IHO properly found the Child School to be an appropriate placement, noting the student's success and asserting that unilateral parental placements are not held to as strict a standard as are district placements. Finally, the parent argues that the IHO correctly found equitable considerations to support his request for reimbursement for the student's tuition costs and the costs of privately obtained evaluations. In a cross-appeal, the parent asserts that the IHO erred in not awarding the full amount of 1:1 tutoring requested as compensatory additional services. The parent argues that the district called "no witness to contradict and/or rebut any of [the EBL director]'s expert testimony" recommending 400 hours of services and it was improper for the IHO to rely on the fact that the student was attending a private school that offered a 12-month

program as a basis for diminution, as that program was to prevent regression during the summer and 400 hours was necessary to address the student's "extensive deficits."

In an answer to the parent's cross-appeal, the district initially asserts that the student is not entitled to compensatory services because her IEPs were fully implemented and she was provided a FAPE for the 2009-10 and 2010-11 school years. The district also contends that compensatory services are not warranted because the student made "substantial educational progress" while in the district public school placement. In any event, the district argues that the recommendation for 400 hours of 1:1 tutoring services was specified as an "ideal scenario" that would enable the student to function on an eleventh grade level, rather than to place her in the position she would have been in had the district provided her with a FAPE.

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. Scope of Review

The district appeals from the IHO's decision to the extent that it could be read to hold that the district failed to implement the December 2009 or December 2010 IEPs; however I do not read it to hold such, nor did the parent make any such assertion in the due process complaint notice and, accordingly, I do not address this issue. I note that the district did not appeal certain of the IHO's findings regarding actions that it took or did not take (including, among others, that the December 2009 IEP did not address the student's poor attention by way of an annual goal); these findings are now final and binding on the parties (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]). However, the IHO based her findings of denials of FAPE for each school year on the cumulative aspect of the errors she found in the development and substance of each IEP, rather than specifying certain errors that by themselves constituted denials of FAPE (IHO Decision at pp. 32-38). The analysis set forth below accordingly focuses on those issues raised by the parties on appeal.

B. 2009-10 School Year

1. CSE Composition and Parent Participation

Initially, I note that the IHO did not address the parent's allegations regarding the qualification of the district representative at the December 2009 CSE meeting or the absence of the student from the meeting, and that the parents do not raise either as an additional basis for a finding of a denial of a FAPE to the student. In any event I would not find a denial of a FAPE on these bases, as nothing appearing in the hearing record indicates that the failure to include these

required members of the CSE impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits.

The IHO also made no explicit findings regarding the effect of the absence of an additional parent member at the December 2009 CSE meeting (IHO Decision at p. 32). However, as the parent has clearly alleged a denial of FAPE on this basis, I address it as such. The district concedes that the absence of an additional parent member from the CSE was a procedural violation but asserts that the parent's ability to participate was not thereby significantly impeded. Although the parent relies on the fact that he did not feel like a member of the CSE and felt that the results of the meeting were predetermined (Tr. pp. 955-56), the hearing record indicates that in response to his concerns regarding the results of the November 2009 psychoeducational evaluation, the district modified the student's classroom placement from a general education classroom with ICT services to include a special class setting for some subjects (Tr. p. 944; compare Dist. Ex. 3 at p. 1, with Parent Ex. D at pp. 1, 11). The parent's testimony further indicates that the student's academic performance, instructional levels, and needs were discussed at the CSE meeting, that the parent was able to voice his concerns, and that the district CSE members explained why they did not believe the student required a smaller classroom placement at that time (Tr. pp. 948-50, 956, 1040-41). Additionally, the father testified that he had previously attended CSE meetings (Tr. pp. 1036-38). Assistive guidance from the Office of Special Education indicates that "[t]he additional parent member can provide important support and information to the parents of the student during the meeting and, in addition to the student's parents, participates in the discussions and decision making from the perspective of a parent of a student with a disability" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 7, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>; see also J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942 at *4 n.11 [S.D.N.Y. Aug. 5, 2013]). As the hearing record reflects that the parent was able to participate in the development of the December 2009 IEP, I find that the absence of the required additional parent member did not significantly impede the parent's ability to participate in the development of the IEP so as to rise to the level of a denial of a FAPE (E.F. v. NYC DOE, 2013 WL 4495676, at *14 [E.D.N.Y. Aug. 19, 2013]; see M.H., 685 F.3d at 255).⁷

⁷ To the extent that the parent asserts "that he needed the assistance of a[n additional] parent member to 'make his case,'" no authority is cited for the proposition that the parent is entitled to the presence of a member of the CSE who will ensure that the parent's wishes are carried out. Indeed, "[n]othing in the IDEA requires the parents' consent to finalize an IEP. Instead, the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F., 2013 WL 4495676, at *17 [noting that " as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions."]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]; 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] ["Meaningful participation does not require deferral to parent choice"]).

2. Evaluative Data Available to the CSE⁸

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 need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and 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][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In a report dated November 24, 2009 a district school psychologist indicated that the student had undergone a psychoeducational evaluation as part of her "mandated three year re-evaluation," to assess her progress, and to update her IEP (Parent Ex. B at p. 1). The school psychologist reported that although the student was "leery" about joining her for the evaluation, the student maintained good eye contact and rapport (id.). According to the report, during the evaluation the student concentrated well on the tasks at hand, and was "compliant and diligent," although it took her "a long time to warm up to new situations" (id. at pp. 1-3). The report indicated that the student took her work seriously, was "methodical and organized," and upon graduation from high school would like to attend college to become an artist (id. at p. 3). The school psychologist reported that the student had developed adequate school/work habits to be able to pursue her career goals (id.).

⁸ I note that the parent does not challenge the sufficiency of the data available to the December 2009 or December 2010 CSEs directly; rather, he contends that the present levels of performance were not adequate because they did not reflect the results of the 2003 auditory processing evaluation (see J.C.S., 2013 WL 3975942, at *9-*10) [noting the distinction between claims of whether a CSE has adequate information to develop an IEP and whether the CSE gave due consideration to the available information). In this instance, discussion of the available evaluative data before the CSE facilitates discussion of the issue to be resolved—the adequacy of the present levels of performance contained in the IEP.

