



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 15-088

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Red Hook Central School District**

### **Appearances:**

Lorraine McGrane, Esq., attorney for petitioners

Girvin & Ferlazzo, PC, attorneys for respondent, Karen S. Norlander, 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 their claims concerning the 2011-12 and 2012-13 school years are time barred, denied their request for reimbursement for privately obtained services and compensatory education for the 2013-14 school year despite finding that respondent's (the district's) Committee on Special Education (CSE) failed to offer the student an appropriate educational program for that year, and found the educational program the CSE recommended for their son for the 2014-15 school year was appropriate. The appeal must be sustained in part.

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

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

At all times relevant to this appeal, the student was eligible for special education and related services as a student with multiple disabilities (Joint Exs. 5 at p. 44<sup>1</sup>; 7 at p. 96; 9 at p. 138; Parent Exs. L at p. 384; N at p. 399).<sup>2</sup> The hearing record indicates that the student's strengths included

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<sup>1</sup> The parties cumulatively numbered the joint and parent exhibits in sequential order (see Joint Exs. 1-70; Parent Exs. A-QQ); the citations in this decision conform to the format used by the parties for ease of reference.

<sup>2</sup> The student's eligibility for special education programs and related services as a student with multiple disabilities

being pleasant, social, and cooperative and having average verbal abilities, auditory attention, word reading skills, and spelling skills (Joint Exs. 12; 18 at pp. 206-09, 211-12, 228). His areas of need included below average visuo-perceptual abilities, processing speed, organizational skills, working memory, writing skills, mathematics, and fine motor skills (Joint Ex. 18 at pp. 206, 210-13, 221, 228-29).

On March 3, 2011, the CSE convened for the student's annual review and to develop an IEP for the 2011-12 (fourth grade) school year (Parent Ex. N at p. 399). The CSE recommended a combined program consisting of a 12:1+1 special class placement and ICT services (*id.* at pp. 399, 407). In addition, the CSE recommended related services on a weekly basis consisting of individual counseling, counseling in a small group, individual occupational therapy (OT), and OT in a small group (*id.*). The CSE also recommended biweekly one-hour sessions of individual resource room services during the summer months (*id.* at pp. 399, 408).

The student and his family moved out of the district for a portion of the 2011-12 school year (Joint Exs. 28 at p. 273; 31 at p. 287; Parent Ex. L at p. 396). On March 7, 2012, the CSE convened for a transition plan review and to develop an IEP for the 2012-13 school year after the student returned to the district (Parent Ex. L at pp. 384, 396). The CSE recommended a combined program consisting of a 12:1+1 special class placement and ICT services (*id.* at pp. 384, 393). In addition, the CSE recommended related services of individual OT, OT in a small group, and speech-language therapy in a small group (*id.*). The CSE recommended two one-hour sessions of individual tutoring during the summer months (*id.*). On September 12, 2012, the CSE convened to amend the student's IEP and added recommendations for counseling in a small group and an additional social/emotional annual goal (Parent Ex. K at pp. 370, 378-79). By prior written notice dated September 21, 2012, the CSE indicated that it proposed to add group counseling to the student's program as he "demonstrate[d] difficulties with self-confidence as a learner" (*id.* at p. 13).

On May 24, 2013, the CSE convened for the student's annual review and reevaluation, and to develop an IEP for the 2013-14 school year (Joint Ex. 9 at p. 138). The CSE recommended a combined program consisting of a 15:1+1 special class placement for math, a 15:1 special class placement for reading, and a class providing ICT services for science, social studies, and English (*id.* at pp. 138, 149, 153). In addition, the CSE recommended related services of counseling in a small group, individual OT, and OT in a small group (*id.* at pp. 138, 149). The CSE also recommended two one-hour tutoring sessions per week during the summer (*id.* at pp. 138, 150).

On February 26, 2014, the CSE convened at the parents' request (Joint Ex. 8 at p. 118). By prior written notice dated April 1, 2014, the CSE recommended an "assistive technology evaluation, math evaluation, adding reading support and allowing [the student] to access a keyboard and/or computer for word processing whenever and wherever possible" (*id.* at p. 136).

On June 3, 2014, the CSE convened for the student's annual review and to develop his IEP for the 2014-15 school year (Joint Ex. 7 at p. 96). The CSE recommended a program consisting of a 15:1+1 special class placement for math, a 15:1 special class for study skills and ICT services for science, English, and social studies (*id.* at pp. 96, 111). In addition, the CSE recommended

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is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

related services consisting of individual OT and individual counseling (*id.*). The CSE recommended that the student receive two one-hour tutoring sessions and one session of OT per week during the summer (*id.* at pp. 96, 113). By prior written notice dated June 3, 2014, the CSE indicated that it had "requested [a] neuropsychological evaluation" (*id.* at pp. 21-22). The prior written notice also set forth that the CSE agreed "to order the materials stemming from the assistive technology evaluation" (*id.*).

On September 19, 2014, the CSE convened for a requested review and determined that "the student's disability adversely affects [his] ability to learn a language" and the CSE recommended "the student be exempt from the language other than English requirement" (Joint Ex. 6 at pp. 72, 91).

