The University of the State of New York

The State Education Department
State Review Officer
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No. 12-183

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION 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, attorneys for petitioner, Brian J. Reimels, Esq., of counsel

Mayerson & Associates, attorneys for respondent, Tracey Spencer Walsh, 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 found that it failed to offer an appropriate educational program to respondent's (the parent's) son, ordered it to reimburse the parent for her son's tuition costs at the Rebecca School for the 2011-12 school year, and awarded the student compensatory additional services. The parent cross-appeals from the IHO's determination which denied her request for reimbursement for privately obtained evaluations and after-school services. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address

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

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

III. Facts and Procedural History

The student demonstrates delays in the areas of communication, sensory regulation, cognition, academics, attention, fine and gross motor skills, social and play skills, activities of daily living (ADL) skills, as well as in receptive, expressive, and pragmatic language (Tr. pp. 145, 150-51, 1261-62, 1384, 1387; Parent Exs. E-G; J).[1] The student has received diagnoses of an autism spectrum disorder (ASD), an expressive and pragmatic language disorder, an auditory processing disorder, a sensory integration disorder, as well as fine/gross motor and graphomotor deficits (Parent Ex. G at pp. 1, 6).

In 2006, the student attended kindergarten in a district public school program and he

[1] There are a number of duplicate exhibits in the hearing record. The parties are encouraged to confer beforehand and submit joint exhibits to the extent practicable (8 NYCRR 200.5[j][3][xii][b]). I also remind the IHO of her obligation to exclude from the hearing record what "she determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). Where exhibits are duplicated, I have cited to the corresponding parent exhibit.

continued to attend the district schools for the next five school years (Tr. p. 1497). In January 2011, due to the parent's concerns regarding the student's perceived lack of progress in the district program, the parent arranged for private neuropsychological, occupational therapy (OT), and speech-language evaluations of the student (Tr. pp. 1498-99, 1501-02; Parent Exs. E-G).[2]

On April 4, 2011, the district convened an annual review of the student's educational program to develop his IEP for the 2011-12 school year (Dist. Ex. 2). To address the student's needs, the CSE recommended placing the student in a 12-month school year program in a 6:1+1 special class in a specialized school with related services of one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, and two 30-minute sessions of OT per week in a group (id. at p. 8).[3] In addition, the CSE recommended that the student receive daily adapted physical education and special education transportation (id. at pp. 8, 10).[4]

By letter to the assistant principal of the student's district school (the assistant principal) dated April 27, 2011, the parent provided the district with copies of the privately-obtained evaluations and requested that the CSE reconvene to discuss the IEP and the recommendations made in the private evaluations (Parent Ex. H; see Tr. pp. 123-26). In a note to the parent dated May 2, 2011, the student's district teacher requested that the parent provide dates on which she was available for a meeting to discuss the private evaluations (Tr. p. 1510; Parent Ex. KK).

On June 7, 2011, the CSE reconvened in accordance with the parent's request to review the student's program and develop a new IEP, taking into consideration the private evaluations (Dist. Ex. 1; see Tr. pp. 118, 123). The CSE recommended continuing the student's placement in a 12-month 6:1+1 special class with related services of two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group (2:1), two 30-minute sessions per week of individual OT, one 30-minute session per week of OT in a group (2:1), and one 30-minute session per week of counseling in a group (3:1) (Dist. Ex. 1 at p. 10). In addition, the CSE recommended daily adapted physical education and special education transportation (id. at pp. 10, 12-13). The CSE determined that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher (id. at p. 4). By final notice of recommendation (FNR) dated June 7, 2011, the district notified the parent of the particular public school site to which the student was assigned and at which his IEP would be implemented (Dist. Ex. 3).[5]

By letter to the CSE dated June 15, 2011, the parent indicated that the program and assigned public school site were inappropriate for several reasons including: the assigned school did not offer an appropriate instructional program or applied behavior analysis (ABA); there were insufficient 1:1 support and related services provided; and the staff at the assigned school were not adequately trained (Parent Ex. I at p. 1). The letter indicated that the parent would unilaterally place the student in a nonpublic school program offering ABA services for the 2011-12 school

[2] Although the neuropsychological evaluation is not labeled as such (Parent Ex. G at p. 1), other evidence in the hearing record does (Parent Ex. M at p. 4).

[3] The hearing record indicates that the April 2011 IEP contained a typographical error and the student actually received both sessions of OT in a 1:1 setting (Tr. pp. 406, 408-09, 478-79, 902, 1507-09).

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

[5] The school psychologist who participated in the June 2011 CSE meeting asserted that she provided the parent with the FNR at the conclusion of the CSE meeting (Tr. p. 162).

year and that she would seek reimbursement or prospective funding from the district for the program and other supports and services (id. at pp. 1-2).

Because of her continued concerns regarding the student's progress in the district placement, the parent privately arranged for a board certified behavior analyst-doctoral (BCBA-D) to conduct a classroom observation, review the June 2011 IEP, and make programmatic recommendations (Tr. pp. 1241-42, 1521; Parent Ex. J at p. 1). On June 21, 2011, the BCBA-D conducted a classroom observation of the student in his district 6:1+1 special class placement, resulting in a July 2011 educational program review and recommendations report (Parent Ex. J). The educational program review provided background information, a classroom observation report, interviews with the student's teacher and related service providers, and summaries of the June 2011 IEP and the recent private evaluations (id.). The BCBA-D made recommendations that were largely consistent with those made by the earlier private evaluators, including that the student be placed in a school with a full-day ABA-based program, and receive five 60-minute sessions per week of individual speech-language therapy, five 60-minute sessions per week of individual OT in a sensory gym, a weekly social skills group, 10 hours per week of home-based ABA services, and two hours per week of parent counseling and training, all on a 12-month basis (id. at p. 8; see Parent Exs. E at pp. 11-12; F at p. 4; G at pp. 6-7). The BCBA-D also recommended that a functional behavioral assessment (FBA) be conducted and a behavioral intervention plan (BIP) be developed to address the student's interfering behaviors (Parent Ex. J at p. 8).

From July 2011 through August 2011, the student attended a district 6:1+1 special class pursuant to the June 2011 IEP (Tr. pp. 1527-28). By letter to the district dated September 1, 2011, the parent indicated that the student was not making meaningful progress in the district program and that the placement was inappropriate because of the student's lack of progress, the lack of instruction provided using ABA or DIR,[6] the level of related services, and the lack of a sensory gym at the assigned school (Parent Ex. BB at p. 1). The parent indicated that the student would attend the Rebecca School and she would seek funding for his program as well as funding for the private evaluations and home-based speech-language therapy, OT, physical therapy (PT), and ABA services (id. at pp. 1-2). The student has attended the Rebecca School since September 2011 (Tr. p. 1532).[7]

A. Due Process Complaint Notice

By due process complaint notice dated September 14, 2011, the parent requested an impartial hearing to determine the appropriateness of the programs recommended in the April 2011 and June 2011 IEPs (Parent Ex. A). The parent asserted that both the April 2011 and June 2011 IEPs failed to offer the student a free appropriate public education (FAPE) (id. at p. 2).[8] As the due process complaint notice includes 78 separate allegations upon which the parent's assertion of the denial of a FAPE is premised, the allegations have been grouped together into categories for purposes of this decision.

With regard to the development of the IEPs and the conduct of the CSE meetings, the

[6] The hearing record indicates that "DIR" stands for developmental individual difference relationship-based model (Tr. p. 1121).

[7] The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[8] All of the allegations raised in the due process complaint notice are asserted to "apply to both the April and June IEP meetings and documents" (Parent Ex. A at p. 8).

parent alleged that: (1) the district had insufficient evaluative data to establish the student's present levels of performance (Parent Ex. A at pp. 2-3 at ¶¶ 2, 11); (2) the district failed to conduct required evaluations or provide them to the parent (id. at p. 3 at ¶¶ 12-13); (3) the district did not adequately consider the private evaluations (id. at p. 3 at ¶ 14); (4) the district failed to document the student's progress and misrepresented his progress (id. at p. 3 at ¶¶ 9-10); (5) the district predetermined its recommendation, precluding the parent from participating in the development of the student's IEP (id. at p. 3 at ¶ 15); (6) the CSE was not validly constituted because it did not include a regular education teacher or an additional parent member (id. at p. 3 at ¶ 3, p. 6 at ¶¶ 49-52); (7) district personnel were inadequately trained in the use of the computer program used to develop the student's IEP (id. at p. 8 at ¶¶ 72-73); (8) the IEP goals were not developed at the CSE meeting with the parent's participation (id. at p. 4 at ¶ 17); (9) the district failed to conduct a classroom observation of the student and unilaterally chose someone to conduct an observation of the student without the parent's input (id. at p. 5 at ¶¶ 35-36); (10) the district did not permit the parent to participate in the selection of the public school site at which the student's IEP would be implemented (id. at p. 5 at ¶¶ 31-33, p. 7 at ¶ 58); (11) the district failed to conduct an FBA or develop a BIP despite the student's interfering behaviors (id. at p. 3 at ¶¶ 5-7, pp. 5-6 at ¶¶ 40-41); (12) the district never provided an FNR to the parent, or the FNR offered an inappropriate assigned public school, or the recommendation was untimely even if appropriate (id. at p. 7 at ¶¶ 56-57, p. 8 at ¶ 70); (13) the IEP did not include a projected initiation date (id. at p. 8 at ¶ 69); and (14) the district did not provide the parent with a copy of the IEP at the conclusion of the CSE meeting or with a copy of the CSE meeting minutes at any time (id. at p. 5 at ¶¶ 34, 37).

With regard to the contents of the IEPs, the parent contended that: (15) the IEPs were developed pursuant to district policies and practices rather than the student's needs (Parent Ex. A at p. 3 at ¶ 16); (16) the recommended program and placement were not reasonably calculated to provide the student with educational benefits (id. at p. 2 at ¶ 1, p. 7 at ¶ 55, p. 8 at ¶ 74); (17) the district offered the student an inadequate amount of related services (id. at p. 4 at ¶ 24); (18) the IEPs lacked adequate goals to address the student's interfering behaviors (id. at p. 3 at ¶ 8); (19) the goals contained in the IEPs did not contain any objective methods of measurement, some goals did not specify methods for measuring progress, some goals contained no short-term objectives, for those goals that contained short-term objectives no term length was specified, the goals were not individualized for the student, the goals were based on improper assessments of the student's present levels of performance, and the goals were otherwise inadequate (id. at p. 4 at ¶¶ 19-23); (20) the district did not provide the student with sufficient 1:1 teaching support (id. at p. 4 at ¶¶ 18, 28); (21) the CSE failed to specify an instructional methodology on the IEP or assess the effectiveness of various methodologies for instructing the student (id. at p. 6 at ¶¶ 46-47); (22) the district failed to address the student's need for generalization by offering extended day services necessary for the student to make progress (id. at p. 4 at ¶ 27, p. 6 at ¶ 45); (23) the district failed to include parent counseling and training on the student's IEPs (id. at p. 3 at ¶ 4); (24) the district failed to consider the student's need for consistency in his program (id. at p. 4 at ¶¶ 26, 29); (25) the IEPs did not promote the student's need for greater self-sufficiency and independence (id. at p. 5 at ¶ 30); (26) the district did not consider providing the student with assistive technology and failed to properly support existing assistive technology (id. at p. 5 at ¶ 38, p. 6 at ¶ 44); (27) the district failed to recommend special education transportation for the student (id. at p. 6 at ¶ 53); and (28) the recommended program offered no supports for school personnel on the student's behalf (id. at p. 8 at ¶ 71).