Administration of the Woodcock-Johnson III Tests of Achievement (W-J III ACH) to the student yielded subtest scores in the following percentiles (range): letter word identification 27 (average), reading fluency 24 (low average), passage comprehension 11 (low average), math calculation 5 (low), math fluency 7 (low), and applied problems 28 (average) (Parent Ex. B at p. 2). The student achieved a broad reading cluster score in the 18th percentile (low average), and a math calculation skill cluster score in the 4th percentile (low) (id.). In reading, the school psychologist reported that the student's word reading ability was in the average range, and she was able to demonstrate understanding of passages up to the upper fourth grade level (id.). The student's performance was "limited" on tasks requiring the ability to use syntactic and semantic clues in comprehending written discourse as she read it (id.). The school psychologist also reported that the student exhibited difficulty using context clues effectively as well as making inferences from the text, and considered these to be areas of weakness for the student (id.). In math, the student's applied problem skills were an area of strength, and her calculation skills were low when compared to her peers and considered to be an area of weakness (id. at p. 3). She exhibited the ability to solve simple addition and subtraction calculation; however, the student had difficulty solving problems involving multiplication, division, decimal numbers, negative numbers and algebraic operations (id.).⁹ The school psychologist reported that the student's "execution" during both reading and math tasks was slow for her age, suggesting that she processed information more slowly than her peers and therefore should be allowed extra time to complete timed tasks (id.). To assess the student's writing skills, the school psychologist asked her to prepare a paragraph about her career choice (id.). The student produced a paragraph with adequate sentence structure, no spelling errors, and appropriate capitalization (id.). However, the student's choice of vocabulary words was "weak" for her age, her writing was "laborious," and the school psychologist estimated that the student's writing skills fell within a fourth to fifth grade level (id.).

The school psychologist noted in the report that the student was not spontaneous, and that it was difficult for her to engage in casual and spontaneous conversation (Parent Ex. B at pp. 1-2). During the evaluation the student spoke in monosyllabic sentences, although the rate and clarity of her speech were adequate (id. at p. 2). The student's oral communication skills were judged through subjectively observing and monitoring her expressive language, which the school psychologist indicated "seemed delayed for her age" (id.). According to the school psychologist, the student was "well behaved," "quiet," and "reserved;" appearing to "keep herself isolated" and have difficulty interacting with other people (id. at p. 3). The school psychologist further reported that the student's insecurities about verbal expression affected her ability to negotiate social interactions and interact appropriately with her peers and teachers (id.). The school psychologist reported that a continuation of the student's placement in an ICT class with related services of speech-language therapy and counseling "seemed indicated" (id.).

On December 16, 2009, the student's speech teacher prepared a handwritten speech-language progress report (Parent Ex. C). The report noted the then-current IEP recommendation that the student receive therapy twice weekly for 30 minutes in a group of eight (id.; see Dist. Ex. 3 at p. 11). The progress report indicated that the student exhibited delays in language skills including vocabulary development and sentence formulation (syntax and spelling) (Parent Ex.

⁹ The school psychologist noted in her report that the student asked to use a calculator during the assessment (Parent Ex. B at p. 3).

C). According to the speech teacher, the student also exhibited delays in listening/auditory processing skills such as taking long periods of time to process information and respond to questions (id.). The report also noted that the student became easily distracted and needed to be reminded to stay on task (id.). The speech teacher recommended that the student continue to receive speech-language therapy at the same mandated level (id.).¹⁰

3. Present Levels of Performance

Among the required 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; and special factors as set forth in federal and State regulations (34 CFR 300.324[a][1]-[2]; 8 NYCRR 200.4[d][2]).

A review of the November 2009 psychoeducational evaluation report and the December 2009 IEP shows that the information included in the IEP's statements of the student's present levels of academic and social/emotional performance were taken directly from the evaluation report (compare Parent Ex. B, with Parent Ex. D at pp. 3-5). Additionally, the December 2009 CSE determined that the student's behavior did not seriously interfere with instruction and could be addressed by her regular and special education teachers (Parent Ex. D at p. 5). The IEP indicated no medical or health concerns but noted that the student was supposed to wear corrective lenses (Parent Ex. D at p. 6).

The speech teacher who had provided the student's speech-language therapy during both the 2008-09 and the 2009-10 school years and who attended the December 2009 CSE meeting testified that at that time of the CSE meeting the student exhibited deficits in listening, auditory processing, and writing skills (Tr. pp. 216-17; Parent Exs. C; D at p. 2). The speech teacher observed that the student "took long periods of time to process information," and was very easily distracted by outside noise, which she determined was related to a "processing issue" (Tr. pp. 219-21, 276-79; Parent Ex. C). Although the speech teacher prepared a progress report in advance of the December 2009 CSE meeting and was a participant, the IEP does not reflect information about the student's listening skills, or her distractibility (Parent Exs. C; D at pp. 3-5). With regard to the student's auditory processing difficulties, the IEP notes that the student's reading and math "execution was slow," suggesting that she processed information more slowly than her peers (Parent Exs. C; D at p. 3). The IEP referenced the student's "language skills"

¹⁰ The speech teacher testified that during the three years she worked with the student, she did not conduct any formal assessments or evaluations of the student's language functioning (Tr. pp. 216, 218, 271, 273). I note that State and federal regulations require that districts evaluate students at least once every three years— unless otherwise agreed by the parent and district—in a sufficiently comprehensive manner so as to identify all of their special education and related services needs (34 CFR 300.303[b][2]; 300.304[c][6]; 8 NYCRR 200.4[b][4], [6][ix]).

delay indicated by the November 2009 psychoeducational evaluation report by stating that the student exhibited difficulty engaging in spontaneous conversation and that she spoke in monosyllabic sentences (Parent Exs. B at p. 2; D at p. 3). Additionally, the IEP reflected the student's difficulties with math calculations (id.).

The hearing record shows that the information included in the December 2009 IEP present levels of performance was generally consistent with the testimony from the teachers and the guidance counselor who were working with the student at the time of the meeting. For example, at the time of the December 2009 CSE meeting, the guidance counselor who was providing the student's counseling services and attended the meeting testified that the student was "very shy," and exhibited a limited ability to verbalize emotions and interact with peers (Tr. pp. 104-07; Parent Ex. D at pp. 2, 5). The student's 2009-10 special education English teacher stated that the student exhibited reading comprehension and writing skill deficits, and required additional time to complete assignments, information reflected in the IEP (Tr. pp. 335-36, 338-40; Parent Ex. D at pp. 3-4).

4. Annual Goals

An IEP must also 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 (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 December 2009 IEP contains 12 annual goals in the areas of reading, writing, math, vocation, counseling, receptive language/writing, and auditory processing (Parent Ex. D at pp. 7-10).¹¹ The December 2009 IEP includes speech-language annual goals to improve the student's abilities to "take notes and organize the information" to produce a written essay and to record three relevant details from an oral presentation, but does not include any goals addressing the student's oral communication and conversation skill needs identified in the IEP (Parent Ex. D at pp. 3, 10).¹² However, goals were developed that were designed to address the student's language needs with regard to listening, auditory processing, working memory, and writing (Tr. pp. 244-45; Parent Ex. D at p. 10). In math, the IEP provided annual goals to improve the student's ability to solve two-step equations and basic two-step word problems (Parent Ex. D at pp. 3, 8).