On October 17, 2014, the CSE convened for a requested review (Joint Ex. 5 at p. 44). By prior written notice dated October 29, 2014, the CSE agreed to "explore CogMed – an online executive functioning/working memory program" (*id.* at p. 70).<sup>3</sup> The CSE also "considered increasing supports given continued difficulties; books on alternative format, classes with soundfield systems, reading and math tutor on alternating days" (*id.*).

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

By due process complaint notice dated January 6, 2015, the parents alleged that the district denied their son a free and appropriate public education for the 2011-12, 2012-13, 2013-14, and 2014-15 school years (Joint Ex. 1 at p. 9). Initially, the parents argued that an exception to the two year statute of limitations applied in this case because the district withheld information from the parent (*id.* at p. 3). The parents claimed that the present levels of performance in the student's IEPs for the 2012-13 and 2013-14 school years were based on outdated information and, as a result, the student's annual goals and objectives were not appropriate for the 2012-13, 2013-14, and 2014-15 school years (*id.* at pp. 10, 12). The parents next alleged that the district denied the student a FAPE by failing to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP), such that the student's behaviors were not adequately addressed for the 2011-12, 2012-13, and 2013-14 school years (*id.* at pp. 9, 13). The parents also contended that without discussion by the CSE, the student's IEP for the 2014-15 school year no longer identified the student as a student who required positive behavioral interventions and supports (*id.* at p. 11). With regard to particular school years, the parents contended that the September 2012 CSE was not properly constituted because a regular education teacher was not in attendance (*id.* at p. 11). The parents asserted that the district removed the student from his special class in math during the 2013-14 school year without obtaining the parents' consent (*id.* at p. 10). The parents next claimed that the CSE predetermined that the student's counseling services would be provided on an individual basis for the 2014-15 school year despite the progress he made in group counseling (*id.* at p. 11). The parents alleged that the district failed to implement the June 2014 IEP by failing to provide summer tutoring in math (*id.* at pp. 11-12). The parents also contended that the district improperly denied them access to the student's educational records (*id.* at p. 11). For relief, the parents requested "an appropriate IEP" for the student, reimbursement for privately-obtained tutoring and counseling services, compensatory education, a neurodevelopmental independent

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<sup>3</sup> The hearing record reflects that CogMed is an online software-based program which addresses executive functioning, planning, memory, and organizational skills (Tr. pp. 66-67).

educational examination (IEE),<sup>4</sup> and training for district employees with respect to FBA and BIP implementation and the use of assistive technology (*id.* at pp. 14-15).<sup>5</sup>

## **B. Impartial Hearing Officer Decision**

After prehearing conferences held on February 19, 2015, and March 6, 2015, the parties proceeded to an impartial hearing commencing on March 11, 2015, and concluding on May 8, 2015, after six days of proceedings (Tr. pp. 1-1397; *see* Joint Exs. 67-68).<sup>6</sup> By interim order dated March 27, 2015, the IHO found that the parents' claims relating to the 2011-12 and 2012-13 school years accrued outside the applicable limitations period (IHO Ex. IV; *see* IHO Exs. I-III). In particular, the IHO determined that independent educational evaluations obtained by the parents in November 2013 and August 2014, although offering the student additional diagnoses, were generally consistent with evaluative information dating to November 2012 (IHO Ex. IV at pp. 6-7). The IHO observed that the student's classification and educational placement were not in dispute (*id.* at p. 7). The IHO further found that the parents' claims prior to the 2013-14 school year did not fall within the exceptions to the statute of limitations (*id.* at p. 5). The IHO found that the district did not withhold evaluations from the parents prior to the parents' request for an IEE, and that the district did not fail to conduct an evaluation of the student or engage in "the level of intentional and willing deceit required" for an exception to the statute of limitations to apply (*id.* at p. 6). The IHO found that the parents were precluded from raising the argument that an exception to the limitations period applied on the basis that the district failed to provide them with copies of the procedural safeguards notice required by State regulations because they did not raise the argument in their due process complaint notice (*id.* at p. 4). The IHO held that the impartial hearing was limited to the parents' claims arising during the 2013-14 and 2014-15 school years (*id.* at p. 8).

By final decision dated July 22, 2015, the IHO held that the district denied the student a FAPE for the 2013-14 school year and offered the student a FAPE for the 2014-15 school year, and denied the parents' request for relief (IHO Decision at pp. 30-31). The IHO found that the district was responsive to the parents' request for the student's education records and that the

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<sup>4</sup> The parents withdrew this request during a prehearing conference (IHO Decision at p. 6; Joint Ex. 67 at p. 332).

<sup>5</sup> The parents also raised the additional claim in their due process complaint notice that the district discriminated against the student in violation of section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act (*id.* at p. 13). This claim is not raised on appeal and will not be further addressed. The parents also raised claims in their due process complaint notice that they withdrew during the impartial hearing (Tr. pp. 8-11; *see* Joint Ex. 1 at pp. 10, 12).