In addition to the claims raised above, the parent also asserted that: (29) "union contracts and agency agreements preclude or restrict collaboration and communication between and among teachers and service providers as well as the duration of related services and the times they may be available" (Parent Ex. A at p. 7 at ¶ 54); (30) district staff were inadequately trained and the

assigned public school staff would be unable to fulfill the student's related service mandates (id. at p. 7 at ¶¶ 59-60); (31) the assigned public school was unable to deliver related services in accord with the IEP mandates (id. at p. 7 at ¶¶ 61-62); (32) the use of related services authorizations (RSAs) in lieu of provision of related services by the assigned public school would be untimely, insufficient to provide the student with a FAPE, and would prevent collaboration between the student's service providers at school and at home (id. at p. 4 at ¶ 25); (33) students in the classroom to which the student would have been assigned were grouped by age rather than functional abilities or disability classifications (id. at p. 7 at ¶ 65); (34) the recommended assigned public school was unsafe for the student (id. at p. 8 at ¶ 67); (35) the assigned public school would require the student to switch schools and involved a student-to-teacher ratio change from the summer program to the 10-month school year program (id. at p. 7 at ¶¶ 63-64); (36) to the extent the assigned public school used a time-out room, it was not in conformance with State regulation (id. at p. 5 at ¶ 39); (37) the methodology at the assigned public school was not appropriate for use with the student (id. at p. 6 at ¶¶ 42-43, 48); (38) the district had failed to implement portions of the IEPs (id. at p. 8 at ¶ 68); and (39) the district was in gross violation of the IDEA by failing to provide the student with an appropriate placement and by failing to implement the recommendations contained in the private evaluations (id. at p. 8 at ¶¶ 76-77).

For relief, the parent requested:

> (a) tuition and costs at the Rebecca School; (b) at least 3 hours per week of 1:1 home- and community-based speech and language services; (c) at least 3 hours per week of 1:1 home- and community-based occupational therapy services; (d) at least 2 hours per week of 1:1 home- and community-based physical therapy services; (e) up to 20 hours per week of 1:1 ABA therapy (f) up to 4 hours per month of BCBA level supervision of the home and community based ABA program; (g) costs of [the private evaluations]; (h) transportation to and from the Rebecca School; (i) a compensatory education award for the gross failure to implement the recommendations of [the private evaluators] and an award of compensatory education for the missed services recommended; and (j) a compensatory education award for any pendency deficiencies and/or gross violations of [the student's] entitlement to a FAPE during the last two years.

(Parent Ex. A at p. 9).[9]

In a response to the due process complaint notice dated September 22, 2011, the district asserted that it relied on a psychoeducational evaluation in recommending the program outlined in the June 2011 IEP and contended that the recommended program and assigned public school site were appropriate to meet the student's needs (Parent Ex. K at pp. 1-3). The district further asserted that the parent was able to participate in the June 2011 CSE meeting; that materials provided by the parent were considered by the CSE; and that the student's needs, the IEP goals, and the recommendation were discussed at the meeting (id. at pp. 3-4).

[9] The parent also asserted the student's entitlement to receive certain related services pursuant to pendency (Parent Ex. A at p. 2) and sought compensatory education for any failures by the district to provide such services (id. at p. 8 at ¶ 75, p. 9).

B. Impartial Hearing Officer Decisions

A hearing on pendency was convened on October 18, 2011 (Tr. pp. 1-12), after which the IHO who presided over the pendency hearing issued an interim order directing the district to provide the student with related services in accordance with an IEP dated April 6, 2009 (Interim IHO Decision at pp. 2-3).[10]

An impartial hearing was convened on January 3, 2012 by a different IHO than the one who presided over the pendency hearing and continued for 12 hearing dates before concluding on June 27, 2012 (Tr. pp. 13-1748).[11, 12] By decision dated August 13, 2012, the IHO found that: (1) the district failed to offer the student a FAPE; (2) the Rebecca School was an appropriate placement for the student; (3) the student did not require home-based services to receive educational benefits; (4) there were no equitable circumstances warranting a reduction or denial of reimbursement; (5) the parent established her inability to fund—and an entitlement to direct funding for—the student's placement; (6) because the parent did not request an independent educational evaluation (IEE) at public expense prior to obtaining the private evaluations, she was not entitled to reimbursement despite the CSE's consideration of the evaluations; and (7) the district's denial of a FAPE to the student for the 2009-10 and 2010-11 school years warranted an award of compensatory additional services (IHO Decision at pp. 6-21).

Initially, the IHO found that the student did not make meaningful progress during his prior two years in a district 6:1+1 special class with similar amounts of related services (IHO Decision at pp. 6-8). The IHO also concluded that the June 2011 IEP was not reasonably calculated to enable the student to receive educational benefits because it did not incorporate the recommendations made by the private evaluators (id. at p. 8). In particular, the IHO found that the student was offered insufficient amounts of speech-language therapy and OT and that the June 2011 IEP did not address the student's needs in the areas of sensory integration or receptive language (id. at pp. 8-9). Furthermore, the IHO found that the use of the TEACCH[13] methodology

[10] The April 2009 IEP (Parent Ex. C) was not admitted into evidence at the impartial hearing, but was included in the hearing record that was submitted to this office by the district (Interim IHO Decision at p. 2 n.1; Tr. pp. 8-9, 256). However, inasmuch as Parent Exhibit C was relied on by the IHO in issuing the pendency decision, it is properly a part of the hearing record and I have considered it as such. I also note that the amount of related services recommended in the April 2009 IEP is identical to the amount offered to the student in a subsequent April 2010 IEP (compare Parent Ex. C at p. 16, with Parent Ex. GG at p. 16).

[11] Except if otherwise indicated, all references herein to the IHO are to the IHO who issued the August 13, 2012 final decision.

[12] On a number of occasions the transcriptionist was unable to hear testimony or on-record discussions due to "background noise" (Tr. pp. 19, 26, 154, 157, 173, 201, 255, 670, 771, 778, 836, 1018, 1022, 1029, 1033, 1039, 1042, 1052, 1113-16, 1147, 1161, 1299, 1741); the IHO on several occasions found it necessary to leave the hearing room to quiet external conversations (Tr. pp. 1353-54, 1377); and there are numerous gaps in the hearing record where it appears from context that words are missing (see, e.g., Tr. pp. 34-37, 137, 264-65, 313-16, 322-23, 345-47, 364-66, 418-19, 556-58, 664-66, 826-27, 830-32, 1068-69, 1325-26, 1363-65, 1452-53, 1513, 1655-56, 1664, 1670-71). It is the district's obligation to ensure that a "verbatim record" of the impartial hearing is kept for use by the parents, the IHO, and subsequent administrative and judicial review (20 U.S.C. § 1415[h][3]; 34 CFR 300.512[a][4]; 8 NYCRR 200.5[j][3][v]). In the event that a hearing record is inadequate to conduct a meaningful review of the underlying proceedings, it may become necessary to consider whether to remand for a reconstruction proceeding (see Kingsmore v. Dist. of Columbia, 466 F.3d 118, 120 [D.C. Cir. 2006]). Because the hearing record is sufficient for review of the issues presented, in this instance I decline to do so—but I strongly caution the district to ensure that it maintains a verbatim record of the impartial hearing.

[13] The hearing record indicates that TEACCH is an acronym for Treatment and Education of Autistic and related Communication-handicapped Children (Parent Ex. O).

in the assigned public school was inappropriate for the student because of his inability to maintain attention for sustained periods of time (id. at pp. 9-10). After having found a denial of a FAPE based on the foregoing reasons, the IHO went on to find that the failure to include parent counseling and training on the student's IEP "constituted a substantial FAPE deprivation," positing that the student may have mastered additional ADL skills and generalized the ADL skills he had learned at school to the home environment had the parent been provided with counseling and training (id. at p. 10). The IHO also found that the recommended program did not provide for generalization of skills and did not sufficiently address the student's deficits in the area of ADLs (id. at p. 11). The IHO next determined that, by not sharing certain evaluative data with the parent, the district prevented the parent from meaningfully participating at the June 2011 CSE meeting, constituting another ground for a finding of a denial of a FAPE (id.). Finally, the IHO found that the recommended program failed to adequately address the student's behavioral needs by relying solely on redirection, inasmuch as the behaviors would continue indefinitely if the underlying causes of the behaviors—the student's sensory and speech-language needs—were not addressed (id. at pp. 11-12).

With respect to the parent's unilateral placement, the IHO found that the absence of ABA services and a BIP at the Rebecca School did not make it an inappropriate placement (IHO Decision at pp. 13-14). The IHO noted that she had not found that the student required ABA services, but rather that TEACCH was an inappropriate methodology for the student (id.). She further explained that it was not the district's failure to develop a BIP that denied the student a FAPE, but rather it was the district's failure to adequately address the student's interfering behaviors that she had found to constitute a denial of FAPE (id.). She determined, based on a Rebecca School progress report and the testimony of the student's service providers, that the Rebecca School provided the student with instruction individualized to meet his unique needs and enable him to make progress (id. at pp. 14-15). However, because she found that the student made progress at the Rebecca School, the IHO determined that the after-school services requested by the parent were not necessary for the student to receive educational benefits (id.).

Turning to the remedy for the district's denial of a FAPE to the student for the 2011-12 school year, the IHO found that equitable considerations did not weigh against granting the parent's request for public funding of the student's unilateral placement and that the parent had established her inability to pay the full cost of tuition, entitling her to an award of direct payment of the student's Rebecca School tuition (IHO Decision at pp. 15-17). The IHO held that because the parent never disagreed with a district evaluation or requested an IEE at public expense, she was not entitled to public funding of the private evaluations (id. at pp. 17-18). With regard to the parent's request for compensatory additional services, the IHO found that the district's failure to provide for parent counseling and training on the April 2009 and April 2010 IEPs prevented the parent from supporting the implementation of the student's IEP and limited the student's acquisition of ADL skills and his generalization of those skills to the home environment, entitling the parent to compensatory services for the district's failure to provide the parent with counseling and training for the 2009-10 and 2010-11 school years (id. at p. 19). The IHO also found that the student was entitled to compensatory additional services for the district's failure to provide the student with a FAPE for the 2009-10 and 2010-11 school years, based on the student's minimal progress; the use of an inappropriate methodology in his district classroom; insufficient levels of related services; and failure to address the student's sensory, behavior, communication, and generalization needs (id. at pp. 19-20). To remedy this "prolonged FAPE deprivation," the IHO awarded the parent two years of the following compensatory additional services: (1) two hours per week of home-based speech-language therapy; (2) 20 hours per week of home-based ABA services; (3) two hours per week of ABA supervision by a BCBA; and (4) two hours per week of parent counseling and training (id. at pp. 20-21).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in finding that it denied the student a FAPE for the 2011-12 school year, that equitable considerations favored the parent, and in awarding the parent direct payment of the student's Rebecca School tuition. Initially, the district challenges the IHO's credibility findings on the basis that she failed to articulate a rationale for these findings or reference specific testimony that she found to be not credible. With regard to the IHO's finding that it withheld evaluative data from the parent, the district asserts that the parent was fully able to participate at the June 2011 CSE meeting and that the results of the evaluations were discussed, even if the documents themselves were not. The district next assigns error to the IHO's determination that the district did not address the student's interfering behaviors, contending that the hearing record established that the student's behaviors did not interfere with his instruction because he could be effectively redirected by use of verbal prompts. With regard to the student's progress, the district contends that the hearing record establishes that the student made more than trivial progress in many areas, such that his overall progress was meaningful. Addressing the IHO's finding that the student required greater levels of related services to make progress, the district asserts that the student was making progress with the levels recommended by the district and that additional time out of the classroom would be inappropriate. Additionally, the district contends that the OT provided to the student would adequately have addressed his sensory needs. With regard to the student's receptive language needs, the district asserts that the student made progress in that area, establishing that it was unnecessary to address it directly by way of an annual goal. Similarly, the district argues that because the student had previously made progress in the district's program, the use of TEACCH was not inappropriate. The district next asserts that, because the hearing record establishes that parent counseling and training was available at the assigned public school, the failure to include it on the IEP did not constitute a denial of a FAPE. With regard to generalization, the district asserts that the provision of a FAPE does not require the district to address the student's ability to generalize skills outside the classroom and, in any event, the hearing record established that the district addressed the student's need for generalization during the school day. The district also asserts that the hearing record does not support the IHO's conclusion that the student made insufficient progress with regard to ADL skills.

Regarding equitable considerations, the district asserts that equitable considerations disfavor the parent because she initially provided inadequate notice to the district that she was rejecting the district's program and subsequently provided untimely notice. Even if equitable considerations did favor the parent's claim, the district contends that she is not entitled to direct payment of the student's Rebecca School tuition. The district also asserts that the IHO erred in awarding compensatory services. The district argues that the failure to provide for parent counseling and training on an IEP is an insufficient basis on which to award compensatory services and notes testimony indicating that such training was available at the assigned public school. With regard to the compensatory services awarded for the district's denial of a FAPE to the student during the 2009-10 and 2010-11 school years, the district argues that no claims were raised with respect to those school years in the parent's due process complaint notice and that even if they were, compensatory services were not warranted, both because the student made progress and the parent failed to notify the district of her concerns.

The parent answers, generally denying the district's assertions and requesting that the IHO's decision be upheld. The parent also asserts additional reasons, not relied upon by the IHO, to support a finding that the district denied the student a FAPE, including that the April 2011 CSE meeting was not validly constituted and that the assigned school did not contain a sensory gym. The parent asserts that an SRO may not rely on the testimony of the student's district special education teacher or occupational therapist to determine that the district offered the student a FAPE

because the IHO found them not to be credible. The parent contends that the district failed to adequately consider the private evaluations. With regard to the student's behavior, the parent asserts that the IHO properly found that the student required an FBA and a BIP to address his interfering behaviors. With regard to the district's arguments concerning equitable considerations, direct payment, and compensatory services, the parent contends that, because the district failed to raise these issues during the impartial hearing, the district is now barred from doing so. In a cross-appeal, the parent asserts that the IHO erred in determining that she was not entitled to reimbursement for the costs of the privately obtained evaluations and that the student did not require additional after-school services to receive educational benefits.

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]; see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that

must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85;

M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Procedural Matters

1. Credibility Findings

Addressing first the district's challenge to the IHO's determination that the parent's testimony was generally more credible than that of district witnesses, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area School v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). However, I agree with the district that the IHO provided insufficient rationale for her determination that the parent's testimony was generally more credible than that of district witnesses; in particular, the student's district classroom teacher and occupational therapist. The IHO referenced no specific instances in which she found a district witnesses' testimony to be not credible, instead stating that she considered the testimony of certain district witnesses "to be lacking in sufficient indicia of credibility and reliability," and that where the parent's testimony conflicted with that of a district witness, she "gave more weight to the Parent's testimony and rejected the conflicting witness testimony," implying that these were determinations of relative probative value rather than credibility (IHO Decision at p. 7 n.5). In other portions of her decision, the IHO characterized testimony from district witnesses with regard to the availability of parent counseling and training at the assigned school as "particularly unpersuasive" (id. at p. 10), and noted that district witnesses gave conflicting testimony with regard to whether the private evaluations were considered at the June 2011 CSE meeting (id. at p. 11). I find that the IHO made findings relating to the weight to be accorded to the testimony of various witnesses, rather than their credibility (see, e.g., Matrejek, 471 F. Supp. 2d at 429; Application of the Bd. of Educ., Appeal No. 08-074). Accordingly, to the extent that I disagree with certain of the IHO's findings of fact, it is with regard to the weight to be accorded to various witnesses' testimony, not their credibility (see L.K. v. Northeast Sch. Dist., 2013 WL 1149065, at *16 [S.D.N.Y. Mar. 19, 2013]; E.C. v. Bd. of Educ., 2013 WL 1091321, at *18 [S.D.N.Y. Mar. 15, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *9-*10 [S.D.N.Y. Feb. 20, 2013]; F.B. v. New York City Dep't of Educ., 2013 WL 592664, at *8 [S.D.N.Y. Feb. 14, 2013]).

2. Scope of Impartial Hearing and Review

Initially, I note that neither party appealed from the IHO's determination that the Rebecca School was an appropriate placement for the student (IHO Decision at pp. 13-15). Accordingly, that determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]).

Next, in addition to her cross-appeal, the parent asserts that she "do[es] not abandon any claims from [her] due process complaint notice that the IHO did not expressly rule on" (Answer ¶ 2 n.2). However, the answer and cross-appeal does not specify which of the two dozen issues on which the IHO did not rule, nor does it describe how a determination on such issues would lead to

a different result than the one reached by the IHO.[14] Under the circumstances presented, I decline to make findings regarding a denial of FAPE on any ground not identified with specificity by the parties on appeal. A party appealing must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken," and this includes clearly identifying which particular issues that the appealing party believes the IHO erroneously failed to decide (see 8 NYCRR 279.4). It is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Hawaii Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).

State regulations governing appeals also require pleadings to set forth citations to the record on appeal, and shall identify the relevant page number(s) in the transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number (see 8 NYCRR 279.18 [b]), however, there are no citations to the hearing record to support the parent's assertion that she is not abandoning many of the claims raised in the due process complaint notice. As the answer and cross-appeal lacks any guidance from the parent's counsel indicating the significance of any issues other than the composition of the April 2011 CSE meeting or the lack of a sensory gym at the assigned school, or citation to relevant portions of the hearing record, I will not sift through the parent's due process complaint notice, the hearing record, and the IHO decision for the purpose of asserting claims on her behalf and I find the answer and cross-appeal insufficient to bring those issues before me (8 NYCRR 279.4[b]; Application of a Student with a Disability, Appeal No. 12-069; Application of a Student with a Disability, Appeal No. 12-032; Application of the Dep't of Educ., Appeal No. 12-022; Application of the Dep't of Educ., Appeal No. 11-127). I have, however, carefully reviewed the entire hearing record to consider those claims that the parent has taken the care to identify in her answer and cross-appeal (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

When an IHO has not addressed claims and the issues are not sufficiently raised on appeal, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (D.N. v. New York City Dep't of Educ., 2013 WL 245780, at

[14] I note that the parent asserts a number of reasons—not ruled on by the IHO—why the district failed to offer the student a FAPE in her memorandum of law that do not appear in her answer and cross-appeal, including that: the student's behaviors were not discussed at the June 2011 CSE meeting; the IEP goals were developed prior to the CSE meeting; there was no baseline data for measuring progress toward goals; the CSE did not develop any reading comprehension goals; the CSE failed to develop goals addressing the student's focusing needs; the district did not collect data regarding the student's interfering behaviors; the IEP failed to address the student's need for ABA; the IEP provided insufficient 1:1 teaching; the district failed to track the student's progress; there was a lack of collaboration between district service providers and teacher; the district speech pathologist failed to address the student's scripting or breathing difficulties or his echolalia; and no provision was made for assistive technology. Inasmuch as a memorandum of law is not a substitute for a properly drafted answer and cross-appeal, I decline to address these claims as not properly before me (8 NYCRR 279.4; 279.6; 279.8[a][3]; Application of the Bd. of Educ., Appeal No. 07-121). I note however that even if I addressed these claims, it would not affect my ultimate disposition of this matter.

*3 [S.D.N.Y. Jan. 22, 2013]).[15] In this instance, however, because I agree with the IHO's overall conclusion that the district failed to offer the student a FAPE, in the interests of administrative efficiency, I will not do so. Accordingly, having neither been addressed by the IHO in her decision nor specifically raised as an issue by either party on appeal, the following claims in the parent's due process complaint notice are not addressed in this decision: (1) the district did not accurately document the student's progress and misrepresented the student's progress to the parent; (2) the district predetermined its recommendation, precluding the parent from meaningfully participating in the development of the student's IEP; (3) district staff were not properly trained in the use of the computer program used to develop the IEP; (4) the goals were not developed at the CSE meeting with the parent; (5) the district failed to conduct an observation of the student in his classroom and unilaterally chose a person to conduct the observation without the parent's input; (6) the parent was unable to participate in the assigned public school site selection process; (7) the district failed to provide an FNR to the parent, or the FNR was for an inappropriate assigned public school, or the recommendation was untimely; (8) the IEP did not specify an initiation date; (9) the district did not provide the parent with the IEP at the end of the CSE meeting or with a copy of the CSE meeting minutes at any time; (10) the IEP was developed pursuant to district policies and practices rather than in accordance with the student's needs; (11) the annual goals did not include objective methods of measurement, methods for measuring progress, or adequate short-term objectives, did not provide the periods in which the short-term objectives were to be measured, and were not clear and individualized for the student, in part because they were based on inaccurate levels of performance; (12) the IEP failed to provide sufficient 1:1 teaching support; (13) the IEP failed to meet the student's need for consistency by not including a transition plan; (14) the district failed to meaningfully consider providing the student with assistive technology or supporting existing assistive technology; (15) the IEP made no provision for special transportation; (16) the IEP did not include any supports for school personnel; (17) union contracts and agreements restrict collaboration between teachers and service providers, the duration of related services sessions, and the times related services are available; (18) the district does not adequately train and supervise its staff and the staff at the assigned public school would be unable to fulfill the mandates on the student's IEP; (19) the assigned public school could not meet the student's related services mandates; (20) the assigned public school would not have made timely provision for the mandates to be met by provision of RSAs, and the use of RSAs is insufficient to offer the student a FAPE and would prevent collaboration between the student's service providers at school and at home; (21) the assigned public school grouped students by age rather than by functional levels of performance or disability classification; (22) the assigned public school constituted an unsafe environment for the student; (23) to the extent the assigned school utilized a time-out room, such use was in violation of State regulation; and (24) the district did not implement the student's IEP mandates.

Finally, regarding the parent's claim that the district is precluded from raising any claims or defenses in its petition that were not included in its answer to the due process complaint notice, there is no legal authority to support the parent's position. Here, the district submitted a response to the due process complaint notice that comported with federal and State regulations, and there is

[15] As a number of the enumerated allegations in the due process complaint notice were overlapping, conflicting, or duplicative (see Parent Ex. A), I remind the IHO that State regulations contain a provision for conducting a prehearing conference to simplify or clarify the issues that will be addressed in an impartial hearing (8 NYCRR 200.5[j][3][xi][a]) to assist the IHO in determining which issues need to be addressed in her decision. In light of the parent's concerns about the district's defenses to her claims, a prehearing conference would also have been an appropriate time and place for the parent and the IHO to seek clarification from the district regarding the extent to which it would contest the student's entitlement to compensatory additional services or the parent's entitlement to direct payment of the student's Rebecca School tuition, and to gain clarification from both parties on what equitable considerations may have been at issue.

no indication in the hearing record that its failure to include a defense below resulted in a denial of a FAPE to the student (34 CFR 300.508[e]; 8 NYCRR 200.5[i][4]; see also Application of the Dep't of Educ., Appeal No. 11-118; Application of a Student with a Disability, Appeal No. 08-151). Moreover, neither federal or State regulations require the insertion of defenses in the response to the due process complaint notice, nor do they suggest that unasserted defenses will be waived (R.B. v. Dep't of Educ., 2011 WL 4375694, at *5 [S.D.N.Y. Sept. 16, 2011]; see, e.g., L.K., 2013 WL 1149065, at *21 n.8). Under the circumstances, the district is not precluded from arguing on appeal that the parent failed to provide sufficient notice of her intention to unilaterally place the student, did not assert a claim for compensatory additional services in the due process complaint notice, and did not establish an entitlement to direct payment of the student's Rebecca School tuition (see Application of the Dep't of Educ., Appeal No. 12-086).

B. Independent Educational Evaluation

I agree with the IHO's analysis—and the parent seems to concede—that the parent's request for public funding of the private evaluations she obtained is not supported by the language of applicable regulations. However, I conclude under the circumstances of this case that the parent is nonetheless entitled to reimbursement for the cost of the private evaluations on equitable grounds.

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]). IEEs 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 (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). Although the parent never disagreed with any district evaluation, under the circumstances of this case, the inquiry does not end there. The hearing record contains no documentary evidence that the district had ever conducted an evaluation of the student. Although district witnesses testified that the student was due to be reevaluated in 2012, having been evaluated by the district sometime in 2009, it was unclear whether any of the witnesses had personal knowledge of such prior evaluation (Tr. pp. 128, 168, 823). Furthermore, despite testimony from the student's district occupational therapist that she conducted an OT evaluation of the student in 2009, no documentary evidence of any such evaluation was submitted by the district nor was any reason proffered for the district's failure to do so (Tr. pp. 823, 850-51). The United States Education Department's Office of Special Education Programs has stated that it would be consistent with federal regulation to allow reimbursement for an IEE when the district failed to provide an evaluation in compliance with the IDEA (see Letter to Anonymous, 55 IDELR 106 [OSEP 2010]). Although the parent's due process complaint notice contains an allegation that the district failed to conduct required evaluations (Parent Ex. A at p. 3), the district put forth no evidence that it had fully evaluated the student in each of his areas of disability within the last three years or determined that reevaluation was unnecessary, in accord with the IDEA's procedural requirements (20 U.S.C. § 1414[a][2][B][ii]; 34 CFR 300.303[b][2]; 8 NYCRR 200.4[b][4]). Accordingly, under the circumstances of this case, I find that the parent is entitled to reimbursement for the cost of the private evaluations. While it would have been preferable for the parent to request that the district conduct the necessary evaluations prior to obtaining them herself, where, as here, the district failed to comply with the IDEA's procedural requirements and instead relied in part on the privately obtained evaluations to establish the student's present levels of performance (compare Dist. Ex. 1 at p. 1, with Parent Exs.

E-G), I find that the parent is entitled to reimbursement of the neuropsychological, speech-language, and OT IEEs.[16]

C. April and June 2011 CSE Meetings

1. CSE Composition

On appeal, the parent asserts that the April 2011 CSE was improperly composed, without further elaboration.[17] The April 2011 CSE meeting was attended by only the special education teacher and the parent, which does not comport with statutory or regulatory requirements (Educ. Law § 4402[1][b][1][a]; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). Although the April 2011 CSE was not validly composed, there is no indication in the hearing record that this procedural violation impeded the student's right to a FAPE, impeded the parent's ability to participate in the decision making process, or deprived the student of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Under the circumstances of this case, I find that the failure of the district to include a regular education teacher or an additional parent member in the April 2011 CSE did not contribute to a denial of a FAPE, particularly here where the parent indicated that she desired to obtain the private evaluations prior to having the student's CSE meeting and the district complied with the parent's request and reconvened the CSE in June 2011 subsequent to the parent's receipt of the private evaluation reports (Tr. pp. 387-88, 1499, 1502).[18]

2. Evaluative Data and Parental Participation

With regard to the parent's claim that her participation at the June 2011 CSE meeting was impeded by the district's failure to consider the private evaluations, the IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental

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[16] I note that if the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). In this instance, because the parent did not request that the district evaluate the student prior to obtaining private evaluations, the district was not provided with the opportunity to mitigate its costs. Had the parent followed standard procedure for obtaining an IEE at public expense, the district would have been required to provide her with its criteria for IEEs (34 CFR 300.502[a][2]). The parent would then have the opportunity to demonstrate that "unique circumstances justif[ied] selection of an evaluator whose fees fall outside the [district's] cost containment criteria" (Independent Educational Evaluation, 71 Fed. Reg. 46689-90). Because I am granting the parent reimbursement on equitable grounds, I find it equitable to permit the district to apply the cost containment policies it would have been able to apply had the parent followed the correct procedures to obtain a publicly-funded IEE (see M.V. v. Shenendehowa Cent. Sch. Dist., 2013 WL 936438, at *7-*8 [N.D.N.Y. Mar. 8, 2013]). Accordingly, I grant the parent reimbursement for the private neuropsychological, speech-language, and OT evaluations she obtained, subject to a district policy establishing reasonable cost restrictions that was in existence at the time the evaluations were provided to the district.

[17] The due process complaint notice alleged the district failed to include a regular education teacher and an additional parent member (Parent Ex. A at p. 3 at ¶ 3, p. 6 at ¶¶ 49-52).

[18] The parent does not assert on appeal that the June 2011 CSE was invalidly composed (see Answer; Parent Mem. of Law).

disagreement with a school district's proposed IEP does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; 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"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]). A component of the parent's right to participate is the requirement that the CSE must consider private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). As further explained below, I find that under the circumstances of this case, the CSE adequately considered the private evaluations provided to it by the parent.

The parent asserts that because the district did not conduct its own evaluations of the student, it was required to adopt the recommendations of the private evaluators. The hearing record reflects that, although the recommendations from the private evaluations were not adopted wholesale, portions of the evaluations consisting of educational analysis, rather than opinion regarding the appropriate manner in which to treat the student's deficits, were incorporated into the June 2011 IEP (compare Dist. Ex. 1 at p. 1, with Parent Exs. E-G). Although the parent would have preferred that the CSE adopt the recommendations made by the private evaluators, the IDEA does not mandate that the district follow the private evaluator's recommendation over the opinions of its staff (Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a private recommendation alone does not invalidate the substantive adequacy of a program recommended by the CSE], aff'd 2005 WL 1791553 [2d Cir. July 25, 2005]; see Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 641 [7th Cir. 2010]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *10 [S.D.N.Y. Jan. 13, 2013]; M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *12 [S.D.N.Y. Feb. 16, 2011]; Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583, at *6 [S.D.N.Y. Sept. 29, 1998]). In any event, "'[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 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]).

Moreover, although the district's failure to share the underlying data of certain evaluations with the parent is not in the spirit of cooperation envisioned by the IDEA, I disagree with the IHO that it deprived the parent of the opportunity to participate in the June 2011 CSE meeting (see IHO Decision at p. 11). Upon review of the hearing record, I find that the underlying data was not required in this instance for the CSE to adequately discuss the student's needs and abilities inasmuch as a clinical interpretation was provided of the data at the June 2011 CSE meeting (Tr.

pp. 330, 410-12).[19] The hearing record contains no indication that the parent requested to inspect or review the student's education records (34 CFR 300.613; 8 NYCRR 200.5[d][6]). In addition, I note that the district complied with the parent's request to reconvene the CSE to discuss the private evaluation reports, with which district personnel were largely in agreement (Tr. pp. 185, 581, 598), so that I find the parent's ability to participate in the development of the June 2011 IEP was not impeded.

D. April and June 2011 IEPs

1. Progress in the District Placement

With regard to the programs developed for the student, I first address the IHO's finding that the student did not demonstrate meaningful progress during the 2010-11 school year. Both the April 2011 and June 2011 IEPs recommended a 12-month 6:1+1 special class placement in a specialized school (Dist. Exs. 1 at p. 10; 2 at p. 8). The student attended a district 6:1+1 special class program during the 2010-11 school year and through summer 2011 (Tr. pp. 1497, 1527-28).

The student's special education teacher during the 2010-11 school year stated that the student had demonstrated "tremendous progress" since the time he entered the district's program and that the student "should be able to continue to make progress" if he continued to attend the 6:1+1 special class placement during the 2011-12 10-month school year (Tr. pp. 313-14). According to the special education teacher, based on the results of the Assessment of Basic Language and Learning Skills-Revised (ABLLS-R) and classroom observations, the student demonstrated progress in the areas of receptive language, ADL skills, visual performance, motor imitation, vocal imitation, social interaction, attention, classroom performance, reading, math, handwriting, spelling, and generalization of skills (Tr. pp. 284-86, 289-95, 317-18, 410).[20] Specifically, the student exhibited progress in letter-sound association, sight word vocabulary, requests, and labeling (Tr. pp. 286, 314-15). In the area of math, the student exhibited progress in money concepts, counting, addition, and subtraction (Tr. pp. 315-17). Regarding ADL skills, the student demonstrated progress in dressing, washing, and grooming, including the student being independent with respect to toileting (Tr. pp. 295, 317-18). According to the special education teacher, the student exhibited progress in social skills, including sharing and maintaining eye contact (Tr. pp. 318-19). The student also exhibited progress in the area of communication, including answering questions as well as labeling objects and emotions (Tr. pp. 319-20). The teacher reported that the student exhibited a decrease in echolalia over the course of the school year (Tr. p. 320). The hearing record reflects that the student had been "improving gradually" during the 2010-11 school year and that the district members of the June 2011 CSE believed the student had exhibited progress in his district placement (Tr. pp. 161, 387). Additionally, the special

[19] Although the district speech-language pathologist testified that she could not recall whether she discussed the results of an evaluation she conducted of the student at the June 2011 CSE meeting (Tr. p. 577), the same assessment was conducted by the private speech evaluator and the district speech-language pathologist testified that she agreed with the statement of the student's abilities contained in the private evaluation report (Tr. pp. 577, 748-52; see Parent Ex. F).

[20] After the district initially sought to submit a black and white copy of the ABLLS into evidence at the impartial hearing (Tr. pp. 22-24), the copy of the ABLLS ultimately admitted into evidence at the impartial hearing was in color (Tr. pp. 276-79, 283, 302; Dist. Ex. 11). However, the document provided to this office by the district was a black and white copy of the ABLLS. I find that I do not require a copy of the exhibit in color in order to issue a decision in this instance, but I caution the district to ensure that it submits a true copy of the exhibits in the hearing record to the Office of State Review (see 8 NYCRR 279.9[a]).

education teacher stated the student also demonstrated academic and social progress during the 2009-10 school year (Tr. pp. 321-22).

The special education teacher testified that the student's progress in the areas of syntax/grammar, intra-verbal communication, labeling, social interaction, spontaneous vocalizations, reading, group instruction, and eating did not meet her expectations (Tr. pp. 442-46). However, she nonetheless stated that the student demonstrated "overall progress" despite a lack of progress in certain areas, and that the student exhibited meaningful progress in light of his autism diagnosis and related communication delays (Tr. pp. 482, 484). In addition, the student's progress met her expectations in the areas of math skills, making requests, and dressing (Tr. pp. 443, 445-46).[21]

The student's occupational therapist for the 2010-11 school testified that the student demonstrated progress in the areas of forming/writing letters, manipulating clothing fasteners, cutting using scissors, hand-eye coordination, and visual motor skills (Tr. pp. 826-29). The occupational therapist also testified that the student consistently demonstrated progress in relation to his IEP annual goals in the area of motor skills (Tr. pp. 834-35). Although the student was unable to perform certain self-care skills independently, the occupational therapist opined that, nonetheless, "[f]or him it was progress" (Tr. p. 868). The student's speech-language pathologist stated that the student exhibited progress in the areas of receptive, expressive, and pragmatic language, including responding to questions, length of utterance, requesting objects, initiating conversations, and with peer interactions and social language skills (Tr. pp. 543-46, 770-71). Furthermore, although the student had not mastered all of the speech-language goals from prior IEPs before being withdrawn from the district program, he made progress toward some of the goals, in particular with respect to making requests, following directions, and social communications (Tr. pp. 711-38, 775-81). In addition, the speech-language pathologist stated that although the student's progress was slow and he could have possibly made more progress, it was nonetheless meaningful, as the student had become more likely to initiate language and made improvements at peer socialization, which were his "fundamental delay[s]" with respect to his speech-language abilities (Tr. pp. 792, 815).

The student's 2010-11 school report card provided the student's grades regarding the fall, winter, and spring trimesters (Dist. Ex. 5). From fall 2010 through spring 2011, the student exhibited progress in all subject areas, including English language arts (ELA), math, science, social studies, and physical education (id. at p. 1). For example, in the area of ELA, the student progressed from a rating of "1" indicating he needed more time to learn the skills, to a rating of "2" which indicated that the student showed progress (id.). In fall 2010, in the area of math, the student earned a rating of a "1" and in spring 2011, he earned a rating of a "3," indicating the student demonstrated progress and exhibited the skills on a regular basis (id.). The student's teacher remarked that during fall 2010, the student "adjusted well" to the new class and peers as well as followed the classroom rules (id. at p. 2). Regarding the winter session, the teacher indicated that the student continued to exhibit progress in academics, including the ability to label all the sounds of the alphabet and identify 25 sight words (id.). In spring 2011, the teacher reported that the student exhibited progress in all academic areas (id.).[22]

[21] I note that the BCBA-D testified that the ABLLS-R results indicated that the student regressed and/or the evaluator lacked knowledge regarding the administration of the assessment (Tr. pp. 1276-77).

[22] The student's special education teacher from July 27, 2011 through the end of the summer program testified that the student exhibited late-kindergarten academic skills (Tr. p. 1030).

Based on the foregoing, I find that the student demonstrated overall meaningful progress during the 2010-11 school year in the areas of communication, academics, motor skills, social skills, ADL skills, as well as receptive, expressive and pragmatic language. The special education teacher's testimony regarding the specific areas in which the student demonstrated progress as well as the student's 2010-11 report card indicate that the student made progress relative to his special education needs (Tr. pp. 161, 284-286, 289-295, 317-18, 387, 410; Dist. Ex. 5 at pp. 1-2). In addition, both the occupational therapist and speech-language pathologist testified as to specific areas in which the student demonstrated progress (Tr. pp. 543-46, 770-71, 826-29). Therefore, although the student's progress may be described as gradual progress, I find that, based on his cognitive abilities, the student's progress in the district placement was meaningful (Mrs. B., 103 F.3d at 1121 ["a child's academic progress must be viewed in light of the limitations imposed by the child's disability"]; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at *13-*14 [S.D.N.Y. May 24, 2012]; see also Tr. p. 329; Parent Ex. G at p. 8). Although I sympathize with the parent's concern that her son was making minimal progress in a district program, the IDEA guarantees access to an appropriate public education, not specific results (see Rowley, 458 U.S. at 192; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 195; Walczak, 142 F.3d at 132).

2. Levels of Related Services Provided

During the 2010-11 school year, the student received one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, and two 30-minute sessions per week of individual OT (Parent Ex. GG at p. 16). The April 2011 CSE continued to recommend related services of one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, and two 30-minute sessions of individual OT per week (Dist. Ex. 2 at p. 8).[23] The June 2011 CSE increased the amount of speech-language therapy and OT and initiated counseling services (Dist. Ex. 1 at p. 10). Specifically, the June 2011 CSE recommended related services of two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group (2:1), two 30-minute sessions per week of individual OT, one 30-minute session per week of OT in a group (2:1), and one 30-minute session per week of counseling in a group (3:1) (id.).

The student's 2010-11 speech-language pathologist and occupational therapist attended the June 2011 CSE meeting (Tr. pp. 542, 821-22; Dist. Ex. 1 at p. 15). The district school psychologist testified that the June 2011 CSE relied on input from the student's speech-language pathologist and occupational therapist as well as the private March 2011 OT evaluation report and the private March 2011 comprehensive speech and language evaluation (Tr. pp. 127-28). Moreover, the June 2011 IEP contained information from the private February/April 2011 neuropsychological evaluation, the private March 2011 OT evaluation report, and the private March 2011 comprehensive speech and language evaluation (compare Dist. Ex. 1, with Parent Exs. E-G). During the June 2011 CSE meeting, the speech-language pathologist and occupational therapist discussed the student's functioning and progress during the 2010-11 school year (Tr. pp. 131, 543, 826-29, 834-35). As stated above, the occupational therapist testified that the student consistently demonstrated progress in relation to his IEP annual goals in the areas of motor skills during the 2010-11 school year (Tr. pp. 826-29, 834-35) and the student's speech-language pathologist stated that the student exhibited progress in the areas of receptive, expressive, and pragmatic language during the 2010-11 school year (Tr. pp. 543-46, 770-71). The June 2011 CSE, based on parent

[23] As noted above, the hearing record indicates that the April 2011 IEP contained a "typo" and the student received all of his OT in a 1:1 setting (Tr. pp. 406, 408-09, 478-79, 902, 1507-09).

concerns regarding the student's language development, peer interaction, sensory regulation, and motor skills, increased the student's speech-language and OT services (Tr. pp. 135-36, 554-55, 1505, 1508, 1520). The June 2011 CSE considered the recommendations of the private evaluators for five 60-minute sessions per week for both speech-language therapy and OT (Tr. pp. 136-37; Parent Exs. E at p. 11; F at p. 4), but believed that the private recommendations regarding related services were excessive inasmuch as the student was exhibiting progress, achieving his annual goals, and would benefit more from instructional time within the class than being removed from class for additional related services (Tr. pp. 136-39, 178-80, 549-50, 788, 867). The student's speech-language pathologist and occupational therapist both believed the student's language, motor, and sensory needs were being addressed with the recommended frequency of speech-language and OT services (Tr. pp. 139, 553, 833-35). Based on the hearing record and my determination that the student made progress in the district placement, I find that the April and June 2011 CSEs appropriately addressed the student's related services needs.[24]

3. Activities of Daily Living

Turning to the district's assertion that it met the student's needs with regard to ADL skills, I find that the June 2011 IEP provided an adequate description of the student's ADL skills (Dist. Ex. 1 at p. 2). The IEP reflects the evaluative data available to the CSE, specifically the neuropsychological evaluation that described the student's self-care skills (compare Dist. Ex. 1 at p. 2, with Parent Ex. G at p. 5). The June 2011 IEP reflected that the student's "personal skills [we]re low" (Dist. Ex. 1 at p. 2). Specifically, the student held utensils correctly, dressed himself with clothing that opened in the front, and drank from a cup without spilling (id.). The IEP indicated that the student was working on toileting independently, brushing his teeth, and washing his hair; the IEP further noted that the student did not wipe or blow his nose using a tissue and did not put his shoes on the correct feet (id.). The IEP also reflected that the student's domestic skills were low; he was working on helping with simple household chores and being careful around sharp objects (id.). Additionally, the student did not clear items from his place at the table, put away personal possessions, or clean up his work/play area (id.). The June 2011 IEP contained one annual goal and three corresponding short-term objectives related to self-care skills, which addressed the student's self-care needs related to dressing, eating, and bathing (id. at p. 9).[25] As noted above, the hearing record indicates that although the student was incapable of performing certain ADL skills at home, he made progress in self-care skills at school, including with regard to manipulating buttons, using zippers, tying shoelaces, hand washing, and independent toileting (Tr. pp. 295, 317-18, 339, 463-66, 468-69, 495-96, 826, 910, 1049-50). For these reasons, I find that the hearing record does not support the IHO's conclusion that the June 2011 IEP failed to adequately address the student's ADL needs.