¹¹ While both the December 2009 and December 2010 IEPs contain annual goals in the area of vocation, the hearing record does not provide information about the student's vocational skills and needs, nor do the parties assert claims regarding vocational issues, therefore I make no findings regarding the appropriateness of the student's vocational annual goals (Dist. Ex. 2 at p. 7; Parent Ex. D at p. 8).

¹² Nor did those skills appear to be a focus of the speech-language therapy the student received subsequent to the December 2009 CSE meeting (Tr. pp. 241-45).

I note that the parent now challenges the IEP on the basis that it did not include an annual goal to address every deficit identified in the auditory processing evaluation, psychoeducational evaluation, and speech progress reports, particularly reading comprehension, writing, and phonemic decoding. With regard to the student's reading comprehension, the December 2009 IEP provided reading comprehension annual goals related to the student's deficits identified in the present levels of performance and her then-current needs as described by the special education English teacher (Tr. pp. 339-40; Parent Ex. D at pp. 3-4, 7). Regarding the student's phonemic decoding abilities, I note that there is no indication in the hearing record that this continued to be an area of need at the time of the December 2009 CSE meeting, the 2003 auditory processing evaluation designating it as an area of need was over six years old at that point, and the private auditory processing evaluation—although conducted 18 months after the December 2009 CSE meeting—indicated that this aspect of auditory processing was no longer an area of deficit for the student (compare Parent Ex. A at pp. 2-3, with Parent Ex. J at pp. 4-5). With regard to writing, I note that although the speech-language progress report indicated that the student had difficulty with spelling and syntax, the psychoeducational evaluation report indicated that while the student's choice of vocabulary was "weak for her age," her spelling and sentence structure were judged to be adequate (compare Parent Ex. B at p. 3, with Parent Ex. C). The special education English teacher indicated that vocabulary was an area of strength for the student and that her spelling and syntax were appropriate (Tr. pp. 342-43, 425-26, 470-71). I find that although the writing goals included on the IEP regarding the student's ability to identify parts of speech addressed only a facet of her need to improve her ability to complete paragraph-length written assignments, they were not so deficient as to deny the student a FAPE (Tr. p. 338; Parent Exs. B at p. 3; D at p. 7). Finally, I note that the counseling annual goals are in keeping with the needs identified by the present levels of social/emotional performance and as described by her guidance counselor (Tr. pp. 115-17; Parent Ex. D at pp. 5, 9).¹³

5. Speech-Language Therapy and Counseling¹⁴

The hearing record shows that the speech teacher considered the student's primary speech-language needs to include her listening, auditory processing, and writing skills, which were addressed by way of annual goals as discussed above (Tr. pp. 217, 220-21, 244-45). The December 2009 CSE recommended that the student continued to receive twice weekly sessions of group speech-language therapy (Parent Ex. D at p. 13).

Regarding the student's counseling services, the hearing record shows that although not achieved, the student demonstrated progress toward her November 2008 IEP counseling annual goals (Dist. Ex. 3 at p. 15; see Parent Ex. D at p. 9). The December 2009 CSE recommended that the student receive one session per week of group counseling services, to improve the student's peer interaction and social skill needs (Parent Ex. D at pp. 9, 13). The student's

¹³ To the extent that the assistant principal for instructional support services at the district school the student attended for the 2008-09 through 2010-11 school years indicated that she reviewed every IEP developed to ensure "that every two student has two reading, two writing, two math, [and] two vocational goals," I caution the district that goals should be developed to meet each student's particular needs.

¹⁴ The parent did not challenge the provision of related services to the student during the 2009-10 school year other than with respect to the goals developed for speech; this information is included for its relevance to my discussion of the 2010-11 school year.

counselor indicated that these goals would improve the student's in-class peer interactions (Tr. p. 119). The counselor testified that although the student was shy, with a limited ability to express herself and her emotions, her ability to interact with peers and verbalize her feelings progressed during the school year (Tr. pp. 105-07, 112-13, 120).

6. ICT/15:1 Special Class Placement

The December 2009 CSE recommended placing the student in a general education class with ICT services provided in a 14:1 ratio for English, science, and history classes, and in a 15:1 special class for math instruction (Parent Ex. D at p. 11; see Tr. pp. 692-95). The student's English special education teacher for the 2009-10 school year testified that although during fall 2009 prior to the CSE meeting he was unsure whether the ICT placement was appropriate, by December 2009 he determined that, when provided with extended time to complete assignments (included as an accommodation in the December 2009 IEP), the student demonstrated the ability to complete the academic work in the general education class with ICT services (Tr. pp. 344-47, 360-61; Parent Exs. D at p. 4; R). The math special education teacher who taught the student in fall 2009 prior to the December CSE meeting testified that the 15:1 special class placement was appropriate for the student because in her class the student received the individual attention she needed to make progress from either the special education teacher or the classroom paraprofessional (Tr. pp. 691, 695-98). The hearing record shows that the student passed all of her classes during the 2008-09 school year while placed in general education classes with ICT services, and at the time of the December 2009 CSE meeting, had passed Regents Competency Tests (RCTs) in math and science (Tr. p. 530; Dist. Exs. 3 at p. 1; 9; Parent Ex. B at p. 1).¹⁵

7. Conclusion

An analysis of the student's December 2009 IEP reveals that the district appropriately described the student's academic and social/emotional present levels of performance, developed reading comprehension and counseling annual goals, and recommended counseling, ICT services, and special class placements to meet the student's needs (Parent Ex. D at pp. 3-5, 7, 9, 11, 13). The IEP does not fully describe the student's auditory processing and language deficits, and did not include annual goals to address each of the student's expressive language and oral communication needs. Although the district may not have identified the student's needs with level of specificity preferred by the parent, it is not necessary to conclude that the present levels of performance were so imprecise that it denied the student a FAPE (P.G. v. New York City Dep't of Educ., 2013 WL 4055697, at *11 [S.D.N.Y. July 22, 2013]). I am concerned by the CSE's failure to modify the student's speech-language and writing goals to address her needs with more specificity. However, viewed as a whole, I find that the December 2009 IEP was reasonably calculated to provide the student with educational benefits (Dist. Ex. 9; see Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, "the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart

¹⁵ It appears that the student was placed in a 15:1 special class for math during the 2008-09 school year (Tr. pp. 691-95; Dist. Ex. 9), but the November 2008 IEP contained in the hearing record does not specify such a recommendation (Dist. Ex. 3).

from the whole"]. The hearing record indicates that the student passed each of her classes during the 2008-09 school year (Tr. p. 530; Dist. Ex. 9) and there is no indication that the student's academic needs had changed at the time of the development of the December 2009 IEP so as to warrant the provision of a special class placement on a full-time basis. Goals were developed in each of the student's areas of need, and the district recommended related services to address her speech-language and social/emotional needs. On balance, the December 2009 IEP adequately addressed the student's needs as known to the December 2009 CSE. "[A] school district fulfills its substantive obligations under the IDEA if it provides an IEP that is likely to produce progress, not regression, and if the IEP affords the student with an opportunity greater than mere trivial advancement" (T.P., 554 F.3d 247, 254 [2d Cir. 2009] [citations omitted]), and the evidence above weighs more heavily in support the conclusion that the district fulfilled this standard with respect to the challenges to the December 2009 IEP.

