The University of the State of New York

The State Education Department
State Review Officer
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No. 13-054

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

Appearances:
Greenberg Traurig LLP, attorneys for petitioners, Caroline J. Heller, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for compensatory education and to be reimbursed for her daughter's tuition costs at the Rebecca School for the 2011-12 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

The decision of an IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]). A party aggrieved by the decision of an IHO may 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]).

III. Facts and Procedural History

I was appointed to conduct this review on October 29, 2014. The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. Briefly, the CSE convened on May 19, 2009, to formulate the student's IEP for the 2009-10 school year, found the student eligible for special education as a student with autism, and recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school with related services (see generally Parent Ex. I). The parent disagreed with the May 2009 CSE's recommendation and the CSE convened a second time on September 24, 2009; the CSE changed the student's classification to a student with an other health-impairment and deferred to the "central based support team" (CBST) for the purpose of recommending a State-approved nonpublic school (Tr. pp. 614-17; Parent Ex. H). In September 2009 the district provided the parent with a "Nickerson letter" and the parent placed the student in the New Life School (New Life); a State-approved nonpublic school (Tr. pp. 617-19).[1] The student attended New Life for the 2009-10 school year (see Dist. Exs. 2 at p. 2; 5).

The CSE convened on April 28, 2010, to formulate the student's IEP for the 2010-11 school year (see generally Dist. Ex. 3). The CSE found the student eligible for special education as a student with an other health impairment, and recommended placement for a 12-month school year program in a 12:1+1 special class in a State-approved nonpublic day school with related services (id.). By final notice of recommendation (FNR) dated April 28, 2010, the district summarized the recommendations in the April 2010 IEP and identified New Life as the particular nonpublic school to which the district assigned the student to attend for the 2010-11 school year (see Parent Ex. Q). The student attended New Life from September 2010 to March 2011 (Tr. pp. 645-46). In March 2011 the parent removed the student from New Life and home-schooled the student for the remainder of the 2010-11 school year (Tr. pp. 669-70).

The CSE convened on April 12, 2011, to formulate the student's IEP for the 2011-12 school year (see generally Dist. Ex. 1). The CSE found the student eligible for special education as a student with an other health-impairment, and recommended placement for a 12-month school year program in a 12:1+1 special class in a State-approved nonpublic day school with related services (id.). By final notice of recommendation (FNR) dated April 13, 2011, the district summarized the recommendations in the April 2011 IEP and identified New Life as the particular nonpublic school to which the district assigned the student to attend for the 2011-12 school year (see Parent Ex. R).

[1] A "Nickerson letter" is a remedy for a systemic denial of a FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; R.E., 694 F.3d at 192 n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]).

The parent disagreed with the recommendations contained in the April 2011 IEP, as well as with the particular nonpublic school site, New Life, to which the district assigned the student to attend for the 2011-12 school year and, as a result, notified the district of their intent to unilaterally place the student at The Rebecca School (Tr. pp. 671-74, 764-65).[2] In a due process complaint notice, dated March 25, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10, 2010-11, and 2011-12 school years (see Parent Ex. A).

An impartial hearing convened on May 31, 2012, and concluded on November 21, 2012, after 7 days of proceedings (Tr. pp. 1-781). In a decision dated February 26, 2013, the IHO determined that the district offered the student a FAPE for the 2009-10, 2010-11, and 2011-12 school years and that the parent was not entitled to direct payment of tuition at the Rebecca School for the 2011-12 school year or the compensatory education that she sought (IHO Decision at pp. 18-25).

IV. Appeal for State-Level Review

On appeal, the parent does not request any relief for the 2009-10 school year. The following issues presented on appeal must be resolved on appeal in order to render a decision in this case:

1. Whether the IHO erred in determining that the educational placement listed in the April 2010 IEP, and as implemented during the 2010-11 school year, was appropriate to address the student's needs and provided the student a FAPE. If the IHO did err in making that determination, the parent's request for compensatory education must be considered.

2. Whether the IHO erred in determining that the educational placement listed in the April 12, 2011, IEP for the 2011-12 school year was appropriate to address the student's needs and offered the student a FAPE. If the IHO did err in making that determination, the appropriateness of the parent's unilateral placement at the Rebecca School, equitable considerations, and the parent's request for direct funding of tuition must be addressed.

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

[2] An August 26, 2011 letter to the district written by an advocate for the parent that provided notice to the district that the parent was placing the student at the Rebecca School is discussed in the hearing record and referenced on the parent's exhibit list as Exhibit EE, but a copy of the letter is not present in the hearing record (Tr. pp. 764-65; IHO Decision at p. 27).

students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [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, 361 Fed. App'x 156, 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, 293 Fed. App'x 20, 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, 486 Fed. App'x 954, 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]).

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. 2010-11 School Year

1. April 2010 IEP

In her due process complaint notice, the parent contended that the April 2010 CSE failed to offer the student an appropriate program, and I agree (Parent Ex. A at p. 4). Specifically, the parent claimed that the student regressed academically, socially and behaviorally during the 2009-10 school year at New Life under the student's previous IEP, which should have prompted the CSE

to modify the IEP's recommendations, including the recommendation that the student attend New Life (id.). In the parent's view, the student regressed during the 2009-10 school year because she was the target of bullying by other students at the school and the services and setting provided by the district were not appropriate for the student (id.).[3] A student's progress under a prior IEP—or, as in this case, the student's progress under the September 2009 IEP—is a relevant area of inquiry for purposes of determining whether a subsequent or future IEP (i.e., the April 2010 IEP) has been appropriately developed, particularly if the parent expresses concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at pp. 13, 18 [December 2010]). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153–54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]; Schroll v. Bd. of Educ., 2007 WL 2681207, at *3 [C.D. Ill. Aug. 10, 2007]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).[4] Accordingly, some discussion of the student's progress or lack thereof during the 2009-10 school year is relevant to the question of the CSE's action in recommending an IEP with virtually the same services and goals for the 2010-11 school year (compare Parent Ex. H, with Dist. Ex. 3).

[3] The IHO found the parent's allegation that bullying took place at New Life during both the 2009-10 and 2010-11 school years was not credible (IHO Decision at p. 22). In reversing the IHO's finding that the district provided the student with a FAPE during the 2010-11 school year, I need not reverse the IHO's finding that bullying did not occur, and instead find that the April 2010 IEP failed to address the student's social and emotional needs and was improperly implemented at New Life. Nonetheless, I am compelled to note that there are a number of instances of asserted bullying that the district's witnesses agree occurred, but the district witnesses contend that the actions complained of were accidental, caused by "silliness", did not constitute bullying, or were misinterpreted by the student (see, e.g. Tr. pp. 321, 330-31, 403, 409-12, 415-17; see also Tr. pp. 762-65, 771).

[4] Parents may not use a student's subsequent lack of progress under a given IEP to support a claim that the IEP was inappropriate at the time that the IEP was developed and drafted by the CSE (see R.E., 6945 F.3d at 187 ["Parents who end up placing their children in public school cannot later use evidence that their child did not make progress under the IEP in order to show that it was deficient from the outset."]). Parents are permitted, however, to introduce "evidence that the school district did not follow the IEP as written" in order to "show that the child was denied a FAPE because necessary services included in the IEP were not provided in practice" (id. at n.3).

a. Social-Emotional and Behavior Needs Prior to Implementation of the April 2010 IEP for the 2010-11 School Year

Prior to the student's attendance at New Life during the 2009-10 school year the student was verbal with her teachers, the parent and other family members including cousins, aunts and uncles and grandparents (Tr. pp. 599; Parent Exs. H at p. 4; M at p. 2). During the student's initial weeks at New Life, she spoke on a number of occasions to adult staff at the school, but she ceased speaking to all adults and students at New Life for the rest of the 2009-10 school year (Tr. pp. 189, 215, 263, 403, 603; Dist. Exs. 2 at p. 2; 8; Parent Exs. L at p. 2; M at p. 2).[5]

The September 2009 IEP describes the student as "having difficulties communicating in any kind of group setting . . . [she] feels more comfortable interacting with adults . . . [she] needs [prompting] to initiate a conversation . . . [and] will communicate in a soft voice and [is] selective about whom she will talk to" (Parent Ex. H at p. 4). The September 2009 IEP does not recommend a behavior intervention plan (BIP) and lists the reason for rejecting a 12:1+1 program—presumably a 12:1+1 program at a public school rather than a nonpublic school—as being because the student "does not displace [sic] any behavioral concerns" (id. at pp. 4, 15). She was described as respectful and well-behaved by her 2009-10 school year teacher, and her report card from the 2009-10 school year reflects strong grades in all subjects with the exception of music (Dist. Ex. 5 at pp. 1-2). However, the report card also indicated that throughout the 2009-10 school year the student struggled socially within the classroom and needed to work on communication skills with both teachers and peers (id. at p. 1).

Therapy notes produced by the student's speech language therapist at New Life during the 2009-10 school year confirm that the student was vocal with the therapist as late as October 21, 2009 but only communicated non-verbally or in writing thereafter (Parent Ex. 8 at pp. 1-9). The notes reflect that at times the student seemed happy, but there are multiple mentions of the student being upset with things that happened in other classrooms, or becoming upset during testing in the therapy room (id.). The notes reflect that the therapist was targeting speech-language therapy goals including developing and extending auditory comprehension, greeting classmates and teachers and developing and expanding expressive language skills by answering questions and "utilizing a listen-think-respond", but the notes do not indicate that the student met any of the goals (id.). The third quarter goals and objectives progress report attached to the student's 2009-10 report card reflects that the student's providers did not expect the student to meet any of the speech-language or social/emotional goals on the September 2009 IEP (Parent Ex. 5 at pp. 6, 8-9).[6] An April 28, 2010 progress report concerning the 2009-10 school year developed by the student's special education teacher described the student as cooperative, shy, quiet and focused student and noted that the student "will keep to herself and only interact in classroom lessons when called upon" (Parent Ex. N at p. 1-2). According to the parent, the student regressed behaviorally and socially

[5] The student remained selectively mute and did not speak to any adults or peers at New Life for the 2010-11 school year as well (Tr. pp. 310-11; Parent Ex. N at p. 1).

[6] The speech-language and social/emotional goals on the September 2009 IEP included improving the student's auditory comprehension, expressive language, ability to work cooperatively with classmates, reciprocate social information, greet teachers, classmates and friends, and comment to teachers and peers during class and leisure activities (Parent Ex. H at pp. 8, 12-13).

during the 2009-10 school year. The parent testified that the student informed her that the students at her school were "fighting every day", she frequently complained that other students were being mean to her and that she did not play with the other students in the school, and would read on her own instead (Tr. p. 634, 637). The parent testified that she noticed the student forgetting things she knew, like words, and was losing the ability to compete tasks independently, such as working with a workbook at home (Tr. pp. 635, 638). She testified that the frequency of the student's seizures increased (Tr. p. 635).[7] She also testified that the student became more withdrawn at home (Tr. p. 635). For example, the student would normally communicate with her cousins and play with them during visits but after attending New Life she would not (id.).

The April 2010 IEP states that the student's social skills and ability to interact had improved since attending New Life, that her communicative intentions had increased and she became less isolated (Dist. Ex. 3 at pp. 4-5). New Life's assistant principal testified that by the end of the 2009-10 school year the student was "working in small groups", "grunting" and "playing with students" (Tr. p. 199-201). However, the assistant principal's testimony is called into question by the special education teacher's statement in the April 28, 2010 progress report that the student would "keep to herself and only interact in classroom lessons when called upon" (Parent Ex. N at pp. 1-2). On balance, I find that the weight of the evidence established that the student declined socially and emotionally during the 2009-10 school year at New Life, and I reverse the IHO's finding on this issue, to the extent he made one (see IHO Decision at pp. 21-23).

I also find that the IHO erred in his analysis of the evidence presented by the private psychologist who testified during the parent's case (see Tr. pp. 546-94). The IHO noted that because the private psychologist had not evaluated the student prior to 2012, and had limited knowledge of New Life during the period in question, he gave little weight to his testimony (IHO Decision at p. 23). I disagree and find that the private psychologist had an adequate basis for his opinions regarding the student's needs and the appropriateness of the programs offered and provided by the district.[8]

[7] The parent testified that the student was diagnosed with epilepsy at an early age; however this diagnosis was later changed to pseudo seizures, which she described as a type of seizure brought on by stress (Parent Ex. H at p. 2; Tr. pp. 598-99).

[8] The private psychologist was approached by the New Life School during its formation and given a description of the nature of the school's program with the aim of informing the psychologist so that he could recommend the program for those students he believed would be appropriate to attend the school (Tr. pp. 558-59). He testified that "I was in touch with them a couple of times, went to see them a couple of times, even brought a student or two with their families to tour it and to recommend it. So I felt that for certain presentation I thought it was a very good school" (Tr. p. 559, 563). The school provided the private psychologist with information and documentation concerning the school and he toured the facility (Tr. pp. 558, 584). He visited the school on two occasions with the families of potential students, for between one and three hours, one of those visits occurred in 2010 during the time the student attended the school (Tr. pp. 559, 565, 579, 582). The private psychologist and a colleague conducted a psychological re-evaluation of the student on March 24, 2012 (Parent Ex. BB). During that evaluation, the private psychologist reviewed documents and reports detailing the student's education and medical history including a 2008 Speech-language progress report, a 2009 psychoeducational evaluation conducted by the district, a 2009 social history update, a 2011 psychoeducational evaluation conducted by the district, a 2011 report of progress from the Rebecca School and documents produced by New Life during the time the student attended the school (Tr. pp. 563, 580-81; Parent Ex. BB at p. 1). The private psychologist testified that he had experience with selective mutism, having worked with "a dozen or so" during his career (Tr. p. 583). In addition to the

The private psychologist testified that based on his review of prior evaluations the student's "cluster" of symptoms and needs had remained essentially the same from 2009 through his evaluation in 2012, except that her selective mutism had become more "entrenched" (Tr. pp. 556-57, 576-68). The psychological reevaluation described the student as "motivated and cooperative" and that she "demonstrates symptoms of anxiety, depression, somatization, withdrawal, and difficulties with adaptability" (Parent Ex. BB at p. 7). The psychological reevaluation noted that the student was shy and did not interact or initiate conversations with peers or teachers and that she could become anxious and overwhelmed when faced with novel situations. (id.). In testimony the private psychologist described the student as a student with autism who presented as selectively mute (Tr. p. 566). He further testified that the student required a "specialized small ratio environment that is very nurturing that can address the issues that are part of an autistic spectrum diagnosis as well as part of a vulnerable, anxiety and selective mutism" and was a "vulnerable, anxious young girl who needs a tremendous amount of structure, nurturance, quiet, support, and safety in order for her to feel safe and engage at all in even the most basic skill of conversing let alone an academic educational plan" (Tr. pp. 556, 558).

When asked to describe the program at New Life, the private psychologist stated that "their system was set up for really more mental health and behavioral issues. They have mental health breakout rooms. They have a crisis mental health team" (Tr. p. 565). Regarding the types of students New Life is designed to accommodate, and whether the student would have been appropriately placed there during the 2009-10 school year, the private psychologist stated that:

> They are very intense children with real acting out issues, and by [the school's] own admission autism is not something that they're comfortable with. They consider it really just case by case. Their children are very street smart, tough children who absolutely deserve the best education and therapeutic environment for those children, but not autism, not a child who's vulnerable, anxious, and presented as selectively mute. It would be totally, totally overwhelming and being around very street smart, socially sophisticated children who have behavioral acting out, it's not even a matter of coming close to being appropriate. It's completely not appropriate and would—I would never recommend a class like that or a school like that for a child like [the student].[9]

(Tr. pp. 565-66).

