The University of the State of New York

The State Education Department
State Review Officer
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No. 13-208

Application of a STUDENT WITH A DISABILITY, by his 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:
H. Jeffrey Marcus, PC, attorneys for petitioner, Gina M. DeCrescenzo, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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 those portions of the decision of an impartial hearing officer (IHO) that determined that respondent (the district) offered the parent's son a free and appropriate public education (FAPE) for the 2011-12 and 2013-14 school years and denied her request for certain compensatory services and reimbursement for privately obtained diagnostic testing. The district cross-appeals from those portions of the IHO's determination that found the district denied the student a FAPE for the 2012-13 school year and awarded the student 100 hours of compensatory services. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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 was initially evaluated for special education in kindergarten (Parent Ex. I at p. 1). An IEP was developed for the student in September 2009, wherein he was classified as a student with an other health-impairment (Parent Ex. G at p. 1). The September 2009 IEP reflected that the student had deficits related to handwriting and recommended occupational therapy (OT) services to address this deficit (Parent Ex. G at pp. 5, 7, 10). The hearing record reflects that an IEP was developed in September 2010 for the 2010-11 school year and the student continued to

receive OT services (Parent Ex. F at pp. 5-7, 10). The September 2010 IEP reflected that the student was functioning at a mid-second grade level in both reading and math (Parent Ex. F at p. 3). An additional IEP was developed for the student during the 2010-11 school year on February 28, 2011, which reflected that the student was on a third grade level in math and at a second grade level in reading and writing skills, and recommended continuation of the student's OT services (Dist. Ex. 3 at pp. 1, 6).[1] This IEP also included testing accommodations including extended time (1.5), revised test directions (questions read and reread), and testing in a separate location with a group no larger than 12 (Dist. Ex. 3 at p. 7).[2]

By the end of the 2010-11 (third grade) school year, the student was at risk for promotion, however, his level 2 score on New York State English language arts (ELA) and math tests allowed him to be promoted to the fourth grade (Tr. pp. 60-61, 64, 66; Dist. Ex. 19; Parent Ex O at p. 1). At the start of the 2011-12 school year, the district conducted a reevaluation of the student (Dist. Ex. 6). On September 28, 2011, the CSE convened for a review of the student and to develop an IEP for the 2011-12 (fourth grade) school year (Dist. Ex. 8 at p. 1). The resulting IEP reflected that the student's classification was changed from other health-impairment to a learning disability, and recommended direct special education teacher support services (SETSS) three periods per week in ELA and two periods per week in math (Dist. Ex. 8 at pp. 1, 7). The CSE also recommended continuing the student's testing accommodations and OT services and added counseling services for one 30-minute session per week (Dist. Ex. 8 at pp. 7-9). At the end of the 2011-12 school year the student scored at a level 2 on the State ELA and math tests and had increased his grades (Dist. Exs. 18 at p. 2; 22 at p. 2; compare Parent Ex. O at p. 2, with Parent Ex. N at p. 2). For the student's 2012-13 (fifth grade) school year IEP, the CSE convened on September 28, 2012 (Dist. Ex. 11 at p. 1). The resultant IEP continued the student's SETSS and OT services and increased the student's counseling services to twice per week, while modifying one of the SETSS sessions in ELA to an indirect service to be provided on teacher meeting days (Dist. Ex. 11 at pp. 5-6).[3]

The student's grades suffered during the beginning of the 2012-13 school year and, on January 25, 2013, the district issued the parent a "Promotion-in-Doubt" letter (Parent Ex. R; see Parent Exs. K; M; but see Parent Ex. L). The parent responded to the district by letter dated February 14, 2013 requesting that the district conduct a reevaluation of the student (Parent Ex. Q). A psychological evaluation update was subsequently conducted by the district in April 2013 (Dist. Ex. 14).

[1] The February 2011 IEP indicated in the summary of recommendations that the student was recommended to receive counseling services, however as the IEP did not contain counseling goals or needs related to his social-emotional functioning, and because counseling services were not listed under the recommended special education programs and services section of the IEP, this appears to be an error (Dist. Ex. 3 at pp. 1-2, 6, 10).

[2] According to the parent, the student received a diagnosis of an attention deficit hyperactivity disorder (ADHD) from his private psychiatrist sometime in 2011 (Tr. pp. 207, 222, 237).

[3] According to the district's representative at the impartial hearing, SETSS are identical to resource room programs (Tr. p. 259; see 8 NYCRR 200.6[f]). However, the reference in the September 2012 IEP to the service as "direct" and "indirect" is more in keeping with the language used in State regulations for consultant teacher services (Dist. Ex. 11 at p. 5; see 8 NYCRR 200.6[d]).

On May 8, 2013, the student was privately evaluated at the Huntington Learning Center (HLC) at the behest of the parents (Parent Exs. S; U). On May 20, 2013 the CSE convened to review the reevaluation of the student (Dist. Ex. 16 at p. 1). The resultant IEP recommended integrated co-teaching services (ICT) in ELA, math, social studies, and science, and counseling and OT services once per week (Dist. Ex. 16 at p. 6).

A. Due Process Complaint Notice

On June 10, 2013 the parent, through her attorney, filed a due process complaint notice requesting an impartial hearing (Dist. Ex. 1). The parent alleged that the district failed to offer the student a FAPE for the 2011-12, 2012-13 and 2013-14 school years (id.). With respect to the September 2011 CSE meeting, the parent argued that the September 2011 CSE "was improperly comprised" (id. at p. 3). The parent next contended that the September 2011 IEP was not based on current evaluations and the recommendations contained therein were not based upon the student's needs (id.). Moreover, the parent asserted that the IEP was deficient, and that the student was denied a FAPE thereunder, because it failed to sufficiently describe the student's present levels of performance, including his needs, abilities, and deficits, or "the nature of his reading, writing, math and language deficiencies" (id.). The parent further argued that the IEP did not include goals that were designed to meet the student's needs and that the goals were immeasurable and too vague to guide the student's instruction or evaluate his progress (id.). The parent also contended that the student was denied a FAPE by the district as a result of the district's recommendation that the student receive five weekly sessions of SETSS, given the student's lack of progress during the prior school year (id. at pp. 2-3).

Concerning the September 2012 CSE meeting and IEP, the parent asserted identical arguments with respect to CSE composition, lack or insufficiency of the evaluative information available to the September 2012 CSE, present levels of performance, and annual goals as she did regarding the September 2011 CSE meeting and IEP (Dist. Ex. 1 at p. 3). In addition, the parent alleged that the district failed to offer the student a FAPE as a result of the CSE's recommendation that the student continue to receive five sessions of SETSS per week during the 2012-13 school year, despite his lack of academic progress in the 2011-12 school year under an identical recommendation with respect to SETSS (id.). Moreover, the parent contended that the student did not actually receive the recommended number of SETSS sessions during the 2012-13 school year.

The parent also alleges that the district failed to offer the student a FAPE for the 2013-2014 school year (Dist. Ex. 1. at p. 4). Initially, the parent asserted similar arguments with respect to the inadequacy of the present levels of performance and annual goals contained in the May 2013 IEP as she did with respect to the September 2011 and September 2012 IEPs (id.). The parent also argued that the recommendation that the student receive ICT services was inadequate to address the student's needs given his academic deficits and alleged lack of progress during the prior two school years (id.). The parent contended that the student's needs required more individualized attention, such as the addition of SETSS to the recommended ICT placement (id.).

As relief, the parent requested that the student receive additional services in the amount of 651 hours of 1:1 tutoring to be provided by HLC as compensatory services based upon the alleged denial of FAPE for the three school years in question (Dist. Ex. 1 at pp. 4-5). In addition, the parent sought payment of transportation costs to and from HLC, reimbursement for diagnostic

testing conducted by HLC, and reimbursement of the HLC registration fee (id. at p. 5). Finally, the parent requested that the district create an IEP that provided the student with "sufficient, specialized increased support" (id. at p. 4).

B. Impartial Hearing Officer Decision

An impartial hearing was held on August 30, 2013. By decision dated September 20, 2013, the IHO found that the district offered the student a FAPE for the 2011-12 and 2013-14 school years but failed to offer him a FAPE for the 2012-13 school year (IHO Decision). The IHO determined that the student was entitled to 100 hours of compensatory special education tutoring services to remedy the district's failure to offer the student a FAPE during the 2012-2013 school year (id. at pp. 5, 7-8).

In reaching her conclusion that the district offered the student a FAPE for the 2011-2012 school year, the IHO determined that sufficient evidence existed in the hearing record to support a finding that the student had made educational progress during that year pursuant to the September 2011 IEP (IHO Decision at pp. 2-4). Specifically, the IHO noted that, upon comparison of the student's September 2011 IEP with the September 2012 IEP, the student's reading goals had increased from decoding at a fourth grade level to decoding at a high fourth/low fifth grade level, the student's reading comprehension goal increased from the third grade level to the fourth grade level, while his problem-solving goals in mathematics, although set at an upper-fourth grade level for both school years, had increased from single step problems to multiple step or mixed application problems (id. at pp. 2-3). In addition, the IHO credited the testimony of the principal of the student's district public school during the 2011-12 school year, who testified that the student had made progress in reading and mathematics (id. at pp. 2, 4).

With respect to the 2012-13 school year, the IHO found no evidence of academic progress, noting that the student was described in both the September 2012 IEP and the May 2013 IEP as performing at a fourth grade level in reading and mathematics and, therefore, evidently had not made any progress during the 2012-13 school year (IHO Decision at pp. 4-5). Moreover, the IHO found that the student did not receive the number of SETSS sessions mandated by the September 2012 IEP (id.). Accordingly, the IHO concluded that the student's lack of progress under the September 2012 IEP, coupled with the district's failure to provide the student with the requisite number of SETSS sessions, entitled the student to an award of compensatory services (id. at pp. 4-5, 7).[4]

The IHO next determined that the district provided the student with a FAPE for the 2013-2014 school year (IHO Decision at pp. 5-7). In so finding, the IHO referenced her determination with respect to the 2011-12 school year that the student had made progress in a program that provided him with fewer supports than the ICT recommendation for the 2013-14 school year (id.

[4] The IHO also noted the parent's testimony concerning the fact that the student stopped wearing his eyeglasses sometime during the 2011-12 school year and did not wear them for the entirety of the 2012-13 school year, and that references were made throughout the student's educational records "to a concern regarding [his] visual acuity problems and his failure to wear prescribed reading glasses" (IHO Decision at pp. 4-5). However, although the IHO cited the student's lack of eyeglasses as a potential factor in his failure to progress academically during the 2012-13 school year, she did not explicitly find that this lack of eyeglasses was attributable to the district or constituted a denial of FAPE (id. at p. 7).

at pp. 6-7). Noting her finding that the student had not made progress during the 2012-13 school year, the IHO opined that said failure was "likely to have been partly due to the fact that he did not have his prescription glasses and because he did not receive some of the recommended SETSS" (id. at p. 7). In contrast to the 2012-13 school year, the IHO determined that "[d]uring the 2013-2014 school year, the Student is likely to make progress," in part because he now "has reading glasses, and he will be provided additional attention and services in a co-teaching environment (id.)."

Concerning the student's social/emotional functioning, the IHO noted that the parent was not requesting either that a functional behavioral assessment be conducted or a behavioral intervention plan be developed, and had indicated at the impartial hearing that she hoped the ICT class, as well as the additional services that she was seeking as relief, would be sufficient to address any behavioral issues experienced by the student (IHO Decision at p. 7). The IHO noted that if it appeared at any time during the school year that additional services were needed, the parent could request that the CSE reconvene and reconsider its current recommendations for the 2013-14 school year (id.).

With respect to the parent's request for an independent educational evaluation (IEE) of the student, the IHO noted that the due process complaint notice did not request such relief (IHO Decision at p. 7). Therefore, to the extent the parent requested an IEE at the hearing itself, the IHO found such request to be outside of the scope of the hearing and declined to address it, noting that the district had objected to the addition of this issue during the hearing (id.).

Finally, the IHO awarded the student compensatory education, "to allow for remediation in reading and math," based upon her finding that the student was denied a FAPE for the 2012-13 school year (IHO Decision at p. 7). The IHO ordered that the student receive 100 hours of special education tutoring in a 1:1 ratio in reading and math, "as compensatory education and as a supplement to his current program" (id. at pp. 7-8). The IHO rejected the request for compensatory services as recommended by HLC, stating that said recommendations "go well beyond what would be appropriate compensatory education" (id. at p. 8).[5] The IHO also rejected the parent's request that the compensatory services be provided by HLC, finding that 100 hours of 1:1 special education tutoring provided by the district, in conjunction with his receipt of ICT services and current use of eyeglasses, would allow the student to "recoup lost ground" (id.). Finally, the IHO directed the student's teachers to provide written reports regarding the student's academic, social/emotional, and behavioral functioning and academic progress, and ordered the CSE to reconvene to consider the reports and determine if further evaluative data was necessary or whether any changes should be made to the student's IEP (id.).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in finding that: (1) the student received a FAPE for the 2011-12 and 2013-14 school years; (2) the student was not entitled to 651 hours of

[5] The IHO also found "no basis" for awarding the parent the cost of testing and registration at HLC (IHO Decision at p. 8).

compensatory education to be provided by HLC; (3) the parent was not entitled to reimbursement for payment of registration and diagnostic testing fees to HLC.