C. 2010-11 School Year

1. CSE Composition and Parent Participation

With regard to the absence of an additional parent member from the December 2010 CSE meeting, the district argues that it convened a validly constituted CSE subcommittee while the parent responds that there was no evidence the meeting proceeded as a CSE subcommittee meeting and thus the additional parent member was required. Assuming for this discussion that the district did not properly notify the parent of the fact that it was convening a CSE subcommittee for the student's annual review,¹⁶ and that the failure to include an additional parent member constituted a procedural violation, the hearing record does not support a finding of a denial of a FAPE on this basis. The parent testified that the district attempted to engage the student, who was present, but that she did not contribute much (Tr. p. 964). He also indicated that he felt that his requests that the student be placed in a smaller, quiet classroom were "largely ignored" (Tr. p. 969). However, he testified that the meeting included discussions of the student's social/emotional and classroom performance, and that the district asked if he had any concerns or questions (Tr. pp. 1042-43). Although it appears that the CSE likely could have made greater efforts to convey its respect for the parent's differing viewpoint during the CSE's deliberations, it is not clear from the hearing record that the presence of an additional parent member would have in any way provided any further convincing information to the CSE that the student required a different placement (see E.F., 2013 WL 4495676, at *17, *24-*25 [holding that where a parent was able to participate in the CSE meeting despite the absence of an additional parent member, the procedural error was one of "form over substance" and did not make the IEP inadequate]).

2. Present Levels of Performance

The present levels of performance included in the December 2010 IEP state that the student was a "shy and introspective" junior (Parent Ex. E at p. 3). In the area of

¹⁶ There is no evidence in the hearing record that the district provided the notice required when the district convenes a CSE subcommittee in accordance with 8 NYCRR 200.5(c)(2)(vi) (see E.F., 2013 WL 4495676, at *13-*14).

social/emotional performance, the December 2010 IEP indicated that the student was "respectful" and appeared to recognize the value of school (Dist. Ex. 2 at p. 4). According to the IEP, at times the student had difficulty socially interacting with peers, and participating in groups during structured counseling sessions (*id.*). The December 2010 CSE determined that the student's behavior did not interfere with instruction, and could be addressed by the regular and/or special education teachers (*id.*).¹⁷

A review of the hearing record shows that during the December 2010 CSE meeting, the discussion focused on the student's social/emotional performance (Tr. pp. 125-28, 517-18, 930, 1042). The district guidance counselor who provided the student's counseling services while she was enrolled in the district public school testified that at the time of December 2010 CSE meeting, the student was exhibiting an increase in anxious behaviors including crying because she was feeling "overwhelmed" by peer interactions (Tr. pp. 126-27; *see* Tr. p. 209). The guidance counselor testified that the student's interaction with peers was "very limited," and that instances of her becoming upset were a change from the previous school year (Tr. p. 128). The student's special education English teacher who participated at the meeting testified that the CSE discussed that socially, the student exhibited difficulty working with other students (Tr. pp. 502-03, 518). The special education English teacher stated that during the 2010-11 school year, the student was "very withdrawn" and did not communicate well with peers or adults, socialize with peers, or work well in groups (Tr. p. 510). The speech teacher who provided the student's speech-language therapy services while she attended the district and who participated at the December 2010 CSE meeting testified that during the 2010-11 school year the student was "very withdrawn and crying a lot" (Tr. pp. 226-28; Parent Ex. E at p. 2). The speech teacher further testified that the student socially was not able to function in a group with other students because she did not know how to interact with peers (Tr. p. 227).

Regarding the student's academic skills, in preparation for the December 2010 CSE meeting, the special education English teacher spoke with the student's math teacher and the speech teacher to determine the student's abilities and needs (Tr. pp. 524-25). The hearing record does not otherwise describe how the December 2010 present levels of performance were developed, or upon what information they were based. The resultant IEP indicated that the student had received a diagnosis of an auditory processing disorder and exhibited delays in processing information, but otherwise provides no information about the student's language or oral communication skills and needs (Parent Ex. E at p. 3). In reading, the IEP indicated that the student exhibited good comprehension and that she enjoyed reading (*id.*). At the time the IEP was developed, the student was working on increasing her academic vocabulary through a "word of the day" to increase her comprehension (*id.*). In writing, the student was learning to develop "higher level writing skills" by incorporating transitional language and higher level vocabulary into her writing (*id.*). In math, the IEP indicated that the student was good at solving equations using the order of operations and completing calculations, but that she needed to work on solving systems of equations, working with similar triangles and polygons, and solving word problems (*id.*). The IEP stated that the student was "capable of completing high school level work, if she has clear expectations and has been given a time constraint" (*id.*). According to the IEP, the

¹⁷ In the area of health and physical development, the IEP indicated that the student was reportedly in good health, her physical development was age appropriate, and she was "supposed to wear corrective lenses" (Parent Ex. E at p. 4).

student was easily distracted and needed to be provided with "several prompts in order to stay on task" (id.). To help the student focus, the IEP indicated that the student should be seated in the front of the classroom (id.). Additionally, the IEP provided the student with extra time to complete tasks (id.). The IEP included WJ-III ACH subtest percentiles and instructional levels from the November 2009 psychoeducational evaluation report (compare Parent Ex. B at p. 4, with Parent Ex. E at p. 3).¹⁸

3. Annual Goals

The December 2010 IEP contains 12 annual goals in the areas of reading, writing, math, vocation, counseling, receptive language/writing, and auditory processing (Dist. Ex. 2 at pp. 6-10). The student's receptive language/writing and auditory processing annual goals were continued from the December 2009 IEP because, according to the speech teacher, the goals were not met and the student had demonstrated either "a little" or "very little" progress toward the goals (Tr. pp. 246-51, 322-24; compare Dist. Ex. 2 at p. 9, with Parent Ex. D at p. 10). One of the student's counseling annual goals relating to her ability to develop appropriate group interaction skills was also continued from the December 2009 IEP, as the student had demonstrated "very minimal" progress toward that goal (Tr. pp. 129-31; compare Dist. Ex. 2 at p. 8, with Parent Ex. D at p. 9). I note that although the November 2009 psychoeducational evaluation report indicated that the student's oral communication and expressive language skills appeared "delayed," which in part affected her social skills with peers and adults, the December 2010 IEP did not include annual goals or otherwise provide supports to improve those skills (see Dist. Ex. 2; Parent Exs. B; E).¹⁹ A review of the student's reading, math, and writing goals shows that they align very closely with the information about the student's academic abilities included in the present levels of performance (compare Dist. Ex. 2 at pp. 6-7, with Parent Ex. E at p. 3).

4. Related Services

The hearing record showed that at the time of the December 2010 CSE meeting, the student had been receiving one weekly 30-minute group session of counseling, and twice weekly 30-minute group sessions of speech-language therapy since November 2009 (Dist. Ex. 3 at p. 11; Parent Ex. D at p. 13). As discussed above, in December 2010 the student exhibited oral communication and expressive language needs, an increase in anxious behaviors about peer interactions, and had made minimal progress toward her annual goals in both speech-language therapy and counseling (Tr. pp. 129-31, 227-28, 246-51; Parent Ex. B). The guidance counselor testified at that time she was addressing the student's anxiety "one-on-one" and "individually;" however, the IEP does not reflect any modification in her counseling services from the December 2009 IEP to adjust for her changing social/emotional performance levels (Tr. pp. 127,

¹⁸ The November 2009 psychoeducational evaluation report included WJ-III ACH grade equivalents (GE), which are the same as the "instructional levels" listed in the December 2010 IEP (compare Parent Ex. B at pp. 2-4, with Parent Ex. E at p. 3).

¹⁹ While the December 2010 IEP did include an annual goal designed to improve the student's ability to initiate conversation with peers, the IEP did not address the student's underlying expressive language and oral communication deficits (Dist. Ex. 2; Parent Ex. E).

139; compare Dist. Ex. 2, with Parent Ex. E). Similarly, despite the lack of progress toward the student's receptive language and auditory processing annual goals, and the IEP's lack of oral communication and expressive language goals, the December 2010 CSE recommended continuing the student's level of speech-language therapy from the previous school year (compare Parent Ex. D at p. 13, with Parent Ex. E at p. 7).

5. ICT/15:1 Special Class Placement

The December 2010 CSE recommended placement of the student in 14:1 ICT classes for English, science and social studies classes, and 15:1 special classes for math, "lab" and Spanish (Parent Ex. E at p. 5).²⁰ The special education English teacher testified that during the 2010-11 school year she provided instruction to the student in an ICT class focusing on preparation for the Regent's examination (Tr. pp. 503, 506). Prior to the December 2010 CSE meeting, the special education English teacher, who was also the student's "grade advisor," testified that she spoke with the student's math teacher, her counselor, and her speech teacher to determine the student's performance (Tr. pp. 524-28, 582-83).²¹ The student's math teacher provided information that enabled the special education English teacher to understand what the student could do, in what areas she needed help, and the goals the student needed for math (Tr. pp. 525-26). The special education English teacher testified that during the December 2010 CSE meeting the CSE discussed that the student's academic development was "improving" and that she was doing well in class, but that the focus of the discussion was on the difficulty she had working with other students (Tr. pp. 517-18). She further stated that although the student could become distracted in the general education classroom, with redirection and prompts she was "fine" and could function in a large class setting (Tr. pp. 521-23). The hearing record further shows that the student had passed all of her academic courses during the 2009-10 school year, as well as all of the Regent's examinations administered to her (Tr. pp. 530, 762-63; Dist. Ex. 9).

6. Conclusion

As with the December 2009 IEP, an analysis of the student's December 2010 IEP results in the conclusion that it met the student's needs in some areas, but failed to address other needs. Specifically, the district adequately described the student's academic present levels of performance and developed appropriate annual goals for academics, and appropriately recommended ICT services and special class placement as required to meet the student's needs (Dist. Ex. 2 at pp. 6-7, 9; Parent Ex. E at pp. 3-5, 7). However, I am troubled by the district's failure to address the student's increased anxiety levels and feelings of being overwhelmed by peer interactions, acknowledged by district witnesses who worked directly with the student during the 2010-11 school year and participated in the December 2010 CSE meeting (Tr. pp. 126-28, 226-28; Parent Ex. E at p. 2). Despite the December 2010 CSE meeting focusing primarily on the student's social/emotional needs (Tr. p. 517), the resultant IEP failed to appropriately address this area of concern. On reviewing the IEP as a whole, I find that the deficiencies in the IEP, including the failure to adequately describe the student's auditory

²⁰ The hearing record does not provide information about the student's 2010-11 Spanish class.

²¹ The special education English teacher testified that grade advisors schedule students' classes and ensure they have the right classes needed for graduation (Tr. p. 528).

processing, language, and social/emotional needs, develop annual goals to sufficiently address the student's expressive language and oral communication deficits, or make adjustments to the student's program to account for her failure to demonstrate progress in speech-language therapy and her changing social/emotional needs, support in this rare set of circumstances the IHO's finding that the December 2010 IEP failed to provide the student with a FAPE. While in most cases "the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress" (see Rowley, 458 U.S. at 207 n.28, Walczak, 142 F.3d at 130 [2d Cir 1998]), "[c]onversely, ex post evidence of a student's progress does not render an IEP appropriate" in all instances (Antonaccio v Bd. of Educ. of Arlington Cent. Sch. Dist., 281 F Supp 2d 710, 724 [SDNY 2003]), especially where, as further described below, it appears that the ex post evidence progress is attributable to interventions that were not called for by IEP in question.

D. Compensatory Additional Services

Having found that the district failed to offer the student a FAPE for the 2010-11 school year, it is necessary to determine what, if any, remedy is required to cure the harm suffered by the student. 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]). 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 the Dep't of Educ., Appeal No. 12-135; Application of the Dep't of Educ., Appeal No. 11-132).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see 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 [DC 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"]; Application of the Dep't of Educ., Appeal No. 11-075; Application of a Student with a Disability, Appeal No. 10-052). 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"]; 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, 525 [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 ["There is no obligation to provide a day-for-day compensation for time missed"]; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

I first address a theme appearing throughout the hearing record. Counsel for the parent on several occasions implied or stated outright that the grade equivalent scores achieved in November 2009 and reflected as instructional levels in the student's IEPs directly correlated to the skill levels she exhibited in the classroom, her ability to benefit from the instruction she received during the 2009-10 (tenth grade) and 2010-11 (eleventh grade) school years, and the degree to which the tenth and eleventh grade curricula could be modified to meet her needs (see, e.g., Tr. pp. 291-96, 369-72, 424-25, 588-89, 615-28, 649-50, 652-53, 758-60, 779-90, 875-99). According to the private psychologist who conducted the June 2011 psychoeducational evaluation of the student, "grade equivalent is not the best way to look at a child even if everybody does it" (Tr. p. 1190). She further testified that percentile rankings "are a more accurate statistical measure than a grade equivalent" (Tr. p. 1190). The district special education teachers who taught the student during the 2009-10 and 2010-11 school years testified that they provided her with materials and instruction at a grade level she could work with based upon their observation of the skills she demonstrated in the classroom (see e.g. Tr. pp. 371-72, 349, 424-27, 596-600, 652-53, 775-79, 787, 809-10), regardless of the grade equivalents she had achieved in 2009.²² Additionally, despite the deficiencies in the December 2010 IEP, the academic

²² I note that the hearing record showed that both the student's Child School special education English and math teachers testified that they did not conduct formal testing of the student's skills, rather, they informally assessed the student to determine her classroom performance levels using writing assignments, reading in class, tests, and quizzes (Tr. pp. 1082-83, 1130, 1337-38, 1340, 1376-77). The special education teachers further testified that they modified the eleventh grade Regents curriculum to the student's levels during the 2011-12 school year in manners similar to those described by the district special education teachers (Tr. pp. 1121-22, 1134-35, 1351-54, 1375).

instruction provided to the student enabled her to exhibit progress in the curriculum and successfully pass her courses and the corresponding Regents examinations (Dist. Ex. 9).

The student's special education English teacher during the 2010-11 school year testified that the student received supports including a checklist for developing essays, "Saturday School" and tutoring opportunities, group work, outlines, and graphic organizers (Tr. pp. 508-09, 515-16, 521, 550-51). According to the special education English teacher, the student exhibited progress during the school year, including her ability to become more independent and add more detail to her written work, infer more from reading material, and exhibit a decreased need for scaffolding and checklists (Tr. pp. 507-08, 514, 548-52). The student also demonstrated an increase in vocabulary and comprehension, and a decrease in the number of prompts to follow the class (Tr. pp. 519, 521-22). Overall, the special education English teacher stated that the student exhibited "great progress" in her class during the 2010-11 school year (Tr. pp. 558-59). Additionally, that special education teacher, who was also the student's grade advisor, testified that the student had taken the required classes for ninth, tenth and eleventh grades, "passed every class she ever took," and passed all of the Regents examinations she had taken (Tr. pp. 528-30; Dist. Ex. 9).²³

The speech teacher indicated that the student made very little progress on either of her goals during the 2010-11 school year, despite the goals being verbatim copies of the goals from the December 2009 IEP and on which the student had made little progress during the 2009-10 school year (Tr. pp. 224-25, 246-47, 249-51; compare Dist. Ex. 2 at p. 9, with Parent Ex. D at p. 10). With regard to the counseling services provided to the student during the 2010-11 school year, the hearing record indicates that the student made "very minimal" progress toward her goal for cooperative group interaction and, although she would attempt to initiate conversations, was sometimes off topic (Tr. pp. 130-32). Although the counselor opined that the lack of progress was related to the student's inconsistent attendance at her counseling sessions, I note that the counselor indicated that the student's attendance improved after she notified the parent (Tr. pp. 128-29, 136, 195; Parent Ex. G). Additionally, the counselor recommended to the parent that the student take advantage of "possible outside support services . . . to address the social/emotional piece;" she did not further explain why she believed that the student's social/emotional needs could not adequately be addressed during her in-school counseling sessions (Tr. pp. 132-33).

The IDEA provides no guarantee of any specific amount of progress, so long as the district offers a program that is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192). Although in this instance I find that the district denied the student a FAPE for the 2010-11 school year by failing to adequately describe and address her needs, I find that the hearing record indicates that the student's special education teachers did much to cure the

²³ I note that although the student did not receive a 65 on each Regents examination on her first attempt, she eventually received a passing grade above a 65 on each of the Regents examinations she took while still enrolled in the district (Dist. Ex. 9). In any event, the hearing record indicates that a grade of 55 at that time was a passing score for a student with a disability entitling the student to receive a local diploma (Tr. p. 914; see also "General Education and Diploma Requirements," Office of Curriculum and Instruction [Nov. 2012], available at <http://www.p12.nysed.gov/ciai/gradreq/revisedgradreq3column.pdf>; "Summary of Diploma Requirements for Students Who First Enter Grade 9 in 2008," Office of Curriculum and Instruction [Nov. 2011], available at <http://www.p12.nysed.gov/ciai/gradreq/2008GradReqDetails.html>).

deficiencies in the IEPs by providing instruction in a manner not required by the IEPs themselves. With respect to the parent's request that I award 400 hours of compensatory additional services in the form of 1:1 tutoring recommended by the owner of the tutoring company, I do not find such services to be necessary to remediate the district's denial of a FAPE to the student. Although the witness testified that 1:1 tutoring would allow the student to make "significant progress" (Tr. p. 1268) and recommended that the student receive 400 hours of tutoring, she indicated that would be "an ideal scenario" (Tr. p. 1259), which goes beyond the district's obligation to provide the student with a program reasonably calculated to provide educational benefits. In particular, the witness did not explain how the provision of tutoring services for reading, writing, and math were targeted at remediating the deficits in the student's IEPs—on which she expressed no opinions—but rather testified that such services would be effective in addressing the student's still-existing deficits (Tr. pp. 1257-58). I find no reason appearing in the hearing record to award tutoring services in writing and math to redress a denial of FAPE which I find stems from the district's failure to appropriately address the student's increasing social/emotional difficulties and auditory processing/language needs, and reverse the IHO's award of compensatory additional services.²⁴ Instead, in exercising my authority to order equitable relief, I will direct the district to provide the student with 18 hours of 1:1 counseling and 36 hours of 1:1 speech-language therapy to address her social/emotional and language difficulties that went unaddressed by the district during the 2010-11 school year, unless the parties otherwise mutually agree to a different amount.²⁵ Unless the parties otherwise agree, the provider shall be chosen by the parent from professionals duly licensed and/or certified under State law to provide such services, and the district will be ordered to pay for these services at a rate of up to \$110 per hour.²⁶ The student may access these services at any time within two years of the date of this decision.