<sup>6</sup> After the second prehearing conference, by letter to counsel for the parties dated March 6, 2015, the IHO indicated that the conference had been held to clarify the issues to be determined and stated the parties' understanding that the impartial hearing was limited to a determination of the parents' claims relating to the 2013-14 and 2014-15 school years, specifically their challenges regarding (1) the present levels of performance and annual goals on the student's IEPs for both years; (2) the district's alleged failure to adequately evaluate, describe, and address the student's behavioral needs for both years; (3) the student's removal from his special class in math during the 2013-14 school year; (4) the district's failure to implement the student's IEP by not providing the student with math tutoring during summer 2014; and (5) the district's failure to provide the parents with the student's education records when requested (Joint Ex. 68). The letter indicated that the parents requested compensatory services as relief (*id.*).

parents were in the best position to advise the district if they felt the response was incomplete (id. at p. 29). With respect to the 2013-14 school year, the IHO held that the present levels of performance contained in the May 2013 IEP reflected consideration of the evaluative information available to the CSE and were accurate and sufficient to describe the student's academic, social/emotional, and physical functioning and his management needs (id. at pp. 15, 28). The IHO determined that although the student required positive behavioral interventions and supports to address his organizational needs, the student did not demonstrate interfering behaviors, it was not necessary for the district to conduct an FBA, and the IEP adequately described and addressed the student's organizational needs (id. at pp. 16, 28-30). However, the IHO observed that despite the student's acknowledged needs with respect to recalling math facts, addition, subtraction, multiplication, and division, there were no goals developed regarding the student's difficulties with these areas, and held that the annual goals were not appropriate to meet the student's needs in those areas, reading, or writing (id. at pp. 17, 28). The IHO also held that the district's removal of the student from a special class in math into a general education math class with ICT services without written parental consent was not appropriate (id. at pp. 17-18, 21, 29). Based on the foregoing, the IHO held that district did not offer the student a FAPE for the 2013-14 school year (id. at p. 30).<sup>7</sup>

With respect to the 2014-15 school year, the IHO held that the June 2014 CSE accurately described the student's present levels of performance and the annual goals in the June 2014 IEP were appropriate to address the student's needs (IHO Decision at pp. 13, 23, 28). As to the parents' claim that the district failed to implement tutoring services during summer 2014, the IHO found that the parents waived the student's right to the tutoring services by not informing the district that the student was not receiving the services (id. at pp. 25, 29). The IHO further held that student did not demonstrate behaviors that interfered with his ability to learn such that it was necessary for the district to conduct an FBA and that his organizational needs were appropriately addressed in his IEP (id. at pp. 29-30). Accordingly, the IHO found that the district offered the student a FAPE for the 2014-15 school year (id. at p. 30).

The IHO denied the parents' request for compensatory services (IHO Decision at pp. 30-31). The IHO noted the district began providing the student with supplemental 1:1 tutoring in November 2014 for between two and three hours per week to address his skill deficits in the areas of math, reading, writing, organization, and keyboarding, and held that the tutoring provided by the district sufficiently addressed any deficiencies in the program provided to the student for the 2013-14 school year and any harm caused by the removal of the student from the special class in math during that year (id. at pp. 26-27, 30-31). The IHO further denied the parents' request that certain training be mandated for district employees (id. at p. 31). Finally, the IHO also found that the parents were not the prevailing parties at the impartial hearing (id.).

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

The parents appeal from both the interim and final decisions, contending that the IHO misapplied the statute of limitations and the matter should be remanded for further consideration of the parents' claims concerning the 2011-12 and 2012-13 school years, the IHO erred in finding

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<sup>7</sup> The district does not appeal this finding. Accordingly, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

in favor of the parents on additional denials of a FAPE for the 2013-14 school year and not awarding compensatory education for the district's failure to offer the student a FAPE, and the IHO erred in finding that the district offered the student a FAPE for the 2014-15 school year. The parents also allege that the IHO was biased in favor of the district and improperly shifted the burden of proof to the parents.

The parents allege that the IHO erred in holding that the parents' claims relating to the 2011-12 and 2012-13 school years were time-barred, improperly calculated the limitations period using school years instead of calendar years, and failed to find that an exception to the time limitation applied on the basis that the district withheld the student's education records and failed to provide the parents with the required notice of procedural safeguards. The parents contend that the district intentionally omitted some records from its response to the parents' record requests and that the IHO erred in finding that the district met its obligation to provide them the student's education records. The parents assert that the IHO erred in holding that the district was not required to conduct an FBA of the student, that the student's organizational needs impeded his ability to learn, and that the district did not adequately address the student's organizational needs. The parents assert that the district did not develop appropriate goals to address the student's needs for the 2014-15 school year. The parents also argue that the IHO erred in failing to award them reimbursement for privately-obtained keyboarding instruction and counseling services to address the student's needs in light of the district's failure to provide mandated math tutoring during summer 2014. The parents also allege that the IHO erred in failing to fashion a compensatory education award and that the supplemental tutoring offered during the 2014-15 school year was insufficient to remedy the past denial of a FAPE and was intended to serve the student's current educational needs in the 2014-15 school year. Finally, the parents allege that the IHO improperly found that the parents were not prevailing parties at the hearing.

In an answer, the district admits and denies the allegations in the petition.<sup>8</sup> The district argues that the IHO properly placed the burden of proof on the district at the hearing and there was no evidence of bias on the part of the IHO. The district alleges that the IHO properly dismissed the parents' allegation that they were denied access to the student's educational records. The district next contends that the IHO appropriately ruled that the parents' claims regarding the 2011-12 and 2012-13 school years were time barred and that the district's alleged failure to provide notice of procedural safeguards should not create an exception to the limitations period because the parents did not raise this alleged procedural violation in their due process complaint notice and should not be allowed to raise this issue for the first time on appeal. The district argues that the

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<sup>8</sup> Along with the answer, the district submits an affidavit from a district employee appending additional evidence including the student's report card for the 2014-15 school year, a progress report for the 2014-2015 school year, a prior written notice dated June 11, 2015, and portions of an IEP for 2015-16 school year. The district offers this additional evidence in order to support its position of an "ongoing commitment to afford [the student] with supplemental compensatory education beyond his individualized education program." Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 15-033; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013]). Since these documents postdate the impartial hearing and concern the issue of compensatory services, which is at issue in this matter, I consider this additional evidence to the extent relevant to the development of any necessary award of compensatory services.

IHO appropriately found that it was not required to conduct an FBA or develop a BIP in the absence of any finding that the student presented with significantly interfering behaviors. The district alleges that the IHO properly denied the parents' claim for reimbursement for privately-obtained services and held that the district's voluntary offering of compensatory services during the 2014-15 school year remediated any denial of FAPE during the 2013-14 school year. The district also contends that the IHO has no authority to make a ruling as to which party is prevailing as only the courts have such authority.

## 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]).

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).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Conduct of Hearing/Impartial Hearing Officer Bias**

The parents argue that the IHO exhibited bias in the manner in which she conducted the hearing by interjecting questions and drafting the decision in a light favorable to the district. Based on a careful review of the record, the parents' allegations are without merit. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 12-064). In addition, State regulations authorize an IHO to "ask questions of counsel or witnesses for the purpose of clarification or completeness of the record" (8 NYCRR 200.5[j][3][vii]).

Overall, a review of the evidence in the hearing record does not support the parents' contentions. Rather, the hearing record reveals that the IHO did not demonstrate bias against the parents and that IHO observed the mandates of due process throughout this proceeding. The IHO allowed both parties to conduct fair and unimpeded direct and cross-examinations of the witnesses. The IHO also fairly considered objections from both parties. At times, the IHO permissibly inquired of the witnesses called by both parties for purposes of clarification and completeness of the record (see, e.g., Tr. pp. 77-78, 191-93, 287-88, 320, 582, 594-96, 610, 694, 703-04, 765-66, 898, 958-59, 1079). The parents also contend that the IHO exhibited bias in crafting her decision. The parents' allegation overlooks the IHO's determination that the May 2013 CSE failed to develop appropriate goals for the 2013-14 school year and, therefore, denied the student a FAPE (IHO Decision at pp. 17, 30). The IHO also noted that she credited the parent's testimony with respect to the parents' wishes to place the student back into a special math class after he was placed into an ICT class (id. at pp. 20-21). In light of the IHO's findings and the manner in which she conducted the hearing, there is no basis to find that the IHO acted with bias. Furthermore, while the IHO's decision does not indicate that she improperly shifted the burden of proof to the parents, even assuming that the IHO had misallocated the burden of proof, I have conducted an independent review of the entire hearing record and largely concur with the IHO's determinations.

## 2. Statute of Limitations

The parents allege that the IHO misapplied the statute of limitations by calculating the time limitation by school years rather than calendar years and erred in failing to find an exception to the limitations period applied. It is the parents' contention that their claims did not accrue until their receipt of independent evaluation reports in November 2013 and August 2014. The parents also contend that an exception to the statute of limitations applied because the parents did not receive a yearly procedural safeguards notice until filing their due process complaint notice. As set forth below, this matter must be remanded as there is no evidence in the hearing record that the district complied with its obligation to provide the parents with procedural safeguard notices.

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (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 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at \*17 [S.D.N.Y. Mar. 29, 2013]; R.B. v. Dept. of Educ., 2011 WL 4375694, at \*2, \*4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]).<sup>9</sup>

With respect to the issue as to when the parents knew or should have known of the actions forming the basis for their claims, the parents contend that the student's needs were not known

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<sup>9</sup> New York State has affirmatively adopted a two-year limitations period (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

until the November 2013 independent educational evaluation and August 2014 independent neuropsychological evaluation were completed.<sup>10</sup> The November 2013 and August 2014 evaluation reports identified the student as having difficulty in the following areas: academic fluency, reading comprehension, written expression, handwriting, math concepts, attention, organization, memory, fine motor skills, and visuospatial abilities; and the evaluators offered diagnostic impressions of "symptoms of dyslexia and dysgraphia," dyscalculia, a nonverbal learning disorder, an attention deficit hyperactivity disorder, and encephalopathy (Joint Exs. 18 at pp. 211-14; 24 at p. 263). A review of the hearing record reflects that the student's strengths and needs remained fairly consistent over the years, with significantly higher verbal than nonverbal abilities noted since preschool, and previously identified deficits in working memory, visual perceptual skills, fine motor skills, attention, math skills, self-confidence, and organizational skills (Joint Exs. 25; 28; Parent Exs. A; B; K). Consequently, the results from the November 2013 educational evaluation report and August 2014 neuropsychological evaluation report did not differ significantly from the student's previously identified strengths and needs; therefore, the parents' claim that they lacked knowledge of the student's needs until their receipt of the independent evaluations is without merit.

Despite finding that the parents' claims accrued prior to their receipt of the independent evaluation reports, an exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]; R.B., 2011 WL 4375694, at \*6). Case law interpreting the "withholding of information" exception to the statute of limitations has found that the exception applies only to the requirement that parents be provided with certain procedural safeguards required under the IDEA (see D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 [3d Cir. 2012]; Avila v. Spokane Sch. Dist. 81, 2014 WL 5585349, at \*8 [E.D. Wash. Nov. 3, 2014]; R.B., 2011 WL 4375694, at \* 6; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943, 945 [W.D. Tex. 2008]; Evan H. v Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at \*7 [E.D. Pa. Nov. 4, 2008]). Such safeguards include the requirement to provide parents with prior written notice and procedural safeguards notice containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3], [d]; 34 CFR 300.503, 300.504; 8 NYCRR 200.5[a], [f]). Under the IDEA and federal and State regulation, a district must provide parents with a copy of a procedural safeguards notice annually, as well as upon initial referral or parental request for evaluation; the first occurrence of the filing of a due process complaint; and upon parental request (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, regardless of whether a district has provided the parent with a procedural safeguards notice, if a parent is aware of his or her rights in developing a student's educational program, it has been held that the failure to provide the procedural safeguards does not under all circumstances prevent the parent from requesting an impartial hearing (see R.B., 2011 WL 4375694, at \*7; Richard R., 567 F. Supp. 2d at 944-45).

With respect to the parents' claim that an exception to the limitations period applied due to

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<sup>10</sup> Although not at issue here, I note that the district appropriately informed both independent evaluators of its criteria for public funding of independent educational evaluations (Parent Exs. W; X).

the district's failure to provide them with the procedural safeguards notice, the IHO rejected the parents' argument that an exception applied because the parents did not raise this allegation in their due process complaint notice (IHO Exhibit IV at pp. 3-4). However, while a parent is required to raise all claims in a due process complaint notice, there is no basis on which to conclude that the failure to raise an exception to an affirmative defense in an initiating pleading, prior to the time the affirmative defense is interposed, precludes its assertion at a later date, and the parents interposed the defense in their submissions in opposition to the district's motion to dismiss their claims relating to the 2011-12 and 2012-13 school years (IHO Exs. I; III). A review of the hearing record provides no support for a finding that the district provided the parents with notice of the procedural safeguards. The parent testified that she had no recollection of receiving a procedural safeguards notice until after the due process complaint notice was filed (Tr. pp. 968-969). The prior written notices related to the recommendations contained in the March 2012 and September 2012 IEPs indicate that the parents could obtain a copy of the procedural safeguards notice by contacting the district's director of pupil personnel via phone or email (Parent Exs. K at p. 383; L at p. 397). This procedure is not in compliance with the regulatory mandate set forth in 8 NYCRR 200.5(f)(3). Furthermore, a review of the entire hearing record reveals no information suggesting that the parents were aware of their right to request a due process hearing during the 2011-12 or 2012-13 school years and thus the hearing record supports a finding that the parents were prevented from requesting an impartial hearing based upon the district's failure to provide the parents with the procedural safeguards notice in the required manner.

Therefore, considering the record as a whole, the district's apparent failure to provide the parents with a procedural safeguards notice<sup>11</sup> is sufficient to conclude that the withholding of information exception to the IDEA's statute of limitations applies in this instance (20 U.S.C. § 1415[f][3][D]). Accordingly, I remand this matter and direct the IHO to allow the district an opportunity to submit evidence of its compliance with its obligation to provide the parents with notice of the procedural safeguards (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). If the district fails to demonstrate it complied with its obligations to provide the parents with a copy of the procedural safeguards notice, the IHO shall develop a record and make a determination on the merits of the issues raised in the parents' due process complaint notice with respect to those school years.<sup>12</sup>

### **3. Parents' Records Request**

Under Federal regulations, parents must be given the opportunity to inspect and review their child's education records (34 CFR 300.613; see 34 CFR 99.10[a]). The district is not required to provide parents with a copy of the student's education records unless "failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the

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<sup>11</sup> The hearing record contains a number of prior written notices indicating that the parents had previously received a copy of the procedural safeguards notice; however, none of the notices specifies at what point the district provided the parents with the procedural safeguards (Joint Exs. 5 at p. 70; 8 at p. 136; 9 at p. 155; Parent Ex. M).

<sup>12</sup> The IHO is strongly encouraged to conduct a prehearing conference for the purpose of clarifying and narrowing those issues (8 NYCRR 200.5[j][3][xi]). It appears that the only issues raised with respect to those school years are whether the CSE convened in September 2012 was properly composed, whether the annual goals and short-term objectives were appropriate to meet the student's needs, and whether the district adequately addressed the student's behavioral needs (see Joint Ex. 1 at pp. 9-13).

records" (34 CFR 300.613[b][2]; see 34 CFR 99.10[d]). The hearing record reveals that in response to a request to review the student's records, dated December 16, 2014, the district's director of pupil personnel sent a number of records to the parents, invited the parents to inspect and review the records with him, and made an appointment with the parents to do so (Joint Ex. 3; Tr. pp. 159-60). However, the parents canceled the appointment the same day (Tr. p. 160). There is no evidence that the district prevented the parents from exercising their right to inspect and review the student's education records. Accordingly, I find the school district discharged its obligations with respect to allowing the parents access to the student's records.<sup>13</sup>

### **B. 2013-14 School Year: Consideration of Special Factors—Interfering Behaviors**

Although the IHO found that the district failed to offer the student a FAPE for the 2013-14 school year, the parents contend on appeal that the district's failure to conduct an FBA prevented the district from obtaining information necessary to address the student's disorganization and avoidance behaviors during the 2013-14 school year. Based on a review of the record, the IHO properly found that the student's behaviors did not rise to the level of interfering with his learning and were adequately addressed by the supports, goals, and services provided in the May 2013 IEP.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also R.E., 694 F.3d at 190-91; A.C., 553 F.3d at 172). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it (8 NYCRR 200.1[r]).

According to school personnel, the student did not exhibit behavioral problems in school; rather, they described him as engaging, cooperative, friendly, pleasant, hardworking, and well-liked by his peers (Tr. pp. 91, 94, 561-62, 635, 1300). To address the student's organizational needs, the May 2013 IEP included the following supports and resources: small group instruction, support for organization of materials and following routine multi-step directions, preferential seating, visual supports, copy of class notes, check for understanding, extended time on tasks, additional time to respond in class, positive behavioral interventions, laptop computer, and a goal that focused on coming to school on time and being prepared with materials for his classes (Joint Ex. 9 at pp. 146-47, 149). Based on the review of the record, the IHO appropriately found that the student did not exhibit behaviors that interfered with his learning to the extent that the district was required to conduct an FBA, the parents provide no support for the proposition that the student's organizational difficulties are appropriately considered "behaviors" which must be addressed by the development of a BIP, and the student's organizational difficulties were adequately addressed

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<sup>13</sup> In any event, the parent has identified no harm she has suffered as a result or any remedy necessary to cure the district's alleged violation.

by the May 2013 IEP (see E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at \*2 [2d Cir. May 8, 2015]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 169 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140-41 [2d Cir. 2013]; R.E., 694 F.3d at 190; A.C., 553 F.3d at 172-73).<sup>14</sup>

## **C. 2014-15 School Year**

### **1. June 2014 IEP Implementation**

The parents contend that the student did not receive math tutoring during summer 2014 as mandated on the June 2014 IEP. The IHO found that the parents waived the student's right to this service after the student's mother indicated to the district that she would find a provider and failed to notify the district that the student was not receiving the services (IHO Decision at p. 25).

In this case it is undisputed that the student did not receive the summer math tutoring mandated by the June 2014 IEP (Tr. pp. 117-19; Joint Ex. 7 at pp. 96, 113). The district secured a tutor to provide the student with math instruction for the summer 2014 and provided him with the parents' contact information (Tr. pp. 117-118, 389). The parents contacted the tutor but were not able to reach a mutually agreeable schedule (Tr. pp. 998-99; Parent Exs. BB, CC). After their unsuccessful attempt to schedule math tutoring services, the parents emailed the district reporting their inability to come to an agreement with the tutor regarding scheduling for these services and indicated they would attempt to find a tutor (Tr. p. 999; Parent Ex. DD). The district's director of pupil personnel services testified that he did not know of the parents' inability to schedule the services until receiving the due process complaint notice (Tr. pp. 117, 392). However, upon confrontation with the parents' email on cross-examination, the director testified he received the email and admitted that he did not respond to it (Tr. p. 393; see Tr. pp. 999-1000). Contrary to the IHO's finding, there is no evidence in the record that the parent waived the student's entitlement to these services by failing to procure them independently. The hearing record shows the student did not receive the summer math tutoring services he was entitled to, and it was ultimately the district's obligation to ensure the student's IEP was implemented (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323[c][2], [d]; 8 NYCRR 200.4[e][3], [7]). Therefore, I order the district to provide the student with the 12 hours of 1:1 math instruction he should have received during summer 2014.<sup>15</sup>

### **2. Annual Goals**

The parents contend that the district failed to provide the student with appropriate goals to address his needs for the 2014-15 school year. As set forth below, a review of the hearing record

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<sup>14</sup> To the extent the parents now assert that the district was required to conduct an FBA to adequately address the student's behavioral needs for the 2014-15 school year, no such claim was raised in their due process complaint notice and it is not properly before me (see 20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.508[d][3][i]-[ii], 300.511[d]; 8 NYCRR 200.5[i][7][i][b], [j][1][ii]). In any event, the IHO appropriately found that the inclusion of organizational goals in the student's IEPs for the 2014-15 school year adequately addressed the student's needs in this area (IHO Decision at pp. 22-23, 29-30).

<sup>15</sup> The June 2014 IEP recommended two hours of tutoring weekly for six weeks (Joint Ex. 7 at pp. 96, 113).

supports the IHO's determination that the CSE developed appropriate goals to address the student's identified needs.

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][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal is required to include the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the CSE (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

A review of the evidence in the hearing record demonstrates that the annual goals in the June 2014 IEP were created based on skills and needs identified by the student's special education teacher and recent evaluation reports (Joint Exs. 7 at p. 97; 19; 23; 28; 69; Parent Ex. E).<sup>16</sup> The student's present levels of performance on the June 2014 IEP reflected needs in the following areas: organizational skills, math facts, word problems, comprehension, proofreading, written expression, memory, self-confidence as a learner, visual motor and visual perceptual skills, and fine motor skills (Joint Ex. 7 at pp. 100-04). The director of pupil personnel services testified that the annual goals were "sketched out" prior to the CSE meeting, but were discussed and revised with members of the committee at the CSE meeting (Tr. pp. 57-58, 86, 94-96).

A review of the academic goals recommended by the June 2014 CSE shows that they were consistent with the student's identified needs and contained sufficient specificity to guide instruction. The annual goals corresponded with the student's academic, cognitive, social/emotional, and motor needs, with seven goals addressing reading (e.g., syllable division, comprehension strategies, word analysis skills, fluency), six goals addressing mathematics (e.g., basic operations, solving real-life mathematical problems, fractions), five goals addressing written expression (e.g., punctuation, spelling, grammar, using writing processes of planning, editing, rewriting), five goals addressing study skills (e.g., use of checklist for materials and homework, organization of binders, learn new strategies to remember materials), one social/emotional goal (identifying strengths and weaknesses), and four motor goals (e.g., use of classroom materials to complete projects and organize materials, use of spaces in written work to assist with visual perception, type dictated paragraph) (Joint Ex. 7 at pp. 104-10). Accordingly, the hearing record supports a finding that the student's annual goals for the 2014-15 school year appropriately addressed his needs as reflected in the evaluative information available to the CSE (see, e.g., J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]).<sup>17</sup>

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<sup>16</sup> While the CSE reconvened in September 2014 and October 2014, and the October 2014 IEP incorporated results from the August 2014 independent neuropsychological evaluation report in the student's present levels of performance and management needs, the goals remained the same as those developed by the June 2014 CSE (see Joint Ex. 5 at pp. 45-46, 51-52; compare Joint Ex. 7 at pp. 104-110, with Joint Ex. 5 at pp. 53-59, and Joint Ex. 6 at pp. 81-87).

<sup>17</sup> The parent does not assert that the annual goals were deficient in any particular area.

## **E. Relief**

### **1. Compensatory Education**

The parents contend that the IHO erred in finding that the district remediated the denial of a FAPE for the 2013-14 school year with tutoring offered in the 2014-15 school year. The parents argue that the tutoring offered in 2014-15 addressed the student's needs for that school year and do not serve as compensation for the district's failure to offer the student a FAPE. Moreover, the parents seek reimbursement for the private services they obtained for the student.<sup>18</sup>

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]). The purpose of an award of compensatory education 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"]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at \*7 [E.D.N.Y. Mar. 30. 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]).

#### **a. Additional Services**

The parents appeal the IHO's denial of their request for compensatory education in the form of additional services to make up for the district's denial of a FAPE for the 2013-14 school year. In particular, the parents reference the district's removal of the student from his special class in math without written consent, the failure to provide the student with appropriate math instruction, the failure to provide appropriate goals in all areas to meet the student's needs in the 2013-14 and 2014-015 school year, failure to provide 1:1 math tutoring services in summer 2014, and failure to provide educational records and procedural safeguards notice. The district asserts that it provided the student supplemental tutoring during the 2014-15 school year to remediate any denial of a FAPE for the 2013-14 school year.

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<sup>18</sup> Although not argued in this fashion by the parents, the parents' request for relief in the form of reimbursement for privately-obtained services is in the nature of a request for compensatory services, as they are asserted to have appropriately supplemented an otherwise inappropriate program, rather than constituting a unilateral placement (see, e.g., Application of a Student Suspected of Having a Disability, Appeal No. 15-037; Application of a Student with a Disability, Appeal No. 14-173; Application of the Dep't of Educ., Appeal No. 14-082).

The IHO found the district denied the student a FAPE during the 2013-14 school year based on inappropriate goals included on the May 2013 IEP and the removal of the student from the special class in math without written consent. As discussed below, the hearing record supports the IHO's finding that the tutoring services the student received during the 2014-15 school year provided an appropriate remedy for the denial of a FAPE. The director of pupil personnel services testified that supplemental tutoring was recommended at the October 2014 CSE meeting and began in late November 2014, two to three times per week for an hour to an hour and a half, and the tutoring sessions covered mathematics, literacy (including reading and writing), and organization (Tr. pp. 124, 126-28, 270-71). The director testified that the tutoring was put in place to supplement the school day by addressing foundation skills (Tr. pp. 276, 489). I find that these services addressed the student's deficits sufficiently in order to place the student in a position he would have been had the district not removed him from his special class in math and provided appropriate math, reading, and writing goals for the 2013-14 school year.<sup>19</sup>

### **b. Private Keyboarding Instruction**

The parents seek reimbursement for services they obtained for the student in keyboarding, alleging these services were obtained in response to the district's failure to provide a FAPE to the student. The district argues that a district occupational therapist began providing the student with keyboard instruction as soon as it received a recommendation for such services. The student underwent an evaluation in November 2013 which recommended the use of technology for written communication (Joint Ex. 24 at p. 265). The evaluator opined the student's writing skills impeded his academic performance and recommended that the student needed to learn proper keyboarding skills using a formal program that involved direct instruction (*id.*). The parents privately engaged the evaluator to provide the student with ten 45-minute sessions of keyboarding instruction (Tr. pp. 799, 816).<sup>20</sup> The evaluator testified that the program she implemented with the student involved learning how to type based on the alphabet rather than remembering home keys (Tr. pp. 799-800). The parents requested a CSE meeting by letter dated January 24, 2014, requesting that the evaluator who prepared the November 2014 report be present (Parent Ex. R). By email dated January 30, 2014, the parents indicated their reasons for requesting a CSE meeting included concerns regarding the student's keyboarding skills and assistive technology needs (Joint Ex. 32). The CSE convened on February 26, 2014, and by prior written notice dated February 26, 2014, the CSE recommended an "assistive technology evaluation . . . and allowing [the student] to access a keyboard and/or computer for word processing wherever and whenever possible" (Joint Ex. 8 at p. 136). The hearing record indicates that the district occupational therapist began working with the student on keyboard skills on or around March 3, 2014, and consulted with the evaluator who prepared the November 2014 report and provided the student with keyboarding instruction (Joint Ex. 36). The occupational therapist indicated that she developed goals and objectives to improve the student's ability to use home row letters without looking at his fingers, proper finger positioning, and increase his typing speed (*id.*). Therefore, the hearing record shows that the district acted appropriately in addressing the student's keyboarding needs based on the results of the November 2013 evaluation and implemented appropriate services in an expeditious manner.

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<sup>19</sup> The parents do not assert any particular services that the student requires to remedy the district's denial of a FAPE for the 2013-14 school year.

<sup>20</sup> The hearing record is unclear as to the exact dates these services were provided.

Accordingly, the parents' request for reimbursement for the costs of the privately-obtained keyboarding instruction is denied.

### **c. Private Counseling**

The parents also seek reimbursement for the counseling they obtained privately for the student starting in January 2014 and continuing as of the time of private provider's testimony in April 2015 (Tr. p. 713). The district argues that these services were unnecessary because the student received counseling from the district during the 2013-2014 school year. As noted by the IHO, the student's private counselor testified that the social/emotional goals included on the May 2013 IEP were "certainly appropriate" (Tr. p. 711). During the 2013-14 school year, the student received one 30-minute session of counseling per week in a small group (Joint Ex. 9 at pp. 138, 149). The only challenge to the counseling services provided to the student raised in the due process complaint notice was that the district modified the student's services from small group to individual on the June 2014 IEP without discussion. While the hearing record is unclear precisely what discussion occurred during the June 2014 CSE meeting regarding the manner in which the student's counseling services would be provided, the director of pupil personnel services testified that the CSE arrived at its recommendation after receiving input from the student's private therapist, district staff, and the parents (Tr. pp. 58-59, 64). Given that the student received counseling services for both school years in accordance with his IEPs, and the parents do not challenge the adequacy of the services as opposed to the manner in which the CSE arrived at its recommendation, the parents are not entitled to reimbursement for the counseling services they privately obtained for the student. The fact that the student benefited from the privately-obtained counseling does not obligate the district to fund additional services beyond those necessary to offer the student a FAPE, and the hearing record does not indicate that reimbursement for these services would remediate the denial of a FAPE for the 2013-14 school year.

## **2. Prevailing Party Status**

To the extent the parents seek to be deemed the prevailing party in this matter, the district is correct that only the court has the authority to make such a determination (20 U.S.C. §1415[i][3][B]). Accordingly, the IHO's determination on this issue is annulled.

## **VII. Conclusion**

Based on a full review of the record, I remand the parents' claims concerning the 2011-12 and 2012-2013 school years to the IHO for further proceedings. I concur with the IHO that the district appropriately remedied the denial of a FAPE for the 2013-14 school year with a recommendation for tutoring and additional services. Accordingly, I deny the parents' claim for compensatory education and reimbursement for privately-obtained services. I also find that the June 2014 IEP was appropriate, but in light of the district's failure to implement tutoring services during summer 2014, I direct the district to provide the student 12 hours of math tutoring.

I have considered the parties' remaining contentions and find them to be without merit or that I need not address them based on my decisions herein.

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

**IT IS ORDERED** that the IHO's decision, dated July 22, 2015, is modified, by annulling that portion which held that the parents were not the prevailing party; and

**IT IS FURTHER ORDERED** that the district shall provide the student with 12 hours of compensatory 1:1 math tutoring, to be completed by the end of the 2015-16 school year; and

**IT IS FURTHER ORDERED** that the matter is remanded to the same IHO who issued the July 22, 2015 decision to receive evidence regarding the district's compliance with its obligation to provide the parents with procedural safeguard notices during the 2011-12 and 2012-13 school years. If the district does not establish such compliance, the IHO will develop a record and make a determination concerning the merits of the parents' claims for the 2011-12 and 2012-13 school years as described in the body of this decision; and

**IT IS FURTHER ORDERED** that, if the IHO who presided over the impartial hearing is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

**Dated:**           **Albany, New York**  
                          **September 18, 2015**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**