The University of the State of New York

The State Education Department
State Review Officer
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No. 15-033

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:
Lincoln Square Legal Services, Inc., attorneys for petitioner, Leah Hill, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Theresa Crotty, Esq., of counsel

DECISION

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 the parent's request for compensatory educational services. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

In this case, the CSE convened on December 14, 2011, pursuant to an IHO's decision, which ordered the district to change the student's placement from a 6:1+1 special class placement at a specialized school to a "residential placement" (Parent Ex. E at pp. 7, 10-11). Accordingly, the December 2011 CSE recommended a 12-month school year program in an 8:1+4 special class placement at a State-approved nonpublic residential school with the following related services: three 30-minute sessions per week of individual occupational therapy (OT), five 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of counseling in a small group (id. at pp. 7-8, 10-11). Consistent with the December 2011 IEP, the

student began attending a State-approved nonpublic residential school (NPS) beginning in January 2012 (see generally Parent Exs. F; H-M).

On March 19, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Parent Ex. O at pp. 1, 9-10, 13). Finding that the student remained eligible to receive special education and related services as a student with autism, the March 2012 CSE recommended a 12-month school year program in an 8:1+4 special class placement at a State-approved nonpublic residential school with the following related services: two 30-minute sessions per week of individual OT, two 30-minute individual sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group, and one 30-minute session per week of counseling in a small group (id. at pp. 1, 9).[1] The March 2012 CSE also indicated in the IEP that the student required "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" (id. at p. 3). In addition, the March 2012 CSE indicated that the student required a behavioral intervention plan (BIP), noting that the student "ha[d] an individual student behavior support plan, behavior counselors and a behavior specialist . . . available at all times as needed" (id.). At that time, the March 2012 CSE documented the parent's expressed concerns regarding "too many cuts in related services" and that the student continued to need "OT and counseling" services (id. at p. 14).

During the 2012-13 school year, the student attended the same NPS that he attended beginning in January 2012 (see generally Parent Exs. F-G; P-Z; CC).

On February 4, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (see Parent Ex. AA at pp. 1, 13). The February 2013 CSE recommended a 12-month school year program in an 8:1+4 special class placement with the following related services: two 30-minute sessions per week of individual OT, two 30-minute individual sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group, and one 30-minute session per week of counseling in a small group (id. at pp. 8-9). In addition, the February 2013 CSE recommended that the student attend a State-approved nonpublic residential school and deferred the student's case to the Central Based Support Team (CBST) (id. at pp. 8-9, 12). At this time, the February 2013 CSE determined that the student did not require "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" and therefore, the student did not require a BIP (id. at p. 2). As documented in the February 2013 IEP, the parent expressed concern that the "student's current school program was recommending termination of counsel[ing] and occupational therapy services" and she believed the student continued to require "these services" (id. at p. 14). The parent also agreed, at that time, that an "alternate site" that would provide "these services" to the student "should be found" (id.).

[1] The student's eligibility for special education programs and related services for the 2012-13 school year, the 2013-14 school year, and the 2014-15 school year as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

During the 2013-14 school year, the student continued to attend the same NPS the student attended during the 2012-13 school year (see generally Parent Exs. F-G; P-Z; CC-EE; EEE).

On May 7, 2014, the CSE convened to conduct the student's annual review and to develop an IEP for the 2014-15 school year (see Parent Ex. JJJ at pp. 1, 11). The May 2014 CSE recommended a 12-month school year program in an 8:1+4 special class placement at a State-approved nonpublic residential school with the following related services: two 30-minute sessions per week of individual speech-language therapy (id. at pp. 1, 8-9, 11). In addition, the May 2014 CSE indicated that the student required "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" and also, the student required a BIP (id. at p. 3). The May 2014 CSE further noted that the student "ha[d] an individual student behavior support plan and a functional behavior assessment [FBA]" (id.). The May 2014 CSE further noted that the student had a "[b]ehavior specialist and behavior counselors . . . available as needed at all times" (id.). Finally, the May 2014 IEP documented the parent's expressed concerns about the "termination of his counsel[ing] and [OT] services, as recommended by his current school program" (id. at p. 12). The May 2014 IEP further indicated that because the parent believed the student needed "these services," the parent was "seeking an alternate placement" to provide the services (id.).

A. Due Process Complaint Notice

By due process complaint notice dated October 28, 2014, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13, 2013-14, and 2014-15 school years (see Parent Ex. UUU at pp. 1, 4-5). Initially, the parent indicated that during the school years in dispute, the district allowed the NPS to "create four substitute IEPs . . . without assembling an IEP team, convening an IEP meeting or notifying [the parent]" (id. at p. 2). The parent further indicated that the "substitute IEPs" created by the NPS reduced or eliminated all related services recommendations, and "quarterly progress reports and annual review reports" during the school years in dispute "suggest[ed]" that the NPS implemented the "substitute IEPs" as opposed to the IEPs created by the CSEs (id. at pp. 2-3). More particularly, the parent indicated that the NPS failed to notify her prior to removing the student's OT and counseling services from his program, and impermissibly reduced the student's speech-language therapy services (id. at pp. 2-3).