E. 2011-12 School Year and Unilateral Parent Placement

²⁴ If I had found that the district did not offer the student a FAPE for the 2009-10 school year, many of these same considerations would apply to the requested award of compensatory services sought for that school year. In particular I note the extensive testimony from the student's special education math and English teachers regarding the manner in which they modified the curriculum for the student and the progress she made while in their classes (Tr. pp. 338-42, 350-51, 354-57, 423, 695-704, 706-07, 709-10, 727-30, 748, 805-06). I also note again that the student passed all of her classes and several Regents exams during the 2009-10 school year (Dist. Ex. 9). In addition, the guidance counselor indicated that the student made progress toward her goals for that year (Tr. p. 120). However, the speech teacher testified that the student made very little progress toward her goals because of her distractibility and auditory processing difficulties (Tr. p. 246-47). Accordingly, the hearing record does not support the award requested by the parent, but could support an award of speech-language therapy.

²⁵ Although an hour for hour calculation is not always appropriate, the hearing record is devoid of any evidence regarding the speech-language services the student may have received at the Child School, and is minimal with regard to the counseling services received by the student. Lacking a sense of the student's current levels of performance in these areas, I have awarded compensatory services in accordance with the mandate contained in the student's December 2010 IEP (36 weeks in the school year multiplied by one half-hour session per week of counseling, and two half-hour sessions per week of speech-language therapy).

²⁶ As the hearing record contains no information regarding the cost of obtaining these services from a private provider within the district, I have awarded the rate charged by EBL Coaching for providing 1:1 tutoring services (Tr. pp. 1260-61).

As noted above, the December 2010 IEP was continued as the operative IEP at the time the student was unilaterally placed at the Child School. Accordingly, because I find that the December 2010 IEP did not offer the student a FAPE, for the reasons stated above I also find that the district did not offer the student a FAPE for the 2011-12 school year and turn to the appropriateness of the unilateral placement of the student at the Child School.²⁷

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), that is, the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000], abrogated on other grounds by Schaffer v. Weast, 546 U.S. 49, 57-58 [2005]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d at 364; see Rowley, 458 U.S. at 207)). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

²⁷ Although the December 2010 IEP expired by its own terms in December 2011, the district does not argue that it developed a subsequent IEP that remediated the deficiencies for the remainder of the 2011-12 school year. Accordingly, inasmuch as the IEP in effect at the beginning of the 2011-12 school year did not offer the student a FAPE and there is no indication regarding program recommendations made by the CSE thereafter, I treat the parents request for reimbursement relief as addressing the full remainder of the 2011-12 school year. Similarly, as the then-existing IEP was insufficient to provide the student a FAPE, I need not consider whether the private evaluations provided to the district by the parent in July 2011 required the district to reconvene the CSE to address them.

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

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

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

As noted above, the sole reason for which the district asserts that the Child School was not an appropriate placement for the student is because the student population is composed entirely of students with disabilities and the Child School was thus "overly restrictive" for the student. Although the restrictiveness of the parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105; Schreiber v. East Ramapo Cent. Sch. Dist., 2010 WL 1253698, at *19 [S.D.N.Y. Mar. 21, 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]), parents are not as strictly held to the standard of placement in the LRE as are school districts (see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and I must consider "the totality of the circumstances" in determining the appropriateness of the unilateral placement (D.D-S. v. Southhold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]).

The admissions director testified that the Child School is a New York State approved nonpublic special education school that serves students with disabilities from kindergarten through high school and that the high school provided a Regents diploma program (Tr. pp. 1055-56, 1068). The student's Child School special education English teacher testified that all classrooms have a 12:1+1 student-to-teacher ratio and that every student in the school has an IEP (Tr. p. 1085). During the 2011-12 school year the student repeated the eleventh grade at the Child School, took courses including English, social studies, math, and transition planning, and received weekly counseling services (Tr. pp. 1070, 1086, 1112, 1145, 1155, 1333). The hearing record indicates that modifications were made to the student's program and that she made academic progress while at the Child School (see Tr. pp. 1104-05, 1107, 1134, 1137-38, 1217,

1222, 1350-52, 1355).²⁸ Additionally, the hearing record reflects that the student made social/emotional progress while at the Child School, including making friends and becoming more comfortable with peer interactions (Tr. pp. 1001-02, 1149-51). Under the circumstances of this case, having considered the hearing record as a whole, including the district's failure to modify the student's program in areas in which she showed no progress, although I have found that the student could be educated appropriately with nondisabled peers, LRE considerations do not weigh so heavily as to preclude the determination that the parents' unilateral placement of the student at the Child School for the 2011-12 school year was appropriate.²⁹

F. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their

²⁸ Although the hearing record also contains recommendations from the private evaluators and the student's Child School teachers for a small classroom in a special education school (Tr. pp. 1205, 1209, 1248, 1292, 1294, 1306; Parent Ex. H at p. 15; I at p. 5; J at p. 6), I have not considered the private evaluations in determining whether the Child School constituted the LRE for the student, as each was obtained subsequent to the student's acceptance to the school.

²⁹ I note that the IHO's determination that the Child School was an appropriate placement to meet the student's needs was not appealed by the district and has become final and binding on the parties; I thus express no opinion with regard to whether the parent established that the Child School met the student's academic, speech-language, or social/emotional needs.

child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist., 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The district asserts that the notification provided by the parent of his intention to enroll the student at the Child School and seek public funding therefor was insufficient because it did not "contain any specific allegations" regarding his concerns with the student's placement. I disagree. The district asserts that the provided notice was "clearly insufficient," without further explication. The cited portion of the IDEA provides that reimbursement "may be reduced or denied" if parents fail to provide written notice "rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" 10 business days prior to the student's removal from the public school (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). Not only does the precatory language of the statute not require that administrative hearing officers reduce or deny reimbursement for a failure to provide the statutorily required notice, but the district would have me rewrite the statute to require that parents provide "specific allegations of a purported defect." Such a requirement does not appear in the text of the statute and I find that the parent's statement that he had "urged her school to provide additional services and help to her[, but that t]he school has continuously refused to assist her and has recommended placement within her same class," together with his provision of two privately obtained evaluations that contained educational recommendations, was sufficient under the circumstances of this case to meet the statutory requirements.³⁰

The district also contends that the parent's actions in enrolling the student at the Child School during spring 2011 evinced his intention not to return the student to a public school placement. I disagree, and note that the hearing record contains no indication that the district sought to reconvene the CSE to address the parent's concerns as expressed in his July 29, 2011 letter or consider whether the new evaluative information warranted a modification in the student's program and placement. As noted by the Supreme Court, if a district wishes to avoid paying tuition reimbursement for unilateral parental placements, it can do so by providing

³⁰ I further note that the parent testified that he indicated his concerns at the December 2010 CSE meeting that the student should be provided with a smaller, quieter classroom environment and "more attention," but that the district indicated that he was "worrying too much" (Tr. pp. 969, 1043). Although the parent did not reject the IEP at that time, the district was on notice of his concerns long before the July 29, 2011 notification of unilateral placement. Similarly, the due process complaint notice—which set forth the parent's concerns—was marked received by the district August 19, 2011 (Parent Ex. N at p. 1), more than 10 business days prior to the student beginning classes at the Child School (Tr. pp. 1086, 1145, 1337).

students with a FAPE in the first instance (Carter, 510 U.S. at 15 [noting that "school officials who conform to [the IDEA's mandate of providing a FAPE to students with disabilities] need not worry about reimbursement claims"]). Although the parent indicated that he "wanted out" of the district after receiving a progress report for the student's annual goals in July 2011 (Tr. pp. 982, 986-87; see Parent Ex. O), I find that this expression of parental frustration in response to what he perceived as the district's recalcitrance to provide the student with the smaller classroom and increased individual attention was not an unreasonable reaction under the circumstances (Tr. pp. 987-88, 1044-46). It is understandable that a parent may have an adverse reaction upon learning that his or her child is not performing as well as expected. Although it would have been more in keeping with the collaborative process envisioned by the IDEA for the parent to have requested that the CSE reconvene to consider the new information, I decline to penalize the parent in this particular instance for not taking additional steps to give the CSE another opportunity to address concerns that he testified had been expressed to district staff for several years (Tr. pp. 940, 942-44, 956, 969, 1040, 1043). Accordingly, I find no reason appearing in the hearing record to exercise my discretion to deny or reduce the parent's request for reimbursement and affirm the IHO's award of full reimbursement for the student's tuition costs at the Child School for the 2011-12 school year.³¹

G. Independent Educational Evaluations

Finally, I address the district's appeal from the IHO's award of reimbursement for the cost of the IEEs obtained by the parent. Initially, I note that the district purports to appeal from the IHO's award of reimbursement "for the three evaluations conducted by [the speech and hearing center]" (Pet. ¶ 54). Of the four IEEs for which the IHO awarded reimbursement, only two (the speech-language and auditory evaluations) appear to have been conducted by staff at the speech and hearing center (see Parent Exs. H-J; CC). In particular, I note that there is no indication in the hearing record that the private psychologist who conducted the private psychoeducational and academic evaluations was affiliated in any way with the speech and hearing center. Rather, the private psychologist indicated that she recommended that the parent have the student evaluated by the speech and hearing center in response to his concerns regarding a prior evaluation of the student's speech-language needs (Tr. p. 1399). As the district has requested that I reverse the IHO's order of reimbursement "for three privately obtained evaluations" (Pet. at p. 20) although the IHO awarded reimbursement for four IEEs (IHO Decision at p. 40), I decline to speculate as to which award of reimbursement for the IEEs conducted by the private psychologist the district intended to appeal. To the extent that the district has restricted its appeal by challenging the IHO's determination only with respect to evaluations conducted by a specific provider, I consider the IHO's award of reimbursement for the IEEs conducted by the private psychologist to be unappealed and, therefore, final and binding on the district (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]; see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at

³¹ Although the hearing record contains some indication that the district agreed to fund the student's placement at the Child School for the 2012-13 school year (Tr. p. 1162-64; Parent Post-Hr'g Br. at p. 29 n.21), I have not considered this information—which was not presented as part of the evidentiary phase of the impartial hearing—in balancing the equitable considerations presented in this hearing record.

*9 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *10 [S.D.N.Y. Mar. 21, 2013]).³²

With regard to the speech-language and auditory processing evaluations, I agree with the district that the parent is not entitled to reimbursement for these IEEs. 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 are 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 disagrees with an evaluation conducted by the district unless the district requests a hearing and establishes the appropriateness of its evaluation (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). The district conducted an evaluation of the student prior to developing the December 2009 IEP (Parent Ex. B); however, the hearing record contains no indication that the parent ever disagreed with any district evaluation. Additionally, the parent testified that he never asked the district to conduct any additional evaluations (Tr. p. 1020; see Tr. pp. 847-48). To the extent that the IHO found that the IEEs "provided the basis for an appropriate placement to be made" (IHO Decision at p. 40), I note that the parent and student visited the Child School in March 2011 and the student was accepted to the school in April 2011, prior to the parent obtaining any of the private evaluations (Tr. p. 998). Additionally, the parent indicated that he obtained the private speech-language evaluation as "a new starting point to continue with a new school" (Tr. p. 994). Under the circumstances of this case, as there was no evidence showing that the district was aware of the parent's desire for additional evaluations to be conducted and the parent failed to follow the prescribed procedures for obtaining an IEE at public expense, I hold that the parent is not equitably entitled to public funding for the privately obtained speech-language and auditory processing evaluations based on the district's alleged failure to sufficiently evaluate the student.

VII. Conclusion

While the district is not required to maximize a student's potential or guarantee any particular amount of progress, progress itself is not dispositive as to whether the district offered the student a FAPE (see, e.g., Lathrop R-II Sch. Dist. v. Gray, 611 F.3d 419, 424-26 [8th Cir. 2010] [holding that "academic progress alone does not prove that the child received a FAPE"]; Seattle Sch. Dist. No. 1 v. B.S., 83 F.3d 1493, 1500 [9th Cir. 1996] [holding that a student's ability to achieve age-appropriate scores on standardized academic tests "is not the sine qua non of 'educational benefit'"]). The district's failure to adequately address the student's language and social/emotional needs on the December 2010 IEP or to respond to the parent's concerns regarding his daughter's education—even after being provided with independently obtained private evaluations—constituted denials of a FAPE for the 2010-11 and 2011-12 school years under the circumstances presented herein, entitling the parent to reimbursement for the cost of

³² Accordingly, I express no opinion with regard to the propriety of the IHO's award of reimbursement for the private academic evaluation, which was conducted more than eight months after the filing of the due process complaint notice and for which counsel for the parent expressly denied the intention to seek reimbursement (Tr. pp. 1072-73; see Parent Post-Hr'g Br. at p. 30).

the student's tuition at the Child School and the student to compensatory additional educational services.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated February 21, 2013 is modified, by reversing her determination that the district did not provide the student with a FAPE for the 2009-10 school year; and

IT IS FURTHER ORDERED that the IHO's decision dated February 21, 2013 is modified, by reversing those portions which found that the parent was entitled to reimbursement for the privately obtained speech-language and auditory processing evaluations and awarded the student 100 hours of compensatory additional 1:1 tutoring services; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall fund compensatory additional services to consist of 18 hours of 1:1 counseling services and 36 hours of 1:1 speech-language therapy services, provided by a qualified provider of the parent's choice, at a rate not to exceed \$110 per hour and to be accessed by the student within two years of the date of this decision.

Dated: Albany, New York
September 18, 2013


JUSTYN P. BATES
STATE REVIEW OFFICER