[24] There is a tension between the IHO's finding that the student required "a substantially higher level of [OT] and speech[-language] therapy" to receive educational benefits than was recommended by the June 2011 CSE (IHO Decision at p. 8) and her holding that the Rebecca School "provided the [s]tudent with an appropriate level of [OT] and speech[-]language therapy during the school day" (id. at p. 14). I note that the CSE recommended that the student receive three 30-minute sessions each of OT and speech-language therapy per week, with two individual sessions and one session in a group for each (Dist. Ex. 1 at p. 10), while the related services provided at the Rebecca School were the same: three 30-minute sessions each of OT and speech-language therapy per week, with two individual sessions and one session in a group for each (Tr. pp. 1134-36, 1342, 1482, 1628; Parent Ex. L at pp. 4-8).

[25] I note that this goal was taken verbatim from the private OT evaluation (compare Dist. Ex. 1 at p. 9, with Parent Ex. E at p. 13). The school psychologist testified that the short-term objective related to bathing could not be worked on in school (Tr. pp. 208-09); however, the occupational therapist testified that the objective could be worked on through miming or by hand washing (Tr. pp. 857-59, 886-87).

4. Behavioral Needs

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications /iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id.).[26] State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

The Second Circuit has explained that when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). In this instance, I find that the failure to conduct an FBA

[26] While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

was a procedural violation because the student exhibited behaviors that had the potential to interfere with his instruction if not properly addressed (Tr. pp. 172-76; see R.E., 694 F.3d at 190).

When the district does not conduct an FBA of a student, the IEP must be closely reviewed "to ensure that the IEP adequately addresses the child's problem behaviors" (R.E., 694 F.3d at 190). Although the evaluative data available to the CSE indicated the student's areas of need with regard to scripting, echolalia, hand flapping, finger stimming, rocking, variable relation, and difficulty maintaining attention, the June 2011 IEP as a whole failed to accurately describe and address the student's behavioral deficits (compare Dist. Ex. 1 at pp. 1-3, with Parent Exs. E-G). The June 2011 IEP described the student's difficulties with attention, echolalia, and rocking behaviors, and indicated his need for "constant redirection" to remain focused and on task (Dist. Ex. 1 at pp. 1-3). The June 2011 IEP also included statements that the student benefited from small group instruction, multiple modalities, manipulatives, visual and verbal prompts, repetition, modeling, and positive reinforcement (id. at pp. 2-3). However, the IEP stated that the student was well-behaved in school and did not otherwise address the student's behaviors (see Dist. Ex. 1). The district school psychologist testified that if the behaviors noted in the private evaluations had been occurring frequently in the student's classroom, "they would have certainly been addressed or they would have been formulated into a goal to decrease the occurrence" (Tr. pp. 175-76). However, she and the student's classroom teacher for the 2010-11 school year admitted that the CSE did not discuss individual behaviors exhibited by the student, the development of goals to address such behaviors, or consider developing a BIP (Tr. pp. 174-75, 200-01, 206-07, 467-68). I note that State regulations require that a CSE consider developing a BIP when "the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions" (8 NYCRR 200.22[b][1]).[27] In this instance, the service providers working with the student at the district school testified that although the student exhibited behaviors that arguably interfered with his instruction, a BIP was not needed because he could be easily redirected and his behaviors addressed by use of a classroom behavior management plan (Tr. pp. 159-60, 172-76, 213-14, 340-41, 486, 770, 784, 814-15, 913, 917-19, 1040, 1111).

In sum, I find that the June 2011 IEP failed to adequately describe and address the student's behavioral needs (see A.C., 553 F.3d at 172). As noted, the district did not develop a BIP. The failure to conduct an FBA in this instance was compounded by the CSE's failure to otherwise sufficiently acknowledge and address the student's behavioral needs in the IEP or by a BIP, constituting a denial of a FAPE to the student (R.E., 694 F.3d at 194).

5. Sensory Needs

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]). Despite the CSE having evaluative data available to it indicating the student's areas of need with regard to scripting, hand flapping, a variable mood (including ignoring others and laughing to himself), difficulties with vestibular, tactile, multisensory, and sensory processing, as well as emotional and social regulation delays, the June 2011 IEP as a whole failed to accurately describe the student's sensory regulation deficits (compare Dist. Ex. 1 at pp. 1-3, with Parent Exs. E-G). The June 2011 IEP included statements

[27] The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

that the student benefited from small group instruction, multiple modalities, manipulatives, visual and verbal prompts, repetition, modeling, and positive reinforcement (Dist. Ex. 1 at pp. 2-3). In addition, the IEP included one annual goal related to the student's sensory needs that indicated the student would improve his sensory processing skills, self regulation, and interactive skills (id. at pp. 8-9). The IEP also described the student's difficulties with attention and echolalia (id. at pp. 2-3). However, the IEP did not otherwise address the student's sensory needs (see Dist. Ex. 1). I find that it was improper for the district not to adequately describe the student's sensory needs known to the CSE at the time of the June 2011 meeting. Under the unique circumstances of this case, I find that the June 2011 IEP failed to offer the student a FAPE because it failed to accurately reflect the student's present levels of functional performance and his functional needs in the area of sensory regulation, as reflected by the information available to the June 2011 CSE (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see M.S. v. Bd. of Educ., 231 F.3d 96, 103-04 [2d Cir. 2000] [holding that the failure to describe in an IEP some of a student's "major learning difficulties" may constitute a failure to develop a program that is reasonably calculated to confer educational benefits on the student]; Application of the Bd. of Educ., Appeal No. 12-062).[28]

6. Receptive Language Needs

The hearing record establishes that the student's receptive language skills were severely delayed (Tr. pp. 185; Parent Ex. F at pp. 3-4). The private speech-language evaluation report indicated that the student identified photographs of familiar objects, understood inhibitory words, understood words in context, identified clothing items, recognized actions in pictures, understood spatial concepts, understood object functions as well as whole/part relationships, and understood simple descriptive commands (id. at p. 3). The evaluative report also indicated that the student understood quantity concepts and identified colors, but exhibited difficulties with time concepts, pronouns, making inferences, analogies, and expanded sentences (id.). The February/April 2011 neuropsychological evaluation indicated that the student was working on understanding the meanings of "yes" versus "no" and did not understand non-literal language (Parent Ex. G at p. 4). The neuropsychological evaluation also indicated that the student could respond to his name, listen to a story for at least five minutes, and follow single-step directions (id.).

The June 2011 IEP provided an adequate description of the student's receptive language needs and identified the student's receptive language skills as a significant area of need (see Dist. Ex. 1 at pp. 1-2); however, the IEP did not include an annual goal related to receptive language (id. at pp. 1-15). Specifically, as reflected in the evaluative data, the June 2011 IEP indicated that the student's receptive language skills were severely delayed (Dist. Ex. 1 at p. 2; Parent Exs. F at pp. 2-3; G at p. 4). The IEP also indicated that the student responded to his name, listened to a story for at least five minutes, worked on understanding "yes" and "no," followed single-step directions, and followed instructions in the "if-the" form (Dist. Ex. 1 at p. 1). However, despite these documented receptive language needs, the CSE developed two annual goals related to expressive and pragmatic language, but did not include an annual goal related to receptive language (Dist. Ex. 1 at pp. 7-8). The speech-language pathologist testified that through the use of the annual goals related to expressive and pragmatic language the student's receptive language needs could have been addressed, but provided no specific explanation of how the student's receptive language needs would have been addressed (Tr. pp. 556-57, 593-94; Dist. Ex. 1 at p. 7-8). The speech-language pathologist testified that she developed the two annual goals in the area

[28] Although the CSE developed a goal to address the student's needs in this area, the failure to adequately describe the student's needs could impede the implementation of the IEP by a provider who was not already familiar with the student.

of speech-language because the annual goals were relevant to the student, but did not explain how the student's receptive language needs were directly addressed in the IEP (Tr. p. 594). Despite testimony regarding the student's progress in the area of receptive language during the 2010-11 school year (Tr. pp. 320, 546), and although the failure to address each of the student's areas of need by way of an annual goal will not ordinarily constitute a denial of a FAPE (J.L., 2013 WL 625064, at *13), under the circumstances of this case, I find that the CSE's failure to develop an annual goal to meet the student's receptive language needs contributed to the denial of a FAPE.[29]

7. Generalization and Parent Counseling and Training

Addressing the IHO's findings that the lack of parent counseling and training on the April and June 2011 IEPs constituted a denial of a FAPE because it prevented the student from generalizing ADL skills learned in school to the home environment, I note that several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1150-53 [10th Cir. 2008]; L.G. v. Sch. Bd., 2007 WL 3002331, at *5-*6 [11th Cir. Oct. 16, 2007]; Gonzalez v. Puerto Rico Dept of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1292-93 [11th Cir. 2001]; JSK v. Hendry County Sch Bd., 941 F.2d 1563, 1573 [11th Cir 1991]; M.W. v. Clarke County Sch. Dist., 2008 WL 4449591, at *18-*19 [M.D. Ga. Sept. 29, 2008]; R.C. v. York Sch. Dist., 2008 WL 4427194 at *29 n.32 [D. Me. Sept. 25, 2008], adopted at 2008 WL 5135239 [D. Me. Dec. 5, 2008]; San Rafael Elementary Sch. Dist. v. California Special Educ. Hearing Office, 482 F. Supp. 2d 1152, 1160-62 [N.D. Cal. 2007]; see also Application of a Student with a Disability, Appeal No. 11-068; Application of the Dep't. of Educ., Appeal No. 11-031). Because the student made progress with regard to ADL skills while in the district placement, the hearing record does not support the IHO's conclusion that the district failed to adequately address the student's deficits in the area of ADL skills or provide for the generalization of skills to the home environment (see IHO decision at pp. 10-11).

In any event, State regulation requires that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). Recently, the Second Circuit explained that "because school districts are required by [State regulation][30] to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191). The Court further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (id.).

[29] I note that the student's two prior IEPs each included goals to address the student's receptive language needs (Parent Exs. C at p. 9; GG at p. 14).

[30] 8 NYCRR 200.13(d).

A review of the April and June 2011 IEPs reveals that parent counseling and training was not included in the CSE's recommendations and consequently the district failed to satisfy the requirement that such services be identified on the IEP (Dist. Exs. 1-2). I also note that district witnesses—including the assistant principal, unit coordinator, and classroom teacher at the assigned school—testified that the school offered parent counseling and training, including various workshops held on a regular basis, of which parents were given notice (Tr. pp. 324-26, 1661-67, 1715-19). To the contrary, the parent testified that she was never made aware of any workshops or trainings available at the assigned school (Tr. p. 7).[31]

I find under the circumstances of this case that the district's failure to incorporate parent counseling and training into the April and June 2011 IEPs was a violation of State regulation that in this instance, combined with the other deficiencies in the student's IEPs and given the parent's undisputed testimony regarding her need for parent counseling and training (Tr. pp. 1545-46), rose to the level of a denial of a FAPE to the student (see R.E., 694 F.3d at 191, 194; F.B., 2013 WL 592664, at *12). Additionally, I note that, as stated by the Second Circuit, the district "remain[s] accountable for its failure to [provide parent counseling and training] no matter the contents of the IEP," due to the requirements in State regulation (R.E., 694 F.3d at 191).[32] In light of the district's failure in this case to identify parent counseling and training on the student's IEP as required by the IDEA and State regulations, I order that when the CSE next reconvenes to develop a program for the student, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parent with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training on the student's IEP together with an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and State regulations (34 CFR 300.503[b][1]-[2]; see 8 NYCRR 200.1[oo]).

E. Assigned School Issues—Methodology

Despite having found that the district failed to offer the student a FAPE for the reasons stated above, I also address the parent's assertion that the TEACCH methodology employed in the assigned school was inappropriate for the student.[33] Generally, as correctly noted by the IHO (IHO Decision at p. 9), a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd., 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v.

[31] I note that the hearing record indicates that the parent did not take advantage of the parent counseling and training offered by the Rebecca School (Tr. pp. 1544-45, 1600-01).

[32] To the extent that the parent asserted during the impartial hearing that the district failed to discuss the provision of "individualized" parent counseling and training during the June 2011 CSE meeting (Tr. pp. 212-13, 1515, 1699), State regulations do not require the provision of "individualized" parent counseling and training to parents (see 8 NYCRR 200.13[d]).

[33] Although the district asserts that any determination with regard to the 10-month 2011-12 school year is speculative because the student did not attend the assigned school during that time, I note that the June 2011 IEP indicates that the student would receive the same services during summer 2011 as the 10-month school year (Dist. Ex. 1 at pp. 10-11). I also note that the parent asserts that the district did not provide her with notice that the student would attend a different classroom for the portion of summer 2011, but she has cited to no authority indicating that a change in classroom in the same type of program amounts to an actionable claim pursuant to the IDEA (see K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *16 [S.D.N.Y. Aug. 23, 2012]) and the United States Department of Education has clarified that "school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]).

Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *12 [S.D.N.Y. Aug. 23, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *11-*12 [W.D.N.Y. Sept. 26, 2012]; A.S. v New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-045).

The assistant principal of the assigned school testified that components of the TEACCH methodology were used throughout the 6:1+1 special classes the student attended during the 2010-11 school year and summer 2011 and to which he would have been assigned for the 2011-12 10-month school year (Tr. pp. 969, 972-74). The student's special education teacher for the 2010-11 school year was trained to implement the TEACCH methodology in the classroom (Tr. p. 969). The special education teacher testified that she implemented a visual schedule, individualized and modified worksheets, and paired directions with visual cues for the student (Tr. pp. 323-24). She also arranged the physical layout of the classroom based on the auditory, visual, and physical needs of the students (Tr. p. 266). The special education teacher monitored whether or not the student understood a task and exhibited the ability to perform the task prior to the student's engagement in independent work (Tr. p. 361). The special education teacher stated that the student's annual goals were addressed and the student exhibited progress throughout the school year (Tr. pp. 359-66). In addition, she found that the student transitioned well between activities (Tr. p. 324).

The student's special education teacher for the second half of summer 2011, who was also trained in TEACCH, testified that she implemented the TEACCH methodology within the student's 6:1+1 special class (Tr. pp. 1025, 1094). The special education teacher (summer 2011) described TEACCH as a structured program designed to facilitate independence and social skills with the assistance of visual supports, individual schedules, and individual work stations (Tr. p. 1094). The special education teacher further testified that the student needed individual attention when instructed regarding new concepts, but that the student only required verbal prompting after the concept was presented (Tr. p. 1093). She found the use of visual schedules and work stations, both components of the TEACCH methodology, to be effective in instructing the student (Tr. pp. 1110-11).

The hearing record also contains a document prepared by the district describing the TEACCH methodology:

> Provides physical structure, scheduling and organization to the classroom in order to minimize the negative impact of student weaknesses in communication, social skills, hypersensitivity to sensory input, distractibility, etc. while maximizing the positive impact of student strengths, including visual skills, memory and personal interests and preferences. Utilizes class and individual scheduling, verbal and visual prompts and 1-on-1 (teacher/student) joint activity routines based on meaningful and enjoyable social situations as the platform for teaching work, communication, social and leisure skills.

(Parent Ex. O at p. 1).

The BCBA-D who conducted a classroom observation of the student testified that the TEACCH methodology was ineffective for the student due to his "high rates of interfering behaviors" (Tr. p. 1259). However, the BCBA-D also testified that the student required an

intensive program that included both a TEACCH component and ABA services (Tr. p. 1285). It should be noted that the student's Rebecca School teacher testified that the student's behaviors did not prevent the student from maintaining his attention to instruction (Tr. p. 1410). The hearing record shows that the student demonstrated delays in the areas of communication, sensory regulation, cognition, academics, attention, motor skills, social and play skills, ADL skills as well as receptive, expressive, and pragmatic language (Tr. pp.145, 150-51, 1261-62, 1384, 1387; Parent Exs. E-G; J). As stated above, the student responded to his name, maintained attention for at least five minutes, and following single-step directions (Parent Ex. G at p. 4).

Based on the foregoing, I find that the hearing record does not support the parent's argument that the TEACCH methodology in the assigned 6:1+1 special class was inappropriate for the student, particularly here where the hearing record shows that the student received educational benefits when receiving TEACCH previously during the 2009-10 and 2010-11 school years. I find that the TEACCH methodology implemented by the assigned school could have addressed the student's needs in the areas of academics, sensory regulation, language, social/emotional functioning, and ADL skills. The student demonstrated abilities in the areas of academics, attention, and social/emotional functioning that would allow him to be instructed using the TEACCH methodology, such as approximately kindergarten level academic skills, basic attention skills, and an ability to interact with others (Tr. p. 1030; Dist. Ex. 1 at pp. 1-3; Parent Ex. G at p. 4). Moreover, assuming that the parent had enrolled the student in the public school, I find the evidence in the hearing record supports the conclusion that the assigned public school site had the ability to provide the student with instruction using an appropriate methodology within the proposed 6:1+1 special class.

F. Unilateral Parental Placement

As noted above, the district does not appeal from the IHO's determination that the Rebecca School was an appropriate placement for the student and that finding has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). However, because the parent seeks reversal of the IHO's finding that after-school services were unnecessary for the student to receive an appropriate education, even though the issue is not before me directly, I must address whether the hearing record supports the IHO's findings that the Rebecca School appropriately addressed the student's needs and that the student made progress in his placement there.

Initially, I note that the parent never obtained after-school services for the student during the 2011-12 school year of the type she requested in her due process complaint notice (Tr. pp. 1228-30). To that extent, it appears less that the parent is seeking reimbursement or direct payment for a unilateral placement, and more that she is requesting that the district be ordered to provide additional services to the student. Additionally, because 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., 231 F.3d at 104), it is unclear whether the parent would be able to establish that the student required additional services to receive educational benefits despite never having received them. Although parents need not show that the placement provides every special service necessary to maximize the student's potential, the placement must be "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d 356, 364-65 [2d Cir. 2006]; 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, at *9 [S.D.N.Y. Mar. 18, 2010]).

In this case, the private neuropsychological evaluation recommended 10 hours of home-based ABA services to generalize and follow through with the student's goals into the home and community settings (Parent Ex. G at p. 6). The BCBA-D, who conducted a classroom observation of the student, also recommended the student receive 10 hours of home-based ABA instruction to address the student's difficulties with self-care, leisure activities, community activities, and to implement a BIP in the home setting (Parent Ex. J at p. 8). In addition, the private evaluators recommended that the student receive five hours weekly of speech-language therapy and OT (Parent Exs. E at p. 11; F at p. 4; G at p. 7; J at p. 8).

I agree with the IHO that the student's academic, sensory, and social/emotional needs were appropriately addressed at the Rebecca School (IHO Decision at p. 14). Testimonial and documentary evidence support the conclusion that the Rebecca School addressed the student's needs and that the student demonstrated progress while at the Rebecca School (Tr. pp. 663-74, 677, 1126-34, 1183, 1265-71, 1541, 1544; Parent Ex. L at pp. 1-12). At the Rebecca School, the student attended an 8:1+3 class and received related services of speech-language, OT, and PT (Tr. p. 1134; Parent Ex. L at p. 1). The student received instruction using a DIR model to address his needs in the areas of academics, sensory regulation, and social/emotional functioning (Parent Ex. L at p. 1). The hearing record supports a finding that while the student attended the Rebecca School, he demonstrated improvement regarding academics, sensory regulation, motor skills, ADL skills, interactive skills with his peers, and communication skills (Tr. pp. 671-72, 1397; Parent Ex. L at p. 1-12).

Upon review of the hearing record, I find that it does not require a finding that the student required home-based ABA or speech-language services in order to receive educational benefits. Moreover, I agree with the IHO that the Rebecca School program addressed the student's needs and that extended-day services were not required in order for the student to receive educational benefits (see IHO Decision at p. 15).[34] Accordingly, I decline to award additional home-based services as a component of the unilateral parental placement.

G. Equitable Considerations

The final criterion for a reimbursement award is that the parent's 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

[34] While the BCBA-D testified that the student required the home-based services for the Rebecca School to be an appropriate placement (Tr. pp. 1288, 1290), I agree with the IHO that the hearing record in this instance supports a finding that the student made progress while at the Rebecca School, despite him not receiving any home-based services (Tr. pp. 677, 1183, 1186, 1228-30, 1491, 1629-30).

(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 69 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 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, 271-73 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

In this case, the hearing record supports the IHO's finding that there are no equitable factors precluding reimbursement. The hearing record indicates that the parent informed district personnel at the June 2011 CSE meeting of her beliefs that the student required additional related services and that he was not making sufficient progress in his district placement (Tr. pp. 143-47, 327, 403-04, 406-07, 783, 884, 1505, 1511-14). The district representative testified that the parent cooperated with the district and participated in the CSE meeting process (Tr. p. 205). The parent also shared the private evaluations she obtained with the district, providing the bulk of the objective evaluative data contained in the hearing record (Parent Exs. E-H). Furthermore, despite the parent writing two letters to the district indicating her dissatisfaction with the June 2011 IEP and the assigned school (Parent Exs. I; BB), the district did not respond or attempt to cure her concerns with the offered program (Tr. pp. 1526, 1529). Accordingly, I see no reason to disturb the IHO's finding that equitable considerations favor the parent's request for reimbursement for the student's 2011-12 school year tuition at the Rebecca School.

To the extent that the district asserts that reimbursement for the student's tuition should be reduced on the basis that the notice provided by the parent in June 2011 incorrectly identified the private school in which the student was eventually enrolled, I note that the IDEA requires only that parents inform the CSE that they are rejecting the proposed placement, "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]; 34 CFR 300.148[d]). The parent initially informed the CSE by letter dated June 15, 2011 that she was rejecting the offered program, stated her concerns with the program, and indicated her intent to place the student in a private school and seek reimbursement or direct payment for the placement (Parent Ex. I). The parent followed up her original notice—which contained all the statutorily required elements—by letter dated September 1, 2011, in which she reiterated that she was rejecting the proposed program, restated her concerns with the offered

program, and again informed the CSE of her intent to place the student privately and seek public funding for such placement (Parent Ex. BB). The IDEA contains no requirement that the parent identify a particular private school in her notice to the district, and I decline to read such a requirement into the statute. Under the circumstances, I decline to find that equitable considerations do not support the parent's request for relief.

H. Compensatory Additional Services Award

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case and may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (Wenger v. Canastota, 979 F. Supp. 147, 150-51 [N.D.N.Y. 1997]; 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 has been awarded to students who are ineligible for special education services by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory 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 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., 108 LRP 49659 [S.D.N.Y. Mar. 6, 2008], adopted by 50 IDELR 225 [S.D.N.Y. July 7, 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, 1143-44 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; see, e.g., Application of the Dep't of Educ., Appeal No. 12-135; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see 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. 12-135; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

Here, the district contends that the IHO read the parent's due process complaint notice too broadly in finding that the parent had raised issues relating to the provision of a FAPE to the student during the 2009-10 and 2010-11 school years by requesting "a compensatory education award for any pendency deficiencies and/or gross violations of [the student's] entitlement to a FAPE during the last two years" (Parent Ex. A at p. 9). I concur with the district that the parent did not specify in her due process complaint notice any actions taken by the district that led to gross violations of the student's right to a FAPE prior to the development of the April 2011 IEP (Parent Ex. A at pp. 2-8). In her post hearing memorandum, the parent requested compensatory additional services only for the district's failure to provide parent counseling and training for the 2009-10 through 2011-2012 school years (IHO Ex. LXII at pp. 1, 30). Assuming without deciding that the issue of whether the district offered the student a FAPE during the 2009-10 and 2010-11 school years is properly before me, the hearing record does not support a conclusion that the district failed to implement the IEPs in effect at that time by not providing the student with all of the recommended services, or that the district grossly failed to meet its obligations under the IDEA. 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 2011-12 school year by failing to adequately describe and address his needs, I have also found that the student made progress while attending the district's program during the 2010-11 school year, and therefore, the hearing record does not support the IHO's award of additional services.[35] Even assuming the student had not made progress, the hearing record contains no evidence indicating that the student's needs for the 2009-10 and 2010-11 school years were identical to his needs at the time the parent obtained the private evaluations. Accordingly, the hearing record was insufficient to determine whether the district offered the student a FAPE in prior school years and, because there were no allegations relating to the 2009-10 and 2010-11 school years in the due process complaint notice, the district had no reason to believe that it would be required to establish that it

[35] The IHO herself found that the student made some progress during his time in the district's program (IHO Decision at pp. 19-20) and, as noted above, the parent's post hearing brief specified only the district's failure to provide parent counseling and training as a basis for compensatory services. To the extent that the parent requested home-based services in addition to district funding of the student's unilateral placement at the Rebecca School, such services were requested as a component of the student's educational placement, rather than as compensatory additional services (IHO Ex. LXII at pp. 17-18, 30).

offered the student a FAPE for those years.

I note that in fashioning a remedy of additional services, the IHO relied on grounds that I find did not constitute a denial of a FAPE for the 2011-12 school year, including: the student's lack of progress in the district's placement; the amount of related services provided; the failure to address the student's need for generalization; and the use of the TEACCH methodology in the assigned school. However, there were no allegations made by the parent with respect to any particular deficiencies occasioned by the supposed denial of a FAPE to the student for the 2009-10 and 2010-11 school years, nor did the IHO make any specific findings with regard to such deficiencies (see IHO Decision at pp. 18-20). Rather, the IHO relied on the private evaluations and the testimony and report of the BCBA-D in fashioning an award of additional services (id. at p. 20). However, the private evaluators and the BCBA-D report recommended services for the student's educational program going forward, rather than to remediate past deficiencies in his program (Parent Exs. E at pp. 11-12; F at p. 4; G at pp. 6-7; J at p. 8). The BCBA-D's testimony also did not establish any particular level of services that should be focused toward remediation, aside from the statement that the student should receive "home based ABA instruction to provide him with a level of intensity and practice that he requires in order to learn skills, and also to make up for the four years of time that he lost in his previous placement" (Tr. p. 1278). Based on the student's progress both while in the district's program and his subsequent progress while at the Rebecca School, I find that there is no reason in the hearing record to conclude that the student does not already occupy "the same position [he] would have occupied but for the school district's violations of IDEA" (Reid, 401 F.3d at 518). Accordingly, I will annul the IHO's award of additional services, finding that the student's previous progress in the district's program weighs against any such award.[36]

I. Request for Direct Funding

Turning to the IHO's award of direct payment for the student's Rebecca School tuition, SROs have previously assigned to parents seeking direct tuition payment the burden of establishing their inability to pay for the student's private school tuition (see Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041). The parent indicated that she has insufficient resources available to her to pay the student's Rebecca School tuition (Tr. pp. 1532-35; Parent Exs. Y; FF). Although the parent submitted her 2010 federal Form 1040 and W-2 (Parent Exs. Y; FF), she did not put into evidence any indication of the resources available to her other than her income from 2010. Moreover, the federal tax return introduced into evidence was incomplete (Parent Ex. FF). Additionally, while the parent asserts on appeal that "there was no evidence presented . . . that [the student's] father was an active participant in his life" (Answer at p. 12 at ¶ 40), a review of the hearing record indicates that the student's father participated in a parent-teacher conference while the student attended a district program (Tr. p. 903) and was listed on the student's April 2009 and April 2010 IEPs as living in the same home as the student and his mother (Parent Exs. C at p. 1; GG at p. 1). Additionally, the student's father was a participant in the April 2009 CSE meeting (Parent Ex. C at p. 2). Absent any information in the hearing record regarding the availability of resources from the student's father, and with incomplete information regarding the resources available to the student's mother, I decline to find that the parent has sufficiently established her entitlement to direct funding of the student's tuition costs at the Rebecca School for the 2011-12 school year (see

[36] I note in particular that there is no evidence in the hearing record that the student was excluded from school or denied special education services for any period of time, or that the district failed to properly implement the April 2009 or April 2010 IEPs so as to warrant an award of additional services.

Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 427-30 [S.D.N.Y. 2011]; Application of the Dep't of Educ., Appeal No. 12-070; Application of a Student with a Disability, Appeal No. 12-004; see also Connors v. Mills, 34 F. Supp. 2d 795, 805-06 & n.6 [N.D.N.Y. 1998]). However, as the parent submitted proof of partial payment of the student's Rebecca School tuition for the 2011-12 school year (Parent Exs. M at pp. 1-3; OO), I direct the district to reimburse the parent for that amount already paid and, upon proof of payment, for the balance of the student's 2011-12 school year Rebecca School tuition.

VII. Conclusion

Progress, although important to determining whether the program offered by the district was appropriate, is not dispositive of all claims brought under the IDEA (see M.S., 231 F.3d at 103-04). The goal of the IDEA is to provide opportunities for students with disabilities to access special education and related services that are designed to meet their needs and enable them to access the general education curriculum to the extent possible (20 U.S.C. §§ 1400[d]; 1414[d][1][A]). In this instance, the district's failure to appropriately describe or address the student's behavior, sensory, and receptive language needs in the June 2011 IEP, and to provide parent counseling and training, collectively comprise a denial of a FAPE for the 2011-12 school year. However, the student's past progress weighs against awarding additional services for the district's possible failure to have provided the student with an appropriate program during his time in a district placement.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 13, 2012 is modified, by reversing those portions which denied the parent's requests for reimbursement for privately obtained evaluations and granted her requests for compensatory additional services and direct payment of the student's Rebecca School tuition; and

IT IS FURTHER ORDERED that at the next CSE meeting regarding the student's special education programming, the district shall consider whether it is appropriate to include parent counseling and training on the student's IEP and, thereafter, shall provide the parent with prior written notice consistent with the body of this decision; and

IT IS FURTHER ORDERED that the district shall, upon satisfactory proof of payment, reimburse the parent for the student's Rebecca School tuition for the 2011-12 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parent for the costs of the privately obtained speech-language, OT, and neuropsychological evaluations, upon satisfactory proof of payment and subject to district policy regarding reimbursement rates for IEEs.

Dated: **Albany, New York**
April 4, 2013

STEPHANIE DEYOE
STATE REVIEW OFFICER