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review of the documents described above, the private psychologist and his colleague conducted evaluations to assess the student's cognitive functioning, attention and concentration, academic achievement, emotional functioning, and adaptive behavior as well as observing the student in class at the Rebecca School (Parent Ex. BB at pp. 3-6, 9-12). In addition, the psychological re-evaluation compared the results of the 2012 evaluations with those conducted in 2009, 2010 and 2011 (id. at pp. 9-12).

[9] The IHO discounted the parent's claim that it was inappropriate to place the student in a classroom that contained seven of twelve students classified with an emotional disturbance during the 2009-10 school year at New Life upon the reasoning that the emotional disturbance classification was by no means a determination that a student is a behavior problem or had "violent tendencies" (IHO Decision at pp. 23-24; see Tr. pp. 747-48). However, the IHO appeared to overlooked the evidence in the hearing record that several of the student's in the 2009-10 classroom did have aggressive or violent behaviors, including verbally and physically assaulting peers and adults (see Parent Ex. RR at pp. 3-4; II at pp. 3-4; ZZ at pp. 3-4). Similar evidence is attached to the Petition as additional

Elsewhere in testimony the private psychologist stated that because the program provided to the student during the 2009-10 school year did not address the "areas that are consistent with a child on the autistic spectrum" and could not address the student's anxiety and vulnerability, it was a "setup for regression" with the result that the student "withdrew more into herself" (Tr. pp. 572-73). With regard to the student's perception that she was bullied by other students while she attended New Life, the private psychologist opined that, "real or perceived it doesn't matter. This is part of [the student's] internal life" (Tr. p. 574).

In light of the above, I find that the hearing record demonstrates that the student declined socially and emotionally during the 2009-10 school year and that the decline was caused by the failure of the September 2009 IEP, and the setting in which it was implemented, to address the student's social/emotional needs.

The record is less clear on the student's academic progress during the 2009-10 school year. The parent points to, among other things, declining or stagnating skills in reading and math as shown by grade equivalency results in academic testing conducted before the commencement of the 2009-10 school year, and testing conducted in February 2010 during the 2009-10 school year, the result of which were available to the April 2010 CSE (compare Parent Exs. H at p. 3; M at p. 7 with Parent Ex. T at p. 2; Dist. Ex. 3 at p. 3). The district, meanwhile, asserts that testimony from New Life's assistant principal and the student's report card demonstrate academic progress (Tr. pp. 193-99, 197-205, 209-13; Dist. Ex. 5). I find that the hearing record does not contain clear evidence of academic progress or decline, however the hearing record does demonstrate that the student's primary needs were linguistic, and social/emotional, stemming from her autism.[10]

A comparison of the September 2009 and April 2010 IEPs reveals numerous changes in the description of the student's academic performance, social emotional performance, speech performance and learning characteristics, health and physical development (compare Parent Ex. H at pp. 3-5 with Dist. Ex. 3 at pp. 3-6).[11] However the two IEPs are nearly identical in every other way, including: the same student-to-teacher ratio, the same amount and type of related services, and goals and objectives targeting the same skills to be implemented in the same nonpublic school (compare Parent Ex. H with Dist. Ex. 3). More specifically, both IEPs recommended a 12:1+1 staffing ratio in a special class (Parent Ex. H at p. 1; Dist Ex. 3 at p. 1). Both IEPs recommended a State-approved nonpublic school (id.). Both IEPs recommended special education transportation (id.). Both IEPs recommended related services in the form of occupational therapy, physical

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evidence which I find is not required for this determination, although the district does not object to it (see Pet. Exs. AAA at pp. 3-5; BBB at pp. 5; CCC at pp. 3-4; see 8 NYCRR 279.10[b]; see, e.g., Application of the Dep't of Educ., Appeal No. 12-103). The evidence in the hearing record significantly bolsters the private psychologist's description of the setting experienced by the student during the 2009-10 school year.

[10] For example, in addition to the private psychologist's conclusions about the student's primary needs set forth above, a district school psychologist, in a psychoeducational evaluation conducted prior to the start of the 2009-10 school year, recommended that "the student may benefit most from a setting that addresses her language and processing difficulties" (Parent Ex. M at pp. 5-6).

[11] The April 2010 IEP contained a BIP, while the September 2009 IEP did not (see Dist Ex. 3 at. p. 15). Given that the record is replete with evidence that the student did not display any behavior problems, it is unclear why this BIP was added, perhaps because the assistant principal at New Life testified that every student at New Life is recommended to have a BIP (Tr. p. 233; see, e.g., Dist. Ex. 3 at pp. 3, 12).

therapy, speech-language therapy, and counseling, at the same frequency, duration, and student-teacher ratio (Parent Ex. H at p. 16; Dist Ex. 3 at p. 13). With the exception of adding a goal to address anxiety, both IEPs contained goals and objectives targeting the same skills, often with identical wording (Parent Ex. H at pp. 6-13; Dist Ex. 3 at pp. 7-10). Both IEPs rejected placing the student in other special education programs for the same reasons (Parent Ex. H at p. 15; Dist Ex. 3 at p. 12). And the district recommended that both IEPs be implemented at New Life (Parent Exs. Q; W).

The April 2010 IEP essentially is a copy of the IEP which failed to produce progress in the student's primary area of need in the prior school year. I find that the April 2010 IEP was not reasonably calculated to promote progress and not regression, and failed to offer the student a FAPE for the 2010-11 school year.

b. Implementation of the April 2010 IEP

In addition to finding that the April 2010 IEP failed to offer the student a FAPE, I also find that the IEP was not properly implemented at New Life during the 2010-11 School year.

A party must establish more than a de minimis failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 379 Fed. App'x 202, 205 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007) [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

I find that the district failed to implement two material aspects of the April 2010 IEP and that these failures were not de minimis.

First, the district failed to properly group the student for instructional purposes. Students with disabilities placed together for purposes of special education must be grouped by similarity of individual needs (8 NYCRR 200.6[a][3]). Pertinent to this matter, the range of academic or educational achievement of such students shall be limited to assure that instruction provides each student appropriate opportunities to achieve his or her annual goals (8 NYCRR 200.6[a][3][i]). The learning characteristics of students in the group shall be sufficiently similar to assure that this range of academic or educational achievement is at least maintained, and, the social development of each student shall be considered prior to placement in any instructional group to assure that the

social interaction within the group is beneficial to each student, contributes to each student's social growth and maturity, and does not consistently interfere with the instruction being provided (id.; 8 NYCRR 200.6[a][3][ii]).

Here, the individual needs of the students in the student's class during the 2010-11 school year were so dissimilar that the instructional group was a detriment to the student, it contributed to the student's social decline, and it consistently interfered with the instruction being provided.

The student was placed in a classroom that contained at least seven students classified with an emotional disturbance of twelve in the 2010-11 classroom at New Life (see Tr. pp. 746-48; Parent Ex. Y at pp. 1-3). The IEPs of several of the student's in the 2010-11 classroom have been admitted into the hearing record and demonstrate that these particular students had frequent disruptive behaviors that would interfere with instruction including aggressive or violent behaviors, such as verbally and physically assaulting peers and adults (see Parent Ex. GG at pp. 3-4; OOO at pp. 3-5, 14). Similar evidence is attached to the Petition as additional evidence which I find is not required for this determination, although the district does not object to it (see Pet. Exs. DDD at pp. 3-5; EEE at pp. 4-7; FFF at pp. 3-4; see 8 NYCRR 279.10[b]; see, e.g., Application of the Dep't of Educ., Appeal No. 12-103).

As described elsewhere in this decision, the student's social/emotional profile and needs were completely different from her classmates at New Life. The April 2010 IEP describes the student as focused, cooperative, shy, quiet, that she keeps to herself and only interacts in classroom lessons when called upon does not display any behavior problems (Parent Ex. 3 at pp. 3, 12; see Tr. p. 373). The IEP also describes the student as "sweet", and as having difficulties communicating with adults and peers, suffering from anxiety that hinders communication, and dedicated to her schoolwork (id. at p. 5). The failure to properly group the student for instructional purposes contributed to the student's continuing social and emotional decline during the 2010-11 school year as set forth below.

Second, the district failed to properly implement the student's special education transportation provided for in the April 2010 IEP (Parent Ex. 3 at p. 1). The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Transportation as a related service can include travel to and from school and between schools; travel in and around school buildings; and specialized equipment such as special or adapted buses, lifts, and ramps (34 CFR 300.34[c][16]). Specialized transportation must be included on a student's IEP if required to assist the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (Irving Independent Sch. Dist. v. Tatro, 468 U.S. 883, 891-94 [1984]; Dist. of Columbia v. Ramirez, 377 F. Supp. 2d 63 [D.D.C. 2005]; Application of a Child with a Disability, Appeal No. 03-053; see Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; Letter to Hamilton, 25 IDELR 520 [OSEP 1996]; Letter to

Anonymous, 23 IDELR 832 [OSEP 1995]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If a CSE determines that a student with a disability requires transportation as a related service in order to receive a FAPE, the district must ensure that the student receives the necessary transportation at public expense (Transportation, 71 Fed. Reg. 46,576 [Aug. 14, 2006]; see 8 NYCRR 200.1[ww]). Safety procedures for transporting students are primarily determined by state law and local policy (see Letter to McKaig, 211 IDELR 161 [OSEP 1980]).

Here, there is no dispute that the student required special education transportation, and the service was included on the student's April 2010 IEP (Dist. Ex. 3 at p. 1). The parent's testimony on this topic, which is essentially unrefuted, indicates that "after the Christmas vacation" in January 2011 during the 2010-11 school year, the student's bus failed to arrive to pick up the student in the morning two to three times per week (Tr. pp. 659-60). The parent called the school and called "OPT" when this occurred, and informed OPT that the student had been ready to board the bus at the appropriate time but the bus had never arrived (Tr. p. 660). On some of these occasions the parent was able to get the student to school herself, but other days she could not (id.). The parent's complaints to the school are corroborated by the school social worker at New Life during the 2010-11 school year (see Tr. pp. 302-04). According to the parent, she removed the student from New Life in March 2011 and began to home-school the student because bullying in the school made the student too afraid to attend, and that the "bus situation" contributed to her decision to remove the student from the school (Tr. pp. 669-70).

c. Social/Emotional Needs During the 2010-11 School Year

The hearing record establishes that the student's social/emotional functioning continued to stagnate and decline during the 2010-11 school year. According to the parent, she was under the impression that the CSE did not intend to recommend that the student attend New Life during the 2010-11 school year because, in her view, she had expressed her interest in having the student attend a different school, and the CSE did not discuss New Life at the April 2010 CSE meeting (Tr. pp. 638-39, 643-45). The parent testified that she was also under the impression that a different school with a different staff had been recommended for the 2010-11 school year, and was surprised to find that it was the same school with the same staff, because New Life had moved to a different building with a different address prior to September 2010 (Tr. pp. 187, 645-47; see Parent Exs. W; Q). On the first day the student attended New Life during the 2010-11 school year she refused to enter her assigned classroom because it contained most of the students who had been in her classroom during the 2009-10 school year, and, according to the parent, the student told her she was afraid those students would "bother" her again (Tr. pp. 646-47).[12] This testimony was corroborated by New Life's school social worker (Tr. p. 293). The parent promptly asked for a transfer to a different school, but was told she would have to speak to the principal who was unavailable (Tr. pp. 647-48).

[12] The district contends that "any progress" the student made with her communication skills during the 2009-10 school year was lost during summer 2010 because the student did not attend the summer portion of her recommended 12-month school year for the 2010-11 school year (Answer ¶ 20-21). I disagree with the district's contention on this point because I find, as set forth above, that the student's communication skills declined during the 2009-10 school year.

In any event, the staff at New Life recognized the student's "high levels of social anxiety" and allowed the student to choose a different class with different students and the student attended New Life until removed by the parent in March 2011 (Tr. pp. 293-95; 669-70). The school social worker testified that the strategies used to encourage the student to communicate with peers and interact in groups were ineffective and the student "typically made it clear that she didn't want to participate through her facial language or sometimes she'd be able to shake her head no, and then other times through written communication she would indicate that she did not want to participate" (Tr. pp. 298-99). The social worker testified that the student's selective mutism was a form of social phobia and that the student struggled with this phobia during the 2010-11 school year (Tr. p. 310). She also testified that she did not believe the student withdrew further socially during the 2010-11 school year and stated that, "I believe she was actually taking positive steps towards being able to communicate her needs with staff members as well as during counseling sessions" and gave a few examples (Tr. pp. 310-11). However, the school social worker's group counseling notes for the 2010-11 school year reflect that despite her best efforts, there was a general decline in the student's ability to communicate and further social withdrawal (Dist. Ex. 7 at pp. 1-6). For example, the group counseling notes reflect that the student remained non-verbal and refused or avoided meeting with a peer present in every counseling session during the 2010-11 school year (id.). In the beginning of the school year the student expressed "anger at school and a desire to leave" and "anger at school and feelings of distrust" in writing (id. at pp. 1-2). In the first half of the school year the student typically was willing to communicate in writing during counseling sessions, but the notes reflect starting in late January 2011 and continuing through the final six counseling session the student attended she did not communicate at all, either verbally or in writing (id. at pp. 4-6).

According to the student's classroom teacher during the 2010-11 school year, the student was "very, very shy" and would "keep to herself in the back of the room" (Tr. p. 373). The teacher testified that the student ate lunch alone in a separate room because "she didn't like to sit in the cafeteria" (Tr. p. 377). She testified that the student did not communicate or socialize with peers, and had no peer friends, but made progress in communicating in writing to staff (Tr. p. 384, 403). She testified that there were no other autistic or selectively mute students in the class, that group instruction "just wasn't working" and that the student responded well when she would work with the student one-to-one (Tr. p. 391-92; 405-06). She testified that the student would hand her notes "once or twice a month" describing what was bothering her or why she was sad or upset (Tr. p. 384, 417). In those notes the student would tell the teacher that she "hated" school and the other students and wanted to go home but often would not be more specific (Tr. pp. 400-01).

The parent testified that the student continued to regress socially and emotionally during the 2010-11 school year in that she became aggressive at home, began to have temper tantrums, and that her pseudo seizures persisted (Tr. pp. 662-63). Although there is much conflicting testimony regarding bullying of the student during the 2010-11 school year, there is accord in the hearing record that the student complained to her mother about a variety of incidents that she perceived as bullying, and that the parent communicated in writing and in person with the classroom teacher regarding a handful of incidents (see Tr. pp. 402, 409-11, 653-54).

Lastly, the April 2010 IEP and the April 2011 IEP both contain the same description of the student's speech performance and learning characteristics, including using the same examples indicating progress was made (i.e. playing games with staff and peers, smiling and laughing with

staff and peers) (compare Dist. Ex. 1 at p. 4 with Dist. Ex. 3 at p. 4). Describing a student's speech performance as identical from one April to the next does not demonstrate progress.

The failures to properly implement the April 2010 IEP at New Life during the 2010-11 school year, combined with the student's continuing social/emotional decline and lack of progress during the school year, lead me to conclude that the district failed to provide the student a FAPE during the 2010-11 school year. Accordingly, the parent's request for compensatory education must be considered.

2. Compensatory Education

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];[13] 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding

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

it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. 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"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30. 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "(c)ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]; Application of a Student with a Disability, Appeal No. 13-168; 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).

In her due process complaint notice, and on appeal, the parent requests 1000 hours of tutoring as compensatory services to remedy the district's failure to offer a FAPE for the 2010-11 and 2011-12 school years. However, there is a dearth of information in the parent's pleadings as well as in the hearing record as to how the requested relief would 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. Nonetheless, and in the interest of judicial economy, I will direct the district to provide additional services as set forth below. As the parties have prepared no argument with respect to developing an additional services award, a quantitative approach will be used rather than a qualitative approach (see, e.g. Application of the Bd. of Educ., Appeal No. 14-013).

I note that although the parent requests additional services to remedy a denial of FAPE during both the 2010-11 and 2011-12 school years, during the 2011-12 school year the student attend an appropriate private unilateral program, as set forth below, and suffered no educational detriment to remedy. Confining this determination to the district's failure to provide the student with a FAPE during the 2010-11 school year, I note that although the principal deprivation suffered that school year was in the social/emotional realm, the parent seeks additional services in the form of 1:1 tutoring, rather then, for example, counseling (see Tr. pp. 574-75). I have found above that the student was not suitably grouped for instruction while in attendance at New Life during the 2010-11 school year, and the private psychologist identified through his evaluations some specific academic skills (math and spelling) that indicated a lack of progress over time based upon his review of testing conducted in 2009, 2011, and 2012 (id.; Parent Ex. BB at pp. 7, 9-12). The student's special education teacher at New Life testified that the student responded well to 1:1 instruction (Tr. pp. 391-92). Accordingly, I will award two hours of 1:1 tutoring additional services for each day the student attended New Life during the 2010-11 school year. Because the district failed to fully implement the student's special education transportation during February 2011, I will award tutoring services for every school day during that month. A review of the student's attendance card for the 2010-11 school year using this calculation results in a total of 67 days during the 2010-11 school year (see Dist. Ex. 9). Accordingly I will award 134 hours of additional services in the form of 1:1 tutoring, to be provided by a certified special education teacher, which shall be used by the student within two years of the date of this decision, unless the parties otherwise agree.[14]

B. 2011-12 School Year

1. April 2011 IEP

I am cognizant of the fact that the student's grades and the results of some of the evaluations of academic achievement indicate that the student may have progressed in some academic skills and declined in others during the time she was educated under the September 2009 and April 2010 IEPs, potentially weighing in favor of a finding that a similar IEP would be reasonably calculated to confer educational benefit. However, the hearing record as a whole indicates that the student's primary needs were linguistic, and social/emotional, stemming from her autism. The record

[14] As the parent has requested no particular provider for these services, I direct the district to provide the student with these services at a time and location to be determined by the parties. If the district is unwilling or unable to provide these services, it shall provide the parent with authorization to obtain these services at district expense.

demonstrates lack of progress and some significant decline in those domains under the September 2009 and April 2010 IEPs, as set forth in detail above, such that I cannot find that a similar IEP containing the same student-to-teacher ratio, the same amount and type of related services, and the same goals and objectives to be implemented in the same nonpublic school would be an appropriate recommended program for this student. Therefore, I find that the April 2011 IEP failed to offer the student a FAPE because it is not an IEP that is likely to produce progress, not regression, it does not afford the student with an opportunity greater than mere trivial advancement and is not reasonably calculated to provide some meaningful benefit (see Rowley, 458 U.S. at 192; Cerra, 427 F.3d at 195, T.P., 554 F.3d at 254; Newington, 546 F.3d at 118-19; Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]).

2. Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is

> receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

Although the district asserts that the parent provided insufficient evidence of educational benefit by failing to provide information regarding curriculum, teaching methodologies, assessment strategies, grouping and progress, I disagree. The program director of the Rebecca School testified that the school specialized in working with children with neuro developmental delays in relating and communicating, which includes children who had received diagnoses of autism spectrum disorders (Tr. p. 438). Student's in the school were formed into classes based on their age, developmental profile, verbal ability, sensory processing and academic ability (Tr. p. 439). During the 2011-12 school year the student was placed in a classroom with a 5:1+2 ratio (Parent Ex. P at p. 1). The program employed a DIR model to address students' neuro developmental delays in relating and communicating (Tr. p. 438). During the 2011-12 school year the student was placed in a classroom with five students, one teacher, and two teacher assistant and two individual paraprofessionals four teacher assistants (Tr. pp. 450-51). The aim was to assist the student with her social/emotional needs and to create "an environment where she felt safe, and we could help reduce her anxiety. So, we looked at a classroom where the students would be less demanding and sort of less threatening to her" (Tr. p. 450). The student received related services of speech-language therapy, OT, and music therapy (Tr. pp. 439, 452; Parent Ex. P at pp. 5-8). The Rebecca School had experience in educating student's with selective mutism, having taught four other selectively mute students in prior school years (Tr. p. 466). Initially upon entering the school the focus was on reducing the student's anxiety and building trusting relationships, rather than academics, in an effort to address her selective mutism (Tr. pp. 456-58). The hearing record shows that during the 2011-12 school year, Rebecca School staff addressed the student's identified social/emotional and speech-language needs as well as in academic areas, including literacy, mathematics, science, and social studies (Tr. p. 448-50, 462-66; Parent Ex. P at p. 4-4, 9-11).

With respect to the student's progress at the Rebecca School, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C. 2013 WL 563377, at 9-10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]). But in an any event, in this instance, the 2011-12

Rebecca School progress reports entered into the hearing record establish that the student's program was specially designed to meet her unique needs and established that she made progress during the 2011-12 school year (Parent Exs. P; AA; see also Tr. pp. 468-70). In relation to her social emotional/needs the most notable examples of progress during the 2011-12 school year are the fact that the student became very comfortable relating with one of her teacher assistants, and began to relate closely to one of her classroom peers by seeking out her presence and eating lunch with her (Tr. pp. 458-60; 461-62). After December 2011 the student began to participate in group activities and interact with classroom peers including at morning meeting, group music and art, and to participate in group community walks (Parent Ex. AA at p. 9). Although verbal communication remained a challenge, the student's gestural and written communication using a white board improved and, at the end of the school year the student vocalized to her speech-language therapist on one occasion (Tr. p. 505-08).

Based on the foregoing, the evidence in the hearing record supports a finding that the parent met her burden to establish that the Rebecca School provided the student with instruction and services specially designed to meet her unique needs.

3. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 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"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; 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, 192 Fed. App'x 62, 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]).

The district asserts that tuition reimbursement should be denied in its entirety because the parent failed to provide the district with written notice that she was rejecting the recommended program for the 2011-12 school year. The parent's exhibit list identifies Parent Exhibit EE as a "10-day notice letter" dated August 26, 2011. This exhibit was discussed during the impartial hearing (Tr. pp. 764-65). It is clear from the hearing record that Exhibit EE was a letter written by an advocate dated August, 26, 2011 that provided the district with notice that the parent was placing the student in the Rebecca School, however, possibly as an oversight the letter was not entered into evidence (id.). Although proper notice was not conclusively established, I decline to reduce or deny tuition reimbursement on this basis.

C. Relief—Direct Funding

I now turn to the district's argument that the parent has not established that she is entitled to direct payment of tuition to the Rebecca School. Specifically, the district argues that the parent provided no evidence regarding the financial status of the student's father or his ability or inability to pay the tuition and that the parent has not established that she is legally obligated to pay private tuition. The parent, on the other hand, claims that she was entitled to direct funding because she as contractually obligated to pay tuition to Rebecca and was without the financial means to do so.

With regard to fashioning equitable relief, one court has addressed whether it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 358-60 [S.D.N.Y. 2009]). The Mr. and Mrs. A. Court held that in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430). Since the parent selected Rebecca as the unilateral placement, and her financial status is at issue, the parent bears the burden of production and persuasion with respect to whether the parent has the financial resources to "front" the costs of Rebecca and whether she is legally obligated for the student's tuition payments (Application of a Student with a Disability, Appeal No. 12-036; 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).

In this case, it is undisputed that the parent entered into an enrollment agreement with the Rebecca School for the student's attendance during the 2011-12 school year (see Parent Ex. Z). Under the terms of the enrollment contract and by signing the agreement, the parent acknowledged her financial obligation for payment of the student's tuition (see Tr. pp. 674-76; Parent Ex. Z at p. 2). In addition, the parent testified that she would be responsible for the tuition in the event she was unsuccessful at the impartial hearing (id.). The parent also testified that she paid a $1000 deposit to the school with the assistance of her father and was on a payment plan (Tr. pp. 675). Based upon the foregoing, the evidence sufficiently supports the conclusion that the parent was "legally obligated" to pay the student's tuition at Rebecca (Mr. and Mrs. A., 769 F. Supp. at 406).

Next, however, a review of the hearing record indicates that the parent did not provide sufficient evidence regarding whether, due to a lack of financial resources, she was financially unable to front the costs of the tuition at Rebecca for the 2011-12 school year. The parent testified that she had injured her foot and was on disability, her sole source of income, but has not submitted any evidence regarding the amount of her disability payment or what her expenses were in relation to those payments (Tr. pp. 596-97). Further, and more importantly, although the parent testified that she has sole custody of the student the hearing record does not offer any information regarding the father's income, financial resources, or whether the father is responsible for and is supporting the student in this case (Tr. p. 595). In short, when a single parent seeks direct funding due to a lack of financial resources, there should be at least some minimal testimonial or other evidence showing why the other parent's financial resources, or lack thereof, should or should not be considered before determining that the student's placement should be directly funded at public expense due to the parents' financial circumstances. Under these circumstances, the district is correct that the parent has not met her burden to establish that there were insufficient financial resources to "front" the student's tuition costs for the 2011-12 school year (Mr. and Mrs. A., 769 F. Supp. at 428). Accordingly, the parent is awarded relief in the form of reimbursement of the costs of the student's tuition at the Rebecca School upon proof of payment. However, in view of the fact that the parent's only source of income is State disability, should it become apparent to the district that resources from the student's father are in fact unavailable or unknown through no fault of the parent, I would strongly encourage the district to reconsider its position and reach an agreement with the parent to directly fund the student's tuition costs.

VII. Conclusion

After a complete and careful review of the record, I reverse IHO's finding that the district offered student a FAPE for the 2010-11 and 2011-12 school years, as set forth above. A further review of the hearing record reveals that Rebecca School was an appropriate unilateral placement for the student. However, the parent has not established her entitlement to direct funding of the costs of the student's tuition by the district.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated February 26, 2013 is modified by reversing those portions which found that the district offered the student a FAPE for the 2010-11 and 2011-12 school years; and

IT IS FURTHER ORDERED that the district shall provide additional services to the student in the form of 134 hours of 1:1 tutoring, to be provided by a certified special education teacher, which shall be used by the student within two years of the date of this decision, unless the parties otherwise agree. I direct the district to provide the student with these services at a time and location to be determined by the parties. If the district is unwilling or unable to provide these services, it shall provide the parent with authorization to obtain these services at district expense; and

IT IS FURTHER ORDERED that the district shall reimburse the parent for her deposit of $1000 paid to the Rebecca School for the 2011-12 school year; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall reimburse the parent for the costs of the student's tuition at Rebecca for the 2011-12 school year upon the submission of proof of payment to the district.

Dated: **Albany, New York**
November 25, 2014

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DAVID N. GREENWOOD
STATE REVIEW OFFICER