Specific to the 2012-13 and 2013-14 school years, the parent alleged that the district failed to conduct "sufficiently comprehensive evaluations" of the student, the district failed to assess the student in "all areas related to his disabilities," the district failed to develop measurable annual goals, and the district failed to determine or select a methodology to "promote [the student's] meaningful educational progress" (id. at pp. 1, 4). Specific to the 2013-14 and 2014-15 school years, the parent asserted that the district failed to provide the parent with copies of the student's IEPs (id. at p. 5).

With respect to the 2012-13, 2013-14, and 2014-15 school years, the parent alleged the following: the district failed to recommend special education programs and related services to address the student's "unique needs," and failed to, in part, "consider service recommendations

identified" in evaluations; the district failed to develop annual goals and short-term objectives related to the student's unique needs or based upon the evaluative information or present levels of performance; the district failed to conduct an appropriate FBA or develop an appropriate BIP for the student; and the district failed to modify the student's IEPs to address his lack of progress (Parent Ex. UUU at pp. 4-5). In addition, the parent asserted that the district impermissibly predetermined the student's "educational program" by refusing to "consider input from anyone other than [NPS] in the development" of the student's "educational program" (id. at p. 3). Finally, the parent alleged that when the district "recommended" transferring the student from the NPS to a different residential placement in 2014, the only school to consider accepting the student was not appropriate to meet his needs (id.).

Without regard to a specific school year, the parent alleged that the district failed to reevaluate the student based upon its own recommendations, the district failed to offer adequate levels and frequencies of related services, the district failed to consider the use of assistive technology in developing the student's IEP, and the district failed to provide the student with specialized transportation or progress reports (see Parent Ex. UUU at pp. 1, 4). In addition, the parent asserted that the district failed to respond to the parent's "multiple requests" for an independent educational evaluation (IEE) of the student, the district impeded the parent's right to "participate in the provision of a FAPE" by ignoring her concerns and failing to convene a CSE meeting prior to modifying the student's IEP (id. at pp. 3, 5). Finally, the parent alleged that the district failed to provide prior written notice before making changes to the student's IEP, the district failed to provide parent counseling and training on the student's IEP, and the district "gave up on meeting [the student's] needs" and had "low expectations" (id. at p. 5).

As relief, the parent requested compensatory educational services in the form of the following additional services: "behavior management services" to address the district's failure to provide an appropriate FBA and BIP for the 2012-13, 2013-14, and 2014-15 school years; speech-language therapy services to "compensate for the unsupported reduction of these services" in the 2012-13, 2013-14, and 2014-15 school years; counseling and OT services to "compensate for the unsupported removal of these services" during the 2012-13, 2013-14, 2014-15 school years; and parent counseling and training (see Parent Ex. UUU at p. 5). In addition, the parent requested a copy of the student's IEP for the 2014-15 school year, the development of an IEP incorporating recommendations identified in the student's 2014 evaluations, reimbursement for the costs of independently obtained evaluations, and an award of compensatory educational services for "all unfulfilled pendency services" (id. at pp. 5-6).

B. Impartial Hearing Officer Decision

On November 19, 2014, the IHO conducted a prehearing conference, which resulted in a "Pre-Hearing Order" that addressed the presentation of witness testimony, requests to extend the compliance date for the impartial hearing, the date of the impartial hearing and witness availability on that date, opening and closing statements, the parties' exchange of the student's educational

documents, pre-marking exhibits, requests for additional documentation, and requested notifications if the case settled or was otherwise canceled or withdrawn.[2]

On December 19, 2014, the parties completed the impartial hearing (see Tr. pp. 1-340).[3] In a decision dated February 2, 2015, the IHO ultimately denied the parent's requests for compensatory educational services (see IHO Decision at pp. 8-17). First, however, the IHO addressed the district's statute of limitations argument with regard to the parent's "claims from 2012" (id. at pp. 7-8). The IHO concluded that based upon the applicable limitations period, "all requests w[ould] be limited to a start date of October 29, 2014"—two years prior to the date of the parent's due process complaint notice (id. at p. 8).[4] Turning next to the parent's request for "'compensatory behavior management services,'" the IHO found that the parent failed to specify or indicate "what" these services entailed and an April 2014 psychoeducational evaluation report did not "mention behavior management" (id.). As such, the IHO concluded that the parent failed to "meet their burden" and denied the parent's request for "compensatory behavior management" (id.). Additionally, the IHO noted that while the parent requested one year of "'at-home compensatory Behavior Management services using Applied Behavioral Analysis ("ABA") techniques for [the student] or, in the alternative, placement in a nonpublic school that offer[ed] ABA instruction" in the parent's post-hearing brief, the parent did not request this relief in the due process complaint notice (id.). Consequently, the IHO determined that the parent could not amend the due process complaint notice "through their closing argument" (id.). In addition, the IHO further found that the hearing record did not contain any evidence in support of the parent's requested relief (id.).

With regard to the parent's request for compensatory educational services in the form of additional speech-language therapy services, OT services, and counseling services, the IHO determined that the hearing record failed to contain evidence that the NPS improperly discontinued these services or that the district knew that the NPS no longer provided these services to the student during the school years in dispute (see generally IHO Decision at pp. 9-12, 14-15). Consequently,

[2] Although the IHO did not enter the November 2014 Pre-Hearing Order into evidence at the impartial hearing, it was submitted with the hearing record to the Office of State Review. According to the order, the IHO scheduled the impartial hearing for December 10, 2014; however, at the request of the parties, the IHO granted an adjournment for the purpose of settlement discussions, and the IHO rescheduled the impartial hearing for December 19, 2014 (see IHO Decision at p. 2). When the parties met on December 19, 2014, the district's attorneys requested another adjournment for continued settlement discussions, which the IHO denied (id.; see Tr. pp. 1-12).

[3] In an interim order on pendency, dated January 8, 2015, the IHO found that—upon agreement of the parties—the special education programs and related services recommended in the student's December 2011 IEP formed the basis of his pendency (stay-put) placement in the instant proceedings (IHO Interim Order at p. 2). As such, the IHO ordered the district to provide the student with the following pendency services: an 8:1+4 special class placement at a "[r]esidential" school, five 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, and one 30-minute session per week of counseling in a small group (id.).

[4] It appears that the IHO mistakenly referred to the date of the parent's due process complaint notice—"October 29, 2014"—rather than two years prior to that date—"October 29, 2012"—as the benchmark for the statute of limitations period (see IHO Decision at p. 8).

the IHO found that the parent failed to sustain her "burden of proof" and the IHO denied the parent's request for additional services (id.). Furthermore, the IHO denied the parent's request to be reimbursed for the costs of IEEs because the hearing record failed to contain evidence that the parent disagreed with any aspects of the evaluations conducted by the district (id. at pp. 12-14). Next, the IHO concluded that the evidence in the hearing record did not support the parent's contention in the closing brief that the district failed to fully evaluate the student (id. at pp. 15-16). Finally, the IHO found that despite the parent's assertion in the closing brief that the student failed to make progress on any of his annual goals since 2012, "[i]t may be beyond the scope of anyone's ability to change that level of cognitive functioning" (id. at p. 16). The IHO further noted that the student's progress "must be measured within the scope" of his abilities and the student made "progress in his behaviors," which made him "available" for learning (id. at pp. 16-17).

IV. Appeal for State-Level Review

The parent appeals, and alleges that the IHO erred in denying the parent's request for compensatory educational services in the form of the following additional services: one year of "at-home compensatory Behavior Management services using Applied Behavioral Analysis ("ABA") techniques for [the student] or, as an alternative, placement in a nonpublic school that offer[ed] ABA instruction;" 198 hours of OT services, 66 hours of counseling services, and 184.8 hours of speech-language therapy services; and parent counseling and training for the "remainder" of the 2014-15 school year and the "entirety" of the 2015-16 school year. In addition, the parent asserts that the IHO erred in denying the request to be reimbursed for the costs of IEEs. Initially, however, the parent argues that the district failed to sustain its burden of persuasion and burden of production at the impartial hearing because it did not present any testimonial or documentary evidence to demonstrate that it offered the student a FAPE for the 2012-13, 2013-14 and 2014-15 school years. Alternatively, the parent contends that even if the district was not required to present evidence at the impartial hearing, the parent presented sufficient evidence upon which to conclude that the district failed to offer the student a FAPE, including that the student's program was "incomprehensible" due to preparation of multiple IEPS by the district and the NPS, "ambiguity" as to which IEP the NSP implemented during the 2012-13 and 2013-14 school years, the student's lack of progress during the 2012-13 and 2013-14 school years, and the district's failure to modify the student's IEPs in light of his lack of progress. Next, the parent alleges that the district failed to recommend or provide the parent with parent counseling and training for the 2012-13, 2013-14, 2014-15 school years. Furthermore, the parent contends that the district failed to adequately evaluate the student—especially given the student's lack of progress—and the district failed to follow-up on the additional evaluations recommended in the student's 2014 psychoeducational evaluation and 2014 speech-language evaluation. The parent also alleges that the district improperly engaged in predetermination of the student's May 2014 IEP, which resulted in a failure to offer the student a FAPE. In addition, the parent asserts that the district impeded her right to participate in the decision-making progress regarding the provision of a FAPE to the student by failing to provide the parent with copies of the student's IEPs, the district's delay in responding to the parent's requests for IEEs, the failure to consider the parent's concerns regarding the student's lack of progress, and by predetermining the student's May 2014 IEP. Next, the parent argues that the IHO failed to develop a sufficient hearing record by improperly denying the parent's request to issue subpoenas, admit relevant documentary evidence, and allow witness testimony. Similarly,

the parent asserts that the IHO exhibited bias during the impartial hearing by failing to declare a witness as a hostile witness, by ignoring and refusing to "credit" the parent's testimony, and by relying upon confusing witness testimony. Finally, the parent asserts that the IHO also erred by generally misinterpreting the facts and the law. As relief, the parent requests that in light of the IHO's procedural errors and the resulting "truncated record," the case should be remanded for a new impartial hearing before a new IHO. Alternatively, the parent argues that the hearing record supports a finding that the district failed to offer the student a FAPE for the 2012-13, 2013-14, and 2014-15 school years and seeks an order directing the district to provide the student with additional services.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. Finally, the district argues that although the hearing record contains "evidentiary gaps," the IHO properly conducted the impartial hearing and the IHO did not exhibit bias.[5]

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]; 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

[5] As neither party appeals the IHO's finding that the statute of limitations barred the consideration of issues or claims that arose prior to October 29, 2012, the IHO's determination is final and binding on both parties and will not be further addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]; IHO Decision at pp. 7-8).

[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]; 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. Preliminary Matters

1. Conduct of the Impartial Hearing

The parent asserts that the IHO's refusal to issue subpoenas, admit relevant documentary evidence into the hearing record, and allow witness testimony at the impartial hearing resulted in the failure to develop an adequate hearing record upon which to permit meaningful review of all of the parent's claims in the due process complaint notice. The district—while acknowledging that "evidentiary gaps" exist in the hearing record—disagrees with the parent's assertions regarding the conduct of the impartial hearing.

Parties to an impartial hearing have the power to compel the attendance of witnesses (20 U.S.C. § 1415[h][2]; 34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). To that end, IHOs in New York are authorized to issue subpoenas (8 NYCRR 200.5[j][3][iv]). In this case, when the parties met for the impartial hearing on December 19, 2014, the parent's attorney inquired about "several subpoenas" sent for the IHO's consideration (Tr. pp. 24-25). The IHO indicated that she only received the subpoenas "two days ago," and upon receiving the subpoenas, the IHO sent an e-mail to the "case manager" noting that she "would not sign subpoenas for two days prior to the hearing" and further instructed that the parent's attorney should "contact the [district] and make that request to them orally" (Tr. p. 25). The parent's attorney stated that she submitted the subpoenas "consistent" with the prehearing order (id.). At that time, the IHO indicated that she would "check with the case manager" and proceeded with the impartial hearing (see Tr. pp. 25-26).

Subsequently, as the parent's attorney discussed the propriety of conducting the impartial hearing past "business hours" of "9:00 to 5:00" without prior notice to the parties, the IHO indicated the impartial hearing office received the parent's subpoenas on "Friday at 5:25 p.m.," the IHO did not receive the subpoenas until "this past Monday, at 5:07 p.m.," and consistent with the IHO's earlier representation, the IHO responded on "Tuesday at 10:41" (Tr. pp. 61-64). Without further discussion, the parties continued with the impartial hearing (see Tr. pp. 64-174). Following witness testimony, the parent's attorney indicated that the parent did not, at that time, wish to rest

her case, but rather, the parent's attorney requested a "continuance to call the witnesses . . . subpoenaed" (Tr. p. 174). The IHO reiterated the sequence of events regarding the receipt of the subpoenas—including the IHO's e-mail response on Tuesday—which the parent's attorney denied receiving (see Tr. pp. 174-75). The IHO then asked the parent's attorney if she wanted to call the CSE in order to present the district's school psychologist as a witness, and upon reaching the witness, the parties continued with the impartial hearing and the witness's testimony (see Tr. pp. 175-317).

On appeal, the parent specifically argues that the IHO refused to issue the subpoenas because the hearing office received them "twenty-four minutes after a time of day deadline that was not expressed" in the prehearing order. Although a review of the prehearing order confirms that the order did not explicitly address the submission of subpoenas or otherwise direct submissions by a particular time of day, the parent fails to assert how the absence of additional witness testimony affected the development of an adequate hearing record or how the absence of additional testimony precluded a meaningful review of the issues raised in the due process complaint notice—for which, according to statute, the district bore the burden of proof. In addition, given the fact that the parent had an opportunity to present the district school psychologist as a witness without a subpoena at the impartial hearing, it is unclear how the IHO's failure to issues subpoenas in any way disadvantaged the parent's ability to present her case. As a result, the evidence in the hearing record does not support the parent's contention.

Next, the parent argues that the IHO failed to admit relevant evidence in the form of "separate, concurrent IEPs" created by the NPS the student attended during the school years in dispute. More particularly, the parent asserts that these IEPs demonstrated that the student's program was "incomprehensible" and that the student did not make progress at the NPS. However, while impartial hearing rights include the right of both a parent and a district to "present evidence and confront, cross-examine, and compel the attendance of witnesses" (34 CFR 300.512[a][2]; see 8 NYCRR 200.5[j][3][xii]), the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). At the impartial hearing, when the parent attempted to enter an IEP created by the NPS into the hearing record, the district's attorney objected on the basis of relevance, noting that the district could not "defend" an IEP it did not develop (Tr. pp. 23-26; see Tr. pp. 31-32, 35-36). Based upon the district's objection, the IHO did not enter the proffered IEP into evidence, but instead, the IHO marked the exhibit for identification and indicated that the parent would have an "opportunity later" to offer it into evidence (Tr. p. 24; see Tr. pp. 31-32, 35-36). As a result, the hearing record does not include three IEPs created by the NPS, but the hearing record does include approximately 66 exhibits entered into evidence by the parent (see Tr. pp. 23-26, 31-32, 35-36; Parent Exs. A-C; E-F; H-M; P-Z; AA; CC-ZZ; AAA-FFF; HHH-JJJ; NNN; PPP-XXX). Notwithstanding the parent's concerns, however, the hearing record does not support a finding that the IHO improperly declined to enter the three IEPs created by the NPS as evidence based upon the district's stated objections or that the absence of the three IEPs prevented the development of an adequate hearing record upon which to review the issues raised in the parent's due process complaint notice.

2. IHO Bias

The parent asserts that the IHO exhibited bias during the impartial hearing and in considering the hearing record by failing to declare a witness as a hostile witness, by ignoring and refusing to "credit" the parent's testimony, and by relying upon confusing witness testimony. The district disagrees, and alleges that the IHO did not exhibit bias.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066; Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). An IHO must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 12-064; Application of a Student with a Disability, Appeal No. 07-090; Application of a Student with a Disability, Appeal No. 07-075; Application of a Student with a Disability, Appeal No. 04-046; Application of a Student Suspected of Having a Disability, Appeal No. 01-021).

Contrary to the parent's contentions, the evidence in the hearing record does not support a finding that the IHO's actions at the impartial hearing constituted bias. At the impartial hearing, the parent's attorney requested that the IHO declare the district school psychologist a hostile witness because the parent's attorney did not perceive the witness as answering her questions and the witness "interrupt[ed]" her (Tr. pp. 207-10). In response, the IHO declined to declare the witness as a hostile witness, and the IHO instructed the witness to wait until the parent's attorney finished the question before responding (see Tr. p. 210). Next, to the extent that the parent disagreed with the conclusions reached by the IHO—or with the weight afforded to testimonial evidence presented at the impartial hearing—such disagreement does not provide a basis for finding actual or apparent bias by an IHO (see Application of a Student with a Disability, Appeal No. 13-083; Application of a Child with a Disability, Appeal No. 06-035; Application of a Child with a Disability, Appeal No. 06-013). Overall, an independent review of the hearing record demonstrates that the parent had the opportunity to present her case at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]; see generally Tr. pp. 1-340). Thus, the parent's assertions must be dismissed.

3. Additional Evidence

The district submitted additional documentary evidence with its answer for consideration on appeal (see Answer Exs. 1-2). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this case, the district submitted a copy of the parent's petition with handwritten, numbered paragraphs inserted on that copy and a copy of an assistive technology evaluation, dated July 21, 2014 (see Answer Exs. 1-2). While the additional copy of the parent's petition with handwritten, enumerated paragraphs could not be offered at the time of the impartial hearing, it is not now necessary to render a decision in this case and will not be considered. However, the assistive technology evaluation, dated July 21, 2014, was available at the time of the impartial hearing, and the district offers no explanation regarding the failure to submit this as evidence at that time—as a result, the assistive technology evaluation will not now be considered.

B. FAPE: March 2012 IEP, February 2013 IEP, and May 2014 IEP

The parent argues that the district failed to sustain its burden of proof to establish that it offered the student a FAPE for the 2012-13, 2013-14, and 2014-15 school years because the district failed to present any testimonial or documentary evidence at the impartial hearing. The district argues that "[b]ased on the admittedly limited record developed at the hearing," the March 2012 IEP, the February 2013 IEP, and the May 2014 IEP offered the student a FAPE. As previously noted, State law places the burden of proof upon the school district during an impartial hearing. Here, a review of the hearing record supports the parent's contention that the district did not offer or submit any testimonial or documentary evidence into the hearing record at the impartial hearing (see Tr. pp. 1-340; Parent Exs. A-C; E-F; H-M; P-Z; AA; CC-ZZ; AAA-FFF; HHH-JJJ; NNN; PPP-XXX; IHO Exs. I-II). Accordingly, the district failed to sustain its burden of proof at the impartial hearing, and as a result, the district failed to demonstrate that it offered the student a FAPE for the 2012-13, 2013-14, and 2014-15 school years.

C. Relief—Additional Services

The parent asserts that the IHO erred in denying the request for compensatory educational services. A review of the evidence in the hearing record supports, in part, the parent's assertions, and as explained more fully below, the student was entitled to compensatory educational services in the form of additional services for OT, counseling services, and speech-language therapy services.

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]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), 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];[6] 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). 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]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd. of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of 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

[6] 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]).

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

1. OT Services

A review of the March 2012 IEP indicates that, based upon the student's needs, the March 2012 CSE recommended that the student receive two 30-minute sessions per week of individual OT for the 2012-13 school year (see Parent Exs. O at p. 14). Upon further review, the hearing record fails to contain any evidence that the student received individual OT services pursuant to the March 2012 IEP at the NPS from July 2012 through June 2013 (see generally Tr. pp. 1-340;

Parent Exs. A-C; E-F; H-M; P-Z; AA; CC-ZZ; AAA-FFF; HHH-JJJ; NNN; PPP-XXX; IHO Exs. I-II). Similarly, the February 2013 CSE recommended that the student receive two 30-minute sessions per week of individual OT for the 2013-14 school year (see Parent Exs. AA at pp. 8-9). The hearing record fails to contain any evidence to establish that the student received individual OT services pursuant to the February 2013 IEP at the NPS from July 2013 through June 2014 (see generally Tr. pp. 1-340; Parent Exs. A-C; E-F; H-M; P-Z; AA; CC-ZZ; AAA-FFF; HHH-JJJ; NNN; PPP-XXX; IHO Exs. I-II).

As noted above, 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. Therefore, in order to effectuate the purpose of an award of additional services as an equitable remedy in this case, the district is ordered to provide the student with the OT services it failed to provide to the student from July 2012 through June 2013 for the 2012-13 school year (two 30-minute sessions per week of individual OT) and to provide the student with the OT services it failed to provide to the student from July 2013 through June 2014 for the 2013-14 school year (two 30-minute sessions per week of individual OT services).

With respect to the development of the May 2014 IEP for the 2014-15 school year, the evidence in the hearing record reveals that the May 2014 CSE considered an April 2014 OT evaluation report of the student (see Tr. pp. 260-62; Parent Exs. XX at pp. 1-8; DDD at pp. 24-29; EEE at pp. 30-32, 64, 79-80). According to the April 2014 OT evaluation report, the student exhibited difficulty processing information from his sense of balance, touch, and hearing, which affected his ability to move skillfully outdoors and during physical education activities (see Parent Ex. XX at p. 3). Likewise, the student's sensory issues challenged his ability to understand classroom teaching and work assignments (id.). In addition, the report indicated that the student could not complete schoolwork due to handwriting difficulties, he struggled to get along with classmates as well as handling the usual amount of frustration in a school day, and he required assistance to brush his teeth and tie his shoes (id.). Furthermore, the April 2014 OT evaluation report indicated that the student made impulsive choices about his own safety and comfort needs in the classroom (id.). Based upon the results of the evaluation, the occupational therapist recommended specialized instruction in handwriting, activities of daily living (ADL) skills, and instrumental activities of daily living (IADL) skills of "money management and community safety" (id. at pp. 1, 3). In addition, the occupational therapist noted that due to the student's difficulties with "coordination, sensory perception, and motor planning related to these deficits," the student required "attention to the sensory integration aspects of these tasks, as well as daily practice and one-to-one instruction for mastery" (id. at p. 3). As a result, the occupational therapist recommended that the student receive three 60-minute sessions per week of OT to address his needs during the 2014-15 school year and to achieve his related annual goals (id.).

Upon review of the May 2014 IEP, the May 2014 CSE documented the student's continued needs in the areas of fine motor skills, graphomotor skills, sensory needs, ADL skills, safety-awareness and motor-planning needs, as well as noting a "very low level" of visual motor integration skills in the present levels of performance section of the IEP (see Parent Ex. JJJ at pp. 1-3). However, notwithstanding the student's needs as identified in the IEP, the May 2014 CSE failed to recommend OT services to address the student's needs (see Parent Ex. JJJ at p. 8). Given

the student's identified needs and the May 2014 CSE's failure to address these needs in the IEP, the student is entitled to an award of additional services and the district is directed to provide the student with two 30-minute sessions per week of individual OT services for its failure to recommend OT services in the May 2014 IEP from July 2014 through June 2015 or to otherwise address the student's needs in the IEP from July 2014 through June 2015.

2. Counseling Services

Upon review of the hearing record, the evidence reveals that based upon the student's needs the March 2012 CSE recommended that the student receive one 30-minute session per week of counseling services in a small group for the 2012-13 school year, and moreover, the evidence reveals that the student received counseling at the NPS during the 2012-13 school year from July 2012 through June 2013 pursuant to the recommendation in the March 2012 IEP (see Parent Exs. I; K; L; M at pp. 27-28; Q; R at p. 1; T at p. 3; Z at pp. 26-27; CC; AAA at p. 11; CCC). Given that the student received counseling services from July 2012 through June 2013 in accord with the March 2012 IEP, the student is not entitled to an award of counseling services as additional services for the 2012-13 school year.

Next, the evidence in the hearing record demonstrates that based upon the student's needs the February 2013 CSE recommended that the student receive one 30-minute session per week of counseling in a small group for the 2013-14 school year; however, the hearing record contains no evidence that the student received counseling services at the NPS from July 2013 through June 2014 (see Tr. pp. 272-73; Parent Exs. AA; see also IHO Ex. I). Therefore, in order to effectuate the purpose of an award of additional services as an equitable remedy in this case, the district is ordered to provide the student with the counseling services the student was entitled to receive during the 2013-14 school year from July 2013 through June 2014 (one 30-minute session per week of counseling in a small group) as an award of additional services.

With respect to the development of the May 2014 IEP for the 2014-15 school year, the evidence in the hearing record reveals that the May 2014 CSE considered an April 2014 psychoeducational evaluation of the student and that the May 2014 CSE discussed the annual goals in the psychoeducational evaluation report related to counseling (see Parent Exs. AAA at pp. 11-14; DDD at pp. 5, 32; EEE at pp. 12-15, 64; JJJ at pp. 2, 8). According to the April 2014 psychoeducational evaluation, social skills were one of the student's greatest areas of need and counseling was the related service to address this need (see Parent Ex. AAA at p. 12). Further, the psychologist recommended that pull-out services should be maximized due to the student's need for one-to-one support to address his marked attention and social difficulties (id.). In the report, the psychologist recommended annual goals related to counseling, noting that they were "particularly urgent" to address, as all other areas were dependent upon the student improving the way he learned, his ability to learn for longer periods of time, and his motivation to learn more facts and skills (id. at p. 13). According to the report, counseling was needed to address very specific skills that applied behavioral analysis methods alone could not address (id.).

In the present levels of performance section of the May 2014 IEP, the May 2014 CSE documented that the student continued to exhibit social/emotional and management needs, such as

the inability to sustain interactions with others, difficulty maintaining self-control, and the need for social skills training (see Parent Ex. JJJ at pp. 1-3).[7] However, despite the student's identified social/emotional and management needs, the May 2014 CSE did not recommend counseling services in the May 2014 IEP for the 2014-15 school year (see generally Parent Ex. JJJ). Given the student's identified needs and the May 2014 CSE's failure to address these needs in the IEP, the student is entitled to an award of additional services and the district is directed to provide the student with one 30-minute session per week of counseling services in a small group for its failure to recommend counseling services in the May 2014 IEP from July 2014 through June 2015 or to otherwise address the student's needs in the IEP from July 2014 through June 2015.

3. Speech-Language Therapy Services

Next, a review of the March 2012 IEP and the February 2013 IEP reveals that based upon the student's needs, both the March 2012 CSE and the February 2013 CSE recommended that the student receive two 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week of speech-language therapy in a small group for the 2012-13 school year (July 2012 through June 2013) and for the 2013-14 school year (July 2013 through June 2014) (see Parent Exs. O at p. 9; AA at pp. 8-9). According to the evidence in the hearing record, the student received speech-language therapy services pursuant to the recommendations in the March 2012 IEP and in the February 2013 IEP, and therefore, the student is not entitled to speech-language therapy services as an award of additional services for either the 2012-13 or the 2013-14 school year (see Parent Exs. J; K; M at pp. 23-25; P; R at p. 1; Z at pp. 23-25; EE).

In the development of the May 2014 IEP for the 2014-15 school year, the evidence in the hearing record demonstrates that the May 2014 CSE considered an April 2014 speech-language evaluation report (see Parent Exs. YY; EEE at pp. 38-46; JJJ at pp. 1, 8). According to the April 2014 speech-language evaluation report, the student demonstrated a severe delay in receptive and expressive language skills, as well as a delay in phonology (see Parent Ex. YY at p. 6). At that time, the student used one-to-two word utterances, and he exhibited significant difficulty with functional communication skills (id. at pp. 6-7). According to the evaluation report, the student demonstrated reduced attention throughout the evaluation, and he required frequent redirection due to distractibility (id. at p. 3). Based upon the results of the April 2014 speech-language evaluation, the evaluators recommended the following services: five 60-minute sessions per week of individual speech-language therapy; five 60-minute sessions per week of individual/classroom integration speech-language therapy; and five 60-minute session per week of individual and classroom assistive technology services (id. at pp. 15, 19).

At the May 2014 CSE meeting, the evaluator who conducted the April 2014 speech-language evaluation described the student's speech as "non-functional in all . . . of his communication needs" (Parent Ex. DDD at pp. 2, 17). According to the student's then-current classroom teacher from the NPS (classroom teacher) who also attended the May 2014 CSE

[7] At the May 2014 CSE meeting, disagreement arose regarding whether the annual goals in the April 2014 psychoeducational evaluation report related to counseling or whether the annual goals related to "language" and "behavior[]" (Parent Ex. EEE at pp. 11-14).

meeting, the student demonstrated "tremendous growth" in his communication skills and she described the student as "verbal" (id. pp. 33-35). The student's then-current speech-language provider who also attended the May 2014 CSE meeting described the student as a "verbal communicator," who "look[ed] to interact with others verbally;" at that time, the speech-language provider worked with the student both in the classroom and in group settings (Parent Ex. EEE at pp. 32, 35-36). In addition, the May 2014 CSE discussed that the speech-language therapy services were an integral part of the student's program at the NPS, and the NPS principal indicated that the NPS program provided a "strongly language-based environment" and that "language skills [were] reinforced in virtually every situation" (id. at p. 45). The district representative at the May 2014 CSE meeting also noted that the student's needs were being addressed within the program (id. at p. 91).

As an area of continued need, the May 2014 CSE created three annual goals with corresponding short-term objectives to address the student's speech-language needs, and further recommended that the student have access to a picture exchange communication system and receive two 30-minute sessions per week of individual speech-language therapy services for the 2014-15 school year (see Parent Ex. JJJ at pp. 3, 7-8). However, a review of the evidence in the hearing record does not support the May 2014 CSE's decision to reduce the frequency of the student's speech-language therapy services for the 2014-15 school year by eliminating the previously recommended speech-language therapy in a small group (see generally Tr. pp. 1-340; Parent Exs. A-C; E-F; H-M; P-Z; AA; CC-ZZ; AAA-FFF; HHH-JJJ; NNN; PPP-XXX; IHO Exs. I-II). Rather, the evidence in the hearing record indicates that the student continued to exhibit severe delays in his receptive and expressive language skills, as well as in his phonology skills, and while the student may have demonstrated some progress during the 2012-13 and 2013-14 school years at the NPS, the student received both individual speech-language therapy services and speech-language therapy services in a small group during the previous two school years (see Parent Exs. J; K; M at pp. 23-25; P; R at p. 1; Z at pp. 23-25; EE; YY at pp. 3, 6-7; EEE at pp. 33-37). In addition, although the May 2014 CSE discussed the student's progress and the language-based environment of the student's program at the NPS, the evidence in the hearing record does not attribute the student's progress in communication to the NPS program, alone, or otherwise justify the May 2014 CSE's decision to reduce the recommendation for speech-language therapy services for the 2014-15 school year. As a result, given the student's continued speech-language needs, the student is entitled to an award of additional services and the district is directed to provide the student with one 30-minute session per week of speech-language therapy services in a small group for its failure to recommend the same in the May 2014 IEP from July 2014 through June 2015.

4. Parent Training and Counseling Services

Here, it is undisputed that the district did not recommend parent counseling and training as a related service in the March 2012 IEP, the February 2013 IEP, or the May 2014 IEP. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]).

Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, the Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) to provide parents counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hough the failure to include parents counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191).

As noted previously, 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. Here, given the passage of time and the absence of sufficient evidence upon which to fashion an equitable remedy for the district's failure to recommend parent counseling and training during the 2012-13, 2013-14, and 2014-15 school years, the parent's request for parent counseling and training as an award of additional services must be denied. The district is cautioned, however, that it cannot disregard its legal obligation to include parent counseling and training in a student's IEP. Therefore, upon reconvening this student's next CSE meeting, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction, and after due consideration, provide the parent with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training in the student's IEP, together with an explanation of the basis for the CSE's recommendation, in conformity with the procedural safeguards of the IDEA and State regulations (see 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo], 200.5[a]). If, however, the CSE already convened for the student's annual review and developed an IEP for the 2015-16 school year and the CSE did not otherwise discuss whether the parent counseling and training was required to enable the student to benefit from instruction, the district is directed to reconvene another CSE for the purpose of discussing whether parent counseling and training is required and to then follow the directives set forth above regarding the provision of prior written notice to the parent following the CSE meeting.

5. Behavior Management Therapy Services

The parent alleges that the IHO erred in failing to award the student one year of "at-home compensatory Behavior Management services using Applied Behavioral Analysis ("ABA") techniques for [the student] or, as an alternative, placement in a nonpublic school that offer[ed] ABA instruction." Moreover, the parent alleges that the IHO also erred in her interpretation of the law and the facts regarding the parent's request for "compensatory ABA services." The district generally argues that the IHO correctly denied the parent's request for compensatory behavior management services because the parent failed to describe these services in the due process complaint notice.

Upon review, while the parent's due process complaint notice did not specifically request behavior management services using ABA or alternatively, placement in a State-approved nonpublic school that offered ABA instruction, the parent did request behavior management services to address the district's failure to provide the student with an appropriate FBA and BIP during the 2012-13, 2013-14, 2014-15 school years (see Parent Ex. UUU at p. 5). However, neither the parent's due process complaint notice nor the evidence in the hearing record provides any insight into what behavior management services might entail (id.; see generally Tr. pp. 1-340; Parent Exs. A-C; E-F; H-M; P-Z; AA; CC-ZZ; AAA-FFF; HHH-JJJ; NNN; PPP-XXX; IHO Exs. I-II). Given that 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, the hearing record does not include sufficient evidence upon which to fashion an equitable remedy in the form of behavior management services for the district's failure to provide the student with an appropriate FBA and BIP during the 2012-13, 2013-14, and 2014-15 school years. Therefore, the parent's request for behavior management services using ABA as an award of additional services must be denied.

C. Reimbursement for IEEs

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

Here, as the IHO found and as the district correctly asserts, the hearing record contains no evidence that the parent disagreed with a district evaluation. Accordingly, there is no reason to

disturb the IHO's determination and the parent's request to be reimbursed for the cost of IEEs must be denied.

VII. Conclusion

In summary, the evidence in the hearing record supports a finding that the district failed to offer the student a FAPE for the 2012-13, 2013-14 and 2014-15 school years and that the student was entitled to compensatory educational services in the form of OT services, counseling services, and speech-language therapy services as additional services.

THE APPEAL IS SUSTAINED TO THE EXTEND INDICATED.

IT IS ORDERED that the IHO's decision, dated February 2, 2015, is modified by reversing those portions which denied the parent's request for compensatory educational or additional services; and

IT IS FURTHER ORDERED THAT, consistent with this decision, the district shall provide the student with OT services, counseling services, and speech-language therapy services as an award of compensatory educational or additional services, all of which are to be provided prior to the conclusion of the 2016-17 school year.

Dated: **Albany, New York**
May 28, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER