The University of the State of New York

The State Education Department
State Review Officer
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No. 15-099

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 Hendrick Hudson Central School District

Appearances:
Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, Daniel Petigrow, 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 the decision of an impartial hearing officer (IHO) which denied their request for compensatory education services and reimbursement for their son's tuition costs at a nonpublic school (NPS) for the 2013-14 and 2014-15 school years. Respondent (the district) cross-appeals from the IHO's determination that it denied the student a free appropriate public education (FAPE) for the 2013-14 and 2014-15 school years. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has been the subject of two prior administrative appeals related to the 2010-11, 2011-12, and 2012-13 school years. As a result, the parties' familiarity with the student's educational history and the prior due process proceedings is assumed and will not be repeated here in detail (Application of a Student with a Disability, Appeal No. 12-138 and Application of the Bd. of Educ., Appeal No. 14-015). At the time of the impartial hearing in this case, the student was enrolled in the NPS (see Tr. pp. 568, 1354; Dist. Ex. 90 at pp. 1-2).

On May 24, 2013, the CSE convened to develop the IEP for the 2013-14 school year (Dist. Exs. 13 at p. 1; 106A at p. 1; see also Dist. Exs. 3 at p. 1; 7 at p. 1). Participants at the May 24, 2013 CSE included the student's parents and district staff including the director of pupil personnel

services (PPS) (Director 1) who also served as the chairperson, counsel for the district, an English teacher, a special education teacher, a guidance counselor, a principal, a social worker, a school psychologist, and a private neuropsychologist, and the academic director and a counselor from the NPS staff participated by telephone (Dist. Ex. 106 A at pp. 1-3; see Tr. pp. 130, 883-84).[1] During the meeting, the CSE determined that the student remained eligible for special education and related services as a student with an other health-impairment (OHI) (id. at pp. 43-47). The May 2013 CSE discussed the student's functioning related to academics, cognition, executive functions, and attention (see generally Dist. Ex. 106A). The CSE considered a 15:1 special class placement within the district high school (Dist. Ex. 106A at pp. 105-06). At the end of the meeting, the May 2013 CSE agreed to meet a second time in order to continue their discussion of possible program placements (Dist. Ex. 106 A at pp. 107-08, 114).

On June 19, 2013, the CSE reconvened for the continued development of the student's IEP for the 2013-14 school year (Dist. Exs. 18 at p. 1; 106 B). Director 1 provided the June 2013 CSE members with a copy of a draft IEP which contained information from updated evaluative reports and the discussion at the May 2013 CSE meeting (Dist. Ex. 106 B at pp. 3-4; see also Dist. Ex. 19). Director 1 also reviewed the student's present levels of performance, accommodations and supports, and annual goals (Tr. pp. 180-87; Dist. Ex. 106 B at pp. 9-16, 18-19, 23-24, 36-37; see Dist. Ex. 19). The June 2013 CSE discussed counseling services for the student to address his social/emotional needs (Dist. Ex. 106 B at pp. 58-62). The June 2013 CSE also discussed a visit the student made to the district's public high school in early June and determined through consensus of both the district and parent participants that the high school was not appropriate for the student (Dist. Ex. 106 B at pp. 51-52, 67-68; see also Dist. Exs. 12 at p.1; 106A at pp. 109, 114). Director 1 then suggested four potential out-of-district programs that the student could attend (Tr. pp. 197-203; Dist. Ex. 106 B at pp. 69-71). Consideration of the out-of-district programs included two Board of Cooperative Educational Services (BOCES) programs (Tr. pp. 200-07; Dist. Ex. 106 B at pp. 69-71). The June 2013 CSE also discussed a private day school identified by the parent, but the both the district and parent participants at the CSE agreed that the private placement would be inappropriate (Tr. pp. 202-03; Dist. Ex. 106 B at p. 75). Before the June 2013 CSE meeting concluded, the CSE requested the parents' consent to send personal information regarding the student to the four potential out-of-district programs; the parents explained that they would discuss the matter amongst themselves before providing consent (Tr. pp. 203-04; see Dist. Ex. 106 B at pp. 76-77).

In a letter dated June 25, 2013, the parents stated that they would not execute the consent forms to share information with the four potential out-of-district placements because the district failed to provide them with "any additional information about . . . [the] programs" (Dist. Ex. 21 at pp. 1-4; see Dist. Ex. 21 at p. 2). The parents also stated that they would only provide consent after they received "a list identifying the specific programs for which [the district proposed] possible placement of [the student] and an explanation of what each program offer[ed], a discussion of the participants in the program[,] and why [the CSE believed] the placement in each program would be appropriate" (Dist. Ex. 21 at p. 3).

Over the next several weeks, the district and the parents exchanged correspondence regarding the referral packets; in most of their letters, the parents reiterated their belief that the

[1] Director 1 served as director of PPS at the district from October 2004 through early October 2013 (Tr. p. 86).

district did not have the right to send referrals without their consent, regardless of whether the student's personally identifiable information was redacted by the district (see generally Dist. Exs. 27; 96-98; Parent Exs. O-R; U; X).

By letter dated August 21, 2013, the parents notified the district of their intent to unilaterally place the student at the NPS at public expense for the 2013-14 school year (Parent Ex. AA at pp. 1-2).

On September 20, 2013, the CSE reconvened again to finalize the student's IEP for the 2013-14 school year (Dist. Exs. 53 at p. 1; 106C at p. 1). Participants at the September 20, 2013 CSE included the parents, Director 1 who also served as the chairperson, counsel for the district, and other district staff including an English teacher, another regular education teacher, a guidance counselor, a special education teacher, a school psychologist, a school nurse, a social worker, as well as a BOCES principal (Dist. Exs. 53 at p. 1; 106C at pp. 1-3). The September 2013 CSE determined that the student continued to remain eligible for special education and related services as a student with an OHI (see Dist. Ex. 53 at p. 2). The September 2013 CSE recommended a 12:1+1 special class BOCES placement located within an out-of-district public high school (Dist. Exs. 53 at pp. 1, 9, 12; 54 at p. 2; 106C at pp. 64-65). The September 2013 CSE also recommended the provision of two 30-minute sessions of counseling per week, with one to be provided individually and one in a small group (Dist. Ex. 53 at p. 9). In addition, the proposed IEP included several supplementary aids and services and program modifications/accommodations including access to class notes, additional time for assignments, nursing services as needed, and refocusing/prompting (id. at p. 9-10). The proposed IEP noted that the student needed a structured and supportive environment and needed to improve his coping skills to manage academic and social stressors (id. at p. 7). The September 2013 IEP also included annual goals and information regarding the student's post-secondary transition needs together with corresponding post-secondary goals (id. at pp. 8-9). This proposed IEP was not implemented, and student continued to attend the NPS for the entirety of the 2013-14 school year (see Dist. Ex. 63 at pp. 10-12; Parent Ex. AAAA at p. 1).

On July 2, 2014, the CSE convened to conduct an annual review regarding the student's special education needs for the 2014-15 school year (Dist. Ex. 106D at p. 1; see Dist. Ex. 64 at p. 1; Parent Ex. CCC at p. 1). Participants at the July 2, 2014 CSE included the director of PPS (Director 2), who also served as chairperson, counsel for the district, the parents, and district staff including a school psychologist, a regular education teacher, and a special education teacher (Dist. Ex. 106 D at pp. 1-2, 12).[2] The July 2014 CSE reviewed the student's needs in the areas of academics and social/emotional functioning (Dist. Ex. 106 D at pp. 7-10). During the July 2014 CSE meeting Director 2 first acknowledged that the student may no longer be eligible for special education; rather, she suggested that a "504 plan" might be more appropriate to address the student's needs (Dist. Ex. 106 D at pp. 47-48). The parents expressed disagreement with this proposal, and the CSE proceeded to discuss placement at the district high school, opining that the student could possibly enroll in advanced placement (AP) courses, which typically contain a smaller number of students (Tr. pp. 496-97, 1240-41; Dist. Ex. 106 D at pp. 48-55).

[2] Director 2 began serving as the district's director of PPS on May 27, 2014 (Tr. p. 469).

Director 2 also discussed the possibility of placement in a particular out-of-district program at the July 2014 CSE meeting (Dist. Ex. 106 D at p. 58). The students in that program, according to Director 2, "attend[ed] typical AP classes or regents level [] classes" and had supports in place so that they have the opportunity to talk with social workers and psychiatrists in order to help relieve possible stressors; Director 2 further described the program as "highly structured" (Tr. pp. 495-96; Dist. Ex. 106 D at pp. 58, 59). The July 2014 CSE, including the parents, agreed to reconvene the CSE once the student was reevaluated by his neuropsychologist using the Behavioral Assessment System for Children-Second Edition (BASC-2) and the Stanford Diagnostic Reading Test (SDRT) (Tr. pp. 499, 551; Dist. Exs. 76 at p. 1; 106D at pp. 50, 72-75). Director 2 also informed the parents that she would gather additional information regarding the two programs discussed at the meeting (Dist. Ex. 106 D at pp. 65, 76-77).

By letter dated August 18, 2014, the parents notified the district of their intent to unilaterally place the student at the NPS and to seek the costs of the student's tuition at public expense for the 2014-15 school year (Dist. Ex. 90 at pp. 1-2).

On September 4, 2014 the CSE reconvened to discuss the student's special education needs for the 2014-15 school year, including whether the student's continued classification was appropriate (Dist. Exs. 84 at p. 1; 106E; see also Dist. Ex. 85 at pp. 1-2). Participants included the parents, Director 2 who also served as the chairperson, the district attorney, as well as a district English teacher, special education teacher, and school psychologist (Dist. Ex. 106 E at pp. 1-2). Director 2 discussed the program profile received from the out-of-district program, but both Director 2 and the parents agreed that the program was inappropriate for the student (Tr. pp. 513-14; Dist. Exs. 89 at pp. 1-2;. 106 E at pp. 31-34). Director 2 also relayed information about the district's public high school program, noting that many of the AP and honors classes contained fewer students (approximately 13 to 23 students in each class) (Tr. p. 515; Dist. Ex. 106 E at pp. 34-37). However, the parents indicated they were no longer interested in the program because it was too late in the school year (Tr. pp. 515-16; Dist. Ex. 106 E at p. 41). The September 2014 CSE ultimately concluded that the student would no longer be eligible for special education services as a student with an OHI (Tr. pp. 559-60; Dist. Exs. 86; 87; 106 E at pp. 21-22, 26-27, 47, 70-71). The parents disagreed with this determination at, and subsequent to, the September 2014 CSE meeting (Tr. p. 1063; Dist. Ex. 88 at pp. 1-2; Dist. Ex. 106 E at pp. 67-68, 70, 71).

In a prior written notice to the parents dated September 4, 2014, the district stated that the student did not meet the eligibility requirements as a student with a disability and did not require special education or supports (Dist. Ex. 86 at p. 1). The September 2014 prior written notice indicated that the student presented with good cognitive, daily living, and academic skills such that he was able to physically participate in age appropriate activities, enjoy social activities, and exhibit appropriate behavior at school (id.). The district also issued a declassification statement dated September 4, 2014 which included the results of the evaluative reports that the CSE reviewed (Dist. Ex. 87 at pp. 1-6).

A. Due Process Complaint Notice

By due process complaint notice dated November 6, 2014, the parents alleged that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years (see Parent

Ex. QQQ at pp. 1-2).[3] The due process complaint notice contained numerous allegations; however, due to the limited issues presented on appeal and as further explained below, only those allegations both germane to the findings in the IHO's decision and presented for resolution in this appeal are described below. Accordingly, the parties' familiarity with the remaining claims from the due process complaint is presumed.

With regard to the 2013-14 school year, the parents contended that the September 2013 CSE's recommendation was predetermined since the CSE only discussed one possible placement at the CSE meeting (Parent Ex. QQQ at pp. 16, 42). Further, the parents argued that the September 2013 CSE recommended the proposed placement "without substantive comment or question and made no effort to identify an appropriate program" (id. at p. 19). The parents also alleged that the September 2013 IEP failed to "have an IEP in place" prior to the start of the school year (id. at pp. 13, 21-22, 39). The parents additionally contended that the placement recommendation of a 12:1+1 special class with mainstreaming opportunities "at some unspecified time" was inappropriate and could not be implemented (id. at pp. 23, 39). The parents also argued that the September 2013 IEP's placement recommendation did not represent the LRE (id. at p. 24).

As for the 2014-15 school year, the parents argued that the district failed to provide any notice, including five-day notice, that the CSE would consider declassification of the student at the September 2014 CSE meeting (Parent Ex. QQQ at pp. 27-28, 41, 43). The parents also contended that the September 2014 CSE failed to have an IEP "in place" for the student at the beginning of the school year and made an inappropriate declassification recommendation after the school year had started (id. at pp. 31, 40). The parents also asserted that the district failed to conduct a "full reevaluation" of the student prior to the September 2014 CSE meeting and failed to identify any "new medical information" including, for example, a current physical examination before recommending declassification (id. at pp. 28, 30, 40, 43). The parents also argued that the September 2014 CSE failed to "include or propose declassification supports for the student" (id. at p. 30; see also id. at pp. 41, 44). The parents further asserted that the district failed to reconvene the CSE or conduct further evaluations of the student following receipt of "updated diagnostic impressions" provided by the private psychiatrist (id. at p. 31).

The parents further contended that the NPS provided instruction and services that were "specifically designed to meet [the student's] unique needs" during the 2013-14 and 2014-15 school years (Parent Ex. QQQ at p. 31). The parents also argued that no equitable considerations served to diminish or preclude an award of tuition reimbursement, asserting that they fully cooperated with the CSE, attended all meetings, and provided consent for all evaluations (id. at pp. 35, 40, and 42). For relief, the parents requested reimbursement for the tuition costs associated with the student's placement at the NPS for the 2013-14 and 2014-15 school years as well as additional compensatory services in the form of "transition services and counseling" (id. at p. 45).

B. Impartial Hearing Officer Decision

On March 4, 2015, the parties proceeded to an impartial hearing, which concluded on May 26, 2015, after nine days of testimony (see Tr. pp. 1-1446). In a decision dated August 31, 2015,

[3] The amended due process complaint was dated November 6, 2014. The original due process complaint was dated April 11, 2014 (Parent Exs. QQQ at p. 45; UU at p. 32).

the IHO concluded that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years (IHO Decision at pp. 10-16, 20). The IHO further found that the parents failed to meet their burden to show that the student received "education services" that were "specially designed" to meet the student's needs (id. at pp. 17-18).

Specific to the 2013-14 school year, the IHO found that the district failed to provide the student with a placement until after the beginning of the 2013-14 school year (IHO Decision at p. 12). The IHO further stated that the requirement that a district offer a placement prior to the start of the school year "must be applied strictly" (id.). The IHO also found that the district failed to offer the student a placement in the LRE, since the student was "high–functioning" with "relatively mild disabilities" and would have benefitted from a general education classroom with appropriate supports (id. at pp. 13-14). In addition, the IHO found that the district's offer of mainstreaming opportunities "[wa]s not mandated by the IEP" and, thus, could not be relied upon by the parents when they made their placement decision (id. at p. 14).

As for the 2014-15 school year, the IHO found that the district failed to provide the parents with "appropriate" and "clear" notice that the September 2014 CSE intended to declassify the student at the September 2014 CSE meeting (IHO Decision at pp. 15-16). The IHO also found that the district failed to conduct a "meaningful evaluation" of the student's suspected disability prior to declassifying the student, relying solely on a "slim" letter from a psychiatrist (id. at p. 16). The IHO found that these violations, considered together, "denied the parents the right to meaningfully participate in the IEP process" (id.).

The IHO next found that the educational services offered by the NPS during the 2013-14 and 2014-15 school years did not constitute special education, thus rendering the placement inappropriate for purposes of the parents' tuition reimbursement claim (IHO Decision at pp. 17-18). The IHO noted the parents' argument that physical activities at the school "such as rock climbing and kayaking" constituted special education because they were "therapeutic," but rejected this position as without support in legal authority (id. at p. 17). The IHO further noted that the NPS did not employ "trained" staff psychologists or psychiatrists (id.). While the IHO recognized that the NPS developed an "accommodation" plan for the student, he found that "the bulk of these accommodations [we]re provided for all students" (id. at pp. 17-18). The IHO recognized the student's success at the NPS but noted that this was inapposite because the NPS did not offer "special education services specially designed to meet [the] student's education needs" (id. at p. 18).

The IHO also denied the parents' request for an award of compensatory additional services inappropriate based upon the parents' failure to offer any evidence as to what kind of transition services that would be necessary or appropriate for the student (IHO Decision at p. 20). Thus, the IHO denied the parents' requested relief and did not reach the issue of whether equitable considerations should preclude or diminish an award of tuition reimbursement (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in denying relief based upon the appropriateness of the unilateral placement. The parents further assert that equitable considerations supported the parents' requested relief. Additionally, the parents contend that the IHO erred in denying their request for compensatory additional services.

As a preliminary matter, the parents argue that the IHO's decision is legally insufficient insofar as it failed to resolve all of the issues in the parents' amended due process complaint notice. With respect to the appropriateness of the unilateral placement, the parents contend that, contrary to the IHO's conclusion, the NPS offered specially designed instruction to meet the student's needs. The parents assert that the NPS was appropriate because it offered an accommodation plan to the student which addressed his needs; "informal, regular" counseling services; small class sizes; nursing services; a "safe and supportive environment"; a residential setting; and transitional services to assist the student in transitioning to, and attending, college. The parents further assert that the student made progress at the NPS, which supported its appropriateness. The parents further contend that the IHO applied the "incorrect legal standards" in assessing the appropriateness of the unilateral placement. As for equitable considerations, the parents aver that they fully cooperated and were involved in the CSE process. The parents further assert that the IHO erred in denying their request for compensatory additional services.

For relief, the parents seek the tuition costs of the student's attendance at the NPS for the 2013-14 and 2014-15 school years as well as "compensatory educational and transitional services in an amount appropriate to compensate the . . . student" for a denial of FAPE (Pet. at ¶ 90). In the alternative, the parents request that the case be remanded to the IHO to resolve the undecided issues in the parents' amended due process complaint notice and, further, to remedy the IHO's application of an "incorrect legal standard" regarding the appropriateness of the NPS.

The district answers the petition, admitting and denying the parents' material allegations. The district further asserts that some of the parents' claims for relief are precluded under the doctrine of res judicata because they could have been raised during a prior impartial hearing.

The district also interposes a cross-appeal, asserting that the IHO erred by finding that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years. Specific to the 2013-14 school year, the district argues that the IHO erred in finding that the September 2013 CSE's failure to identify a specific program prior to the first day of school resulted in the denial of a FAPE and that the September 2013 CSE's recommendation of a self-contained classroom was "too restrictive." The district further argues that the IHO erred in finding that opportunities for mainstreaming within the recommended placement could not be relied upon in assessing whether the district offered the student a FAPE (see Ans. and Cross-Appeal at ¶ 45).

As for the 2014-15 school year, the district argues the IHO erred in finding that the September 2014 CSE failed to give the parents proper notice of the meeting and that the district's evaluation was insufficient to support declassification of the student. The district asserts that the parents knew that the declassification was being considered as of July 2014 and that the district, in conjunction with the parents, considered and relied upon sufficient evaluative material which supported its determination.

The district also asserts that equitable considerations preclude an award of tuition reimbursement to the parents as the parents "substantially interfered with the CSE process" for the 2013-14 school year and predetermined the student's placement for both the 2013-14 and 2014-15 school years. The district further contends that the IHO correctly denied the parents' request for compensatory additional services. The district argues that the student does not require transition services because he graduated from the NPS and is attending college. Moreover, the district asserts

that the student would only be eligible for such services if there was a "gross violation" of the IDEA, which the parents did not assert.

In an answer to the district's cross-appeal, the parents argue that the IHO correctly determined that the district denied the student a FAPE for the 2013-14 and 2014-15 school years. The parents also contend that certain paragraphs in the district's answer and cross-appeal "improperly incorporate testimony and exhibits by reference" (Ans. to Cross-Appeal at ¶ 4).[4] The parents also reiterate the requests for relief identified in their petition.

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

[4] The parents' argument is without merit as the referenced paragraphs are concise, to the point, and permissible under State regulation.

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/Scope of Review

1. Scope of Review

The parents also contend that the IHO's decision was legally insufficient insofar as it failed to address most of the issues identified in the parents' due process complaint notice, and utilized an incorrect legal standard regarding the appropriateness of the parents' unilateral placement. As a remedy, the parents request that this matter be remanded to the IHO. While the parents are correct that the IHO failed to address all of the issues.

An IHO is required to issue detailed findings on the discrete issues identified in a party's due process complaint notice, a process that entails detailed factual and legal analysis (34 CFR 300.511[c][1][iv] [an IHO "[m]ust possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice"]; see generally 20 U.S.C. § 1415[f][3][E]; 8 NYCRR 200.5[j][4]). The IHO's disposition of the parties' claims in this case fell short of this

standard. After this proceeding was commenced, and with input from the parties, the IHO generated a prehearing conference order which identified 20 issues that the parties sought to resolve through the impartial hearing process (IHO Ex. 1 at pp. 1-3; see 8 NYCRR 200.5[j][3][xi]). The parties then proceeded to an impartial hearing which, as noted above, consisted of nine days of hearings (see Tr. pp. 1-1446). Both sides were given ample time to present their case; neither party suggests otherwise on appeal. On August 31, 2015—more than three months after the last hearing date—the IHO issued a written decision which, despite identifying 20 issues for resolution in the decision, addressed only four of the parents' claims (IHO Decision at pp. 2-3, 11-18). A review of the hearing record and the IHO's decision reveals no explanation for leaving the 16 remaining issues unattended.

Under these circumstances, one appropriate remedy would be to remand this case back to the IHO to issue findings on all of the disputed issues (see T.L. v. New York City Dep't of Educ., 2013 WL 1497306, at *16 [E.D.N.Y. Apr. 12, 2013]; F.B. v. New York City Dep't of Educ., 2013 WL 592664, at *15 [S.D.N.Y. Feb. 14, 2013]). However, there is sufficient evidence in the hearing record to render a decision as to the specific claims presented by the parties and resolve the matter.[5] Moreover, remand for additional proceedings would only serve to exacerbate the acrimony between the parties, the delay in resolution and expense to all involved. Therefore, the undersigned has elected to issue a decision because it is possible resolve the parents' tuition reimbursement and compensatory education claims. However, this decision is not an endorsement of the IHO's decision to ignore many of the FAPE-related allegations that were appropriately identified for resolution.[6]

Next, the parents argue that the IHO failed to utilize the appropriate legal standard when analyzing whether the unilateral placement was appropriate for the student. Specifically, the parents claim that the IHO phrased the inquiry as whether the NPS provided "special education services," rather than "educational instruction specially designed to meet the unique needs of [the student]." A review of the IHO's decision reveals that the IHO applied the correct legal standard in assessing the appropriateness of the unilateral placement (see IHO Decision at pp. 17-18). Specifically, the IHO analyzed whether the NPS offered specially designed instruction to meet the student's needs and referenced pertinent legal authority within the Second Circuit (see id.). Moreover, even assuming for purposes of argument that the IHO incorrectly stated the legal

[5] I have addressed each of the issues the parties have taken care to identify with specificity, whether or not the IHO issued findings as to these issues. By contrast, those claims identified in summary fashion have not been addressed (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [indicating that appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 350 Fed. App'x 749, 752 [3d Cir. Nov. 4, 2009] [noting that a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [finding that a generalized assertion of error on appeal is insufficient to preserve a specific challenge]; N.L.R.B. v. McClain of Georgia, Inc., 138 F.3d 1418, 1422 [11th Cir. 1998] [noting that "[i]ssues raised in a perfunctory manner, without supporting arguments and citation to authorities, are generally deemed to be waived"]; see generally Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).

[6] The parents also argue that the IHO's decision contains numerous factual errors. Even assuming for purposes of argument that each of these assertions of error were true, they would not, by themselves, necessitate reversal of the IHO's conclusions.

standard, this would only constitute reversible error if the IHO actually applied an erroneous standard. And a review of the IHO's decision reveals no such defect. The appropriateness of the NPS will be further reviewed below. Hence, the parents' request for remand in this instance must be dismissed.

2. Res Judicata

The district next contends that the parents' claims are precluded by the doctrine of res judicata since they could have been raised during the previous two proceedings. The doctrine of res judicata "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *4 [S.D.N.Y. Jan. 13, 2012]; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.B., 2012 WL 234392, at *5; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6).

Here, the district's argument is unconvincing because the first proceeding concerned the 2010-11, 2011-12, and 2012-13 school years, while the instant proceeding involves challenges to the 2013-14 and 2014-15 school years (compare Application of a Student with a Disability, Appeal No. 12-138 and Application of the Bd. of Educ., Appeal No. 14-015, with Parent Ex. QQQ at pp. 1-2). While the district makes a general assertion that there are overlapping claims between these proceedings, the IHOs' findings in the prior hearings related solely to violations of the student's right to a FAPE during the 2010-2011, 2011-12, and 2012-13 school years (see Application of a Student with a Disability, Appeal No. 12-138 and Application of the Bd. of Educ., Appeal No. 14-015). Therefore, the IHOs' findings in the first and second hearings do not have any preclusive effect on the parents' subsequent claims related to the 2013-14 and 2014-15 school years (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Snyder v. Montgomery County Pub. Schs., 2009 WL 3246579, at *9-*10 [D. Md. Sept. 29, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077 at *21-*26 [N.D.N.Y. Mar. 31 2009]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]).[7] Therefore, the district's res judicata defense is without merit.

[7] The parents could not have challenged the district's recommendations for the 2013-14 or 2014-15 school years in the prior proceeding since their previous due process complaint notice was dated approximately six weeks before the CSE convened to review the student's IEP for the 2013-14 school year (compare Application of the Bd. of Educ., Appeal No. 14-015, with Dist. Exs. 13 at p. 1; 106A at p. 1).

B. 2013-14 IEP

1. Parental Participation/Predetermination

Turning first to the 2013-14 school year, the parents contend that the district predetermined the student's educational placement due to considering only a single placement during the September 2013 CSE meeting. The IHO did not address this claim in his decision. Upon review, the evidence in the hearing record does not support a conclusion that the September 2013 CSE predetermined the student's placement.

With respect to the parents' allegation that the September 2013 CSE impermissibly predetermined the IEP, it is well established that the consideration of possible recommendations for a student, prior to a CSE meeting, is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] [noting that "predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. 2010]).

Furthermore, prior written notice is required to provide parents with a description of the actions proposed or refused by the district, an explanation of why the district proposed or refused to take the actions, a description of other options that the CSE considered and the reasons why those options were rejected, a description of other factors that were relevant to the CSE's proposal or refusal, a statement that the parent has protection under the procedural safeguards and the means by which the parent can obtain a copy of the procedural safeguards, and sources for the parent to contact to obtain assistance in understanding these safeguards (8 NYCRR 200.5[a][3]; see 34 CFR 300.503[b]; 8 NYCRR 200.1[oo]).

At the outset, it is necessary to delineate the scope of this inquiry. While the September 2013 IEP constitutes the operative IEP for purposes of this administrative proceeding, the CSE convened in May, June, and September 2013 to develop the student's IEP for the 2013-14 school year (see generally McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]). Thus, the district's entire course of conduct over the course of these meetings must be considered in assessing whether the district possessed the requisite open mind regarding the student's educational placement.

The hearing record reflects that the CSE discussed and considered other educational placements aside from the 12:1+1 special class in a BOCES out-of-district program that was ultimately recommended (Dist. Exs. 54 at pp. 1-2; 106 A at p. 105-07; 106 B at pp. 55-56, 64-73; 106 C at pp. 24-25, 64-66). Specifically, in May 2013 the CSE considered placement in a 15:1 special class at the district high school which the CSE, including the parents, determined would

not be an appropriate placement for the student (Dist. Exs. 106 A at p. 105-07; 106B at p. 55). The June 2013 CSE discussed integrated co-teaching and resource room services which were available at the district high school; however the parents generally objected to these options, asserting that the student could not "handle [the high school] right now," and that, if the student returned, he would "fall back into the cycle [of migraines]" (Dist. Ex. 106 B at pp. 54-56, 64, 68-69). The parents further objected to placement in a general education classroom, even supplemented with resource room services, because placement in a "large environment" previously made the student "very, very sick" (Dist. Ex. 106 B at pp. 64-65). The June 2013 CSE also discussed placement in out-of-district programs, including two BOCES programs (Dist. Ex. 106 B at p. 70-73). Additionally, the parents initiated a discussion regarding a private day school program which included classrooms with an 8:1+1 classroom ratio. (see Dist. Ex. 106 B at p. 75).

The September 26, 2013 prior written notice summarized the placements that were discussed during the May, June, and September CSE meetings (Dist. Ex. 54 at pp. 1-2).[8] Specifically, the prior written notice indicated that a 15:1 special class at the district high school, a 8:1+1 special class at a private day school, and resource room services within the district's public high school were considered (id.). The prior written notice further indicated that the 8:1:1 special class and resource room were rejected as "too restrictive" for the student and that the 15:1 special class was rejected because "the student group [at the school] was not of similar needs" (id. at p. 2). Thus, the evidence in the hearing record demonstrates that the CSE kept an open mind during the September 2013 CSE meeting by considering other educational settings and listening to the parents' opinions and concerns regarding other placements (Tr. pp. 160, 162, 172, 193-95, 202-03, 292-93, 1161-162; Dist. Exs. 106A at p. 107; 106B at pp. 54-56, 64-65, 68-69; 106C at pp. 64-66). Accordingly, the September 2013 CSE did not impermissibly predetermine its recommendations.

2. Least Restrictive Environment

Next, the district contends that the IHO erred in finding that the September 2013 CSE's placement recommendation did not constitute the student's LRE. The parents respond that the IHO correctly resolved this issue and further assert that the IEP's mainstreaming opportunities were "theoretical, unstructured[,] and unplanned" (Parent Mem. of Law at p. 6). The evidence in the hearing record supports the IHO's resolution of this issue.

The September 2013 IEP recommended placement in a 12:1+1 special class for 5 hours and 30 minutes each day (Dist. Ex. 53 at pp. 1, 9). The IEP also "acknowledge[d] the student's need for special class instruction and recommend[ed] a full day of special class until such time as mainstreaming opportunities can be explored in English, math, science, social studies" (Dist. Ex. 53 at p. 12). The IEP further indicated that "the amount of time in special class will be revised as appropriate at a program review or with an [a]mendment" (id.).

On appeal, the district does not contest the IHO's determination that the student was "a high-functioning student . . . who c[ould] be maintained in a general education setting with

[8] While the parents complain that the September 2013 IEP failed to identify other placement options which were considered by the CSE, there is no specific regulatory requirement that such options be identified on the IEP (see 34 CFR 300.320; NYCRR 200.4[d][2][i]-[xii]; see also Dist. Ex. 53 at p. 12).

appropriate supports" (IHO Decision at p. 14). At the time the CSE developed the student's IEP for the 2013-14 school year, and as the CSE was aware, the student attended general education classes within a general education school (Tr. pp. 315, 369).

Instead, the district argues that the September 2013 CSE's recommendation for a self-contained classroom in a therapeutic day program was appropriate because the student would enjoy mainstreaming opportunities within the recommended program. This argument, however, cannot be entertained as it relies upon retrospective evidence which contravenes the language of the written IEP. The Second Circuit has held that "with the exception of amendments made during the resolution period, an IEP must be evaluated prospectively as of the time it was created" (R.E., 694 F.3d at 188). Even though mainstreaming opportunities are vaguely alluded to on the September 2013 IEP, the testimony relating to these mainstreaming opportunities is not the type of permissible extrinsic evidence envisioned by R.E. that may be used to "[explain or justify] the services listed in the IEP" because "retrospective testimony that the school district would have provided additional services beyond those listed in the IEP may not be considered" (R.E. 694 F3d at 186-87; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014] [testimony that functional behavioral assessment and "more specific" behavioral intervention plan would be created "cannot be offered retrospectively to cure errors in an IEP or its documents."]; D.N. v. Bd. of Educ., 2015 WL 5822226, at *11 [E.D.N.Y. Sept. 28, 2015]).

Here, the September 2013 CSE recommended placement in a 12:1+1 special class for 5 hours and 30 minutes each day (Dist. Ex. 53 at pp. 1, 9). On appeal, the district essentially argues that this provision does not mean what it says, and that the student would not be in the special class to that degree and could be mainstreamed to a greater extent once enrolled at the school (see Ans. and Cross-Appeal at ¶¶ 78-86). As the Second Circuit has explained, when parents are considering whether or not to accept a public placement, "they have only the IEP to rely on, and therefore the adequacy of the IEP itself creates considerable reliance interests" (R.E., 694 F.3d at 186). Thus, the aspirational statements regarding mainstreaming in the September 2013 IEP do not invite a searching inquiry into mainstreaming opportunities at the recommended school.

However, even assuming for purposes of argument that the testimony regarding future mainstreaming opportunities was not impermissibly retrospective, the evidence in the hearing record further illustrates the uncertainty of the CSE's mainstreaming intentions. For instance, Director 1 stated that the CSE would develop a plan to mainstream the student once the student entered the BOCES program, but she failed to describe a mainstreaming plan (see Tr. pp. 295-96, 389-90). This was consistent with testimony of the parents, who stated that the September 2013 CSE failed to discuss specific supports for mainstreaming and failed to identify when mainstreaming opportunities would be provided (Tr. pp. 1157-59, 1161, 1168).

Accordingly, the evidence in the hearing record supports the IHO's finding that the September 2013 CSE's special class recommendation did not constitute a FAPE in the LRE for the 2013-14 school year.

3. Timeliness of the IEP

The district additionally argues that the IHO erred by finding that its failure to develop an IEP for the student prior to the beginning of the 2013-14 school year constituted a procedural violation that rose to the level of a denial of a FAPE. A review of the evidence in the hearing

record confirms that the district's delay in creating the student's IEP further contributed to a denial of FAPE for the 2013-14 school year.

In order to meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (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 [2d Cir. 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6 [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement … for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]; but see C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 225-27 [S.D.N.Y. 2014]).

As a preliminary matter, it is unclear from the hearing record when the 2013-14 school year began. State law provides that a school year begins on July 1; however, as a practical matter, for students who have no need to attend school during July and August and who receive special educational services on a 10-month basis, the point in time at which an IEP should be in effect typically occurs at some point in early September (Educ. Law § 2[15]; see J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 395 [S.D.N.Y. 2010]; M.F. v. Irvington Union Free Sch. Dist., 719 F. Supp. 2d 302, 305 [S.D.N.Y. 2010]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *3 [S.D.N.Y. Mar. 29, 2013] aff'd, 554 Fed. App'x 56 [2d Cir. 2014]; Tarlowe, 2008 WL 2736027, at *6). Nevertheless, the district appears to concede that the 2013-14 school resumed for the student before September 20, 2013, the date of the CSE meeting in question (Dist. Ex. 53 at p. 3; Dist. Ex. 54 at p. 1; Dist. Ex. 106 E; see M.F., 719 F. Supp. 2d [2006-07 school year began on September 6]).

As the IHO correctly observed, despite beginning the review process in May 2013, the district failed to put an IEP in effect for the 2013-14 school year student until September 20, 2013 (IHO Decision at p. 11-12). On appeal, the district contends that its lack of punctuality should be excused due to the parties' lengthy efforts to identify and recommend a placement for the student. While district is correct that the parties engaged in extensive efforts to locate an appropriate placement for the student between May 2013 and September 2013 (see Tr. pp. 197-201, 203-04, 207-10, 215-17, 1287-89; Dist. Exs. 10, 13; 20 at p. 1; 20, 21 at pp. 1-2; 24 at pp. 1-5; 25; 26 at p. 1; 31 at pp. 1-2; 32 at pp. 1-2; 33 at pp. 1-4; 34 at pp. 1-4; 35 at pp. 1-2; 37 at p. 1; 38 at pp. 1-3; 39 at pp. 1-4; 42 at pp. 1, 3; 43 at p. 1; 44 at pp. 1-3; 45 at p. 1; 47 at p. 1; Parent Exs. O at pp. 1-2; R at p. 1; V at p. 1; Y at p. 1; BB at p. 1; CC at p. 1; HH; see generally Dist. Exs. 106A-106C), over a period of more than three months, the district nevertheless bore the responsibility to comply with offering an completed IEP failed to locate and identify a placement by the beginning of the school year. This constituted a procedural violation of the IDEA (34 CFR 300.323[a]; 8 NYCRR 200.4 [e][1][ii]; Cerra, 427 F.3d at 194; K.L., 2012 WL 4017822, at *13; Tarlowe, 2008 WL

2736027, at *6). Thus, the district's procedural violation contributed to the denial of FAPE for the 2013-14 school year.[9]

C. 2014-15 IEP

Turning to the 2014-15 school year, the district argues that the IHO erred in finding that it failed to give proper notice to the parents before declassifying the student. The district also argues that it conducted a sufficient evaluation of the student prior to declassification. The parents argue that the IHO correctly determined that the district's actions significantly impeded their ability to participate in the CSE decision-making process. A review of the evidence in the hearing record supports the IHO's determination.

1. Background

The July 2014 CSE discussed the student's present levels of performance, noting the student's decrease in the number of migraine headaches as demonstrated by a report from the NPS nurse that the student only had six migraine headaches during the 2013-14 school year (Dist. Ex. 106 D at p. 35). Director 2 also acknowledged that the student evinced a move in a "positive direction" when he told his parent that the College Board test was stressful (see Dist. Ex. 106 D at pp. 41-42). Likewise, the student's parents agreed that they had seen "positive development" in the student during the 2013-14 school year and that he expressed himself more when feeling stressed or anxious (Dist. Ex. 106 D at pp. 42-43). Director 2 stated that the student made "very good progress" in academics during his last three years at the NPS, including a decrease in the frequency of migraines, an increase in self-advocacy as shown by accessing a computer science course, and his participation in a wilderness first responder class (Dist. Ex. 106 D at p. 47).

The July 2014 CSE also reviewed an August 23, 2013 letter from the student's psychiatrist which advocated for the continuation of the student's eligibility for special education based on the student's "significant disability" (Dist. Ex. 106 D at pp. 28, 31-33). The CSE noted that the psychiatrist did not recommend any change in school or a segregated special class for the student and recommended extended time on standardized tests due to the student's anxiety disorder and migraine headaches (Dist. Ex. 106 D at pp. 31-33). Director 2 also stated that the CSE should reconvene for a review of updated SDRT and BASC-2 testing results to assess the student's functioning, and the parents agreed to such evaluations (Dist. Ex. 106 D at pp. 72-73, 74-76).

The CSE discussed the student's classification at the July 2014 CSE meeting as well as "his status as a student within special education" (Dist. Ex. 106 D at p. 47). According to Director 2, the CSE received information suggesting that further classification of the student with an OHI would be inappropriate because the student's migraines had been steadily decreasing and the student demonstrated academic and social progress (Dist. Ex. 106 D at pp. 47-48, 50). Director 2

[9] Were this the only violation committed by the district and there were no LRE problems, I would not be so swift to find that this, alone, rose to the level of a denial of FAPE that would warrant the relief requested by the parents. It appears that the IHO was of the view that a late IEP automatically constituted a per se denial of FAPE and, thus, did not analyze the degree to which it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits, especially where as here, the parents had already rejected the public school offer in August and unilaterally placed the student (see C.U., 23 F. Supp. 3d at 225-27).

suggested that, because the student had not attended a public school or state approved school for the last three years, the CSE should look as the student "as a 504 student" since he only required accommodations for flexible setting and extended time (Dist. Ex. 106 D at pp. 47-48, 50). The parents disagreed with the declassification proposal at the CSE meeting (Dist. Ex. 106 D at p. 49). The parents explained that the student's progress and achievement were precisely due to the significant support he received from the parents and the NPS (Tr. pp. 1240-41; Dist. Ex. 106 D at pp. 48-49). In response to the parents' views, the CSE discussion changed course and the CSE went forward and reviewed potentially suitable programs for the student at either the district's public high school or an out-of-district program (Dist. Ex. 106D at pp. 53, 55, 58-60). The July 2014 CSE discussed how the public high school could accommodate the student's particular therapy needs as well as the district's willingness to design a plan for him (Dist. Ex. 106 D at pp. 69-72). At the end of the July 2014 CSE meeting, Director 2 stated that she would "go out and try to get . . . information from the high school" regarding potential class sizes and schedules, and if the parents or student desired additional information, the CSE could reconvene to discuss (Dist. Ex. 106D p. 65; see id. at pp. 76-77)

The CSE reconvened on September 4, 2014 (Dist. Ex. 106 E at p. 1). At this meeting, the CSE reviewed the results of an August 2014 neuropsychological assessment (id. at pp. 10-11). In this evaluation report, a neuropsychologist noted that the student was "doing well socially, emotionally and academically" at the NPS and he had developed positive peer and mentor relationships that reduced his social anxiety and increased his availability for learning (Dist. Ex. 76 at p. 1). According to the report, with respect to the administration of the SDRT, the student achieved a reading comprehension score at the 65th percentile (id.). The student also completed a BASC-2 Self-Report and his responses indicated no significant areas of concern (id.). The student's parent completed a BASC-2 Parent Rating Scale which resulted in scores in the at-risk range in several areas (id.).[10]

Among the evidence considered by the IHO, the district identified several documents that, in its view, supported the recommendations of the CSE including a February 2012 BASC-2 Self-Report, an April 2013 neuropsychological assessment report, a June 2014 student report card, an August 2013 letter from a psychiatrist, an April 2014 neuropsychological follow-up, a June 2014 letter from the student's private clinical social worker (social worker), and an August 2014 neuropsychological follow-up letter (see Dist. Exs. 51; 61; 63; 66; 76; 86 at p. 1; Parent Exs. H; EE). In the April 2014 neuropsychological follow-up, the neuropsychologist concluded based on academic progress reports, input from parents and a brief clinical assessment including mood inventories that the student was "making good progress across the board – socially, emotionally and academically, in his current program" (Dist. Ex. 66 at p. 1). In the June 17, 2014 letter from the social worker, it was reported that the student had attended therapy sessions with her over the past two years (Dist. Ex. 61 at p. 2).[11] The letter indicated that the student "has developed positive

[10] Specifically, the administration of the BASC-2 Parent Rating Scale yielded scores with percentile ranks of 94 in withdrawal, 15 in social skills, 15 in functional communication, 92 in developmental social disorders, 84 in emotional self-control, and 14 in resiliency (Dist. Ex. 76).

[11] The social worker indicated that the sessions first began on a weekly basis and throughout the "2014 year" the student had attended every other week (Dist. Ex. 61 at p. 2). The social worker further indicated sessions during the 2013-14 school began on September 13, 2013, concluded on May 27, 2014, and took place at the NPS (Dist. Ex. 61 at p. 2).

coping skills to address stress and decrease anxiety" (id.). The social worker also reported the student "developed insight and understanding into some triggers for his migraine headaches" (id.). The letter indicated the student adjusted well to school despite his best friend not returning this year, developed several friendships, and was active in sports and social events at the school (id.).[12] The letter also indicated the student had approximately three migraine headaches during the school year for which he had effective medication, but that he did not always take action when symptoms appeared, although at times, he was able to avoid a full migraine headache without medication (id.). Neither the June 2014 letter from the clinical social worker nor April 2014 neuropsychological report addressed whether continued classification was appropriate (Dist. Exs. 61 at p. 2; 66 at p. 1).[13]

At the September 2014 CSE meeting, the district devoted a substantial amount of the meeting to reviewing the proposed programs discussed during the previous meeting, and the CSE considered which programs to offer the student. Director 2 confirmed that she informally contacted the out-of-district program after the July 2014 CSE meeting in order to collect class profiles and class size information (Dist. Ex. 106E at p. 3). Based upon the class profiles received, the September 2014 CSE including the parents determined that the out-of-district program was not appropriate for the student (Tr. p. 513; Dist. Ex. 106E at pp. 31-34). Director 2 again identified the district's public high school program as a potential option (Tr. pp. 514-15; Dist. Ex. 106E at p. 34). During the ensuing discussion, the September 2014 CSE attempted to establish that the program was appropriate for the student; Director 2 stated that the program had small class sizes and opined that the student could be highly successful in the program (Dist. Ex. 106E at pp. 37-38; see Tr. pp. 514-15). The parents, however, responded that because the district was late in its development of the IEP, the parents had returned the student to the NPS for the 2014-15 school year (Tr. p. 515; Dist. Ex. 106E at p. 41).

At the September 2014 CSE meeting, Director 2 stated that the student demonstrated progress during his eleventh grade year at the NPS (Dist. Ex. 106E at pp. 20-21). She further stated that the student took high-level courses, performed well academically, and that his migraine headaches had reduced in frequency (id. at pp. 20-21). She also indicated that the student scored extremely well on tests and that his "physical impairment" (i.e., migraine headaches) was not affecting his educational performance (id. at pp. 25, 68). Hence, the September 2014 CSE determined that the student no longer met the criteria to be classified as a student with a disability and did not require special education (Dist. Ex. 106E at pp. 70-71).

On appeal, the district contends that its declassification of the student was appropriate. However, as the IHO correctly noted, the district committed a number of procedural missteps

[12] According to the letter, the student participated in soccer in the fall, snowboarding in the winter, and kayaking in the spring (Dist. Ex. 61 at p. 2). The letter also indicated the student obtained his wilderness first responder certificate (Dist. Ex. 61 at p. 2).

[13] However, a September 2014 letter from the student's psychiatrist stated that "[the student] continues to qualify for special education service support as a child with a disability and continues to fit the category of 'Other Health Impaired'" (Parent Ex. LLL at p. 1). While this particular letter was dated two weeks after the September 2014 CSE meeting, and thus not reviewed by the CSE team, it is the only evaluation that directly addressed the issue of classification and reached an opposite conclusion from the district's determination regarding the student's eligibility for special education (id.).

which, when considered together, significantly impeded the parents' ability to participate in the provision of FAPE to the student.

First, while the district briefly mentioned declassification during the July 2014 CSE meeting, discussion at the end of the July 2014 CSE meeting and the beginning of the September 2014 CSE meeting sent a very mixed message to the parents, strongly suggested that the district would continue to deem the student eligible for special education services insofar as the CSE actually continued to explore placement in special education programs after the discussion of declassification concluded (Dist. Exs. 106D at pp. 53, 55, 58-60, 69-72; 106E at pp. 3, 31-34, 37-38). And while the district provided the parents with advance notice of the September 2014 CSE meeting, this notice failed to provide the September 2, 2014 meeting notice within five days of the scheduled meeting; the notice was dated two days before the September 4, 2014 CSE meeting (Dist. Ex. 84 at p. 1; see Dist. Ex. 106 E).

The district's failure to provide sufficient notice of the September 2014 CSE and the confusing message in the July 2014 meeting had a substantial impact on the parents' ability to participate in the meeting. Indeed, during the meeting the parents stated that they "could have brought in" the neuropsychologist to address the issue of classification (Dist. Ex. 106E at pp. 23, 51-52, 61).[14] Further, the parents argued that if they been notified of declassification in writing, they likely would not have attended the September 2014 CSE meeting unprepared because they "would have needed more time to make sure . . . [they] had appropriate documentation, [a] physical classroom observation, and [to] make sure [the psychiatrist] had his report in, which was forthcoming" (Tr. p. 1257).

Second, the district failed to consider or recommend declassification support services (Tr. pp. 518-19, 640-41, 1064-65; Dist. Ex. 106E at p. 71). Once a student has been declassified the district is required to provide educational and support services to the student, if necessary; furthermore, such services should be clearly documented in the district's recommendation (8 NYCRR 200.2[b][8][ii], 200.4[b][6][vii], [c][3], [d][1][iii]). State Regulations further provide that a recommendation of declassification support services must "indicate the projected date of initiation of such services, the frequency of provision of such services, and the duration of such services, provided that such services shall not continue for more than one year after the student enters the full-time regulation education program" (8 NYCRR 200.4[d][1][iii][b]). While Director 2 testified that she had planned to have such a discussion, she claimed that she was unable to do so because the parents abruptly left the meeting; as Director 2 stated, "I had [the special education teacher from the district high school] bring the documents upstairs to be copied so we would all have physical copies, and in the end [the parents] decided to not go through those documents and decided to leave" (Tr. pp. 518-19). However, the student's parent and the district psychologist, both of whom were present at the CSE meeting, explained that the meeting simply ended without further discussion (Tr. pp. 640-41, 1064-65). A transcript of the September 2014 CSE meeting supports the latter version of events (Dist. Ex. 106E at pp. 71). There is also no indication in the hearing record that the district attempted to consider or offer declassification support services after

[14] I note, however, that the parents requested that the neuropsychologist attend the September 2014 CSE meeting on the day of the meeting and the district attempted to contact the neuropsychologist during that meeting (Dist. Ex. 106 E at pp. 4-6). This evidence regarding parent participation supports why timely advance notice is important for CSE meetings.

the meeting (Tr. pp. 566-67).[15] Even if the parents had abruptly left the meeting, such a decision would not absolve the district of its obligation to offer declassification support services.

Additionally, prior written notice requires a description of the actions proposed and an explanation of why the district proposed to take such actions, and a description of other options that the CSE considered and the reasons why those options were rejected (8 NYCRR 200.5[a][3]; see 34 CFR 300.503[b]; 8 NYCRR 200.1[oo]). Furthermore, districts are required to identify support services when rendering a recommendation of declassification (8 NYCRR 200.4 [d][1][iii]). While the district issued a notice of declassification and prior written notice to the parents, neither document indicates whether declassification support services were considered or whether they would be appropriate for the student (see Dist. Exs. 86 at pp. 1-2; 87 at pp. 1-6).

Third, the hearing record shows that, following the September 4, 2014 CSE meeting, the district failed to reconvene the CSE in response to the parents' request. By letter to the district on September 5, 2014, the parents unambiguously requested that the CSE reconvene in order to reconsider classification in light of the fact that the district failed to conduct appropriate evaluations and failed to provide notice of the proposed declassification (Dist. Ex. 88 at pp. 1-2). Despite the parents' request, the district did not reconvene and no written notice from the district indicating its refusal to reconvene the CSE was offered into evidence at the impartial hearing. The only justification offered by the district was provided at the impartial hearing: Director 2 testified that "[the CSE] did not [reconvene because the student] was no longer a classified student" (Tr. pp. 520-21).[16] However, it is unclear from the record whether the parents had any new or additional information to add at the time of their request to reconvene other than what was already discussed at the meeting (see Dist. Ex. 88 at pp. 1-2). Nevertheless, the district violated the IDEA by failing to either reconvene the CSE in response to the parents' request or responding with written notice stating the reasons why the district did not believe a reconvene was necessary (see Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]; see also Application of the Dep't of Educ., Appeal No. 12-128; Application of a Student with a Disability, Appeal No. 13-172; cf. Application of a Student with a Disability, Appeal No. 12-071 [finding no violation where the parents stated only that they were "willing to meet" with the CSE to discuss their concerns]).

While the procedural violations described above, standing alone or when considered individually, might not result in the denial of a FAPE, the aggregate effect of the violations in this case significantly impeded the parents participation in the CSE process or resulted in less services to the student—namely, the CSE's failure to provide timely notice of the September CSE meeting; the absence of declassification support services or an indication that such services were considered; and the CSE's failure to reconvene the CSE upon the parents' written request—supports the IHO's finding that the district failed to offer the student a FAPE for the 2014-15 school year (see R.E.,

[15] Director 2 also argued that declassification services were only necessary in the public education setting (Tr. p. 569-70). However, the district has failed to identify any legal support for this contention on appeal.

[16] While the district stated they had no obligation to reconvene, the September 4, 2014 meeting prior written notice incongruously stated that the parents had "the right to address the committee, either in person or in writing, on the appropriateness of the Committee's recommendations" (Dist. Ex. 86 at p. 2).

694 F.3d at 191; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 434 (S.D.N.Y. 2014) aff'd sub nom. 603 Fed. App'x 36 [2d Cir. 2015]).[17]

D. Appropriateness of the Unilateral Placement

Having affirmed the IHO's conclusions that the district denied the student a FAPE for the 2013-14 and 2014-15 school years, I turn next to consider the appropriateness of the parents' unilateral placement. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65).

When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

[17] The district also cross-appeals the IHO's determination that the evaluation it conducted before recommending declassification was inadequate. The appropriate declassification of students with disabilities requires, among other things, a reevaluation in all areas related to the student's suspected disability prior to declassifying a student (8 NYCRR 200.2[b][8][ii], 200.4[c][3], 200.4[b][6][vii]). While it is not necessary to address this claim in detail given the conclusion above, the evaluative reports considered by the September 2014 CSE sufficiently described the student's needs in the areas of academics, social/emotional functioning, and physical development (see Dist. Ex. 86 at p. 1; Dist. Exs. 51; 61; 63; 66; 76; Parent Exs. H; EE). While a classroom observation may have beneficial to the CSE, such an assessment is not specifically required by State or federal law (Dist. Ex. 106 E at pp. 59-60).

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

The parents seek relief for two separate school years in this proceeding, which ordinarily necessitates a year-by-year analysis (see generally Omidian, 2009 WL 904077, at *22-27 [examining each year separately for determining the appropriateness of a unilateral placement]). This inquiry is complicated by the fact that the IHO and both parties have largely condensed this inquiry into a single analysis (see IHO Decision at pp. 17-18; Pet. at ¶¶ 34-68; Ans. and Cross-Appeal at ¶¶ 12-35). Nevertheless, effort has been made herein to analyze the merits of each school year at issue separately.

1. The Student's Needs

a. 2013-14 School Year

The April 2013 neuropsychological assessment report generally reflected the student's average to high average cognitive and academic abilities, and "significant weakness" in mental and motor processing speed, verbal retrieval fluency, working memory, and social/emotional/perception (Parent Ex. H).[18] With respect to the Beck Youth Inventories, the student's scores fell in the average range in the areas of self-concept, anxiety, depression, and anger (id. at pp. 5-6).

In the student's NPS report card for the second marking period of the 2012-13 school year, the student's English II teacher indicated that the student sometimes engaged in inconsistent or inattentive reading (Parent Ex. M at p. 10). The Spanish II teacher reported the student's weakest areas were in completing homework assignments and preparation for class (id.). The student's algebra teacher also indicated the student sometimes lacked effort in class (id. at p. 11). The honors chemistry teacher reported the student needed to give attention to detail in his work, strive for understanding of the content, and needed to apply consistent effort to all assignments (id.).

[18] The report indicated that the student's memory for faces was below expectation (37th percentile) in immediate and delayed recognition (Parent Ex. H at pp. 4-5).

As noted above, the hearing record indicates that the diagnostic impressions of the student included a headache disorder with both physical and psychological contributants including associated features of anxiety and dysthymia (Tr. p. 958; Parent Ex. EE at p. 2). The psychiatrist reported in his August 2013 letter that the student continued to have a migraine headache disorder as shown by the student's headaches occurring approximately on a monthly basis, which affected his educational performance (Parent Ex. EE at p. 1). The psychiatrist further reported that the student's grades were somewhat uneven and opined this resulted from a decline in his study habits and drive which occurred during the 2010-11 school when he was unable to do most of his school work due to his migraine headaches (id. at p. 2). The testimony of the NPS academic director indicated that when the student became overwhelmed that his stress level increased, which triggered migraine headaches for the student during the 2013-14 school year (Tr. p. 909).[19, 20]

b. 2014-15 School Year

The June 23, 2014 report card from the fourth marking period of the 2013-14 school year indicated that the student achieved final grades of "B-" in honors US history, "A-" in English III honors, "B" in Spanish III, "B" in pre-calculus, and a "B" in AP biology (Dist. Ex. 63 at pp. 10-12). The honors US history teacher indicated that the student demonstrated difficulties with timeliness and completing homework but overall performed well with the content of project-based assignments (id. at p. 10). The English III honors teacher further stated that the student "showed a firm grasp of the material" but could have shown more "substance and depth in his response to the short story" (id. at p. 11). According to the Spanish III teacher, if the student's focus improved, his "good work" would be more consistent (id. at p. 11). The pre-calculus teacher reported that the student showed much effort and detail in both classwork and homework and demonstrated a thorough understanding of the material in class, but was less consistent with the amount of effort he put forth in preparing for quizzes and tests (id. at pp. 11-12). According to the AP biology teacher, the student demonstrated a solid understanding of biology and a logical yet creative approach to problem solving and contributed much information to class discussion from outside sources (id. at p. 12).

The psychiatrist in his September 20, 2014 letter indicated that the student continued to present with a migraine headache disorder as shown by "still frequently occurring migraine headaches" which were often triggered by stress or anxiety (Parent Ex. LLL at p. 1). The psychiatrist further indicated that the headaches occurred less frequently than last year and were less debilitating, but continued to "impact on [the student's] educational performance" (id.). The psychiatrist's diagnostic impressions of the student included headache disorder with both physical (migraine) and psychological contributants, associated features of both anxiety and dysthymia, a specific learning disorder involving slow pressing speed, as well as deficits in verbal retrieval fluency and working memory (id. at p. 2).

[19] The attendance report for the 2013-14 school year indicated the student had eight excused absences due to migraine headaches (Parent Ex. QQ).

[20] The academic director was also the student's AP biology teacher during his eleventh grade year (Tr. p. 885).

2. Services Offered at the NPS

a. General Description of the NPS

The hearing record indicates that the NPS is a private, college preparatory boarding school for students grades nine through twelve (Tr. pp. 896, 984; see also Parent Ex. DDDD at p. 2). The NPS enrollment typically ranges from 159 through 175 students depending upon the school year (Tr. p. 896). The academic director testified that athletes and non-athletes attend the NPS based on interests ranging from hockey and skiing, to international students attending for language acquisition needs (Tr. pp. 896-97). According to the hearing record, the NPS staff does not include a psychologist or psychiatrist (Tr. p. 937). The academic director testified that the NPS has a school counselor on staff (Tr. p. 900). The guidance director indicated that the NPS faculty tracks student compliance with what the NPS has identified as the seven essential study skills through use of a web-based communication system that produces interim progress reports to update families and the students (see Tr. pp. 964-65). The student attended the NPS for eleventh grade during the 2013-14 school year and received instruction in honors US history, honors English III, Spanish III, pre-calculus, and AP biology (Dist. Ex. 63 at pp. 10-12). The student also attended the NPS for twelfth grade during the 2014-15 school year and received instruction in AP psychology, English IV advanced composition and world literature, calculus, computer programming, honors physics, ceramic arts, and digital imaging (Parent Ex. CCCC at pp. 1-3).

b. Counseling Services

The hearing record reflects that the student received counseling from a social worker during the 2013-14 school year (Tr. pp. 1202-203; Dist. Ex. 61 at p. 2; see also Dist. Ex. 106 A at pp. 40-41).[21] The counseling sessions took place during the 2013-14 school year first on a weekly basis, and then on a biweekly basis at an unspecified time during this school year (Tr. pp. 1202-03; Dist. Ex. 61 at p. 2).[22]

In a June 17, 2014 letter to the CSE, the social worker indicated that counseling sessions with the student began September 13, 2013 and concluded May 27, 2014 (see Dist. Ex. 61 at p. 2). The letter indicated that the student "developed positive coping skills to address stress and decrease anxiety" (id.). The social worker reported that the student "developed insight and understanding into some triggers for his migraine headaches" (id.).

The parent testified that the student's counseling sessions with the social worker ceased in November 2014 at the request of the student and agreement of the parent (Tr. pp. 1205-206). The parent further testified that the student reported he did not need the counseling, and to her belief the counseling had helped the student, but that the student had enough support at the NPS at that point (Tr. pp. 1205-207).

[21] The student's parents arranged for the student to receive private counseling from the social worker (Tr. pp. 1202-203).

[22] The guidance director testified that he believed the student's counseling sessions with the social worker took place at the NPS school counselor's office (Tr. p. 977).

c. Informal Counseling Services

The student met with the NPS school counselor on an informal basis during both the 2013-14 and 2014-15 school years (see Tr. pp. 976, 1198-199). The guidance director testified that the NPS school counselor also serves as the director of the outdoor program (Tr. pp. 975-76). The guidance director testified that the counselor and student often talked five times a week or more, but he would not refer to it as formal counseling, although he opined "lots of counseling" occurred (see Tr. p. 976). Furthermore, the guidance director noted that "social counseling" rather than therapeutic counseling was provided to the student (Tr. p. 936).

d. Accommodation Plan

The NPS provided the student with a student profile and accommodation plan for the 2013-14 and 2014-15 school years (Parent Exs. JJ at pp. 1-2; HHH at pp. 1-2).[23, 24] The student profile and accommodation plan included educational accommodations, summary information describing the student, as well as the results from a learning style inventory and a list of student responsibilities (see Parent Exs. JJ; HHH).

The hearing record indicates that the guidance director developed the accommodation plans based upon evaluative reports (Tr. pp. 944-45, 960; Parent Exs. JJ; HHH). The guidance director provided the accommodation plan for the 2013-14 and 2014-15 school years to the student's teachers and provided reminders to staff of the plan periodically (Tr. pp. 960-962). The guidance director testified that the purpose of the accommodation plan was to assist the student in learning and mastering skills that were required to succeed in coursework and to perform well in college (Tr. p. 971). The guidance director testified that the accommodation plan was "a support system to help him and all students learn" (Tr. p. 971). The guidance director testified that 10 to 15 students at the NPS had an accommodation plan during the 2014-15 school year (Tr. pp. 966-67, 982, 994).

The summary information in the accommodation plans described the student as having "generally excellent academic and cognitive abilities" with strengths in visual-spatial reasoning, verbal comprehension, vocabulary, and verbal abstract reasoning together with very low verbal retrieval fluency, slow processing speed, and inefficient working memory that affected his academic performance (Parent Exs. JJ at p. 1; HHH at p. 1). In addition, both the 2013-14 and 2014-15 accommodation plans indicated that the student demonstrated difficulties with social/emotional perception (specifically, reading emotion in faces) and social anxiety (Parent Exs. JJ at p. 1; HHH at p. 1). The student profile and accommodation plans noted that teachers should be aware of the student's anxiety because anxiety could lead to the student's debilitating headaches (Parent Exs. JJ at p. 1; HHH at p. 1).

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[23] The guidance director testified that the student was provided with an accommodation plan beginning in ninth grade, and every year some changes were made based on the new evaluations including the use of an iPad for the 2014-15 school year which constituted the "main addition to the plan" (Tr. pp. 958-60).

[24] The AP psychology teacher testified that he provided the student with accommodations in class during the 2014-15 school year (see Tr. p. 978). The AP biology teacher testified that she provided the student with accommodations in class during the 2013-14 school year (Tr. p. 910).

The student profile and accommodation plans included results from a learning style inventory that the student completed which consisted of approximately 100 questions regarding the type of environment and methods the student preferred when learning new and difficult material (Parent Exs. JJ at pp. 1; HHH at p. 1). The guidance director testified that the accommodation plans included information regarding the results of the learning style inventory to provide insight into the student's strengths and weaknesses (Tr. pp. 969-70). The inventory results indicated that the student typically completed tasks and preferred to complete one task before beginning another task (Parent Exs. JJ at p. 1; HHH at p. 1). According to the results of the inventory, it was helpful for the student to understand expectations to avoid frustration and overwhelmed feelings (id.). The inventory results also indicated the student followed through and attempted to complete tasks, liked to please others, and appreciated feedback (id.). The guidance director testified that the learning style inventory created an opportunity to talk about preventing anxiety-based headaches (Tr. p. 971).

The accommodation plan provided to the student during the 2013-14 and 2014-15 school years included extended time for in-class assignments and standardized tests, preferential seating, use of graphic organizers or guided notes to support verbally presented information, individualized, regular counseling sessions with a school counselor, assistive technology (i.e. iPad for class use), supervised study hall, and access to school nurse including individualized nursing services (Parent Exs. JJ at p. 1; HHH at p. 1). The student profile and accommodation plans for the 2013-14 and 2014-15 school years were identical with the exception of two additional features on the 2014-15 plan: access to a licensed social worker and a goal indicating that the student would understand and identify the factors leading to stress and express such factors and feelings early rather than internalizing stress (compare Parent Ex. JJ at pp. 1-2, with, Parent Ex. HHH at pp. 1-2). The AP biology teacher testified that the student sat in front of his class (Tr. p. 912). In addition, the AP biology teacher testified that the student had access to technology and the student could leave at any point to visit the nurse due to a migraine headache during the 2013-14 school year (Tr. p. 912). The guidance director testified that the NPS provided the student with access to a wireless network so that he could use his iPad (Tr. p. 972).

For the 2013-14 and 2014-15 school years, the student profile and accommodation plan included student responsibilities (Parent Exs. JJ at p. 2; HHH at p. 2). The student responsibilities included that the student would understand and utilize educational accommodations, maintain a plan book, ask questions in class, seek help outside of class, be on time for class with needed materials, study effectively, ask the teachers for study strategies, and show consistent effort (id.). As noted above, the accommodation plan for the 2014-15 school year included an additional student responsibility that indicated the student would understand and identify the factors leading to stress and express such factors and feelings early rather than internalizing stress (see Parent Ex. HHH at p. 2). The guidance director testified that the NPS used the student responsibilities to assist the student to meet his goals, including checking in with the nurse about his health and taking advantage of available assistive technology, as well as to take more ownership of the plan (Tr. pp. 966-67).[25]

[25] The academic director testified, without reference to a specific school year, that the NPS teachers were aware of the student's experiences with migraine headaches and were flexible with the student (Tr. p. 914).

e. Other NPS Amenities

The academic director testified that the NPS provided all students with a two-hour supervised study hall five days per week in the evening in either their dorm room, library, or a quiet study place (see Tr. pp. 901-02). The guidance director testified that a faculty member checked in with student regarding homework and materials (Tr. pp. 973-74, 1005). The guidance director stated that the teacher supervising in the library helped the students with college guidance and homework, and within the dorm rooms the supervising staff member ensured the rooms were quiet and the students remained on task (Tr. pp. 901-02). The guidance director testified that in the student's eleventh grade year the student arranged for an additional study hall (Tr. p. 975).[26]

According to the academic director, the NPS had two nurses on staff, one of which was available 24 hours a day, including full time on-call availability (Tr. p. 899). The hearing record reflects the nurses had provided support for the student to manage his migraine headaches (Tr. pp. 1182-183; Dist. Ex. 104; Parent Ex. PP). Nursing records for the 2013-14 school year indicated that the student experienced approximately six headaches for which he received nursing assistance in the form of administration of medication and provision of food and liquids (Parent Ex. PP at pp. 1-6). During the 2014-15 school year, according to the student's progress note, the student received nursing services in the form of medication and provision of food and liquids approximately six times to address headaches (Dist. Ex. 104 at pp. 1-3). However, according to the NPS biology teacher, all students at the NPS have equal access to the school nurses (Tr. p. 939).

The guidance director who also served as the student's academic advisor testified that he provided the student with individual meetings throughout his junior and senior years to discuss college applications, which was the process for all students (Tr. pp. 951-53). The guidance director developed a transition report on May 5, 2015 to assist the student in obtaining accommodations in the college setting (see Parent Exs. SS at pp. 1-5). The guidance director also requested accommodations for the student to use on College Board tests during the 2013-14 school year which were granted (see Parent Exs. KK; MM). On April 7, 2014 the guidance director met with the student to assist him with the college search and application process (Parent Ex. AAA), and subsequently the student was accepted into several colleges (Parent Exs. TTT; UUU, XXX; YYY; ZZZ). However, the transition report itself was primarily tailored to getting the student ready for college; beyond the information provided to assist the student in obtaining testing accommodations, the services were no different than those received by all other students at the NPS (see Tr. pp. 952-53).

The academic director testified that the average class size at the NPS was typically 12 students (Tr. p. 945). The student's mother testified the student benefited from the small class size at the NPS because a small class size addressed the student's academic needs and allowed for flexibility (Tr. pp. 1181-182). During the May 2013 CSE meeting, the student's counselor and English teacher from the NPS stated that a small class size was "ideal" for the student, and the neuropsychologist indicated that in smaller classes it would be easier for the student to process social/emotional information and have access to the teacher (Dist. Ex. 106 A at pp. 25, 31-32).

[26] The NPS also offered students a 25-minute flex period in the morning wherein all teachers were in their classrooms and available to provide extra assistance (Tr. pp. 901-02).

The student's mother testified that the boarding component was "essential" because the student was unable to function in a public school setting (Tr. pp. 1207-208). The student's mother also testified that the neuropsychologist stated the student demonstrated progress because of being in a "seamless environment" (Tr. pp. 1207-208). The student's mother further testified that the student benefited from engaging with his peers and teachers on a full-time basis including improving his social/emotional perception abilities because of his interactions with others (Tr. p. 1208). The counselor stated at the May 2013 CSE meeting that the student's access to the same peers within class, at meal times, and in the dorm as well as seeing the teachers in social and academic situations increased the student's comfort level and "worked to his benefit" (Dist. Ex. 106 A at p. 33). The guidance director testified that the NPS offered the student a "supportive community" with a "close network of peers" and "all types of emotional supports" (Tr. pp. 977-78). While at the NPS, as part of the recreational program which was offered to all students, the student engaged in numerous outdoor activities including skiing, rock climbing, whitewater kayaking, hiking, and ice climbing (Tr. pp. 1000, 1004).

3. Specially Designed Instruction

As in prior school years, the hearing record indicates that the student exhibited progress academically, socially, and physically both during the 2013-14 and 2014-15 school year while at the NPS (see Tr. pp. 889-90, 955-57, 1000, 1077, 1203-04, 1208, 1238; Dist. Exs. 63 at pp. 10-12; 76 at p. 1; Parent Exs. LLL at p. 1; RRR; SSS; CCCC; AAAA).[27] However, a review of the information in the hearing record supports the IHO's determination that the parents did not meet their burden to show that the NPS provided specially designed instruction. Despite the recommendations from the private evaluators for continued support (Dist. Ex. 66; Parent Exs. EE; LLL; see Dist. Ex. 76), there is a lack of evidence in the hearing record that the NPS provided specially designed instruction to the student related to his social/emotional needs; additionally, the accommodations and supports provided by the NPS were generally available to all students.

Turning first to the student's social/emotional needs, the parent testified that the social worker's goals for the student were to identify triggers and manage stress related to his migraine headaches (Tr. p. 1204). Although the social worker indicated in her June 2014 letter that the student had in fact learned to identify triggers and use coping strategies (Dist. Ex. 61 at p. 2), she did not testify at the impartial hearing, and the hearing record failed to include any information such as counseling notes or progress reports about her sessions with the student to show what triggers were identified, what coping strategies were used, or otherwise what instruction was provided to assist the student in achieving this goal. According to the parent, the social worker did not keep detailed progress notes regarding the counseling sessions (Tr. p. 1205). Regarding

[27] Despite the evidence in the hearing record that the student made some progress at the NPS, the Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a private placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

informal counseling provided by the NPS counselor, the hearing record reflects the neuropsychologist's opinion that the student would likely be more receptive within a mentoring situation such as with opportunities for conversation during an outdoor activity (Dist. Ex. 106 A at pp. 41-42), and the parent's testimony that the NPS counselor determined that formal counseling sessions were not beneficial for the student, therefore, he spoke with the student during rock climbing outings and over lunch to monitor and assess the student's well-being (Tr. pp. 1198-199). The parent also testified that the NPS counselor worked with the student to reduce stress and express his anxiety (Tr. p. 1200), however, the NPS counselor did not testify at the hearing, and there is no evidence that provides information about the methods the NPS counselor used to achieve or whether the student made progress toward those goals. The parent further testified that the NPS counselor did not keep records of the goals he was working on with the student (Tr. p. 1200).

Without sufficient evidence, a determination cannot be made regarding whether the services the student received at the NPS addressed the student's needs (see Hardison v. Bd. of Educ., 773 F.3d 372, 387 [2d Cir. 2014] [upholding an SRO's finding that the parent's unilateral placement of the student was not appropriate because the hearing record lacked "more specific information as to the types of services provided to [the student] and how those services tied into [the student's] educational progress," and additionally stressing the importance of "objective evidence" in determining whether a parent's placement is appropriate] citing Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364, 366 [2d Cir. 2006]; see also L.Q. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom, 471 Fed. App'x 77 [2d Cir. Jun. 18, 2012]).

Turning to the accommodations and amenities provided by the NPS, the hearing record shows that all of the students at the NPS had access to many of the accommodations on the student's accommodation plan (see Tr. pp. 887, 912, 938-39, 946, 971-72). The student's AP biology teacher testified that she provided guided notes to all students and all students had the option of using assistive technology and had access to the school nurse (Tr. pp. 887, 912, 938-39). Further, she testified that classes were small such that all students had "preferential seating" (Tr. pp. 939, 946). The guidance director also testified that all teachers were required to "help" with guided notes in various forms including providing outlines, note packets, or files used on student iPads (Tr. p. 972). As stated above, all students also had access to supervised study hall (Tr. pp. 901-02). Although the NPS conducted a learning inventory with the student which the parents argue resulted in an individualized accommodation plan, the guidance director testified that the student responsibilities aligned with "seven essential study skills" such as tracking assignments, arriving to class on time, and using effective study skills, which applied to all students at the NPS (Tr. pp. 962-64).

It is understandable why the parents selected a placement such as the NPS, which offered the type of environment that resulted in physical, social and academic progress. While the NPS offered the student accommodations and supports such as in-class accommodations, nursing services, small class size, post-secondary transition planning, and supervised study hall, the NPS generally offered these supports to all students.[28] Furthermore, simply placing the student in the NPS setting—without proof in the hearing record that the NPS provided the student with appropriate coping mechanisms and strategies to deal with the stressors that cause his anxiety and migraines—is insufficient in this case to meet the parents' burden to establish that the NPS's program provided the student with educational instruction specially designed to meet his unique needs (see Gagliardo, 489 F.3d at 113-15; Frank G., 459 F.3d at 365; see also Rowley, 458 U.S. at 188-89).[29] Rather, it appears that the student's placement at the NPS provided him with "the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not," specifically (Gagliardo, 489 F.3d at 115).[30] Thus, for the reasons stated above, the IHO correctly found that the parents did not meet their burden to establish that the NPS provided the student with educational instruction specially designed to meet the unique needs of the student.

E. Relief—Compensatory Education

The parents argue that compensatory relief in the form of "educational and transition services" should be awarded in an amount appropriate to compensate the parents and student for the denial of FAPE for the 2013-14 and 2014-15 school years. The district argues that the IHO correctly denied the parents compensatory relief. A review of the evidence in the hearing records supports the IHO's conclusion.

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],

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[28] While the accommodation plan for the 2014-15 school year included access to a licensed social worker, as noted above, the student and social worker only met once during the 2014-15 school year

[29] Per State regulation, specially-designed instruction means "adapting, to the needs of an eligible student . . . the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]).

[30] While access to the recreational activities offered at the NPS may have alleviated the student's stress levels and in turn, reduced the frequency of his migraine headaches, such activities do not themselves rise to the level of special education. In this case it is clear that the NPS provided the student a small class size and that appears to have helped. However, the parties point to no authority, and I have found none, that holds that small class size alone constitutes special education within the meaning of the IDEA (see Frank G. v. Board of Educ. of Hyde Park, 459 F.3d 356, 365 [2d Cir. 2006] [declining to determine whether small class size alone constituted special education]; J.B. v. Bd. of Educ., 2001 WL 546963, at *7 [S.D.N.Y. May 22, 2001] ["[w]hile placement in small classes would provide [the student], or any other child, with an education superior to that available in public school, it is well established that the IDEA does not guarantee the best possible education or require that parents be compensated for optimal private placements."]). As in the prior proceeding, I am not inclined to extend such a rule under the totality of the factual circumstances presented in this case (see Application of the Bd. of Educ., Appeal No. 14-015).

1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]).[31] 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. Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456, n.15 [2d Cir. 2015] [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]; J.M. v. Kingston City Sch. Dist., 2015 WL 7432374, at *15-16).

Here, as noted above, the student's eligibility for special education programs and related services as a student with a disability ended upon his graduation in May 2015 and, therefore, unless the district committed a gross violation of the IDEA, the student would not be entitled to compensatory education thereafter (see Parent Ex. RR). In addition, given the fact that graduation with receipt of a high school diploma is generally considered to be evidence of educational benefit (Pascoe v. 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).

A review of the hearing record supports the IHO's determination that the parents failed to identify what compensatory services they desired for the student, or why such services might be appropriate. As noted above, it is not an SRO's role to research and construct the parties' arguments on appeal (see e.g., Gross, 619 F.3d at 704; Fera, 2009 WL 3634098, at *3; Garrett, 425 F.3d at 841). Moreover, the parents have not responded to the district's legal defense that compensatory services are unavailable for a "gross violation" of the IDEA under the circumstances of this case in which the student has become statutorily ineligible for further special education services at this point due to his graduation (see Ans. and Cross-Appeal at ¶¶ 42-43; see also E. Lyme Bd. of Educ., 790 F.3d at 456, n.15). An independent review of the hearing record does not support a conclusion

[31] 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).

that the denials of FAPE described above rose to the level of a gross denial of FAPE (see Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990] [claim for gross violation of FAPE stated where parents alleged that "defendants in effect took advantage of [the student's] mental infirmities in order to evade [IDEA] procedures, resulting in [the student's] complete exclusion from an educational placement until he was 21, with disastrous results"]; Burr by Burr v. Ambach, 863 F.2d 1071, 1073, 1075-76 [2d Cir. 1988] [district's failure to provide any educational services whatsoever during the pendency of administrative review coupled with administrative delay constituted a gross denial of FAPE]). Therefore, the IHO's disposition of the parents' claim is affirmed.

Moreover, with respect to the transition services sought by the parents, these services do not relate to the district's actions which resulted in a denial of FAPE for the 2013-14 and 2014-15 school years. Indeed, the September 2013 IEP addressed the student's transition service needs; identifying that the student needed to develop appropriate work skills and improve upon time management and study skills in order "to be successful in [his] field of study" completing coursework towards a high school diploma (Dist. Ex. 53 at p. 8). To address these needs, the IEP identified transition goals; namely, that "the student will state 4 of his most important criteria when choosing a job or career" (id. at p. 9). Additionally, the district identified transition activities in order to facilitate the student's movement from school to post-school activities including "participation in college prep curriculum, counseling to demonstrate appropriate social skills and coping strategies in academic settings, attending college fairs, and participating in structured learning experiences based on areas of interest" (id. at p. 11). Because a 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, relief in the form of further transition services would be inappropriate at this juncture (Newington, 546 F.3d at 123; S.A., 2014 WL 1311761, at *7; see L.M., 478 F.3d at 316; Reid, 401 F.3d at 518; Puyallup, 31 F.3d at 1497).

Further, there is no evidence in the hearing record that the transition services sought by the parents would be beneficial to the student at this juncture. The hearing record shows that the student is currently attending college and, further, that he timely completed activities required to ensure his acceptance including graduation, as well as utilizing informed strategies to ensure his continued success once in college (i.e., making accommodation request while in college) (Parent Exs. RR; SS at pp. 1-5; AAA; JJJ; TTT; UUU; WWW-ZZZ). It is difficult to imagine what further equitable remedy would be fair to impose upon the district but still benefit the student at this time (see Parent Ex. SS at p. 1-5). As is the case here, a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated" (N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014] report and recommendation adopted, 2015 WL 1137588 [D.R.I. Mar. 12, 2015]). Accordingly, the parents' request for additional compensatory educational and transition services is denied.

VII. Conclusion

The evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years. This evidence further supports the IHO's conclusion that the parents did not establish at the impartial hearing that the NPS offered specially designed instruction to meet the student's needs. In light of the above conclusions, the issue of whether equitable considerations supported the parents' claim for

reimbursement need not be addressed (see M.C., 226 F.3d at 66; D.D-S., 2011 WL 3919040, at *13).

While I empathize with the parents dissatisfaction with the CSE process and note that the student ultimately appears to have done well academically, socially, and physically at the NPS, I am constrained by the factors set forth in federal and State law concerning the imposition of equitable relief upon the district in the form tuition reimbursement for special education and compensatory education pursuant to the IDEA.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 21, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER