



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 15-057

**Application of a STUDENT WITH A DISABILITY, by her parents, 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:**

Friedman & Moses, LLP, attorneys for petitioners, Elisa Hyman, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Theresa Crotty, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their daughter for the 2010-11, 2011-12, and a portion of the 2012-13 school years was appropriate and which did not award all the relief sought by the parents. The district cross-appeals from that portion of the IHO's decision which found that the district denied the student a free appropriate public education (FAPE) for the first eight months of the 2012-13 school year, awarded compensatory education services, and made additional determinations adverse to the district. The appeal must be sustained in part. The cross-appeal must be sustained in part.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

The student presents with certain academic delays and has received the diagnoses of anxiety disorder, attention deficit hyperactivity disorder (ADHD), obsessive compulsive disorder

(OCD), and pervasive developmental disorder (PDD) (Parent ExsN at pp. 1-2, 6; S at pp. 31, 38-39, 42, 47).<sup>1</sup>

The student started high school in the 2010-11 school year (Tr. p. 264). A CSE convened on January 24, 2011 to conduct the student's annual review and found the student eligible for special education as a student with a learning disability (Dist. Ex. 3 at pp. 1, 2). The CSE recommended that the student receive integrated co-teaching (ICT) services in a general education classroom for instruction in English, Spanish, Algebra, and U.S. History (*id.* at p. 11).<sup>2</sup> The CSE also recommended that the student receive one 30-minute session of group counseling per week and two 30-minute sessions of group occupational therapy (OT) per week (*id.* at p. 13).

A CSE convened on January 6, 2012 to conduct an annual review and found the student continued to be eligible for special education as a student with a learning disability (Parent Ex. D at p. 9). The CSE recommended that the student receive ICT services for instruction in math and English language arts (ELA) (*id.* at p. 5). The CSE also recommended that the student receive one 30-minute session of group counseling per week and two 30-minute sessions of individual OT per month (*id.* at p. 5).

The parents completed an application for homebound instruction on March 26, 2013 based on the student's inability to attend school due to "severe anxiety" (Parent Exs. E; Q at p. 31).<sup>3</sup> The student was approved for homebound instruction and a teacher was assigned to the student on April 16, 2013 (Parent Ex. Q at p. 2). The student received homebound instruction for the remainder of the 2012-13 school year (Dist. Ex. 38 at pp. 6-8). The parents reapplied for homebound instruction for the 2013-14 school year in September 2013 (Parent Exs. F; I). Initially, the district denied this request (Parent Ex. Q at p. 22).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated October 15, 2013, the parents contended that the district failed to offer the student a FAPE for the 2010-11, 2011-12, and 2012-13 school years (Parent Ex. A at pp. 1-8). Specifically, the parents alleged that the student was "the subject of

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<sup>1</sup> The hearing record contains multiple duplicative exhibits (compare Dist. Exs. 3-4, 34-36, 39, with Parent Exs. C-D, Q-R, LL). For purposes of this decision, only Parent exhibits are cited in instances where both a Parent and District exhibit are identical; however, some exhibits, such as the parents' version of the January 2011 IEP, are missing pages (compare Dist. 3 at p. 5, with Parent Ex. C). In those instances, reference will be made to the more complete exhibit. I remind the IHO that it is her responsibility to exclude evidence that she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]).

<sup>2</sup> The January 2011 IEP indicates that the student would be moved into a general education class for the two semester Living Environment class for the spring semester (Dist. Ex. 3 at p. 3).

<sup>3</sup> The hearing record includes broad references to the phrase "home instruction"; however, it should be clarified that a student may receive instruction at home or outside of school for a variety of reasons (see 8 NYCRR 100.10, 175.21[a], 200.6[i]). For example, students may be home schooled by their parents (8 NYCRR 100.10); students with disabilities may receive home or hospital instruction as a placement on the continuum of services (8 NYCRR 200.6[i]; see 8 NYCRR 200.1[w]); or students may receive homebound instruction if they are "unable to attend school because of physical, mental, or emotional illness or injury" (8 NYCRR 175.21[a]; see Educ. Law 3602[1][d]).

extreme and ongoing bullying" during the 2010-11, 2011-12, and 2012-13 school years, that the district did not take steps to address the bullying, and that the bullying caused the student's anxiety to worsen (*id.* at pp. 2-3). The parents further alleged that, although the student's public school was aware that the student's anxiety was causing her to miss school during the 2012-13 school year, the district did not reconvene the CSE or recommend the student for home instruction (*id.* at pp. 4-5).

The parents asserted that the January 2012 CSE meeting and the resultant IEP were "fraught with substantive and procedural errors," including that: the district failed to ensure that the parents understood the CSE process; the CSE's recommendations were constrained by blanket policies; the CSE was improperly constituted; the CSE lacked sufficient evaluative information; the IEP did not include an adequate description of the student's strengths and weaknesses or appropriate goals; the IEP failed to address the student's diagnoses of ADHD, PDD, OCD, and anxiety; the IEP failed to address the student's academic delays; and the IEP did not include a recommendation for "CBT," a sufficient OT recommendation, specially designed instruction, or adequate transition services (*id.* at pp. 3-4).<sup>4</sup> The parents also asserted that the district improperly reduced the student's services (by reducing the student's ICT services from five to two classes, terminating OT services, and reducing counseling services) without reevaluating the student (*id.* at p. 3).

Next, the parents asserted that, although the district was aware of the student's excessive absences and increasing anxiety as of the beginning of the 2012-13 school year, the district failed to reconvene the CSE, conduct a reevaluation, or recommend home instruction (Parent Ex. A at p. 4). Regarding the period during which the student received homebound instruction, the parents alleged that the district failed to provide the student with any related services and failed to reevaluate the student (Parent Ex. A at pp. 5, 7). The parents also asserted that the homebound instruction was not "substantially equivalent to what [the student] would have received had she been well enough to attend school in person" (*id.*). The parents contended that the student was entitled to more than 10 hours per week of homebound instruction and that the district should have additionally provided the student with transition planning, Regents' preparation, special education instruction, and access to extra-curricular activities while the student was receiving homebound instruction (*id.* at p. 7). In addition, the parents alleged that the district had not yet approved the student for home instruction (as of October 15, 2013) for the 2013-14 school year and had also failed to develop an IEP for the student for the 2013-14 school year (*id.* at pp. 2, 5-7). The parent further asserted that the district's actions violated section 504 of the Rehabilitation Act of 1973 (section 504) (*id.* at pp. 1, 2, 7, 8, 9).

The parents included a number of requests for relief in the due process complaint notice (Parent Ex. A at pp. 8-9). Initially, the parents requested immediate relief in the form of a pendency placement consisting of 10 hours per week of "home instruction" and counseling and OT services to be provided at the student's home, as well as an "emergency interim order" to increase the "home-based instructional hours" to include instruction for physical education, tutoring for Regents' exams, transition services, 1:1 special education teacher support services (SETSS) "for

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<sup>4</sup> Although the parents' due process complaint notice does not describe what was meant by "CBT," the district's psychiatrist indicated that "CBT" stands for "cognitive behavioral therapy" (Tr. p. 4647).

remediation," and keyboarding instruction (id. at p. 8). The parents also requested an order requiring the district to prepare an IEP for the student to include (1) 15 hours per week of 1:1 "home-based instruction"; (2) OT services to be provided at home; (3) counseling to be provided at home "using a CBT method"; (4) training in executive functioning; (5) tutoring focused on remediation in math, reading, and writing; (6) tutoring for Regents' exams; and (7) assistive technology services and training (id. at p. 9). In addition, the parent requested compensatory education to remedy the district's alleged failure to offer the student a FAPE for the 2011-12 and 2012-13 school years, including "CBT, remedial tutoring, executive functioning training and transition services" (id.). Finally, the parents requested independent educational evaluations in a variety of areas (id. at p. 8).<sup>5</sup>

### **B. Facts Post-Dating the Due Process Complaint Notice**

On October 16, 2013, the district reconsidered the parents' application for homebound instruction and approved the student for homebound instruction through January 31, 2014 (Dist. Ex. 35 at p. 1; Parent Ex. Q at pp. 1, 3-4). In January 2014, the student had earned enough credits to graduate and was awarded a Regents diploma as she earned passing scores (65 or above) on five of her Regents competency tests (Tr. pp. 327-29; see Dist. Ex. 26 at p. 1).

### **C. Impartial Hearing Officer Decision**

After a pendency hearing on December 11, 2013 and a prehearing conference on February 10, 2014, an impartial hearing on the merits convened on March 3, 2014 and concluded on April 5, 2015, after 35 additional days of proceedings (see Tr. pp. 1-5895). The IHO issued an interim decision, dated December 18, 2013, finding that the student's pendency placement consisted of two 30-minute sessions of OT per month and one 30-minute session of counseling per week to be delivered at the student's home (IHO Ex. XV).<sup>6</sup>

In a decision dated April 20, 2015, the IHO addressed the parents' claims pertaining to the 2010-11, 2011-12, 2012-13, and 2013-14 school years (see IHO Decision at pp. 27-44). Initially, regarding the 2010-11 school year, the IHO determined that the district waived the defense of statute of limitations regarding matters that arose during the 2010-11 school year but more than two years prior to the filing of the due process complaint notice (id. at pp. 29-30). The IHO also determined that, although the due process complaint notice did not "explicitly refer to the 2010-11 school year," it did include allegations related to bullying with respect to that year (id. at p. 30 n. 2). The IHO found that the student was the subject of bullying during the 2010-11 school year, that the school had a duty to investigate and take preventative measures, and that the school failed to do so (id. at pp. 30-32). However, the IHO determined that, because the student "did well"

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<sup>5</sup> The parents initially requested a neuropsychological evaluation, an evaluation by an expert in OCD and anxiety, an observation, an assistive technology evaluation, a vocational assessment, a speech-language evaluation, and an optometry assessment (Parent Ex. A at p. 8). However, the parents withdrew their requests for an observation and an evaluation by an expert in OCD and anxiety after the student graduated from high school (Tr. pp. 3939-41).

<sup>6</sup> The IHO awarded pendency prior to the student's graduation in January 2014; however, it is unclear from the hearing record whether the parties agreed that the student's entitlement to pendency terminated upon the student's graduation (see Tr. pp. 131-32).

during the 2010-11 school year and received an appropriate education, there was no gross denial of a FAPE upon which to base an award of compensatory education (id. at p. 32).

Regarding the 2011-12 school year, the IHO found that the student continued to be the subject of bullying, which went unaddressed by the school; however, as with the 2010-11 school year, the IHO determined that the student "did well" during the 2011-12 school year and compensatory education was not warranted (IHO Decision at pp. 32-33). The IHO also addressed allegations related to the appropriateness of the student's special education program for the 2011-12 school year (id. at pp. 33-35). The IHO reviewed the January 2011 and January 2012 IEPs and found that the district provided the student with an appropriate program during the 2011-12 school year (id.). In particular, the IHO determined that the student's attainment of passing grades and her success on the U.S. History Regents exam indicated that the student was making progress in her ICT class (id. at pp. 34-35). The IHO also determined that the student's progress indicated "the CSE had sufficient information to develop an appropriate program even without new assessments" (id.). Thus, the IHO concluded that there was "no basis for concluding that the [s]tudent did not receive a FAPE during" the 2011-12 school year (id. at p. 35).

Regarding the 2012-13 school year, the IHO determined that the district denied the student a FAPE prior to April 2013 (when the student started home instruction), because the district did not conduct new evaluations, did not conduct a functional behavioral assessment (FBA), failed to develop a program to address the student's social/emotional needs, failed to address bullying, failed to convene the CSE for an annual review in January 2013, and failed to consider recommending the student for home instruction (IHO Decision at pp. 35-38). However, the IHO determined that the student "thrived" once the district provided her with "home instruction," that the student did not require counseling as her "anxiety was not problematic in the home instruction setting," and that, therefore, compensatory education was not warranted for the period of time the student received homebound instruction (id. at pp. 38). For the first two-thirds of the 2012-13 school year, the IHO awarded the student compensatory education consisting of 300 hours of individual tutoring, 24 30-minute sessions of counseling, 20 30-minute sessions of OT, and access to college preparation and guidance courses at the public school (id. at pp. 40-41, 43-44). In reaching her determination, the IHO found that the student earned her Regents diploma and that her success was not a result of social promotion; however, the IHO found that compensatory education was appropriate because the student continued to have deficits in her academic skills (id. at pp. 39-40).

Regarding the 2013-14 school year, the IHO found that the district's failure to convene a CSE meeting in January 2013 and its failure to provide the student with home instruction at the beginning of the school year were "inconsistent with the requirements regarding the provision of a special education" (IHO Decision at p. 41). However, the IHO found that the parents' allegations regarding the provision of home instruction during the 2013-14 school year were outside the scope of the impartial hearing because the provision of home instruction postdated the filing of the due process complaint notice (id. at pp. 41-42). The IHO noted that the parents filed a subsequent due

process complaint notice relating to the 2013-14 school year and, therefore, refrained from reaching those claims in the present proceeding (*id.* at p. 42).<sup>7</sup>

Finally, the IHO addressed the parents' claims related to section 504 and found that the district's failure to address bullying was an act of discrimination and that the district's "other failures" were also failures under section 504; however, the IHO determined that any relief under section 504 would have been redundant in light of the relief she already awarded (IHO Decision at p. 42). The IHO also addressed the parents' request that the IHO order IEEs at public expense and determined that no such evaluations were necessary for the development of an award of compensatory education (*id.* at pp. 42-43).

#### **IV. Appeal for State-Level Review**

The parents appeal, seeking to overturn portions of the IHO's decision. As an initial matter, the parents contend that the IHO erred in applying a gross violation standard in determining whether compensatory education was warranted. The parents further contend that the IHO erred in failing to find that the student was denied a FAPE and that the district did not commit a gross violation of the IDEA for the 2010-11, 2011-12, and 2013-14 school years, and for the portion of the 2012-13 school year that the student was receiving home instruction. The parents allege that the district denied the student a FAPE for the years in question because the district "did not have any valid reevaluations," failed to address the impact of bullying on the student, failed to prove that the January 2011 and January 2012 IEPs were appropriate, failed to prove that the CSE understood and addressed the student's diagnoses of ADHD, PDD, OCD, and anxiety, failed to address the student's delays, and failed to provide any transition services.

The parents further contend that the IHO erred in finding that the student made progress during the 2010-11, 2011-12, and 2012-13 school years. In particular, the parents object to the IHO's reliance on the January 2012 IEP as indicating that the student made progress and to the IHO's finding that the student "thrived" and made enormous progress in home instruction. The parents also appeal from the IHO's determination that the student was not socially promoted. The parents contend that the student should have been afforded the same general education, special education, and nonacademic services that the student would have received if she had been able to attend school.

The parents also appeal from the IHO's determination that issues related to the 2013-14 school year were outside the scope of the hearing and contend that the district opened the door to the parents' allegations regarding the 2013-14 school year by introducing evidence of facts that arose after the filing of the due process complaint notice. The parents assert that the district denied the student a FAPE for the 2013-14 school year because the student only received "minimal" instruction, the student did not receive any instruction or services for 26 school days, and the district graduated the student early without following proper procedures. The parents further

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<sup>7</sup> The IHO issued an interim decision dated April 10, 2015 declining consolidation of this matter with the due process complaint notice filed by the parents on April 6, 2015 (April 10, 2015 Interim IHO Decision at p. 10). In their petition, the parents aver that the April 6, 2015 due process complaint notice related to the student's 2013-14 school year and was withdrawn to prevent duplicative litigation regarding the 2013-14 school year (Petition ¶61).

allege that the district's failure to hold a CSE meeting during or after January 2013 or develop an IEP for the period of time the student was receiving home instruction were denials of a FAPE and gross violations of the IDEA.

In an answer and cross-appeal, the district responds to the parents' petition by admitting or denying the allegations raised. In its cross-appeal, the district asserts that the IHO erred in ruling upon claims that arose outside of the IDEA's two year statute of limitations. Further, the district asserts that the IHO erred in determining that the district did not offer the student a FAPE for a portion of the 2012-13 school year. The district also contends that the IHO erred in finding that the district failed to investigate and take preventative measures related to incidents involving bullying of the student. Further, as a general matter, the district contends that the student's receipt of a Regents diploma is adequate proof that the student received educational benefits and that compensatory education is not warranted. The parents answer the district's cross-appeal.

## **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]). 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).



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]). 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; ).

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]), 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]).

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).

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Section 504 Claims**

The parents acknowledge that an SRO does not have jurisdiction to review section 504 claims; however, "for the purposes of exhaustion," the parents appeal from the IHO's failure to find that the district's policies and procedures related to homebound instruction violated section 504 and from the IHO's determination that damages under section 504 would be redundant in light of the relief awarded relating to the district's failure to provide the student a FAPE. As the parents acknowledge, New York State Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 hearings (see Educ. Law § 4404[2] [providing

that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"). Therefore, an SRO has no jurisdiction to review any portion of the parents' claims or the IHO's findings regarding section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]). Therefore, the parents' section 504 claims will not be further addressed.

## 2. Scope of Impartial Hearing and of Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. Generally, 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 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][III], [f][3][B]; 34 CFR 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 730 [2d Cir. May 8, 2015]; B.M. v New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-586 [S.D.N.Y. 2013]; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013]).

On appeal, the parents have raised additional issues regarding the 2010-11 school year, including that the district did not "prove it offered an IEP until January 2011" (Pet. ¶¶ 7, 48). However, as noted by the IHO, the only allegation included in the parents' due process complaint notice related to the 2010-11 school year was a part of the parents' claim that the student was the subject of bullying during her 9th, 10th, and 11th grade school years (IHO Decision at pp. 29-30 n. 1; see Parent Ex. A at p. 2). It would be unfair to allow the parents to assert on appeal that the district did not "prove it offered an IEP until January 2011" as the parents did not raise the issue in their due process complaint notice and the district therefore had no reason to suspect it would be required to defend an IEP that was in effect for that period of time.<sup>8</sup>

In addition, the parent alleges on appeal that the January 2011 CSE lacked evaluative information and that the January 2011 IEP did not adequately describe or address the student's needs and did not include sufficient annual goals or transition services (Petition ¶¶ 8-9, 49). However, none of these allegations were included in the parents' due process complaint notice (see Parent Ex. A). Significantly, while the parents' due process complaint notice included numerous specific allegations related to the January 2012 IEP, it did not even reference the January 2011 IEP (id.).

A district may "open the door" to issues that were not raised in the due process complaint notice by seeking information "in support of an affirmative, substantive argument" (B.M., 569 Fed. App'x at 59; M.H., 685 F.3d at 250). In this instance, the district questioned the student's 9th and 10th grade guidance counselor extensively regarding the 2010-11 school year; however, the district's questioning was targeted at eliciting background information and evidence related to the

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<sup>8</sup> The January 2011 IEP was in effect from January 2011 through January 2012 covering portions of the 2010-11 and 2011-12 school years (Dist. Ex. 3).

counseling services provided to the student during the 2010-11 and 2011-12 school years (see Tr. pp. 249-344). Such questioning related to the appropriateness of the steps that the school took in addressing bullying, a claim properly raised in the due process complaint notice, but it did not open the door to any additional claim related to the 2010-11 school year (see A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 283 [S.D.N.Y. 2013] [finding that the district did not open door to an extended school year claim as there was "no indication that the DOE sought, let alone obtained, a strategic advantage by raising it"]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*9 [S.D.N.Y. Aug. 5, 2013] [finding that the district did not open the door to a claim relating to the sufficiency of evaluative information as district's witness "merely offered background and foundation testimony about the information the CSE considered"]). Accordingly, the hearing record does not support a finding that the district agreed to an expansion of the issues and, as determined by the IHO, the parents' claims relating to the 2010-11 school year are limited to allegations of bullying and its possible impact on the student's education.<sup>9</sup> Further, to the extent that the IHO made determinations relating to the January 2011 CSE or the appropriateness of the resultant IEP, such sua sponte findings were outside the scope of the impartial hearing and are reversed (see IHO Decision at pp. 33-35).

## **B. Bullying**

Under certain circumstances, if a student with a disability is the target of bullying, such bullying may form the basis for a finding that a district denied the student a FAPE (Dear Colleague Letter, 61 IDELR 263 [OSERS/OSEP 2013] [noting that districts have an obligation to ensure that students who are targeted by bullying behavior continue to receive FAPE pursuant to their IEPs]; see also Smith v. Guilford Bd. of Educ., 2007 WL 1725512, at \*4-\*5 [2d Cir. June 14, 2007] [indicating that bullying might, under some circumstances, implicate IDEA considerations]; M.L. v. Fed. Way. Sch. Dist., 394 F.3d 634 [9th Cir. 2005] [finding that "[i]f a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE"]; Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194 [3d Cir.2004] [reviewing whether the district offered the student "an education that was sufficiently free from the threat of harassment to constitute a FAPE"]; S.S. v District of Columbia, 68 F. Supp. 3d 1, 13-17 [D.D.C. 2014]; T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 297-316 [E.D.N.Y. 2011]; Dear Colleague Letter: Responding to Bullying of Students with Disabilities, 64 IDELR 115 [OCR 2014]; Dear Colleague Letter, 55 IDELR 174 [OCR 2010]).

In determining whether the parents' allegations related to bullying and harassment rose to the level of a denial of FAPE, the IHO relied on the test set forth in T.K. v. New York City Department of Education: "whether school personnel w[ere] deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning

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<sup>9</sup> In addition, the district asserts on appeal that the parents' allegations related to the 2010-11 school year are barred by the IDEA's two year statute of limitations; however, the district offers no explanation as to when the parents' claims accrued (Answer ¶ 36; see 20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at \*16 [E.D.N.Y. Aug. 6, 2014] [noting that because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry"]). Accordingly, the parents claims are not dismissed on this basis.

disabilities in her educational opportunities" (779 F. Supp. 2d 289, 297-316 [E.D.N.Y. 2011]).<sup>10</sup> Since the decision in T.K., the United State Department of Education (USDOE) has further clarified that:

A school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly.

(Dear Colleague Letter, 61 IDELR 263). With respect to additional steps that a district might take to address bullying about which it is on notice, the USDOE has identified the following nonexclusive actions: "separating the accused harasser and the target; providing counseling for the target and/or harasser, or taking disciplinary action against the harasser"; providing additional services to the student who was harassed to address the effects of the harassment; adopting new policies or procedures for receiving reports of harassment; or providing training or interventions for the school community (Dear Colleague Letter, 55 IDELR 174).

Neither party asserts on appeal that the IHO should have applied a standard other than that articulated in T.K. or otherwise identifies a different standard to apply.<sup>11</sup> With respect to the 2010-11, 2011-12, and 2012-13 school years, the district argues that the IHO erred in finding that the student was bullied and that district did not take appropriate actions to address bullying. The parents contend that the IHO erred in finding that the bullying did not have an impact on the student's education.

Upon review of the hearing record, three specific incidents occurred during the 2010-11 school year, which were investigated and addressed by district staff (Tr. pp. 450-51, 453-54, 458-59, 461, 476-77, 627, 642-46, 651-54, 1052-55, 1408-09, 4976-79, 5266-68).<sup>12</sup> In addition, throughout the year, the student reported having difficulties with a particular student (Tr. pp. 447, 453-55, 459-60, 469-71, 621, 623-24, 632-42). In response to specific incidents, the district conducted mediations between the student and her peers with whom she had conflicts (Tr. pp. 453-54, 623-31, 4977-78). The result of the mediations included that the students agreed that they were no longer friends, would not talk to each other, and would not talk to their friends about each other, and, in another mediation, no resolution was reached because neither of the students' versions of events could be substantiated (Tr. pp. 625, 630-31, 644-45, 652-53). With regard to a third incident, the hearing record indicates that the district conducted an investigation, which consisted of interviews with and statements from both students, notified the students' parents, and disciplined the offending student by suspending him for one day (Tr. p. 461, 1054-55, 1186, 1324). Despite

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<sup>10</sup> The District Court's decision in T.K. is currently pending appeal to the U.S. Circuit Court of Appeals for the Second Circuit (see T.K. v. New York City Dep't of Educ., 14-cv-3078 [2d Cir. Aug. 21, 2014]).

<sup>11</sup> While the district qualifies its argument by "assuming [the T.K.] test was controlling" (Ans. & Cross-Appeal ¶ 51), it offers no alternative standard that it believes the IHO should have applied to the facts of this case.

<sup>12</sup> There was also an incident between the student's parents and the parents of another student (Tr. pp. 647-50).

these interventions, the student reported to the counselor that she felt that the particular student with whom the student had conflict was staring at her and talking about her throughout the school year (Tr. pp. 632-34, 4975-76, 4979-80). The student testified that she did not want to associate with anyone at the school after the first incident because she did not feel safe (Tr. p. 4979). To further address the continuing tension between the student and her peers, the hearing record indicates that the district also had telephone conversations with the parents and convened a meeting attended by the parents, the school principal, and the school counselor (Tr. pp. 465-66, 636-37, 642-43).

Specific to the 2011-12 school year, student referenced an incident in which a third student reported to the school counselor that the student who had orchestrated the incidents during the 2010-11 school year kept mentioning the student's name (Tr. pp. 5015-16).<sup>13</sup> Neither the school counselor nor the school principal remembered any incidents as being reported during the 2010-11 school year (Tr. pp. 478, 1059). The school counselor remembered questioning the student's teachers on two occasions during this school year to follow up on the student's description of other students exhibiting disruptive behaviors in her classes, but the teachers were not aware of any such behaviors (Tr. pp. 316-19). However, the student's January 2012 IEP, developed during the 2011-12 school year, states that that student "ha[d] faced some instances of other students bullying her" and that "due to the comments of some students, she often fe[lt] more comfortable around teachers and other adults" (Parent Ex. D at p. 2). The IEP also indicated that the student had "manage[d] to overcome obstacles and hold a positive attitude" (*id.*). No additional description of the student's needs as a result of the acknowledged bullying was included in the IEP (*see generally id.*). The special education teacher, who attended the January 2012 CSE meeting, testified that the statement in the IEP that the student was bullied was based on information provided by the parent at the CSE meeting and that the CSE did not follow up on this information because the parent indicated that she was already in contact with the school's guidance office and handling the situation through them (Tr. pp. 2094-95, 2153, 2225-27). As to the 2012-13 school year, the counselor testified that the student did not know of any bullying that year; however, the student testified that during all three school years in question, she continued to feel unsafe in school (Tr. pp. 4979, 4996, 4998-5002, 5005, 5010-11, 5303, 5326-28, 5378).

Next, as to whether or not the student was substantially restricted in her educational opportunities, overall, during the 2010-11 and 2011-12 school years the student's grades and performance on her Regents exams indicated that the student made progress and received educational benefits during the school years in question (Dist. Exs. 26 at p. 1; *see Walczak*, 142 F.3d at 130 ["the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress"]). However, the student's grades suffered during the 2012-13 school year before the student began homebound instruction (Dist. Ex. 13). In addition, the hearing record indicates that the student had varying degrees of poor attendance during the school years in question, which worsened significantly during the 2012-13 school year (Dist. Ex. 3 at p. 5; *see* Tr. pp. 772-73, 783-84, 810-11, 846, 5003-04). The hearing record

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<sup>13</sup> The student testified that this incident occurred on the same day as an altercation outside the school between the two students' parents (Tr. pp. 5015-16), which she testified happened towards the end of the 2011-12 school year (Tr. p. 5017). However, it is unclear from the hearing record if there were two incidents outside of school between the two students' parents, or if this is the same incident that the school principal and counselor identified as occurring towards the end of the 2010-11 school year (*see* Tr. pp. 647-49, 1055-56).

indicates that the student's worsening attendance began to impact her academic performance (Tr. pp. 786-87, 865-66). The student's attendance became particularly significant as of December 2012, when during the last two weeks in December 2012 and the first week of January 2013 the student missed 9 out of 12 scheduled school days (see Dist. Ex. 14 at p. 3). In addition, in December 2012 the student gave a note from her psychiatrist to the school counselor, which indicated that the student "has been suffering from anxiety disorder" (Tr. pp. 5025-26, 5138-39). While causation is certainly difficult to establish in terms of whether the student's declining attendance and performance resulted from the bullying, as explained by the USDOE, bullying may result in higher truancy rates (i.e. school absences), that could trigger the need to consider modifications to the student's IEP (see Dear Colleague Letter, 61 IDELR 263). As discussed below, the CSE failed to convene or consider such modifications.

Given the foregoing, there is insufficient basis in the hearing record to disturb the IHO's determination that the student experienced bullying and that the bullying resulted in a denial of a FAPE to the student. Whether or not this particular denial of a FAPE constitutes a gross violation such that an award of compensatory education is warranted is addressed below.

### **C. January 2012 IEP**

The parents' appeal from the IHO's determination that the January 2012 IEP was sufficient to provide the student with a FAPE through the end of the 2011-12 school year. In particular the parents assert that the January 2012 IEP was not based on sufficient evaluative information, did not include adequate annual goals in all of the student's areas of need, and did not provide for appropriate transition services.

#### **1. Evaluative Information**

The parents allege that the district's failure to conduct a comprehensive reevaluation of the student prior to the January 2012 CSE meeting resulted in insufficient evaluative data for the CSE to recommend an appropriate program for the student.

Generally, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). Additionally, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

According to the student's math teacher, who attended the CSE meeting as a special education teacher of the student, the CSE did not review evaluations during the CSE meeting because the school's practice was to review only a draft IEP and the student's progress during

annual review meetings (Tr. pp. 2179-80). She explained that the school only reviews psychoeducational evaluations during triennial reviews and that service provider reports are reviewed with parents when they are prepared (Tr. pp. 2179, 2181-82). Additionally, although the January 2012 IEP does not indicate the evaluations relied on by the January 2012 CSE (Parent Ex. D), the hearing record contains the following reports that predate the January 2012 CSE meeting: a September 2006 psychological evaluation report (Parent Ex. N at pp. 2-9), a November 2008 speech-language therapy progress report (Parent Ex. S at p. 56), a December 2008 FLEX Assessment report (Parent Ex. S at pp. 31-35), an August 2009 physical therapy (PT) evaluation report (Parent Ex. S at pp. 42-51), a December 2011 OT annual review plan (Parent Ex. S at pp. 38-41), and a student questionnaire completed in December 2011 (Parent Ex. S at pp. 57-58). Based on the above, it appears that the January 2012 CSE did not have updated evaluations of the student in all areas.<sup>14</sup> However, to the extent that the district's failure to conduct such updated evaluations of the student may have been a procedural error, in this instance it did not lead to or contribute to a denial of FAPE.

According to the special education teacher, the CSE reviewed each page of the IEP during the meeting and discussed the student's academic, social, and physical development (Tr. pp. 2110-11). She also testified that she remembered the discussion with the parent and that the parent did not have any objections to any of the information contained in the IEP (Tr. pp. 2153-54).

The special education teacher testified that the student's academic present levels of performance were based on input from the student's teachers, the student's OT provider, and the guidance counselor (Tr. p. 2092). The January 2012 IEP present levels of performance indicate that the student had demonstrated growth and increased confidence in her abilities, was expected to "continue to improve her skills and acquisitions of knowledge in her subject area classes due to her dedication and strong work ethic," but continued to struggle with speaking and writing Spanish (Parent Ex. D at p. 1). The January 2012 IEP further reported the student's scores on her Living Environment (65) and U.S. History (72) Regents exams and the student's most recent grades in Global History (85), Physical Education (85), Earth Science (80), English (88), Algebra (70), and Spanish (60) (*id.*). The IEP also reported that the student's instructional/functional level for reading and math was seventh grade (*id.* at p. 9). The January 2012 IEP further indicated that, based on the student's progress and the belief expressed by both the student and the parent, the student would no longer receive ICT services for social studies but would continue to receive them for math and English (*id.* at p. 1-2). The IEP also indicates that the student was struggling in her Spanish class (*id.* at p. 1).

The special education teacher testified that the information contained in the social development portion of the IEP came from the student, the parent, and the student's teachers (Tr. pp. 2092-96). The IEP indicated that the student was polite and respectful, interacted well with

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<sup>14</sup> The hearing record indicates that the district initiated a reevaluation of the student in April 2012 (Tr. pp. 1557-58; Parent Ex. S at p. 37). The district conducted a social history update with the student's mother in May 2012, which indicated that it was being done as part of a triennial review (Parent Ex. S at pp. 54-55). The district also conducted a classroom observation of the student on October 4, 2012 (*id.* at pp. 29-30). However, despite obtaining consent to evaluate the student from the parents in June 2012 and again in October 2012 (Dist. Ex. 15), for various reasons the district never completed an evaluation of the student (Tr. pp. 1568-78, 1686-87; Dist. Ex. 16 at pp. 1-3).

teachers and peers, and followed directions and classroom rules and routines (Parent Ex. D at p. 2). The January 2012 IEP noted that the student occasionally felt anxious when presenting in front of the class and that she was often more comfortable around teachers and other adults (*id.*). The IEP further indicated that, although the student had been the subject of bullying, the student maintained a positive attitude (*id.*).

Additionally, information contained in the January 2012 IEP parallels the results of the December 2011 OT annual review plan (*compare* Parent Ex. D at p. 2, *with* Parents Ex. S at pp. 38-41). Specifically, the IEP indicates that the student was motivated, improved in her ability to tell time, and was using a variety of relaxation techniques to stay focused in school (*compare* Parent Ex. D at p. 2, *with* Parent Ex. S at p. 39). The January 2012 IEP also contained results from an administration of the Beery-Buktenica Developmental Test of Visual Motor Integration (VMI), which included low scores overall and in motor coordination and very low scores in visual perception (Parent Ex. D at p. 2; *see also* Parent Ex. S at pp. 15).<sup>15</sup>

Accordingly, the hearing record supports a finding that, while the district did not have updated information on all areas of the student's needs, the January 2012 CSE had sufficient information available in order to develop the IEP such that any violation of the IDEA arising from the sufficiency of the evaluative information before the CSE did not rise to the level of a denial of a FAPE.

## 2. Annual Goals

The parents contend that the IHO erred in finding that the annual goals included in the January 2012 IEP met the student's areas of need and were appropriate. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]).

The January 2012 IEP included annual goals to address the student's academic needs in reading and math (Dist. Ex. 4 at p. 4). Specifically, the January 2012 IEP addressed the student's reading skills with a goal designed to improve the student's ability to interpret and analyze complex ideas in various texts, including symbolization, characterization, conflict and irony (*id.*). Two annual goals addressed the student's needs in math and were designed to improve her ability to perform arithmetic operations and her ability to create equations and inequalities consisting of one variable (*id.*). These goals appropriately targeted the subject areas which the CSE agreed were area in which the student would receive ICT services (*id.* at pp. 2, 4, 5). Finally, the academic goals included the required evaluative criteria (4 out of 5 trials), evaluation procedures (teacher made materials, standardized tests, class activities, and/or teacher or provider observations), and schedules to be used to measure progress (bimonthly) (*id.* at pp. 4-5).

The parents also argues that the January 2012 IEP failed to include annual goals or services relating to the student's social skills, ADHD, OCD, PDD, handwriting, or counseling needs.

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<sup>15</sup> The VMI appears to have been administered in September 2010 (Parent Ex. S at p. 15).



Initially, every deficit area of the student's functioning need not have had a corresponding goal in the IEP (see, e.g., J.L. v. City Sch. Dist., 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013] [failure to address all areas of need though goals not a denial of FAPE]). Moreover, the IEP included an annual goal designed to address the student's social/emotional needs through OT, which indicated that the student would use stress reduction techniques learned during OT sessions throughout the school day (id.). Further, the transition plan included in the January 2012 IEP, described further below, indicated that the student should work with her guidance counselor and occupational therapist to decrease hers anxiety and improve her coping skills (id. at p. 7).<sup>16</sup>

Finally, to further support the student's needs and her ability to achieve her annual goals, the January 2012 IEP recommended the use of graphic organizers, a mathematical glossary of key terms and procedures for reference, use of a calculator and manipulative for math, and a Spanish tutorial website, as well as testing accommodations of separate location and extended time (Dist. Ex. 4 at pp. 2, 7). Accordingly, the evidence in the hearing record indicates that the annual goals included in the January 2012 IEP sufficiently addressed the student's areas of need and provided information to guide a teacher in instructing the student and measuring her progress (see D.A.B. v. New York City Dep't of Educ., 973 F.Supp.2d 344, 360 [S.D.N.Y. 2013]; J.L., 2013 WL 625064, at \*13).

### 3. Transition Services

Next, parents contend that the January 2012 IEP contained inadequate goals and services designed to prepare the student for post-school activities. Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). An IEP must also include the transition services needed to assist the student in reaching those goals (id.). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]). It has been found that "the failure to provide a transition plan is a procedural flaw" (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6, \*9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir.

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<sup>16</sup> In addition, with respect to goals related to counseling, the student's guidance counselors for the 2010-11 and 2011-12 school years testified that counseling sessions were "student directed" and addressed the student's social/emotional needs as they occurred (Tr. pp. 292-96, 309, 772-73). Further, the guidance counselors testified that they were available throughout the school day whenever the student felt she needed to leave the classroom to deal with social, emotional, or anxiety issues as they occurred (Tr. pp. 281-84, 309).

2012] and Bd. of Educ. v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]; see also A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*11 [S.D.N.Y. Mar. 19, 2013]).

According to the special education teacher, the transition plan included in the January 2012 IEP was developed based on the December 2011 student questionnaire (Tr. pp. 2240-41; Parent Exs. D at p. 3; S at pp. 57-58). Consistent with the student's plan to attend college after graduation and her expressed interest in business school, the January 2012 IEP reflects the student intent to attend a "4 year university" and possibly pursue a career in accounting or business (compare Parent Ex. S at pp. 57-58, with Parent Ex. D at p. 3). In addition, the IEP included a postsecondary goal that the student live independently and manage her own checking and savings account (Parent Ex. D at p. 3). To meet the student's post-secondary goals, the January 2012 IEP recommended a coordinated set of transition activities and services designed: to have the student graduate from high school; to decrease the student's anxiety and work on her coping skills in preparation for the increased academic demands of college; to gain community experiences through community service; and to encourage her to explore post-secondary institutions and possible career paths (id. at p. 7).

Based on the foregoing, the evidence in the hearing record supports a finding that the January 2012 IEP provided for goals, activities, and services to help the student prepare for post-secondary activities, employment, and living. Although the level of detail and measurability are marginal, any defects in the transition plan do not rise to the level of a denial of FAPE in this instance (see M.Z., 2013 WL 1314992, at \*9; A.D., 2013 WL 1155570, at \*11; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at \*9 [S.D.N.Y. Oct. 12, 2011]).

#### **D. Failure to Convene During the 2012-13 School Year**

The district asserts that the IHO erred in finding that the student's educational needs were not appropriately addressed during the first two thirds of the 2012-13 school as a consequence of the district's failure to convene the CSE, to conduct an FBA, to conduct new evaluations, or to provide home instruction (see IHO Decision at p. 38).

The IDEA requires a CSE to review and, if necessary, revise a student's IEP at least annually (20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). In addition, federal and State regulations also require a CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that, if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). State regulation further provides that, if appropriate, an IEP must be revised to address "any lack of expected progress toward the annual goals and in the general education curriculum," "the results of any reevaluation conducted . . . and any information about the student provided to, or by, the parents," or "the student's anticipated needs" (8 NYCRR 200.4[f][2][i-iii]).

The student's last annual review took place on January 6, 2012 and, according to the IEP developed at the January 2012 CSE meeting, it was to be implemented beginning January 12, 2012 and the student would be due for an annual review on January 3, 2013 (Parent Ex. D at pp. 1, 9).

There is no question that the district failed to convene an annual review.<sup>17</sup> Additionally, it was apparent that the program offered in the January 2012 IEP needed to be revised as of January 2013 as the student was having problems with excessive absences and her grades had diminished significantly.

The student's guidance counselor for the 2012-13 school year testified that the student's anxiety affected her attendance (Tr. p. 846). Furthermore, the guidance counselor testified that the student's problems with attendance were affecting her performance in school, particularly in math (Tr. pp. 786-87, 865-66). Although the student passed all of her classes during the first marking period, which ran for the first six to eight weeks of the school year, by the third marking period, which ran from the beginning of December 2012 through the end of January 2013, the student was failing math, English, and physical education (Dist. Ex. 13; see Tr. pp. 790, 1163-64). During the third marking period, the guidance counselor encouraged the parents to apply for homebound instruction for the student (Tr. pp. 789-90, 836-37, 908-09). She explained that homebound instruction might be "a better option for [the student] while she deals with everything going on" (Tr. pp. 940-41). Based on the above, the district was required to convene a CSE in January 2013 both based on the annual mandate, as well as based on the student's lack of progress, and its failure to do so directly contributed to a loss of educational benefit for the student as a continuation of the prior IEP was no longer appropriate.<sup>18</sup>

Moreover, the IHO's determination that the student received a FAPE once the student was placed on homebound instruction was in error (see IHO Decision at p. 38). Significantly, the student was not recommended for homebound instruction through the CSE as a placement on the continuum of services (Tr. pp. 4000-01). Rather, homebound instruction was provided to the student on an interim basis because she was unable to attend school due to her anxiety (see Tr. pp. 1191, 1245; Parent Ex. E). Districts must be careful not to confuse generalized homebound requirements with the in-home instruction identified in the IDEA (see In re New Jersey Dept. of Educ. Complaint Investigation C2012-4341, 2012 WL 4845648, at \*4 [NJ Super Ct App Div Oct. 11, 2012] [finding that a district could not avoid its obligation to provide special education home instruction by classifying a student's disorder as a "chronic medical condition" that only entitled him to homebound services]). The student did not have an IEP for the period she was on homebound instruction.<sup>19</sup> While the student was homebound, although she received instruction through the office of home instruction, the district did not evaluate the student, did not provide any

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<sup>17</sup> The principal acknowledged that the public school should have held an annual review meeting for the student in January 2013 (Tr. pp. 1245-46, 1308-09)

<sup>18</sup> While the IHO determined the district should have conducted an FBA for the student in the beginning of the 2012-13 school year due to her continued absence from school, the student did not begin to exhibit a significant problem with absences until December 2012 (see Dist. Ex. 14 at p. 3). Therefore, the annual review due in January 2013 would have been an appropriate time for the district to address the student's excessive absences, whether by conducting an FBA or by other means.

<sup>19</sup> There is a disagreement between the district's witnesses as to whether the public school or the office of home instruction was responsible for developing an IEP for the student after she was placed on homebound instruction in April 2013 (see Tr. pp. 1241, 1246, 1689-90, 3487-88; Parent Ex. Y at p. 18). Unfortunately, this disagreement appears to have resulted in the district's failure to convene an annual review meeting and develop an IEP for the student. It is ultimately the district's responsibility to have an IEP in effect for the student regardless of who it assigns to the task (see 8 NYCRR 200.4[e][ii]).

special education program or related services, did not provide transition services, and did not take any steps to determine whether the student could be educated in a less restrictive environment (see Questions and Answers on Providing Services to Children with Disabilities During an H1N1 Outbreak, 53 IDELR 269 [OSERS 2009] [noting that, while students with disabilities have the same right to homebound services that nondisabled students would have under the same circumstances, a district has specific obligations toward students with disabilities, including an obligation to convene a CSE to change the student's placement and modify the contents of his IEP, if warranted]). Accordingly, the district's failure to develop an IEP in January 2013 or thereafter during the 2012-13 school year was a denial of a FAPE (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 450 [2d Cir. 2015] [finding that "a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP"], quoting Forest Grove, 557 U.S. at 238–39).

### **E. 2013-14 School Year**

Although the IHO did not make an express finding that the district failed to offer the student a FAPE during the beginning of the 2013-14 school year, the IHO did determine that the district's failure to develop an IEP for the student and its failure to provide the student with homebound instruction were "inconsistent with the requirements regarding the provision of a special education" (IHO Decision at p. 41). The IHO then declined to consolidate this matter with another due process complaint filed on April 6, 2015 regarding the 2013-14 school year (April 10, 2015 Interim IHO Decision at p. 10). The IHO determined that the parents' claims related to the provision of homebound instruction for the 2013-14 school year arose after this action was commenced and would be addressed in a separate hearing based on the April 6, 2015 due process complaint notice (IHO Decision at pp. 41-42).

The parents contend on appeal that the IHO should have addressed the claims raised in the parents' due process complaint notice regarding the 2013-14 school year (Petition ¶¶61, 65). Upon review, I find that the parents' due process complaint notice in this matter included claims related to the 2013-14 school year, which the IHO should have addressed (Parent Ex. A at pp. 2, 5-7). Specifically, the parents alleged that the district failed to develop an IEP for the student for the 2013-14 school year and set forth allegations regarding the parents' attempts to get the district to provide the student with homebound instruction for the 2013-14 school year (*id.*). While the district did provide the student with homebound instruction beginning October 22, 2013 (Parent Ex. Q at pp. 1, 3, 25), it did not have an IEP in effect for the student as of the first day of the 2013-14 school year, as is required pursuant to the federal and State regulations, or thereafter (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at \*13 [S.D.N.Y. Aug. 23, 2012], *aff'd*, 530 Fed. App'x 81; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). Accordingly for similar reasons as to the 2012-13 school year, the district's failure to develop an IEP for the student for the 2013-14 school year resulted in a denial of FAPE.

## F. Relief

### 1. Eligibility

As noted above, in January 2014, the student had earned enough credits to graduate and was awarded a Regents diploma (Tr. pp. 327-29; see Dist. Ex. 26 at p. 1). In New York State, a student who is 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 (Educ. Law §§ 3202[1]; 4402[1][b][5]; 34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1]; 4401[1]; 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). Therefore, the student's eligibility for special education programs and services as a student with a disability ended upon her graduation in January 2014 (Educ. Law § 3202[1]; 34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; see *T.M. v. Kingston City Sch. Dist.*, 891 F. Supp. 2d 289, 294-95 [N.D.N.Y. 2012]).

The parents assert that the credits earned by the student while receiving homebound instruction should not have been awarded because the student did not receive an appropriate curriculum or sufficient instructional time.<sup>20</sup> However, an impartial hearing is not the proper forum for disputes involving a district's decision to award or its failure to award academic course credit because such hearings are limited to issues concerning the identification, evaluation, and educational placement of the student, or the provision of a FAPE to a student (20 U.S.C. § 1415[b][6]; 34 C.F.R. § 300.507[a][1]; 8 NYCRR 200.5[i]; Application of the Bd. of Educ., Appeal No. 10-124; see Letter to Silber, 213 IDELR 110 [OSEP 1987] [responding to a series of questions posed by a parent on topics including classification and a local agency's rules regarding the accumulation of credits toward graduation and holding that the only issue amenable to an impartial hearing under federal law was whether the student should be classified]). Further, graduation credits and requirements generally fall under the purview of the district's discretionary authority (see Educ. Law § 1709[3] [authorizing a board of education "to prescribe the course of study by which pupils of the schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant"]; Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 205-06 [2d Cir. 2007] [opining that students do not have a right under the IDEA "to graduate on a date certain or from a particular educational institution"]; see also Kajoshaj v. New York City Dep't of Educ., 543 Fed. App'x 11, 17 [2d Cir. Oct. 15, 2013], citing Matter of Isquith v. Levitt, 285 App. Div. 833 [2d Dep't 1955] ["After a child is admitted to a public school, the board of education has the power to provide rules and regulations for promotion from grade to grade, based not on age, but on training, knowledge and ability."]). Additionally, although the parents request that the IHO's determination that the student earned her Regents diploma be overturned, the hearing record reveals that the

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<sup>20</sup> There is a substantial amount of testimony in the hearing record regarding the number of hours of instruction time that the student received through the office of home instruction and the number of hours required for the student to have earned a credit (Tr. pp. 1832, 1850-51, 1969, 2024-25, 2421, 2480, 2599, 2971, 3098-99, 3233, 3235, 3267-71, 3275, 3467-70, 3665-69, 3695-98, 3706, 3722-23, 3733, 4312; Dist. Exs. 29; 31 at pp. 1-11; 34 at pp. 12-14; 38 at pp. 6-8; Parent Ex. Q at pp. 6-19, 26-30).

student and her parents requested that the school issue a diploma to the student (Tr. pp. 330-31, 333-37, 5172-73, 5317-18).

Accordingly, the student's graduation and receipt of a Regents diploma must be considered in the determining whether any relief may be awarded in this matter.

## 2. Compensatory Education

The IHO awarded the parents 300 hours of individual tutoring to compensate the student for the first eight months of the 2012-13 school year. In addition, the IHO ordered that the district provide the student with 24 30-minute sessions of counseling, 20 30-minute sessions of OT, and access to college preparation and guidance services. On appeal, the parent asserts that the IHO erred in finding that the parent had to prove a gross violation of the IDEA in order for the student to receive compensatory educational services. In addition, the parents request additional compensatory 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]).<sup>21</sup> 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 French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078 [2d Cir. 1988]; vacated sub nom. Sobol v. Burr, 492 U.S. 902 [1989], reaff'd, Burr v. Sobol, 888 F.2d 258 [2d Cir.1989]; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689-90 [S.D.N.Y. 2009]; cf. E. Lyme Bd. of Educ., 2015 WL 3916265, at \*12 n.15 [indicating that a showing of "gross procedural violations" is required when an award of compensatory education is requested by a student to whom a district's obligations under the IDEA have terminated]).

Here, as noted above, the student's eligibility for special education programs and related services as a student with a disability ended upon her graduation in January 2014 and, therefore, unless the district committed a gross violation of the IDEA, the student would not be entitled to compensatory education thereafter. In addition, given the fact that graduation and receipt of a high school diploma are generally considered to be evidence of educational benefit (Pascoe v.

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<sup>21</sup> State Review Officers also 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 a State Review Officer 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]; e.g., Application of a Student with a Disability, Appeal No. 08-072; Application of the Bd. of Educ., Appeal No. 08-060; 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).

Washington Cent. Sch. Dist., 1998 WL 684583, at \*4, \*6 [S.D.N.Y. Sept. 29, 1998]; see also Rowley, 458 U.S. at 207 n.28; Walczak, 142 F.3d at 130), the receipt of which terminates a student's entitlement to a FAPE (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; 200.4[i]), when taken together with the Second Circuit's standard requiring a gross violation of the IDEA during the student's period of eligibility (see Garro v. State of Connecticut, 23 F.3d 734, 737 [2d Cir. 1994]; Mrs. C., 916 F.2d at 75), it is a rare case where a student will graduate with a high school diploma and yet still qualify for an award of compensatory education (see, e.g., Application of a Student with a Disability, Appeal No. 13-215; Application of a Student with a Disability, Appeal No. 13-110; Application of a Student with a Disability, Appeal No. 11-159).

Under the circumstances of this case, although the student was not completely deprived of all education and passed her classes and obtained a Regents diploma, the district wrongfully failed to convene a CSE and provide special education services to the student for approximately one year (see S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at \*13 n.5 [E.D.N.Y. Mar. 30, 2014]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*25 [E.D.N.Y. Oct. 30, 2008]).<sup>22</sup> Thus, the hearing record in this instance supports a finding that this case presents the rare situation where a student has graduated and lacks statutory eligibility for special education but has nevertheless met the threshold for compensatory education because the special education services for which she had been entitled were denied her for a substantial period of time (see Mrs. C., 916 F.2d at 75). In contrast, in accord with the determination of the IHO, the hearing record does not support a finding that the bullying, alone, amounted to a gross violation of the IDEA. That is, as a result of the bullying, the student was not denied or excluded from educational services for a substantial period of time until, arguably, that point which overlaps in time with the violation arising from the district's failure to convene the CSE and to deliver special education to the student after she began receiving homebound instruction. Accordingly, it is now necessary to consider what relief, if any, is appropriate to remedy the gross violation of the IDEA from January 2013 through January 2014.

The purpose of an award of compensatory 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"]). Accordingly, a compensatory award of services should aim to place the student in the

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<sup>22</sup> While the district failed to offer or provide the student with any special education services during the period of time that she received homebound instruction beginning in April 2013, the hearing record is unclear as to whether or not the district continued to provide the student the services recommended in the January 2012 IEP between January 2013 when the district failed to convene for the student's annual review, and April 2013. Accordingly, for the purposes of calculating a compensatory education remedy, the period of time considered shall be from January 2013, when the CSE failed to convene to conduct an annual review, through January 2014, when the student received her diploma.

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., 2014 WL 1311761, at \*7 [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"]).

#### **a. Tutoring Services**

The parents request 1:1 tutoring services to make up for missed instructional time.<sup>23</sup> As set forth above, the student was denied a FAPE due to the district's failure to develop an IEP for the student during or after January 2013. Although the student did not have an IEP, the student did receive regular education instruction through the office of home instruction. For the 2012-13 school year, the student was provided with homebound instruction beginning April 16, 2013 through the end of the 2012-13 school year (Parent Ex. Q at pp. 2, 5). During that semester, the student received Bs in all of her classes and scored a 63 on her ELA Regents exam and a 62 on her Global History Regents test (Dist. Ex. 11). For the 2013-14 school year, the student began receiving homebound instruction at the end of October 2013 (Parent Ex. Q at pp. 1, 3, 25). During the first semester of the 2013-14 school year, the student received As and Bs in all of her classes and scored a 73 on her ELA Regents exam and an 84 on her Global History Regents exam (Dist. Ex. 26 at p. 1). In January 2014, the student had earned enough credits to graduate and the student was awarded a Regents diploma as she earned passing scores (65 or above) on the five required

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<sup>23</sup> A significant portion of the parents' request for compensatory education is based on a discrepancy between the number of hours of instruction students are required to receive in school, 180 minutes per week for each credit (8 NYCRR 100.1[a], [b]), as opposed to the number of hours of instruction districts are required to provide as part of homebound instruction, a minimum of 10 hours per week for all subjects (8 NYCRR 175.21; 200.6[i][2]). The approach does not take into account the purpose or nature of homebound instruction or the benefit received by the student as a consequent of the homebound instruction.



Regents exams (Tr. pp. 327-29; see Dist. Ex. 26 at p. 1).<sup>24</sup> The student testified that she benefited from homebound instruction and believed that she received the instruction that she needed from her home instructors (Tr. pp. 5321-23). She also testified that she wanted to graduate in January 2013 and seemed proud of having earned her diploma (Tr. pp. 5201, 5307-08, 5317-18).

On the other hand, a January 2014 private educational evaluation report indicated that the student exhibited "marked delays in many key academic areas that could markedly impact future education and/or training" and recommended "academic remediation to address these deficits" (Parent Ex. T at p. 8).<sup>25</sup> Other than asserting that the student should receive no compensatory education due to her graduation, the district does not offer any argument for or against a particular means for calculating an award. Based on the state of the hearing record, the compensatory award will be calculated using a largely quantitative approach. Reviewing the parents' different proposed calculations, the most aligned with the district's gross violation of the IDEA and with the student's needs operates by looking back to the student's last January 2012 IEP and the services recommended therein (see Parent Ex. D at p. 9). The January 2012 CSE recommended that the student receive ICT services daily for instruction in math and ELA (id. at p. 5).

To the extent these ICT services might serve as a basis from which to calculate compensatory education, however, these must be viewed in the context of the homebound instruction the student received. While student received homebound instruction, she completed two math courses and three ELA courses (see Dist. 11 at p. 1). The compensatory services shall

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<sup>24</sup> The parents contend that the district improperly failed to provide them with prior written notice of the student's graduation. Graduation from high school is a change in placement (8 NYCRR 200.1[h]) and the district is required to provide parents with prior written notice any time a district proposes or refuses to "initiate or change the identification, evaluation, or educational placement of [a] child or the provision of FAPE to the child" (34 CFR 300.503[a]; 8 NYCRR 200.5[a]). However, in this instance, the student and her parents requested that the school issue her a diploma so that she could graduate from high school (Tr. pp. Tr. pp. 330-31, 333-37, 5172-73, 5317-18). Accordingly, while the failure to provide prior written notice is a procedural violation, it did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

<sup>25</sup> The parents contend that the IHO erred in discrediting the January 2014 private educational evaluation report. Generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist., 2015 WL 787008, at \*16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). In the instant case, while the IHO indicated that the report "lacked credibility," her findings appear more related to the weight that she decided to afford to the evaluation report, rather than to her observations of the private evaluator's demeanor during testimony or any discrepancies between his testimony and any documentary evidence in the hearing record (see S.W. v New York Dept. of Educ., 2015 WL 1097368, at \*15 n.6 [SDNY Mar. 12, 2015] [noting that an IHO's decision to discredit portions of a document was not based on a credibility determination of a witness and that the SRO had the same ability to weigh the evidence]; see, e.g., Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 429 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). Accordingly, as the document speaks for itself, to the extent that I agree or disagree with IHO's findings of fact, it is with regard to the weight to be accorded to the private evaluation report, not the credibility of its content (see L.K. v. Ne Sch. Dist., 932 F. Supp. 2d 467, 487-88 [S.D.N.Y. 2013]; E.C. v. Bd. of Educ., 2013 WL 1091321, at \*18 [S.D.N.Y. Mar. 15, 2013]; J.L., 2013 WL 625064, at \*9-\*10; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581 [S.D.N.Y. 2013]).

be calculated based on a 180 day school year, the 10 or 12 hours of instruction per week of homebound instruction, and approximately 10 academic courses completed during the relevant time frame (which totals 40 hours of instruction for each course for purposes of this calculation).<sup>26</sup> Five ELA and math courses during the relevant time period at 40 hours each equals 200 hours. State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). State regulation requires that an ICT class must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). Thus, taking into account that the student received academic instruction but not specially designed instruction during the time she was receiving homebound instruction and that the student received benefit from the homebound instruction such that she successfully graduated with a Regents diploma, the 200 hours should be divided in half. Accordingly, to pursuant to the IDEA, the hearing record supports an award of 100 hours of 1:1 tutoring sessions in the areas of ELA and math.<sup>27</sup>

### **b. Occupational Therapy**

In this instance, the district's failure to provide mandated related services during the period of time the student was placed on homebound instruction also warrants the provision of missed related services as compensatory education. The IHO awarded the student 10 hours of OT to make up for services missed during the 2012-13 school year based on the district's failure to prove that it provided the student with OT after June 2012 (IHO Decision at p. 41).<sup>28</sup> However, while the parents' due process complaint notice contains an allegation that the district failed to provide related services while the student was receiving homebound instruction, it does not contain any allegations that the district failed to implement the OT services recommended in the January 2012 IEP while the student attended the district public school (see Parent Ex. A).

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<sup>26</sup> There is a substantial amount of evidence in the hearing record regarding the number of hours of instruction time that the student received through the office of home instruction and the number of hours required for the student to have earned a credit (Tr. pp. 1832, 1850-51, 1969, 2024-25, 2421, 2480, 2599, 2971, 3098-99, 3233, 3235, 3267-71, 3275, 3467-70, 3665-69, 3695-98, 3706, 3722-23, 3733, 4312; Dist. Exs. 29; 31 at pp. 1-11; 34 at pp. 12-14; 38 at pp. 6-8; Parent Ex. Q at pp. 6-19, 26-30). Nothing in this analysis should be deemed a finding with respect to such matters. The calculations provided are a means of reaching an equitable award to remedy the district's denial of a FAPE under the facts presented.

<sup>27</sup> As noted previously, the parents' due process complaint notice asserted other statutory bases for their claims aside from the IDEA (Parent Ex. A at pp. 1, 2, 7, 8, 9), and the IHO's decision may be reasonably read as determining that the student was entitled to compensatory education services due to section 504 violations (IHO Decision at p. 42). Further, the district does not argue on appeal that the impartial hearing officer awarded compensatory education relief that was attributable solely to an IDEA violation. Consequently, I will not disturb the compensatory education relief granted by the IHO to the extent the parties construe such relief as applicable to the IHO's section 504 determination.

<sup>28</sup> The IHO Decision actually refers to June 2013; however, as the 2012-13 school year ended in June 2013 and as the document cited to by the IHO included a list of dates OT was provided up to June 2012, it appears the IHO intended to refer to June 2012 (IHO Decision at p. 41; see Parent Ex. R at pp. 22-23).

Additionally, the district failed to provide the student with OT (or any other related services) during the 2013-14 school year (Tr. pp. 5192-93).<sup>29</sup> The January 2012 IEP had recommended two 30-minute sessions of individual OT per month (Parent Ex. D at p. 5). For the period in which a gross violation of the IDEA occurred, the student missed approximately 10 months of OT services (see Dist. Ex. 14). Accordingly, while on different grounds than those described by the IHO, the IHO's ultimate determination that the student should be awarded 10 hours of OT services is affirmed. The district is ordered to provide these services in the student's home as compensatory education.<sup>30</sup>

### **c. Counseling**

During the hearing, the parents' requested 40 hours of counseling as compensatory education for the district's failure to provide counseling in accordance with the January 2012 IEP and failure to provide the student with counseling during the period the student was receiving homebound instruction (IHO Ex. XXXIV at p. 29). The IHO awarded 12 hours of counseling services to make up for services the district did not provide while the student was on homebound instruction from April through June 2013 (IHO Decision at p. 40). Although the parents' alleged in their post-hearing brief that the district did not provide counseling in accordance with the January 2012 IEP, the parents' due process complaint notice did not include a claim that the January 2012 IEP was not properly implemented (compare IHO Ex. XXXIV at p. 25, with Parent Ex. A).<sup>31</sup>

Like OT, there is no indication in the hearing record that the student received counseling services during the period of time in which a gross violation occurred. The January 2012 IEP included recommendation for one 30-minute session of group counseling per week (Parent Ex. D at p. 5). During that time, the student missed approximately 36 weeks of counseling. As compensation for the missed counseling services, the student should receive 18 hours of 1:1 counseling to be provided in the student's home.

### **d. Transition Services**

With regard to transition planning, the IHO awarded the student "access to college preparation and guidance services" at the public school (IHO Decision at p. 41). The parents

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<sup>29</sup> Similar to the problems in developing an IEP for the student after the student began receiving instruction at home, staff from the office of home instruction and the student's public school offered conflicting testimony as to who was responsible for providing the student with related services while the student was receiving homebound instruction (Tr. pp. 1247-48, 1273, 3326, 3615-17, 4026-27). Nevertheless, the district remained responsible for providing the student with related services set forth on her last IEP (see 8 NYCRR 200.4[e][7]).

<sup>30</sup> In the petition the parents request transportation to and from the awarded compensatory services (Amended Petition ¶64); however, as the student missed services while on homebound instruction, the missed services should have been provided in the student's home and transportation would therefore be unnecessary.

<sup>31</sup> Additionally, contrary to the parents' assertions, the hearing record indicates that the student received some counseling services from the district during the 2011-12 and 2012-13 school years (Tr. pp. 312-13, 762-63). Although the January 2012 IEP recommended group counseling (Parent Ex. D at p. 5), both of the student's counselors provided the student with individual counseling because they believed individual sessions were more appropriate for the student (Tr. pp. 312-13, 797-99).

request additional transition services; however, the parents request is not entirely clear. The parents request an extension of the student's eligibility based on the district's failure to provide transition services—but the parents do not identify what services they expect the district to provide other than preparation for college and independent living, "including any academic remediation, study assistance, computer skills, self-advocacy, and other similar skills" (IHO Ex. XXXIV at p. 30).<sup>32</sup>

As noted above, the student's long term transition goals included graduation from high school and looking into post-secondary education (Parent Ex. D at p. 7).<sup>33</sup> As of the date of the hearing the student had already accomplished both of those goals. According to the student's testimony, the student was admitted to attend a four year college associated with the City University of New York (CUNY) and was enrolled in the CUNY Start program (Tr. pp. 4972-75).<sup>34</sup> As compensatory award should attempt to place a student in the position he or she would have occupied if not for the violations of the IDEA (Newington, 546 F.3d at 123; S.A., 2014 WL 1311761, at \*7), and the student is currently enrolled in college, transition services in the form of college preparation and guidance are not appropriate. Accordingly, the IHO's award of those services is reversed. However, to the extent the student requires assistance with computer skills, study skills, or self-advocacy, she is encouraged to contact the State Education Department's Office of Adult Career and Continuing Education Services and the State Office for Persons with Developmental Disabilities.

## **2. Reimbursement for IEEs**

The parents contend that the IHO erred in failing to order IEEs at public expense. The parent is requesting IEE's conducted by a neuropsychologist, a speech-language therapist, an assistive technology evaluator, and a writing specialist. 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]).

The parents contend that due to the lack of recent evaluations in the hearing record, the IHO abused her discretion by failing to order IEEs for the purpose of developing the record. However, the IHO determined that IEEs would not be helpful in determining an award of

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<sup>32</sup> To the extent that the parents request academic remediation, academic remediation is not transition planning and it relates more to the parents' request for 1:1 tutoring services, addressed above. Additionally, despite the voluminous hearing record, there is no reference of the student having deficiencies in computer skills, study skills, or self-advocacy.

<sup>33</sup> The transition plan also included a goal to work on coping skills and decreasing anxiety in preparation for college (Parent Ex. D at p. 7); however, that goal involved the support of an occupational therapist and counselor and can be addressed in the OT and counseling sessions already awarded to make up for missed services.

<sup>34</sup> Because the student had only passed one out of three of the CUNY placement tests, the student was required to take the CUNY Start program and retake the placement tests prior to taking credit-bearing classes (Tr. pp. 4974-75). The purpose of the CUNY Start program is to prepare the student to pass the placement tests (Tr. p. 4973-74).

compensatory education because for the purpose of making a comparison of the student's educational needs, the hearing record did not include a picture of the student's functioning prior to the district's failure to provide the student with a FAPE, nor was an IEE able to identify the student's functioning as of her graduation from school (id. at p. 43). The IHO correctly noted that an IEE may be useful in determining an award of compensatory education (IHO Decision at p. 43; see Application of a Student with a Disability, Appeal No. 15-150), and it is within an IHO's authority to order an IEE at public expense (8 NYCRR 200.5[g][2]); however, the hearing record does not support the parents' contention that the IHO's failure to order one in this instance was an abuse of her discretion. This is particularly so, as the parents have not attempted to make a comparison of the student's educational needs, but rather seek compensatory education based solely on the number of instructional hours that the parents felt the student had missed (see IHO Ex. XXIV at pp. 24-27).

The parents also request an IEE at public expense based on the district's failure to defend its evaluations of the student; however, the district correctly points out that the parents did not disagree with any district evaluation or request an IEE prior to the filing of the due process complaint notice. Parents have the right to have an IEE conducted at public expense if the parent disagrees 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 [at public expense] is a disagreement with a specific evaluation conducted by the district"]). If a parent requests an IEE at public expense, the 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 district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]).

The parents contend that their request for a IEEs was contained within the due process complaint notice, and a review of the parents' due process complaint notice confirms that the parents requested IEEs, specifically: a neuropsychological evaluation, evaluation by an expert in OCD and anxiety, an observation, an assistive technology evaluation, a vocational assessment, a speech-language evaluation, and an optometry assessment (Parent Ex. A at p. 8).<sup>35</sup> However, nowhere in the due process complaint notice did the parent point to a specific evaluation conducted by the district with which the parents disagreed, other than general allegations that the district did not reevaluate the student (see Parent Ex. A). Additionally, as noted above, although the district may not have conducted a full reevaluation of the student within the three years prior to the January 2012 CSE meeting, at the time of the January 2012 CSE the district had conducted a number of evaluations with which the parent could have disagreed (Parent Ex. N at pp. 2-9; S at pp. 31-35, 38-51, 56-58) and conducted further evaluations thereafter as part of the reevaluation process (Parent Ex. S at pp. 29-30, 54-55). As the parents' request for IEE's merely requested evaluations, and did not identify any specific evaluations with which the parent disagreed or that the parents thought the district should have conducted, the parents' request does not meet the statutory requirements (see R.H. v. Fayette Cnty. Sch. Dist., 2009 WL 2848302, at \*3 [N.D. Ga. Sept. 1, 2009] [parents failed to request IEE but, "[i]n any event, such a request would have been

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<sup>35</sup> During the hearing the parents abandoned their claim for an evaluation by an expert in OCD and anxiety and for an observation of the student (Tr. pp. 3939-40).

inappropriate because there was no existing evaluation with which the parents disagree"]; Krista P. v. Manhattan Sch. Dist., 255 F. Supp. 2d 873, 889 [N.D. Ill. 2003] [no reimbursement where district decided not to conduct an evaluation and "there was no evaluation . . . to disagree with"]; but see Letter to Baus, 65 IDELR 81 [OSEP 2015] [indicating that if a parent disagrees with an evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area]).

## **VII. Conclusion**

In summary, the evidence in the hearing record establishes that the district offered the student a FAPE for the first half of the 2012-13 school year and the IHO's determination to the contrary is reversed. In addition, the evidence in the hearing record establishes that the district committed a gross violation of the IDEA warranting an award of compensatory education for that period of time commencing in January 2013 and concluding upon the student's receipt of a Regents diploma in January 2014.

I have considered the parties' remaining contentions and find them to be without merit.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated April 20, 2015, is modified, by reversing those portions which found a gross violation of the IDEA for a time period prior to January 3, 2013 and which failed to find a gross violation of the IDEA for that period of time between Jan 3, 2013 and the student's receipt of a Regents diploma in January 2014; and

**IT IS FURTHER ORDERED** that the IHO's decision, dated April 20, 2015, is modified by reversing the compensatory services awarded pursuant to the IDEA; and

**IT IS FURTHER ORDERED** that the district shall provide the student with compensatory services pursuant to the IDEA consisting of: 100 hours of individual tutoring by a special education teacher in the areas of math and ELA; 10 hours of individual OT services; and 18 hours of individual counseling services; and

**IT IS FURTHER ORDERED** that all additional services are to be provided at the student's home or if the parties otherwise agree at a location to be determined by the parties, that the services shall be used by the student within one year of the date of this decision unless the parties otherwise agree, and that if the district is unwilling or unable to provide these services it shall provide the parent with authorization to obtain these services at district expense.

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

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**