The parent contends that the IHO erred in determining that the student achieved progress under the September 2011 IEP. The parent also argues that even if the student did make progress under the IEP, retrospective evidence of progress is insufficient to establish the adequacy of the IEP, as the district provided no evidence that the September 2011 IEP was appropriate to meet the student's needs at the time it was developed. The parent also asserts that the district's only witness, the principal, had no independent knowledge of the student's goals or objectives in the September 2011 IEP and relied solely on a document created by the student's teacher and the student's ELA testing. The parent argues that the document was presented with no background data to support the scores and no witness to testify to the accuracy of the scores. She further asserts that the student's score of 2 on the State ELA test did not demonstrate that he met the goals in his IEP.[6]

Although agreeing with the IHO's ultimate determination that the hearing record contained no evidence that the student made progress during the 2012-13 school year, the parent further alleges that the CSE recommended the same program for the student for the 2012-13 school year despite his lack of progress under the same program during the 2011-12 school year. The parent also alleges that the student did not wear eyeglasses during the 2012-13 school year, despite information in his 2012-2013 IEP that he needed to wear glasses to school, and argues that the IHO erred in not finding that the district's failure to provide the student with eyeglasses constituted a denial of FAPE for the 2012-13 school year. The parent also claims that the district failed to provide the student with the requisite amount of SETSS mandated by the September 2012 IEP.

With respect to the 2013-14 school year, the parent asserts that the IHO erred in finding that the district offered the student a FAPE. The parent argues that the May 2013 CSE ignored HLC testing that found serious deficits in all of the student's areas of academic performance and, therefore, the May 2013 IEP did not reflect the student's needs or recommend a proper program or placement for the student. The parent also asserts that the IHO improperly failed to determine that the IEP was appropriate, instead placing the burden of proof on the parent to establish that the CSE's recommendation was inappropriate. The parent next contends that the IHO erred in determining that the student would likely make progress under the May 2013 IEP based on events in the student's home life. Further, the parent contends that the student's counseling sessions were improperly reduced from two sessions to one session per week.[7]

The parent also argues that the IHO improperly rejected expert testimony from HLC, which recommended 651 hours of compensatory 1:1 tutoring, and instead improperly limited an award

[6] Many of the parent's arguments rest on the fact that some of the information contained in the September 2011 IEP and other documents was uncorroborated by other sources; however, she provides no citation to authority that evidence must be corroborated, nor to any testimonial or other evidence appearing in the hearing record which undermines this information.

[7] The petition mistakenly states that the reduction in counseling sessions occurred during the 2012-13 school year and cites to the September 2011 IEP; as noted above the September 2011 IEP initiated the related service of counseling for the student on a once weekly basis, the September 2012 IEP increased the recommended counseling to twice weekly, and the reduction to once weekly counseling services was included in the May 2013 IEP (compare Dist. Ex. 8 at p. 7, with Dist. Ex. 11 at p. 6, and Dist. Ex. 16 at p. 6).

to 100 hours of compensatory services to be provided by the district, despite there being no evidence in the hearing record to support the conclusion that such an amount would be sufficient to remedy the denial of FAPE to the student. The parent lastly contends that the IHO erred in failing to consider the parents' request made at the impartial hearing for IEEs, as IHOs have broad equitable discretion to fashion remedies. For relief, the parent requests 651 hours of compensatory 1:1 tutoring to be provided by HLC, transportation to and from HLC, payment for HLC's registration and diagnostics fees, an increase in the amount of counseling and OT the student receives, and neuropsychological, OT, and counseling IEEs at public expense.

The district submits an answer, denying the claims raised in the petition, asserting that the IHO properly found that the district offered the student a FAPE for the 2011-12 and 2013-14 school years. The district also contends that the student is not entitled to compensatory services for those school years and that, even if such compensatory services were warranted, the compensatory services proposed by HLC are excessive. Furthermore, the district asserts that the IHO properly refused to consider the parent's request, raised for the first time at the impartial hearing, for IEEs and, in any event, that the parent was not otherwise entitled to an IEE at public expense.

The district also cross-appeals from the IHO's decision on the ground that the IHO erred in finding that the district denied the student a FAPE for the 2012-13 school year. In so arguing, the district states that the IHO improperly relied upon the student's alleged lack of progress under an otherwise sufficient IEP. The district also notes that eyeglasses were never included in any of the student's IEPs as an assistive technology device, nor was such a claim raised in the due process complaint notice, and the district, therefore, was not obligated to provide glasses to the student. The district also argues, in the alternative, that even if an SRO finds that the district denied the student a FAPE, the SRO should reduce the award of compensatory services from 100 to 42 hours, the latter being the number of actual hours of SETTS instruction the district concedes the student missed (56 sessions at 45 minutes each).

The parent replies to the answers and answers the cross-appeal, asserting that although her argument that the district was required to provide the student eyeglasses was not raised in the due process complaint notice, the district pursued a line of questioning on that matter and did not thereafter object to the issue being raised, thereby opening the door to the issue being included within the scope of the impartial hearing.

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 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], cert denied, 133 S. Ct. 2802 [2013]; 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, 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, 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]; 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).

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. September 2011 IEP

In challenging the September 2011 IEP, the parent argues that the district failed to present any testimony concerning the creation of the IEP by the CSE or any evidence that it was reasonably calculated to confer educational benefit to the student based upon the information available to the CSE at the time the IEP was created, including relevant reports or evaluations. In addition, she claims that the IHO improperly relied upon the testimony of the principal of the student's school that the student made academic progress under the September 2011 IEP.

As an initial matter, it is true that the hearing record is unclear as to what documents and other information were before the CSE at the time the September 2011 IEP was developed. In addition, there is no testimony concerning what issues were discussed at the meeting or the nature of the input of any CSE members or the parent. The record does not include minutes of the CSE meeting. However, assuming that the district had before it the documents that were available at the time of the meeting, I note that the IEP reflects adequate information regarding the student's academic functioning and needs upon which to develop the student's goals and to determine his program and placement.[8] Specifically, the IEP referenced in detail a current September 2011

[8] The district could have alleviated this confusion by submitting into evidence the prior written notice, on the form prescribed by the Commissioner, it was required by State and federal regulations to send to the parent, including the information on which the CSE's recommendations were based (8 NYCRR 200.5[a]; see 34 CFR 300.503; see also "New York State Model Forms: Prior Written Notice (Notice of Recommendation) Relating to

psychoeducational update of the student which reflected the student's performance on the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), including that the student's verbal comprehension index, perceptual reasoning index, and processing speed index were in the average range of functioning, while his working memory index fell in the low average range (Dist. Exs. 6 at pp. 3-4, 7; 8 at p. 1). The student's Full Scale IQ was also in the average range (Dist. Exs. 6 at p. 3; 8 at p. 1). The IEP also reflected the student's performance on measures of academic achievement including the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III), where the student's scores reflected grade equivalents of 3.0 in letter-word identification, 3.8 in calculation, 2.5 in spelling, 2.9 in passage comprehension, and 4.1 in applied problems (Dist. Exs. 6 at pp. 4-5; 8 at p. 1).[9] The September 2011 IEP also reflected the student's scores on New York State ELA and Math tests, which indicated the student's performance was at a level 2 (Dist. Ex. 8 at p. 1; see Tr. p. 64; Dist. Exs. 6 at p. 4; 19; Parent Ex. P at p. 1). The hearing record reflects that a score of 2 indicates partial mastery of State learning standards (Parent Ex. P at p. 2).[10] Accordingly, ample current evaluative standardized testing, as well as a recent psychoeducatonal update, were available to the CSE at the time the IEP was developed and, indeed, were cited to at length and relied upon within the four corners of the IEP itself.

In addition, with regard to the student's social-emotional needs, and consistent with information in the September 2011 psychoeducational update, the IEP reflected that although the student presented as a pleasant and essentially compliant child, he harbored unsettling emotions, exhibited self-esteem and self-confidence deficits, and the IEP noted that "affective remediation" was warranted (Dist. Exs. 6 at p. 6; 8 at pp. 1-2). Concerning the student's physical development, the IEP reflected the student's needs as depicted in a December 2010 OT reevaluation which indicated that the student demonstrated deficits in the visual motor integration and motor coordination subtests and that he exhibited weaknesses in handwriting with regard to placement and lower case size, as well as in focusing and vigilance to the task at hand, and further noted that the student needed to wear his eye glasses in school (Dist. Ex. 8 at p. 2).[11]

To address the student's academic needs, the September 28, 2011 CSE changed the student's classification from other health-impairment to a learning disability (Dist. Ex. 8 at p. 1). The CSE recommended that the student receive SETSS as a direct service in ELA three times per week and in math twice per week and continued his OT services of one 30-minute session per week (Dist. Ex. 8 at p. 7). To address the student's social-emotional needs, the CSE initiated

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Special Education," Office of Special Educ. [Jan. 2010], available at http://www.p12.nysed.gov/specialed/formsnotices/PWN/memoJan10.pdf). A district response to the parents due process complaint that complies with federal and State Regulations would have provided similar information, and was required if the procedures for prior written notice were not adhered to (8 NYCRR 200.5[i][4]; see 34 CFR 300.508[e]).

[9] In addition to grade level equivalents, the September 2011 psychoeducational update also reported the student's performance on the WJ-III using a more precise measure of the student's performance, percentile ranks (Dist. Ex. 6 at p. 4). The student's percentile ranks in letter-word identification (32), calculation (57), applied problems (63), and passage comprehension (37) fell in the average range of functioning and his score in spelling (24) fell in the low average range of functioning (Dist. Ex. 6 at pp. 4-5).

[10] The hearing record also reflects that in district public schools, performance at a level 2 on the New York State ELA and Math tests automatically entitles a student to promotion to the next grade (Tr. pp. 60-61).

[11] The December 2010 OT evaluation report was not included in the hearing record.

counseling services of one 30-minute individual session per week (Dist. Ex. 8 at p. 7). The IEP included eight annual goals in the areas of the student's deficits including OT services related to handwriting and copying work from the board, reading decoding and comprehension, math computation and problem solving, self-esteem, and on-task behaviors evidenced by completing classwork and participation in class (Dist. Ex. 8 at pp. 4-6). Testing accommodations were also recommended for the student for all tests over 40 minutes including extended time to time and a half, revised test directions including directions read aloud to the student, questions read aloud to the student for non-reading tests, and separate location in a group no larger than 12 (Dist. Ex. 8 at pp. 8-9).

As described above, and contrary to the parent's allegations, the September 2011 IEP adequately described the student's needs and his present levels of performance based on current evaluations and comprehensive standardized testing, included annual goals in the areas identified as the student's areas of need, and provided services including academic support (SETSS), OT services, and counseling to address all areas of the student's need (Dist. Exs. 6; 8 at pp. 1-2, 4-8, 11). As such, the program recommended in the student's September 2011 IEP was reasonably calculated to provide the student with educational benefits and offered the student a FAPE.

The parents also argue, however, that the IHO erred in determining that the student was offered a FAPE because he made academic progress under the 2011-12 IEP. The student's alleged progress during the 2011-12 school year is irrelevant to the adequacy of the September 2011 IEP. It is well settled that the determination of whether an IEP is reasonably calculated to enable the student to receive educational benefits is a prospective analysis and includes the consideration of only the information known at the time the IEP was developed (R.E., 694 F. 3d at 185-89 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 574-75 [S.D.N.Y. 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *6 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14 n.19 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [Nov. 9, 2012]). Academic progress itself, or the lack thereof, is not dispositive as to whether the district offered the student a FAPE (see, e.g., Lathrop R-II Sch. Dist. v. Gray, 611 F.3d 419, 424-26 [8th Cir. 2010] [holding that "academic progress alone does not prove that the child received a FAPE"]; Seattle Sch. Dist. No. 1 v. B.S., 83 F.3d 1493, 1500 [9th Cir. 1996] [holding that a student's ability to achieve age-appropriate scores on standardized academic tests "is not the sine qua non of 'educational benefit'"]). Indeed, such a retrospective analysis—judging the adequacy of an IEP through the student's subsequent performance under the plan—has now been foreclosed in this Circuit (see R.E., 694 F3d at 186 [holding that "[w]e now adopt the majority view that the IEP must be evaluated prospectively as of the time of its drafting"]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *9 [S.D.N.Y. Jan. 22, 2013] [noting that the fact finder "must not engage in 'Monday-morning quarterbacking' influenced by [the] knowledge of [a student's] subsequent progress"], quoting Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006]).

I find that the hearing record here provides ample evidence, gleaned from the "four corners" of the September 28, 2012 IEP, that the IEP was based upon recent educational evaluations and

assessments, established annual goals designed to meet the student's reading, math, and writing needs resulting from the student's learning disability and, therefore, was reasonably calculated to provide the student with educational benefits sufficient to offer the student a FAPE.

B. September 2012 IEP

In challenging the September 2012 IEP, the parents argue that the district failed to present any testimony concerning the creation of the IEP by the CSE or any evidence that same was reasonably calculated to confer educational benefit to the student based upon the information available to the CSE at the time the IEP was created, including relevant reports or evaluations. In addition, they claim that the district failed to present any evidence that the student progressed academically under the September 2012 IEP. They also allege that the district failed to provide the number of SETSS sessions to the students mandated by the terms of the IEP. The parents also state that the student was denied a FAPE due to the district's failure to provide him with eyeglasses for the 2012-2013 school year.

The hearing record is also unclear as to what was before the CSE at the time that the September 2012 IEP was developed or what specifically occurred at the CSE meeting. Again, assuming the CSE had available to it the documents that were in existence at the time the CSE meeting occurred, the IEP reflects adequate information regarding the student's functioning and needs upon which to develop the student's IEP. Specifically, consistent with documents contained in the hearing record, the September 2012 IEP reflected the student scored at a level 2 (partially meeting State learning standards) on the New York State ELA and Math tests in April 2012 (Tr. pp. 67-68; Dist. Exs. 11 at p. 1; 18 at pp. 1-2; 22 at pp. 1-2).[12] The present levels of academic performance in the IEP reflected that the student struggled most with decoding and comprehension and that these deficits affected his ability to complete word problems in math even if he was able to solve the computational aspect of them (Dist. Ex. 11 at p. 1).[13] The IEP further reflected that the student struggled with writing including grammar, use of writing mechanics, and spelling (id.). Consistent with this, the student's Progress Monitoring Writing Checklist, which was completed by the student's classroom teacher for the 2011-12 school year, reflected that the student received 17 out of a possible 25 points on an "on-demand writing" assessment at the end of the school year (Tr. p. 75; Dist. Ex. 24). The IEP further noted that the student was a visual learner who may respond well to diagrams, graphic organizers, and charts and that he benefited from the use of scaffolding, had poor organizational/work habits, was easily distracted and required prompts often, and responded well to positive praise (Dist. Ex. 11 at pp. 1, 3).

With regard to social-emotional development, the IEP noted that at the start of the 2012-13 school year the student had been disrespectful to his teacher and verbally aggressive with his peers but since intervention by the guidance counselor these behaviors had subsided somewhat (Dist. Ex. 11 at p. 1). The IEP reflected information from previous school reports including that

[12] Testimony by the principal indicated that the State tests the student took in April 2012 was much more difficult that those the student took during the 2010-11 school year (Tr. p. 69).

[13] Although the IEP reflected that the student's guided reading level was M, I note that the student's Individual Student Record of Reading Progress, which according to the principal's testimony was created by the student's current teacher, indicated that in March of 2012 the student had reached level N (Tr. pp. 51, 54-55. Dist. Ex. 20).

the student demonstrated poor self-esteem and self-confidence, could become oversensitive, and appeared to have issues related to personal space (id. at p. 2). The student's father reported that the student had an "anger problem" previously which may have been related to his parents' recent separation (id.).

With regard to physical development, the IEP reflected information provided by the student's occupational therapist at his new school including test results regarding the student's performance on the Beery Buktenica Developmental Test of Visual Motor Integration (VMI) (Dist. Ex. 11 at p. 2).[14] The IEP reflected that the student performed in the below average range in visual motor integration and motor coordination and in the average range in visual perception, although, as he did not have the use of his glasses, the scores may not have been accurate (id.). The student's performance on the "WOLD" sentence copying test indicated he was able to read the sentence provided and demonstrate sentence copying skills on a grade appropriate level (id.). The student also demonstrated adequate letter placement on lines and spacing with the use of a checklist, used slightly larger letter sizing than his grade level peers although overall legibility was adequate, and made frequent spelling errors of simple words that were below his grade level (id.). The IEP also reflected the parents' concern regarding the student's ability to write neatly (id.) Based on the above, the IEP adequately described the student's needs as reflected in then-extant evaluative information.

Additional information that was available at the time of the CSE included the student's progress under his previous fourth grade program. The hearing record reflects that the student had made progress during fourth grade while receiving SETSS five times per week. The student's guided reading level had increased from level L (mid second grade level) to level N (beginning third grade level) by March 2012 (Dist. Ex. 20). He had increased his writing skills from 7 out of 25 points to 17 out of 25 points on the Progress Monitoring Writing Checklist, which reflected an increase in his writing skill level from a level one to one point below a level three (Dist. Ex. 24). As noted above, the student maintained a level 2 rating on the State ELA and Math tests and a comparison of his report cards from the 2010-11 and 2011-12 school years shows that the student's grades improved overall from ratings of primarily 1s and 2s during the 2010-11 school year to ratings of primarily 2s and 3s during the 2011-12 school year (Dist. Exs. 18; 22; compare Parent Ex. O with Parent Ex. N).

Accordingly, the September 2012 CSE appropriately recommended a program similar to his previous IEP. To address the student's needs as identified in the September 2012 IEP, the CSE recommended continuation of the student's once per week OT services and appropriately increased the student's counseling services from one to two times per week in response to the difficulties the student demonstrated at the start of the 2012-13 school year (Dist. Ex. 11 at p. 6). The CSE continued their recommendation for SETSS five times per week (id. at p. 5).[15] The IEP contained eight annual goals in the areas of need that were identified in the present levels of performance including handwriting (OT); ELA related to reading decoding, comprehension, and written expression; math calculations and problem solving; counseling related to self-esteem; and

[14] The hearing record does not contain the OT report from which this information came.

[15] The September 2012 IEP provided for direct SETSS twice per week in ELA and math and for indirect SETSS once per week in ELA (Dist. Ex. 11 at p. 5).

attending and work habits (id. at pp. 3-5). The IEP also modified the student's testing accommodations to include for all state and local tests and assessments, extended time to time and a half, separate location in a group of no larger than 12 students, and questions and directions read aloud on all tests that did not measure reading comprehension (id. at p. 7).

As described above, the September 2012 IEP adequately described the student's needs in the present levels of performance based on adequate and appropriate evaluative information, included annual goals in the areas identified as the student's areas of need, and provided appropriate services in the areas of academic support (SETSS), OT, and counseling to address all areas of the student's need (Dist. Exs. 6; 8 at pp. 1, 2, 4-8, 11). As such, the program recommended in the student's September 28, 2012 IEP was reasonably calculated to provide the student with educational benefits.

The parents assert that the 2012-13 IEP was inadequate because it contained similar recommendations to those provided in the 2011-12 IEP, and that the student had failed to make more than trivial progress pursuant to the 2011-12 IEP. A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see 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. [Dec. 2010], at pp. 18-21, available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153–54 [10th Cir.2008]; S.P. v Carlisle Area Sch. Dist., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; 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. Champaign Cmty. Unit Sch. Dist. #4, 2007 WL 2681207, at *3 [C.D. Ill. Aug. 10, 2007]). Indeed, as previously noted, such a retrospective analysis—judging the adequacy of an IEP through the student's subsequent performance under the plan—has now been foreclosed in this Circuit (see R.E., 694 F3d at 186; McCallion, 2013 WL 237846, at *9). That being said, "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]).

Here, however, the IHO appropriately credited the principal's detailed testimony, and accompanying documentation, that the student had made progress during fourth grade while receiving SETSS five times per week. The student's guided reading level increased from level L (mid second grade level) to level N (beginning third grade level) between September 2011 and March 2012 (Dist. Ex. 20). He had increased his writing skills from 7 out of 25 points to 17 out of 25 points on the Progress Monitoring Writing Checklist, which reflected an increase in his

writing skill level from a level one to just one point below a level three (Dist. Ex. 24). In addition, the student maintained a level 2 rating on the State ELA and Math tests, evidencing that he fulfilled promotion criteria necessary for his advancement to fifth grade. Moreover, the hearing record reflects that the student's grades improved overall from ratings of primarily 1s and 2s during third grade to ratings of primarily 2s and 3s during fourth grade (Dist. Exs. 18; 22; compare Parent Ex. O with Parent Ex. N). Although such progress may not be acceptable or adequate to parents who understandably would prefer a more dramatic and rapid advancement of the student toward meeting his goals, I am constrained to assess the adequacy of the four corners of the September 2012 IEP, while taking into account the progress or lack thereof of the student under the prior IEP as a relevant factor, in light of the standard that 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 at 118-19; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B., 103 F.3d at 1120; see Rowley, 458 U.S. at 192). Here, the 2012-13 IEP recites a detailed assessment of the student's needs and presents goals specifically calibrated toward the student's academic advancement. Moreover, the student received SETSS in the context of a general education program for the first time during the 2011-2012 school year. As this program demonstrably yielded some measure of progress, it cannot be said that the recommendation of a similar program the following year (2012-2013) constituted the denial of a FAPE.

C. Failure to Implement the September 2012 IEP

I do find, however, that the student was denied a FAPE for the 2012-13 school year due to the district's failure to implement his IEP. Despite the fact that the September 2012 IEP was reasonably calculated to enable the student to receive educational benefits, the hearing record reveals that the frequency of the SETSS that was recommended in the IEP (four times per week direct), was not provided consistently to the student during the time that the September 2012 IEP was in effect, beginning on September 28, 2012 through the end of the 2012-13 school year (Dist. Ex. 11 at p. 5). Service records documenting the dates the student received SETSS reflect that he received a total of only 104 out of 160 sessions of SETSS during the school year (IHO Ex. III).[16] Based on this flaw in the implementation of the student's SETSS, the student was denied a FAPE related to the implementation his September 2012 IEP.

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (T.L. v. New York City Dep't of Educ., 2012 WL 1107652, *14 [E.D.N.Y. Mar. 30, 2012]; D.D-S., 2011 WL 3919040, at *13; A.L. v. New York

[16] As a general principle, the 10-month school year usually covers a period approximately 36 weeks with variations to address vacations, holidays, and weather related events, etc. (see, e.g., Application of the Dep't of Educ., Appeal No. 13-048), but in this case the IHO calculated the student should have received 16 sessions of SETSS per month over a ten month school year totaling 160 sessions and the district does not challenge this determination (IHO Decision at p. 5).

City Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 821-22 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). In order to show a denial of a FAPE based on a failure to implement an IEP, a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist., 200 F.3d at 349; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ., 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., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822 [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]).

In this case, I find that the district's failure to provide the required number of SETSS sessions constituted a substantial, significant and material deviation from the provisions of the September 2012 IEP. The student first received SETSS sessions pursuant to the September 28, 2011 IEP. After receiving such sessions during 2011-12, his continued receipt of SETSS was severely compromised and disrupted when the district failed to provide him with a significant number of the sessions mandated by the September 28, 2012 IEP. It is noted that the student was placed in a general education classroom during that school year and the only special education services he received under the 2012-13 IEP with respect to his skill deficits related to his reading and math were the SETTS sessions in question. Accordingly, I find that the district failed to implement the 2012-13 IEP and, in this instance, it was a material deviation from the student's IEP and therefore, deprived the student of a FAPE for the 2012-13 school year (A.P., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822).

D. Compensatory Education and Related Cross-Appeal

Having found that the district failed to offer the student a FAPE for the 2012-13 school year, it is necessary to determine what, if any, remedy is required to cure the harm suffered by the student. Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3]; 1412[a][1][B]; Educ. Law §§ 3202[1]; 4401[1]; 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see

Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd of Educ., 2008 WL 9731053, *12-13 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of the Dep't of Educ., Appeal No. 12-135; Application of the Dep't of Educ., Appeal No. 11-132). 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]).

In fashioning an appropriate award of compensatory education, therefore, the issuing entity must be mindful that the central purpose of such award is to provide a remedy for a specific 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 [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"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address (the student's) educational problems successfully"]; Reid, 401 F.3d at 518, 525 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children

in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 ["There is no obligation to provide a day-for-day compensation for time missed"]; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

In the instant case, the IHO awarded the student 100 hours of compensatory one -to-one tutoring in math and reading to, in effect, "make up" for the missed SETSS sessions.[17] Given that compensatory education is an equitable remedy that may be tailored to meet the unique facts of each case, there is no requirement that the IHO must base his or her award on a strict "hour for hour" formula with respect to the missed SETSS sessions, as is urged by the district in its cross-appeal. Given the totality of the circumstances, such an award lies within the sound discretion of the IHO, and I have been provided with no persuasive authority to overturn her decision with respect to the number of hours of compensatory services the student should receive from the district.[18] Accordingly, the district's cross-appeal is dismissed.

E. May 2013 IEP

The parents object to the May 2013 IEP on the ground that the CSE failed to take into account the testing conducted by HLC, or its recommendations, and instead created an IEP that "did not accurately reflect [the student's] present levels of performance and did not create specific

[17] I note that more than one district court in the Second Circuit has determined that compensatory education is an appropriate remedy only where a "gross" violation of the IDEA exists (see, e.g., V.M. v Colonie Sch. Dist., 2013 WL 3187069, at *19 (S.D.N.Y. 2013); J.A. v Ramapo Sch. Dist., 603 F. Supp.2d 684, (S.D.N.Y 2009); but see P. v. Newington Bd. Educ., 512 F. Supp. 2d 89 [D. Conn 2007] [finding that the "gross violation" standard only applies to compensatory education awarded to students over the age of 21]). Although the cases do not exhaustively define the term "gross violation," it appears that exclusion of the student from school for a substantial period of time would suffice (see Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d. Cir. 1990]; V.M., 2013 WL 3187069, at *19). Here, the student did not receive approximately 35% of his SETSS sessions. Without reaching the issue of whether or not the "gross violation" standard applies here, the centrality of the SETSS sessions to the student's special education services renders the provision of compensatory additional services services, as a means of "making up" for the district's failure to provide a significant portion of the sessions, appropriate as an equitable remedy (see Bd. of Educ. v. Munoz, 16 A.D.3d 1142; Application of the Dep't of Educ., Appeal No. 13-048; Application of a Student with a Disability, Appeal No. 12-209), where, as here, the student continues to be statutorily eligible for special education services and there is no likelihood that he will become statutorily ineligible for IDEA services due to graduation or aging out of the IDEA.

[18] The parent argues at length that the district also denied the student a FAPE for the 2012-2013 school year by failing to provide him with eyeglasses (an issue not raised in the due process complaint notice, although the IHO allowed some testimony on the issue at trial and noted that documentation concerning the student's use of eyeglasses appeared throughout his educational record). The parent contends that the student is entitled to additional compensatory education based upon the district's failure to provide the student with eyeglasses. Although the IHO based her decision that FAPE was denied for that school year upon the student's alleged lack of progress under the current IEP and the failure of the district to provide the requisite number of SETSS sessions, she also noted that the student lacked eyeglasses from May 2012 to May 2013 and that his inability to wear glasses during this period (noted by evaluators) was most likely an exacerbating factor in his failure to progress academically that year. Given the IHO's explicit mention of the student's lack of eyeglasses during this time period, it cannot be said that her use of the equitable remedy of compensatory education to address the denial of FAPE for the 2012-13 school failed to take the eyeglasses issue into account in fashioning an equitable award. Accordingly, I also find no reason to disturb or otherwise modify the compensatory award issued by the IHO.

measurable goals and objectives, which were realistic considering [the student's] deficits."[19] The hearing record reflects that the May 2013 CSE meeting was the result of the parent's request for a reevaluation of the student (Dist. Ex. 14 at p. 2). The hearing record is unclear as to which documents and other educationally relevant information were before the CSE at the time that the May 2013 IEP was developed. Accordingly, it is unclear as to whether the May 2013 testing conducted by HLC was made available by the parent to the CSE or at the meeting. A 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], 200.16, 200.16[d][3]). However, consideration does not require substantive discussion (T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993], citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; K.E. v. Indep. Sch. Dist. No. 15, 2010 WL 2132072, at *19 [D. Minn. May 24, 2010]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Consideration of a privately obtained evaluation also does not require a CSE to adopt the recommendations made by the private evaluators (see, e.g., G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H., 2013 WL 1285387, at *15; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 2013 WL 1187479, at *15 [S.D.N.Y. Mar. 21, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583 at *6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567; Application of the Dep't of Educ., Appeal No. 12-165). Accordingly, although the CSE did not adopt the HLC recommendations (without determining whether such recommendations were in fact before them), the IEP nonetheless reflects adequate information regarding the student's functioning and needs upon which the CSE could sufficiently develop the student's goals and determine his program and placement.

The IEP reflects the results of the April 2013 psychological update of the student including current scores on the Wechsler Individual Achievement Test-Third Edition (WIAT-III) (Dist. Exs. 14 at p. 2; 16 at p. 1). The student's math skills were described as "inconsistent but fairly adequate" with a percentile rank of 23 in the low average range in both numerical operations and math problem solving (id.). The student's reading skills were described as more seriously delayed with percentile ranks of 2 on the word reading subtest and 7 on the pseudoword decoding subtest, which indicate functioning in the very low and low range, respectively (Dist. Ex. 16 at p. 1). The student's performance on the reading comprehension subtest (percentile rank 16) and on the oral reading fluency subtest (percentile rank of 2) was significantly higher and in the low average range of functioning (id.). The IEP reflected the evaluator's observation that the student's visual acuity was a problem based on the type of errors the student made and noted that the student reported that he used to have glasses (id.). The IEP also noted that the student read much better when given full passages to read and on the oral reading fluency subtest generally read with accuracy and fluency, rarely misreading words and used context cues to make sure he was identifying words correctly (id.). The student was able to respond well to fact-based questions but had difficulty finding more

[19] The parent did not include in her due process complaint notice the claim that the CSE failed to consider the HLC testing and recommendations in creating the May 2013 IEP. However, as HLC provided testimony at the hearing, the district failed to object to the scope of the testimony, and said claim could arguably be read into the broader argument that the May 2013 IEP did not reflect the student's needs or create appropriate goals given those needs, I shall address the claim in the present decision.

abstract information or answering questions which required inductive reasoning skills (id.). With regard to math skills, the IEP reflected that the student had gaps in his knowledge related to knowing the values of all coins, interpreting graphs and completing patterns (id.). The IEP reflected information from the student's previous September 2012 IEP describing his academic strengths and weaknesses, his visual learning style, and strategies that the student required, such as prompts to stay focused and engaged in academic tasks and scaffolding (Dist. Exs. 11 at pp. 1, 3; 16 at pp. 1, 2). The parent's concern regarding the student's lack of progress, his need for reminders and redirection, and his declining interest in school was also reflected in the IEP (Dist. Ex. 16 at p. 2). The student's report card reflecting his performance during the first two trimesters of the 2012-13 school year indicated that his grades in all areas of ELA and math had gone down from the first to the second trimester, as well as compared to his performance the previous year, and that at the time of the May 2013 CSE meeting the student's promotion was in doubt (Parent Exs. K; N at p. 2; R).

With respect to social-emotional development, the IEP included information consistent with the April 2013 psychoeducational update that the student demonstrated low energy, diminished interest in school and a somewhat depressed affect and that he responded very well to attention and praise (Dist. Exs. 14 at p. 3; 16 at p. 2). New information in the IEP indicated that the student could be impulsive when agitated, resulting in poorly thought out responses, and that he was sometimes verbally aggressive with peers but felt "bullied" if they responded similarly (Dist. Ex. 16 at p. 2). The IEP reflected that the student had inconsistent relationships with adults in that although he enjoyed attention, he at times turned on those who cared about him, at times appeared depressed and withdrawn, while at other times, he was quite agitated, angry and oppositional (id.). The IEP further reflected that the student and could be sweet and likeable when his emotional needs were met (id.). Concerns of the parents' reflected in the IEP included the student's low self-esteem, impulsivity, his often oppositional behaviors and the negative impact these behaviors had on the student's ability to stay focused on tasks and persist in his efforts (id.).

With regard to physical development, in addition to information reported in the previous IEP regarding the student's fine motor and graphomotor deficits, the IEP noted the parent's report that the student was unable to read at close range, his need for glasses and the "insurance issues" which prevented the student from getting the glasses (Dist. Ex. 16 at p. 2).[20] The IEP further noted that the student often came to school exhausted and often napped at his desk (id.). The parent reported that the student may have sleep apnea like his father and was urged by district staff to have a physical examination of the student conducted (id.).

The May 2013 CSE recommended the student be placed in an ICT classroom and receive OT and counseling services (Dist. Ex. 16 at p. 6). The IEP included goals in the areas of handwriting (OT), writing, reading decoding and comprehension, math, and attending skills and included testing accommodations, similar to those in his previous IEP (Dist. Exs. 11 at pp. 3-5, 7; 16 at pp. 4-6, 8).

Although the hearing record reflects there were inconsistencies in the grade level of instruction required by the student, the IEP overall identified the student's areas of need, included

[20] Testimony by the parent indicated that the student began wearing glasses again in May 2013 (Tr. p. 240).

annual goals in the areas in which the student demonstrated needs and in response to the student's increased level of academic need, recommended a program, including ICT services, that would significantly increase the level of support that the student would receive for the upcoming 2013-14 sixth grade year (Dist. Ex. 16 at pp. 1-6).[21] State regulations dictate that ICT services means the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students where the maximum number of students with disabilities does not exceed 12 students and where the class staffing minimally includes a special education teacher and a general education teacher (8 NYCRR 200.6[g][1][2]). As such, under the May 2013 IEP, the student would receive special education support during all academic subjects each day in addition to the instruction provided by the regular education teacher in the ICT class. Although the parent contends that the CSE discontinued the student's SETSS without regard to his need for individualized attention such as pull-out SETSS sessions, I note that, as described above, State regulations dictate that the ICT classroom would have provided such individualized or specially designed instruction to each of the special education students in the ICT class (8 NYCRR 200.6[g][1], [2]).[22] Moreover, the hearing record reflects that the psychologist who conducted the April 2013 psychological update of the student and who attended the May 2013 CSE meeting, noted in her report that the ICT class was a more appropriate setting for the student for the upcoming school year (Dist. Exs. 14 at p. 3; 16 at p. 13).

With regard to related services, the May 2013 IEP appropriately recommended continuation of the student's OT services of one 30-minute session per week to address the student's fine motor /handwriting deficits (Dist. Exs. 11 at p. 6; 16 at p. 6). However, although the IEP continued to reflect significant social-emotional needs, the frequency of the student's counseling services was reduced from two 30-minute sessions per week to one 30-minute session per week (Dist. Exs. 11 at p. 6; 16 at p. 6). The hearing record does not contain information explaining the basis for the change in the student's counseling recommendation. However, although a detailed assessment of the student's social-emotional needs were included in the IEP, he has not been identified as having an emotional or behavioral disability or in need of a behavioral assessment. Rather, such issues appear to be exacerbating factors to his needs relating to his primary classification as learning disabled. Given his placement in the more intensive and individualized ICT program, with continued counseling and OT, as well as the implementation of compensatory education pursuant to the IHO's award, I cannot conclude that the reduction in recommended counseling services constituted the denial of a FAPE. Indeed, the IHO noted that the student's parents expressed their belief at the hearing that the ICT classroom, coupled with any one-to-one compensatory education he may receive, would be adequate to address his behavioral issues.

[21] The IEP reflects that the student's instructional level in reading and math was at the fourth grade level (Dist. Ex. 16 at p. 10). However, the results from the April 2013 psychological update which were reflected in the IEP reported the student's performance in percentile ranks and did not include the corresponding grade equivalents for the student's performance (Dist. Exs. 14 at p. 2; 16 at p. 1). In addition, the student's scores on the tests administered by HLC were reported using grade equivalents which were lower than the fourth grade level noted on the IEP (Dist. Ex. 16 at p. 10; Parent Ex. S). I note that grade equivalent scores are typically considered to be a less precise measure of academic performance.

[22] I note also that the student's previous SETSS services were implemented in a group setting and would not have provided the student with individual or 1:1 support (Dist. Ex. 11 at p. 5).

Based on the above, the May 2013 IEP was reasonably calculated to provide the student with educational benefits.

F. Request for IEE at Public Expense

With respect to the parents' request at the impartial hearing for IEEs at public expense, it is undisputed that such issue was not raised in the parent's due process complaint and the district did not agree to include said issue in the hearing. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Where, as here, the parents did not secure the district's agreement to expand the scope of the impartial hearing to include the IEE issue and did not identify this issue in the original, or an amended, due process complaint notice, the IHO properly declined to address the issue. Likewise, I decline to consider the issue on appeal. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 2012 WL 33984, at *4-*5 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011] [internal quotations omitted]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12

[S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

However, although the parent did not raise the issue in her due process complaint notice, the district did not appeal from the IHO's directives that "the [s]tudent's general education teacher, special education teacher, and special education tutor shall provide written reports regarding the [s]tudent's behavior, academic and social/emotional functioning and academic progress" and thereafter reconvene the CSE to consider the reports and determine whether any further evaluative information was necessary to address the student's needs (IHO Decision at p. 8). As the district has not appealed these orders, they have become final and binding on it, and I direct the district to comply with the IHO's directives after which, if the parent disagrees with the information contained in the evaluations conducted by the district, she may indicate her disagreement to the district and request that the district provide an IEE at public expense (8 NYCRR 200.5[g][1]).

VII. Conclusion

Based upon the above, I agree with the IHO that the district offered the student a FAPE for the 2011-12 and 2013-14 school years and denied the student a FAPE for the 2012-2013 school year. I find insufficient reason appearing in the hearing record to disturb the IHO's award of 100 hours of compensatory additional services to be provided by the district consisting of one-to-one tutoring with a special education teacher focusing on reading and mathematics remediation in accordance with the terms of the IHO's order.

I have considered the parties remaining contentions and find that I need not reach them in light of my conclusions above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 5, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER