The University of the State of New York

The State Education Department
State Review Officer
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No. 16-016

**Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Riverhead Central School District**

**Appearances:**
Ingerman Smith, LLP, attorneys for respondent, Joseph Madsen, Esq., of counsel

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request for compensatory services for her daughter for the 2013-14 and 2014-15 school years. The appeal must be sustained in part.

### II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2],

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

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

**III. Facts and Procedural History**

According to the director of special education and the student's enrollment record, the student had attended a district school in the past (Tr. pp. 87-88; see Dist. Ex. 12 at p. 175; Parent Ex. 2).[1] The student attended another school district for the 2012-13 school year and a portion of the 2013-14 school year until on or about March 17, 2014, at which point the parent and the student moved back to the district (Dist. Exs. 3 at p. 8; 12 at p. 175; see Parent Ex. 2). On March 17, 2014, a "temporary IEP" was created by the district based on the most recent IEP from the student's previous school district (Tr. pp. 87-88, 93-94, 101-02, 104; Dist. Ex. 3 at p. 8).

On April 9, 2014, a CSE subcommittee convened for a "transfer intake meeting" to develop the student's IEP for the remainder of the 2013-14 school year (Dist. Ex. 4 at p. 40). The April 2014 CSE determined that the student was eligible for special education and related services as a student with an other health-impairment and, for the remainder of the 2013-14 school year,

[1] The district's exhibits are numbered cumulatively and in sequential order. For ease of reference—and because the parties and the IHO utilized this format—citations in this decision to the district's documents utilize the district's method of pagination.

recommended a 15:1+1 special class placement in a community school; the CSE also recommended one 30-minute session per week of occupational therapy (OT) in a group (5:1), three 30-minute sessions per week of speech-language therapy in a group (5:1), and one 30-minute session per week of counseling in a group (5:1) (id. at pp. 42, 49, 51).[2] In addition, the April 2014 CSE recommended a 1:1 full-time aide, participation in alternate assessments, testing accommodations, management needs, and special transportation (id. at pp. 46, 49-51). The April 2014 CSE developed annual goals with corresponding short-term objectives to address the student's speech-language, social-emotional/behavioral, and motor skill needs (id. at pp. 47-48). While the April 2014 IEP included test results and present levels of educational performance identifying academic needs, the CSE did not recommend annual goals or short-term objectives to target the student's academic needs (id. at pp. 42-45, 47-48).

On June 12, 2014, the CSE convened for an annual review of the student's program and to develop her IEP for the 2014-15 school year (Dist. Ex. 5 at p. 63). The June 2014 CSE recommended a 15:1+1 special class placement in a community school with the same related services as identified on the April 2014 IEP (id. at pp. 65, 75, 77). In addition, the June 2014 CSE recommended a 1:1 full-time aide, participation in alternate assessments, testing accommodations, management needs, and special transportation (id. at pp. 69, 75-77). The June 2014 CSE developed annual goals with corresponding short-term objectives to address the student's speech-language, social-emotional/behavioral, reading, writing, mathematics, and motor skill needs (id. at pp. 70-74).

On September 8, 2014, the CSE amended the June 2014 IEP without a CSE meeting with the parent's consent, to remove special transportation from the student's IEP (Tr. pp. 444; Dist. Ex. 6 at pp. 86-87, 100-01).

On October 15, 2014, the CSE amended the June 2014 IEP again without a CSE meeting and with the parent's consent, to reflect the addition of adapted physical education (Tr. pp. 829-30; Dist. Ex. 7 at pp. 107, 124).

According to the director of special education, due to reported attention difficulties and noncompliant and aggressive behaviors, the school psychologist observed the student in the classroom setting in October 2014 and November 2014 for the purposes of developing a functional behavioral assessment (FBA) (Tr. pp. 143-44, 148; see Dist. Ex. 14). The district subsequently developed a behavior intervention plan (BIP) which bore an implementation date of November 18, 2014 (Tr. p. 145; Dist. Ex. 13).[3]

According to the district's daily attendance log, the student stopped attending school after January 5, 2015 (Dist. Ex. 30 at pp. 250-51). During a meeting with the director of special education in mid-January 2015, the parent requested homebound instruction and related services; in response, the district requested documentation from the student's doctor supporting the student's need for homebound instruction (Tr. pp. 162-63, 189-90, 194-95, 463-66; see Dist. Exs. 10; 30 at

[2] The student's continued eligibility at all times relevant to this appeal for special education and related services as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[3] The October 2014, March 2015, and May 2015 IEPs reflect the CSE's recommendation of the October/November FBA and BIP (Dist. Exs. 7 at p. 118; 8 at p. 140; 9 at p. 164).

pp. 250-51).[4] The parent provided documentation from two of the student's doctors on or about February 6, 2015 (Tr. pp. 239-41, 464-66, 754-55; Dist. Exs. 10; 11; 34). According to the district's daily attendance log, it initiated home instruction beginning on January 16, 2015 (Dist. Ex. 30 at p. 250).

On or about March 2, 2015, the student's homebound instruction teacher discontinued services due to reported student behaviors (Tr. pp. 772, 781-82; Dist. Ex. 37). While it is unclear from the evidence in the hearing record, it appears that the district secured a second homebound instruction teacher who provided instruction to the student (Tr. pp. 240-42, 773-75; Dist. Ex. 8 at p. 130).

On March 4, 2015, the CSE convened for a "requested review" of the student's program (Dist. Ex. 8 at p. 129). For the remainder of the 2014-15 school year, the March 2015 CSE recommended a Board of Cooperative Educational Services (BOCES) 8:1+1 special class placement, with the same level of related services as listed on the April 2014 IEP (id. at pp. 131, 139-40, 142). In addition, the March 2015 CSE recommended a 1:1 full-time aide, participation in alternate assessments, testing accommodations and management needs (id. at pp. 134, 139-42). The March 2015 CSE also indicated that the student would continue to receive homebound instruction two hours per day from February 3, 2015 to March 31, 2015 (id. at pp. 140). The March 2015 CSE developed annual goals with corresponding short-term objectives to address the student's speech-language, social-emotional/behavioral, reading, writing, mathematics and motor skill needs (id. at pp. 135-39). The parent did not accept the March 2015 CSE's recommended placement and the student continued to receive instruction at home (Tr. pp. 196, 1005-07; Dist. Exs. 8 at p. 130; 30 at p. 249).

The hearing record contains conflicting accounts as to the circumstances under which the district provided services to the student during the latter part of the 2014-15 school year. On the one hand, the director of special education testified that on or about May 9, 2015 the parent no longer wanted the services of the instructor who was providing instruction (Tr. pp. 239, 243-44). The director of special education further testified that the speech-language provider withdrew in May 2015 and, as a result, the student did not receive speech-language services from May 2015 through October 15, 2015 (Tr. pp. 670-71). Other evidence suggests that the parent did not request cessation of homebound instruction; specifically, an acknowledgement in the student's enrollment records that the student continued "home-schooling" beginning on July 1, 2015; and testimony from the director of special education that once the district provided the student with homebound instruction in January 2015, it did not stop offering such services up until the time of the impartial hearing (Tr. pp. 668-70; Dist. Ex. 16; Parent Ex. 2 at p. 1).

[4] The hearing record includes references to the phrase "home instruction"; however, it should be clarified that a student may receive instruction at home or outside of school for a variety of reasons (see 8 NYCRR 100.10, 175.21[a], 200.6[i]). For example, students may be home schooled by their parents (8 NYCRR 100.10); students with disabilities may receive home or hospital instruction as a placement on the continuum of services (8 NYCRR 200.6[i]; see 8 NYCRR 200.1[w]); or students may receive homebound instruction if they are "unable to attend school because of physical, mental, or emotional illness or injury" (8 NYCRR 175.21[a]; see Educ. Law 3602[1][d]). As the district provided the student with home instruction for medical reasons based on documentation provided by the student's doctors (Tr. pp. 189-95; Dist. Exs. 10-11), the term homebound instruction is used throughout this decision.

On May 20, 2015, the CSE convened for a "requested review" of the student's program (Dist. Ex. 9 at p. 152). For the remainder of the 2014-15 school year, the May 2015 CSE continued the recommendation for a BOCES 8:1+1 special class placement in a community school, with the same level of related services as listed on the April 2014 IEP (id. at pp. 153, 163-64, 166). In addition, the May 2015 CSE recommended a 1:1 full-time aide, participation in alternate assessments, testing accommodations and management needs (id. at pp. 158, 163-66).[5] The May 2015 CSE developed annual goals with corresponding short-term objectives to address the student's speech-language, social-emotional/behavioral, reading, writing, mathematics and motor skill needs (id. at pp. 159-63).

**A. Due Process Complaint Notice**

By due process complaint notice dated July 22, 2015, the parent requested an impartial hearing, alleging that the district denied the student a free appropriate public education (FAPE) for the 2013-2014 and 2014-15 school years (Dist. Ex. 1 at pp. 1-2). The parent claimed that the district failed to properly evaluate the student in all areas of suspected disability and sought a neuropsychological evaluation, to include a classroom observation, evaluations in "speech/verbal, written and reading functioning," and an assistive technology evaluation (id. at p. 1). The parent alleged that the student required a 1:1 teaching assistant (id.). The parent also alleged that the district failed to "properly meet the [student's AT] needs," and requested assistive technology, including "books on tape[,] a keyboard, laptop, software and a smart pen" (id.). The parent further argued that she disagreed with the district as to the level of speech-language therapy, OT, physical therapy (PT), counseling, and 1:1 reading and writing instruction that the student required (id.). The parent sought a "different level of related services for the student," and contended that the district failed to meet the student's needs in reading and writing (id.). The parent also claimed that the level of individualized math instruction provided to the student was insufficient (id.).

The parent asserted that the "district program, IEP and services" for the 2013-2014 school year were not appropriate and failed to address the student's needs (Dist. Ex. 1 at p. 1). Additionally, the parent claimed that the district failed to supply "required and appropriate educational instruction and related services" during the 2014-15 school year and left the student without "consistent instruction and related services for months" (id.). The parent asserted that the student was denied counseling, educational instruction, and occupational therapy (OT) during the 2014-15 school year (id.). The parent also asserted that the district failed to offer the student a "proper summer placement/program" with transportation (id.).

Next, the parent claimed that the student's needs were not being met during "regular school hours," and the parent claimed that the student required "extended school day services" in the form of "daily extra help or a resource room" (Dist. Ex. 1 at p. 2). The parent argued that the student cannot do "self-directed homework" and needed help with class work and homework in the form of support services and goals (id.). The parent also claimed that the district failed to follow the student's IEP and had utilized "untrained and unqualified staff to instruct and teach the student" (id.). Further, the parent contended that the student's OT and speech-language needs were not being met and that the IEP goals were deficient (id.). The parent also claimed that the student

[5] The May 2015 CSE also indicated that the student continued to receive home instruction two hours per day from February 3, 2015 to March 31, 2015 (Dist. Ex. 9 at p. 164). The IEP noted that this was an appropriate level of service (id.). Although these dates had passed at the time the IEP was created, the district continued to include them in the recommendations for the May 2015 IEP (id.).

required placement in an out-of-district "placement and program" (id. at p. 2). The parent further claimed that the district failed to meet the student's social and emotional needs in the 2013-14 and 2014-15 school years, and that the student required "the direct services of a behavioral specialist" (id.).

As for relief, the parent asserted that the student required "compensatory service[s] and instruction hours," including 920 hours of "reading and writing instruction," 200 hours of 1:1 math instruction, 65 hours of compensatory counseling and training for the parent, and 180 hours of counseling for the student to address social and emotional needs (Dist. Ex. 1 at pp. 1-2). The parent further requested that the district agree to (1) conduct all evaluations sought in the complaint, (2) supply the student with digital notes, digital books, a smart pen, a smart board, a keyboard, a computer, and a laptop, (3) provide the student with 1:1 counseling five times a week, (4) provide the student with a 1:1 teaching assistant, (5) place the student in a "full day co-teacher model in another district," (6) provide the student with door to door transportation to the out-of-district placement, (7) "furnish a behaviorist to work one on one with the student, 5 days a week," (8) offer and supply parent training, (9) reimburse the parent for the cost of the student's summer camp, and (10) pay "any costs associated with bringing this action," including "advocacy costs, document production costs, work time loss[,] damages and travel costs" (id. at p. 3).

### B. Impartial Hearing Officer Decision

After a single prehearing conference on September 2, 2015, the parties proceeded to an impartial hearing on October 13, 2015, which concluded on October 16, 2015, after four days of hearing (see Tr. pp. 1-1038).[6] During the hearing, the parent requested a pendency hearing to determine the student's placement for the duration of the proceeding (Tr. p. 38). The IHO explained to the parent's advocate that the IHO would only hold a separate hearing on pendency if pendency was raised in the due process complaint notice and gave the parent's advocate the opportunity to request an amendment of the due process complaint notice to include a claim for pendency (Tr. pp. 40-41, 46-49). The parent advocate declined and the IHO determined that he would consider pendency "as part and parcel of the overall determination" (Tr. pp. 50-51).

In a decision dated February 4, 2016, 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. 23, 27). The IHO did not make a determination as to the student's pendency placement, finding that pendency was not properly raised, and, in any event, the district provided homebound instruction as requested by the parent during the hearing and represented it would continue to do so until the IHO issued his decision (see id. at pp. 3-5). Prior to analyzing the substance of the parties claims, the IHO also found that the parent's testimony lacked credibility as she "concisely answered questions on direct [examination] but was evasive, combative and argumentative on cross [examination]" (id. at p. 12).

Regarding the 2013-14 school year, the IHO found that there was "no firsthand testimony from any [d]istrict witness knowledgeable about [the student] in the classroom, in the building or during related services therapy sessions as to whether she had benefitted whatsoever from the [d]istrict's program and placement during the 2013-14 school year" (IHO Decision at pp. 14-15).

[6] The parties also participated in two post-hearing conferences on December 21, 2015 and January 20, 2016 (Tr. pp. 1059-1161).

The IHO also found that the district failed to "adequately perform its evaluative obligations" for the 2013-14 school year, and that the March 2014 IEP and April 2014 IEP were completed without any "evaluations or assessments necessary to adequately understand the nature and scope of [the student's] disabling conditions" (id. at p. 21). Furthermore, the district failed to demonstrate it had contacted the student's previous school district for copies of the most recent psychological assessment report (id.). The IHO also found that the "[d]istrict's change of program to a 15:1:1 class, initial denial of a [1:1] aide, creation of an IEP which lacked reading goals and objectives and failure to pursue evaluative information, [resulted in a denial of FAPE] for the 2013-14 school year" (id. at pp. 19-20, 23).

Regarding the 2014-15 school year, the IHO found that the district developed the June 2014 IEP with no additional evaluative information or progress reports from the prior year, except for a "rudimentary OT progress report" (IHO Decision at p. 7, 23). Furthermore, the IHO found that the parent never "wrote the district requesting a[dditional] evaluations and there is nothing in the record that indicates the [d]istrict sought written consent to evaluate [the student]" (id. at pp. 11-12). The IHO also found that the CSE continued to offer an inappropriate 15:1+1 special class on the June 2014 IEP (id.). The IHO found that the district did not develop an appropriate FBA or BIP, and that the district inappropriately relied upon the services of a security guard as a behavioral support, who was not identified in the BIP (id. at pp. 24-25). The IHO also found that the district failed to timely reconvene the CSE after the student began receiving homebound instruction (id. at pp. 25-27). Further, the IHO found that when the district finally did reconvene the CSE, they recommended a BOCES program without having a BOCES representative present during the meeting (id. at pp. 9, 26-27). Finally, the IHO found that the CSE failed to alter "the goals and objectives" on the student's IEP to conform with the change of placement to an 8:1:1 BOCES special class (id. at pp. 26-27).

As for relief, the IHO ordered (1) the district to provide notice to the parent that they request consent to perform evaluations in all areas of suspected disability, including a neuropsychological evaluation, a psychoeducational evaluation, and an OT evaluation, and to conduct such evaluations once consent is received (2) the parent to provide consent for the district's to evaluate the student, (3) the CSE to convene to review all evaluative information and propose an appropriate program, (4) the parent to cooperate with scheduling the CSE meeting, (5) the district to perform an assistive technology evaluation addressing the parent's requests for a smart pen, smart board, keyboard, computer and laptop, which should be reviewed by the CSE at the next CSE meeting, (6) the district to have a "behaviorist…review [the student's] FBA and BIP [and to update those documents if necessary] to ensure that they comply with regulatory requirements," (7) the district to train a 1:1 teaching assistant to provide behavioral interventions if a new BIP places emphasis on the need of such an aide, (8) the district to provide transportation to the student should she be placed outside of the district, (9) the district to provide the parent with training, and (10) the parties to calculate the total number of "hours of tutorial" and related services that the student should have received between February 6, 2015 and "sometime in May 2015," and provide as compensation any hours that were not actually received by the student during that time (IHO Decision at pp. 28-34).[7]

[7] While it is concerning that the IHO ordered the parent to provide consent to the district's requests for evaluations, it is of no consequence at this point as the parent identified in the petition that she, in fact, provided consent (Pet. at p. 8).

The IHO denied the parent's requests for (1) placement of the student in a "co-teacher model in another district," (2) a behaviorist to work with the student 1:1 five days per week, (3) reimbursement for the costs of the summer camp, and (4) reimbursement for advocacy costs (IHO Decision at pp. 30, 35).

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

The parent appeals, asserting that the IHO failed to determine the student's placement during the pendency of the proceeding. Additionally, the parent requests additional compensatory education, asserting that the IHO incorrectly found that "no evidence was submitted to [prove]…the specificity of services [the student] missed," and thus, failed to award the correct amount of compensatory services for the student, including homebound instruction and the following related services: OT, counseling, social skills therapy, speech-language therapy, and paraprofessional services. The parent also claims that the impartial hearing was improperly conducted; specifically, the parent claims that the impartial hearing and the issuance of the IHO's decision took too long. Further, the parent contends that the CSE meeting following the hearing was conducted improperly, and that the student is currently not receiving any related services from the district. The parent also objects to the IHO's determination that her testimony during the hearing was not credible. Finally, the parent requests the consideration of additional evidence.

As for relief, the parent requests (1) a determination be made as to pendency, (2) five hours of counseling per week, (3) five hours of social skills therapy, (4) an order that the parent be allowed to be "part of the search to find an appropriate out of the district school placement" for the student, (5) teaching assistant services, (6) ten hours of 1:1 reading and writing instruction per week "to begin immediately going forward and during the summer," (7) reimbursement for the costs associated with the summer camp the student attended "during the 2014-15 school year," (8) reimbursement for evaluations provided by the parent, and (9) "the total missed hours from January 14, 2015, to current[]."

In an answer, the district generally admits or denies the various allegations of the parent, and requests that the petition be dismissed in its entirety. The district claims that the petition should be dismissed as it failed to include a "clear and concise statement of the Petitioner's claims showing that [the] petitioner is entitled to relief." The district also claims that the petition should be dismissed because the parent untimely served the petition and the notice of intention to seek review upon the district. Regarding pendency, the district argues that the parent's request for "home instruction and related services" as pendency should be denied since the CSE never agreed to change the student's "placement to home instruction." The district contends that the IHO properly denied the parent's request for compensatory education as the parent failed to support her request with any evidence during the hearing. The district further asserts that the IHO properly denied the parent's request for the student "to be placed in [a] co-teacher model in another District," as the parent failed to submit evidence to support such a request; the district asserts that the parent's request to be "part of the search" to find the student's placement should be denied as the parent failed to raise this allegation in the impartial hearing request. The district contends that the parent's requests for five hours of social skills therapy and individual counseling, and 1:1 reading and writing instruction should be denied as "no information [has been] submitted to support" the parent's request. Finally, the district contends that the parent's request for reimbursement of the summer camp should be rejected as the parent failed to present any information to support reimbursement.

The district accepts the IHO's finding that it denied the student a FAPE for the 2013-14 and 2014-15 school years, and the district asserts that it is "in compliance with the IHO's directive to calculate the student's missed tutorial home instruction and related services."[8]

In a reply to the district's answer, the parent rejects the district's contentions and generally argues in further support of the petition. In addition, the parent alleges that the district incorrectly argued the parent failed to timely serve the petition and notice of intention to seek review.[9]

## V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y.

[8] Because the district does not cross-appeal from the IHO's determinations which were adverse to the district, those determinations have become final and binding on the parties and will not be reviewed on appeal (8 NYCRR 200.5[j][5][v]; M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, 325 [S.D.N.Y. 2013]).

[9] State regulations permit service of "a reply . . . to any procedural defenses . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). While the reply was not served in a timely manner, I exercise my discretion to accept it for the limited purposes permitted by State regulations.

Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding

the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

## VI. Discussion

### A. Preliminary Matters

#### 1. Timeliness of Appeal

In its answer the district claims that the parent failed to timely serve the petition and the notice of intention to seek review, and thus, the petition must be dismissed. State regulations provide that a notice of intention to seek review "shall be personally served upon the school district . . . within 25 days from the date of the [IHO] decision," and a petition for review must be "personally served upon the school district within 35 days from the date of the [IHO] decision" (8 NYCRR 279.2[b]). State regulations further provide an exception to these timelines: If the decision was served by mail upon petitioner, the date of mailing and the four days subsequent thereto are excluded in computing the 25- or 35-day period (id.).

Here, the IHO issued his decision February 4, 2016, and the decision was mailed to the parties that same day (IHO Decision at p. 35; see Answer Ex. 1). From February 4, 2015, the date of mailing, the parent had until March 7, 2016 to serve a notice of intention to seek review, and until March 15, 2016 to serve the petition. Thus, the parent served both documents in a timely manner, serving the notice of intention to seek review upon the respondent on March 3, 2016, and the petition on March 14, 2016 (see Pet. at p. 10). The district argues that the extension of time pertaining to IHO decisions sent by mail does not apply because, in addition to mailing his decision, the IHO also transmitted his decision to the parties via e-mail on February 4, 2015. The district's argument requires reading an e-mail exception into the five-day extension applicable to a mailed IHO decision and is contrary to the plain language of the regulation (8 NYCRR 279.2[b]). While the district cites Application of a Student with a Disability, Appeal No. 10-081 in support of its argument, I find that decision distinguishable as the IHO in that case did not, in fact, serve his decision by mail. Thus, counsel for the petitioner in Application of a Student with a Disability, Appeal No. 10-081 could not avail himself of the five-day mailing exception. Accordingly, the parent's petition was timely served.

#### 2. Credibility

The parent claims that the IHO improperly denied her requests for relief based upon his finding that her testimony lacked credibility. The IHO found that the parent's testimony was not credible because she was "evasive, combative and argumentative on cross[-examination]" (IHO Decision at p. 12). Generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist., 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]).

I find no evidence in the hearing record to reverse the credibility findings of the IHO. The IHO explained the basis of his credibility finding and justified it with reference to specific examples in the hearing record. While the parent disagrees with this finding, she has not identified

any non-testimonial information in the hearing record which refutes the IHO's conclusion let alone "compel[s] a contrary conclusion" (Carlisle, 62 F.3d at 528). It would be improper to second-guess the IHO's determination, which was based upon his personal observation of the witness (see In re Claim of Suchocki, 132 A.D.3d 1222, 1224, 18 N.Y.S.3d 773, 775 [N.Y. App. Div. 2015]). However, the IHO did afford the parent's testimony some weight where it was not refuted by other evidence or the district's testimony (IHO Decision at pp. 15, 24), and the parent's testimony will be afforded similar weight herein.

**3. Additional Evidence**

In her petition, the parent indicates that she has additional evidence that she would like to submit to the SRO for consideration. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

In this case, the parent has failed to submit evidence or identify the nature of the evidence she intends to submit; without this information, it is impossible to determine whether the evidence could have been offered during the impartial hearing or whether it is necessary to render a decision. While the parent does indicate that the evidence is "very important to [her] case," she does not assert that the evidence is necessary to render a decision (Pet. ¶ 6, at p. 6). Thus, because the parent has failed to submit any additional evidence or identify what evidence she intends to submit, I am unable to grant the parent's request. However, I do accept and consider some of the additional evidence submitted by the district with its answer: a forwarded e-mail from the IHO's office indicating that the IHO decision would be mailed and a letter that provided the district's calculation of the total compensatory service hours. This evidence was unavailable at the time of the impartial hearing and is relevant to making determinations in this decision (Answer Ex. 4). As to the remaining evidence submitted by the district in its Answer, these documents were either available at the time of the impartial hearing or are unnecessary to render a decision in this matter.

**4. Length of the Impartial Hearing**

Next, the parent asserts that the duration of the impartial hearing and the issuance of the IHO's decision were improperly delayed. Although federal and State law impose time limitations upon impartial hearings, parties may request a specific extension of time which an IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). An IHO "shall promptly respond in writing to each request for an extension and shall set forth the facts relied upon for each extension granted" (8 NYCRR 200.5[j][5][iv]). The IHO's written response "shall become part of the record" (8 NYCRR 200.5[j][5][iv], [vi][h]). Oral decisions granting such extensions are permissible, so long as they are "subsequently provide[d] . . . in writing and include[d] [] as part of the record" (8 NYCRR 200.5[j][5][iv]).

The evidence in the hearing record generally supports the parent's position. With one exception, the hearing record does not contain any documentation showing that the parties requested, or that the IHO granted specific extensions of time (Tr. pp. 1068-69). I caution the IHO to comply with the applicable timelines for convening and completing impartial hearings. Further,

if permissible extensions of the timeline are granted, the IHO should enter written confirmation of such extensions into the hearing record.

### 5. Scope of Review

Before addressing the merits of this appeal, it is necessary to determine which claims may be properly considered. On appeal the parent makes the general argument that the due process complaint notice includes claims pertaining to the 2015-16 school year. However, even when read broadly, the due process complaint notice only identifies claims pertaining to the 2013-14 and 2014-15 school years (see Dist. Ex. 1). Additionally, during the hearing, the parent's advocate stated that he intended to file a second due process complaint notice and indicated that the due process complaint notice only sought relief up to June 2015 (Tr. pp. 645-46, 887-89). Accordingly, the parent's allegations related to the 2015-16 school year are outside the scope of review and will not be considered (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]; see, e.g., T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170 [2d Cir. 2014]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]). In addition, the parent makes arguments in relation to a December 9, 2015 CSE meeting that occurred after the commencement of the hearing. Such claims are also beyond the scope of this appeal. Allowing parents to raise new allegations pertaining to ongoing events is prohibited as it deprives the district of fair notice of parents' claims and prevents operation of the IDEA's resolution period (R.E., 694 F.3d at 187, n.4 [2d Cir. 2012]). These claims, therefore, cannot be considered on appeal.[10]

### 6. Form Requirements for Pleadings

The district argues that the petition does not contain a clear and concise statement of the parent's claims showing that she is entitled to relief. State regulations require that a "party seeking review shall file with the Office of State Review . . . the petition for review," which "shall clearly indicate the reasons for challenging the [IHO's] decision, identifying the findings, conclusions and order to which the exceptions are taken, and shall indicate what relief should be granted" (8 NYCRR 279.4[a]). In addition, a petition, answer, reply, and memorandum of law "shall each set forth citations to the record on appeal, and shall identify the relevant page number(s) in the hearing decision, transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[b]). Moreover, all pleadings must "set forth the allegations of the parties in numbered paragraphs" (8 NYCRR 279.8[a][3]).

I disagree with the district that the petition fails to identify a clear and concise statement of the parent's claims (see 8 NYCRR 279.4[a]). In this case, the district was able to formulate a responsive answer to the petition that addresses and responds to the discrete issues identified by the parent in her petition. Moreover, the parent, who is proceeding pro se at this juncture, appears to be acting in a good faith attempt to comply with these requirements. Therefore, I decline to exercise my discretion to dismiss the petition on this basis.

[10] Nothing in this decision precludes the parent from filing a new due process complaint notice for the 2015-16 school year, if she has not done so already (see 34 CFR 300.508; 8 NYCRR 200.5[i]-[j]).

### B. Pendency

#### 1. Then-Current Educational Placement

On appeal the parent claims that the IHO improperly determined pendency was not properly raised at the impartial hearing because the parent failed to include the issue in her due process complaint notice and it was not raised during the pre-hearing conference. The parent contends that the homebound instruction and services the student began receiving on February 6, 2015 constitutes the student's pendency placement, and requests compensatory services for "the total missed hours from January 14, 2015 to current."[11] Conversely, the district argues that the student's last agreed upon placement, and thus her pendency placement, is outlined in the June 2014 IEP.

The IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. §1415[j]; Educ. Law §§4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996]; Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]).

The Second Circuit has described three variations on the definition of "then-current educational placement": (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the pendency provision of the IDEA was invoked; and (3) the placement at the time of the previously implemented IEP (E. Lyme Bd. of Educ., 790 F.3d 440 452 [2d Cir. 2015]; Mackey, 386 F.3d at 163; see Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625–26 [6th Cir. 1990]). The U.S. Department of Education has opined that a student's then- current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]).

[11] Only a portion of the parent's claim for compensatory services relates to pendency. As the due process complaint notice was filed on July 22, 2015, the student's right to remain in her then-current educational placement pursuant to pendency also began on July 22, 2015 (Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 526-27 [S.D.N.Y. 2011]).

As a preliminary matter, the IHO incorrectly determined that he did not have to rule on pendency because it was not raised in the due process complaint or at the pre-hearing conference (Tr. pp. 32-34, 41, 1071-73; see IHO Decision at p. 4). A student's right to pendency automatically arises as of the filing of the due process complaint notice, and therefore, is one particular issue that generally is not contained in a due process complaint. Additionally, considering the focus on maintaining the status-quo during the proceeding and the time sensitive nature of a pendency determination, an impartial hearing officer may and should promptly address a parent's pendency claims (see Murphy v. Arlington Cent. Sch. Dist., 297 F.3d 195, 199-200 [2d Cir. 2002]; see also M.R. v. Ridley Sch. Dist., 744 F.3d 112 [3d Cir. 2014] cert. denied, 135 S. Ct. 2309 [2015]; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 701 [S.D.N.Y. 2006]). While the IHO acknowledged during the hearing that "invocation of due process rights is an automatic injunction and invokes pendency," he dismissed the parent's requests to be heard on this issue because of her failure to mention pendency in her due process complaint notice or during a prehearing conference (Tr. pp. 1071-73). However, as the parent raised the possibility of a dispute regarding the student's pendency placement prior to the start of the impartial hearing, any disputes regarding the student's pendency placement should have been addressed during the impartial hearing (Tr. pp. 31-32). The student's pendency placement and the parent's claim for compensatory services based on pendency will be addressed herein.

Turning to the parent's request for a determination on pendency, the hearing record shows, at the time the parent's due process complaint notice was filed on July 22, 2015, the student was receiving homebound instruction. The director of special education testified that at the time of the impartial hearing on October 15, 2015 homebound instruction and related services "haven't ended" since the student began receiving services in February 2015, and that "they are being delivered at this point" (Tr. pp. 668-70). While the IHO found that the parent voluntarily discontinued homebound instruction in May 2015, this finding is not supported by the weight of the evidence in the hearing record. It appears to have been based on the director of special education's testimony that the parent "no longer wanted the services of the home instructor that was providing services to [the student]" (Tr. pp. 243-44). However, the IHO's finding was not consistent with the director's testimony that the student received related services at home from February 2015 up to and through the impartial hearing (Tr. pp. 668-70). The district's summary of related services also indicates that the student received OT outside of school during June 2015 (Dist. Ex. 16). Additionally, the parent explained that she wanted a different instructor from the one providing services in May 2015 because she believed that the instructor was not reliable (Tr. pp. 814-15). The parent's explanation is not inconsistent with the director's testimony as both can be read as the parent objecting to the specific instructor who was providing services rather than homebound instruction as a whole (Tr. pp. 243-44, 814-15). Accordingly, the hearing record supports finding that homebound instruction continued to be the operative placement actually functioning through the end of the 2014-15 school year.

The district argues that homebound instruction and related services are not the student's pendency placement because homebound instruction was temporary and was not agreed to by the CSE as a special education placement. Initially, the fact that the district attempts to qualify that homebound instruction was a temporary placement is inconsequential, as the district's obligation to provide pendency "is rooted in statute, not contract" (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 453 [2d Cir. 2015] [rejecting district's argument that a placement in an IEP could not "be a stay-put placement because the parties intended it to be a temporary arrangement"]).

The district generally asserts that homebound instruction should not be considered an educational placement for purposes of making a pendency determination; however, neither party points to any controlling authority on this issue. While there are few cases directly addressing this issue, some courts have determined that homebound instruction initiated for medical reasons may be considered a student's then-current educational placement (see Hale v. Poplar Bluffs R-I Sch. Dist., 33 IDELR 268 [E.D.Mo. Jan. 10, 2001] [holding that homebound instruction was an appropriate pendency placement for a student initially placed on homebound instruction for medical reasons, even where "the home placement was [no longer] medically necessary"], aff'd, Hale v. Poplar Bluffs R-I Sch. Dist., 280 F.3d 831 [8th Cir. 2002]; Clark v. Special Sch. Dist. of St. Louis Cty., 2012 WL 592423, at *8 [E.D.M.O. Feb. 23, 2012] ["[t]he filing of the due process hearing complaint triggered the 'stay-put' provisions of the IDEA requiring the [district] to continue to provide [the student] with homebound services during the Hearing Panel's procedures, and the pendency of [the] litigation"]; J. v. Com. of Pennsylvania, Dep't of Educ., 1995 WL 273639, at *7-*8 [E.D. Pa. May 8, 1995] [granting a parent's request for homebound instruction as the pendency placement and subsequent request for reimbursement for homebound instruction despite the district's argument that homebound instruction was provided as a temporary measure necessitated by the student's "emotional problems"]). Particularly persuasive is the court's statement in Com. of Pennsylvania that "[t]he fact that the homebound instruction has never been adjudged to be the appropriate long-term placement…does not affect the court's analysis" that homebound instruction may be established as the pendency placement (1995 WL 273639 at fn. 9).

In this matter, the director of special education testified on several occasions that the CSE had not actually recommended homebound instruction on any IEP, and that the district provided the student with homebound instruction solely to address medical issues (Tr. pp. 189-90, 194-95, 463-67, 483-85, 570-72; Dist. Exs. 3-9). Additionally, the March 2015 IEP states that the CSE did not agree to "home instruction" as the student's placement as requested by the parent (Tr. pp. 195, 462-64, 482, 484; Dist. Ex. 8 at pp. 129-30; see generally Dist. Exs. 3; 4; 5; 6; 7; 9). However, the March 2015 IEP also notes that "the CSE feels [two hours of home instruction with related services] is appropriate at this time to meet [the student's] academic needs" (Dist. Ex. 8 at p. 130). Although, there may be circumstances where a temporary placement of a student on homebound instruction may not establish homebound instruction as the student's educational placement, under the circumstances present here and considering the direction taken by courts in other jurisdictions, homebound instruction was the student's operative placement actually functioning at the time when the pendency provision was invoked.[12]

Thus, the district shall continue to provide these services during the pendency of this administrative proceeding or any subsequent judicial proceeding at a neutral site, such as the library previously utilized, to be determined by the parties. The instruction and services shall be provided as follows: 10 hours of home instruction a week, to be provided two hours per day; one 30-minute session of OT per week; one 30-minute session of counseling per week; and three 30-

[12] While in certain situations pendency could be the placement described in the student's most recently implemented IEP, in this instance, considering that the 15:1+1 special class placement described in the student's most recently implemented IEP may have contributed to the student's anxiety and thus her need for homebound instruction (see Dist. Exs. 10-11), the district has not presented a sufficient argument to revert to the most recently implemented IEP rather than the homebound instruction functioning at the time when the pendency provision was invoked.

minute sessions of speech-language therapy per week.[13] However, as a final point, while the district must continue to provide homebound instruction and related services as the student's pendency placement, that does not mean that such services are appropriate for this student (see Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 459 [S.D.N.Y. 2005]["pendency placement and appropriate placement are separate and distinct concepts"]). Homebound instruction exists as a temporary service for students "unable to attend school because of physical, mental, or emotional illness or injury" (8 NYCRR 175.21[a]), and there is no indication in the record that the student is unable to attend school at this time. Additionally, homebound instruction deprives the student of the opportunity to participate in educational programs along with her non-disabled peers, or any peers at all, and accordingly, if the student is able to attend school, homebound instruction is an unnecessarily restrictive setting. Therefore, I strongly urge the parties to cooperate in finding an appropriate school placement for the student going forward.

### C. Compensatory Relief

#### 1. Compensatory Pendency Services

One form of relief the parent seeks in this proceeding is the "total missed hours" of instruction that the district allegedly failed to provide. As a consequence of the above determination as to the student's pendency placement, it appears that the district may not have provided the full extent of the student's pendency entitlement. The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme Bd. of Educ., 790 F.3d at 456 [full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [services that the district failed to implement under pendency awarded as compensatory services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

The director of special education testified that at the time of the impartial hearing on October 15, 2015 the district had been providing homebound instruction and related services to the student, uninterrupted, since January 2015 (see Tr. pp. 668-70). Beyond this broad and temporally limited statement, it is unclear from the hearing record what services the student actually received during the pendency of the impartial hearing. The director of special education testified that as of the date of the hearing the student received counseling once per week and OT once per week, while later stating that the student received counseling services sporadically and that she was not sure precisely what OT services the student had been receiving (Tr. pp. 669-70, 673). The parent testified that the student has not received any counseling services since January 2015 (Tr. pp. 682, 755-57), and the director of special education testified that the student had not

[13] The director testified that the student received related services including OT once a week, speech-language therapy three times a week, and counseling once a week; these services can be corroborated, to a certain extent, by the related service recommendation made on every IEP throughout the 2013-14 and 2014-15 school years (Tr. p. 669-70; Dist. Exs. 8 at p. 139-40; 9 at pp. 163-64; see Dist. Exs. 5 at p. 75; 6 at p. 98; 7 at p. 118). While it is not clear that the district delivered these services consistently during the impartial hearing, it is evident that the district intended to deliver related services outside of school of the same type and duration as the related services identified in the student's prior IEPs.

received speech-language therapy from May 2015 through the date she had provided testimony, October 15, 2015 (Tr. pp. 670-71). As a result of the limited information in the hearing record, it is impossible at this juncture to determine a precise award of compensatory pendency services for the student.

However, the total amount of pendency services owed to the student can be determined. From July 22, 2015 through the issuance of this decision, the district was required to provide 386 hours of 1:1 instruction, 19 and one-half hours of OT services, 58 and one-half hours of speech-language therapy services, and 19 and one-half hours of counseling services at the student's home or at a location agreed to by the parties.[14] The parties will have to determine the specific amount of services actually owed to the student by subtracting the amount of services implemented during the course of the proceeding from the total amounts identified above. Once the parties reach an agreement, the district will provide the remaining amount of hours to the student.

Furthermore, based upon the equities I find no reason to reduce or deny the final compensatory award. While the IHO found that the parent refused homebound instruction as of May 2015—a finding which might have relevance to the equities—this finding, as described above, is not supported by the evidence in the hearing record (see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 643 [S.D.N.Y. 2011] [finding that equitable considerations did not support a compensatory award for a pendency violation where the parents failed to respond to the district's offer to implement pendency services in a timely manner]; see also T.M., 752 F.3d at 172 [district not required to make up undelivered pendency services where the parent refused acceptance of such services]). Of greater equitable importance is the fact that the IHO failed to resolve the parties' pendency dispute at the start of the impartial hearing. While this harmed both parties, it would be particularly inequitable to hold this misfeasance against the student. Thus, I find that equity does not preclude a full award of the services the student should have received pursuant to pendency.

As a final point, in a letter submitted with its Answer, the district provided a calculation of the total compensatory service hours awarded to the parent as a result of the IHO's order (Answer Ex. 4; see IHO Decision at pp. 34-35). In this letter, the district stated that as of February 4, 2016, the date of the IHO's decision, "home instruction ceased . . . and the compensatory education [ordered by the IHO] commenced thereafter" (Answer Ex. 4). However, as the student's pendency placement took effect on July 22, 2015, any homebound instruction and related services provided to the student during the impartial hearing arose from the student's entitlement to remain in her pendency placement, not from the IHO's award of compensatory services. The determination of a student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered to the student by the CSE (Mackey, 386 F.3d at 160). In other words, the student is entitled to pendency services irrespective of the merits of her claim. Thus, the district cannot deliver services to satisfy its obligations under pendency and then also subtract these hours from any relief ordered by the IHO as the result of a denial of FAPE.

[14] The homebound instruction award was calculated based upon the recommendation of two hours of daily home instruction included in the March 2015 IEP and May 2015 IEP (Dist. Exs. 8 at p. 140; 9 at p. 164). The related services award was calculated based upon the testimony of the director of special education and the related service recommendations detailed in every IEP in the hearing record that the student received one 30-minute session per week of OT, one 30-minute session per week of counseling, and three 30-minute sessions per week of speech-language therapy (Tr. pp. 668-70; see Dist. Exs. 3; 4; 5; 6; 7; 8; 9).

**2. Compensatory Additional Relief**

The parent further claims that the compensatory services awarded by the IHO were inadequate and should have included additional homebound instruction, OT, speech-language therapy and counseling (including social skills) services. The district argues that the parent failed to support her claims with evidence that the services and amount of services requested would be appropriate; further, the district claims that it provided the student with counseling, OT, and speech-language therapy throughout the 2013-14 and 2014-15 school years, including the period during which the student received homebound instruction.

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 relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X., 2008 WL 4890440, at * 23 [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd. of Educ., 2008 WL 9731053, at *12-*13 [S.D.N.Y. March 6, 2008], adopted, 2008 WL 9731174 [S.D.N.Y. Jul. 7, 2008]) Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]).

The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E. Lyme Bd. of Educ., 790 F.3d at 456; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't of Educ., Appeal No. 11-075). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30, 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys.,

518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

As noted above, the IHO found that the student was denied a FAPE for the 2013-14 school year because the district failed to pursue or complete any evaluations; impermissibly changed the student's placement from a 12:1+1 to a 15:1+1 special class; failed to recommend a 1:1 aide in the March 2014 IEP; and failed to include reading goals and objectives in the April 2014 IEP (IHO Decision at pp. 14-15, 19-21, 23). The IHO further found that the student was denied a FAPE for the 2014-15 school year because the district failed to develop the June 2014 IEP with additional evaluative information or progress reports from the prior year; the district continued to offer an inappropriate 15:1+1 special class on the June 2014 IEP; and the district did not develop an appropriate FBA or an appropriate BIP (id. at pp. 7, 11-12, 23-27).

However, despite the ample grounds upon which the IHO found a denial of FAPE for the 2013-14 and 2014-15 school years, he only considered whether compensatory services were warranted for a narrow window of time between February 2015 and May 2015.[15] Thus, the IHO failed to consider whether any compensatory relief was warranted for the denial of FAPE during portions of the 2013-14 and 2014-15 school years. While the IHO did not analyze this issue in his decision, he alluded to the paucity of evidence offered by the parties at the hearing (see IHO Decision at pp. 11-12). Upon review of the hearing record, and grappling with the same difficulties alluded to by the IHO, I have concluded that there is insufficient evidence to determine what, if any, compensatory additional services would make up for a denial of FAPE with regard to the impact on the student's academic and social and emotional functioning. However, with regard to related services other than counseling, the evidence in the hearing record suggests that additional compensatory services in these areas are not warranted.

On appeal, the parent seeks additional compensatory relief in the form of homebound instruction, OT, speech-language therapy, and counseling.[16] In order to assess the parent's specific requests, it is necessary to consider the effect of the specific denials of FAPE on the student's

[15] I note that the parent does not appear to appeal the IHO's specific award of homebound instruction covering February 6, 2015 to May 2015. While it is clear, as discussed further below, that the parent seeks additional relief, there is no indication in the parent's petition that she objects to this portion of the IHO's decision. Thus, the IHO's ordered relief pertaining to services the student missed between February 6, 2015 and May 2015 is final and binding and will not be addressed further.

[16] Social skills instruction and counseling services are being discussed together. The director of special education testified that the student received "social skills training" as part of her counseling sessions, suggesting that social skills are addressable as a segment of counseling (Tr. pp. 390-91, 656-67). However, the CSE will need to make a determination, on remand, whether counseling and social skills instruction should be addressed separately or as one service.

ability to receive educational benefit from the special education and related services provided during this time period.

The hearing record contains some limited information, which shed some light on the student's needs for the period during which the IHO found a denial of FAPE. Specifically, the hearing record contains a June 2014 counseling summary and recommendation; an OT report from June 2014; a January 2015 speech-language evaluation; and an April 2015 annual OT review report (Dist. Exs. 15; 17-19).[17] In addition, while the district included the previous district's evaluation and testing results in each of the student's IEPs, only the results of the February 2014 psychoeducational evaluation were included in the hearing record (Dist. Ex. 12 at p. 178; see Dist. Exs. 3-9).[18] The psychoeducational evaluation report indicated that the student exhibited "global delays in all areas of intelligence, academics and adaptive skills" and significantly below average scores in all areas (Dist. Ex. 12 at pp. 175-78). Further, the evaluator noted that teacher reports and interviews confirmed that the student performed "well below grade level expectations in all areas" (id. at p. 178). Most notably, the evaluation report identified that the student's teachers believed the student was "not in the correct environment" and that she was "well below the functional level of all others in her [12:1+1 special] class" (id.).

According to the June 2014 counseling summary and recommendation, the student adjusted well to the "late transfer," and was a "willing and cooperative group member . . . [participating] to the best of her ability" in counseling sessions (Dist. Ex. 19). The report further indicated that the student "attends all sessions willingly and cooperatively" (id.). In addition, the social worker noted that the student "would benefit from continuing counseling for the next academic year" (id.).

The hearing record indicates that the student began to engage in behaviors which interfered with instruction in October and November 2014. The parent testified that the student demonstrated no behavioral problems when the student first began attending the 15:1+1 special class with a 1:1 paraprofessional (Tr. p. 712). The parent also testified that the student did not demonstrate "being

[17] The IHO did not make any findings that the student was denied a FAPE based on the speech-language therapy or OT services (IHO Decision at pp. 19-27) and the parent is not seeking compensatory additional services for speech-language therapy or OT during the period the student attended the public school. Accordingly, there is no need to address whether the district's provision of speech-language therapy and OT services during the period the student attended the public school warranted compensatory education. However, as there is some information in the hearing record as to the student's needs in these areas, a brief summary of the available information is provided herein. The June 2014 OT report indicated that the student made "slow progress" and continued to exhibit delays in fine motor and functional handwriting skills (Dist. Ex. 17). The report further indicated that the student was "easily distracted and require[d] verbal cues to complete tasks in a timely fashion" (id.). The 2014-15 annual OT review report from April 2015 indicated that the student was progressing in all identified goals and that the student's underlying skills "continued to improve" (Dist. Ex. 18 at pp. 192-94). The January 2015 speech-language evaluation report detailed the results of a November 2014 administration of the Clinical Evaluation of Language Fundamentals-5 (CELF-5), which indicated that the student achieved significantly below average scores with respect to core, expressive, receptive, and language memory skills (Dist. Ex. 15 at pp. 187-88).

[18] It should be noted that the parent testified that she first provided the district with the psychoeducational evaluation report on March 25, 2015 (Tr. pp. 908-10; see also Tr. pp. 262-263). The district claims that this was a result of the parent's failure to provide such documents to the district (Tr. pp. 262-264). However, the IDEA requires a district to which a student has transferred to take reasonable steps to promptly obtain from the old district the student's records, including "the IEP and supporting documents and any other records relating to the provision of special education or related services to the child" (20 U.S.C. § 1414[d][2][C][ii][I]; 34 CFR 300.323[g][1]; 8 NYCRR 200.4[e][8][i]).

aggressive or hitting or kicking or spitting or biting" before entering the middle school in September 2014 (Tr. p. 712-19). However, the parent stated that in October or November 2014, the student's paraprofessional changed and the student came home angry and upset, complaining about the new paraprofessional (Tr. pp. 712-19, 723-24). The district conducted an FBA and developed a BIP in October and November 2014 to address the student's escalating negative behaviors; specifically, spitting, hitting, eloping, and noncompliance (Tr. pp. 547, 582; see Dist. Exs. 7 at p. 112; 13; 14).

The director of special education testified that the BIP, scheduled for implementation on November 18, 2014, was implemented for a brief period of time (Tr. pp. 547-48, 560-61, 581-82). The parent testified that after the student's initial paraprofessional left in October or November 2014, the new paraprofessional began calling a security guard for help in addressing the student's behaviors (see Tr. pp. 724-37). The parent further testified that the student was afraid to come to school due to the security guard (Tr. pp. 724-26). The parent also testified that she "reached out" to the student's teacher and eventually met with the assistant director of special education to discuss her concerns regarding the student's paraprofessional and the use of a security guard (Tr. pp. 715-19). The director of special education further testified that the efficacy of the BIP became a "moot point" when the student's school attendance declined in December 2014 and January 2015 (Tr. p. 560).

In addition, the hearing record includes a progress report for the 2014-15 school year, which shows the student's progress towards the annual goals set forth in the June 2014 IEP (compare District Ex. 28, with Dist. Ex. 5 at pp. 70-74). According to the progress report, the student made some progress towards her annual goals in the first two marking periods; however, due to absences during the third marking period the student stopped making progress in the third marking period (see Dist. Ex. 28 at pp. 230-37). Overall, the student's lack of progress, combined with the student's behavioral needs that manifested in the classroom during fall 2014, suggest that compensatory services are warranted to "make up" for the district's denial of FAPE during this time period.

While the hearing record identified that the student exhibited global delays, below average test scores, and below grade level performance the record is sparsely developed with respect to the specific educational harms suffered by the student while enrolled in a 15:1+1 special class in the district. Specifically, it is unclear to what extent placement in a 15:1+1 special class affected the student's academic and social-emotional functioning. Under the circumstances, in the exercise of my discretion, I direct the CSE to reconvene in order to determine what compensatory services, if any, may be necessary in this matter to remediate the district's failure to provide the student a FAPE from March 2014 through January 2015. I believe the parties are in the best position to identify the specific additional 1:1 teaching and counseling or social skills services that the student may require. Therefore, I encourage the parties to ascertain, to the best of their abilities, the services that they believe would best remedy the district's failure to provide the student with a FAPE for the period beginning March 2014 through the period the student began home instruction, that those positions be presented to and considered by the CSE, and that the CSE make a determination as to the appropriate amount of compensatory services. If the parent disagrees with the CSE's determination, the parent may file a due process complaint notice to challenge the CSE's recommendation at an impartial hearing. However, the parties are encouraged to work out an amicable solution; further administrative hearings are not necessarily in the student's interest, especially if they result in the student being out of school.

### D. Other Relief

#### 1. Prospective Relief

In her petition, the parent requests five hours of counseling a week, 10 hours a week of 1:1 reading and writing "going forward and through the summer," five hours of social skills a week, teacher assistant services, and paraprofessional services (Pet. at p. 7). Prospective relief in the form of modifying the student's IEP would be inappropriate under the circumstances of this case. A CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing a student's needs, and it would be inappropriate to circumvent these statutory processes by ordering the CSE to include specific services, especially in the absence of any material evidence regarding the annual review of the student's current needs or services conducted subsequent to the matters under review in this proceeding (see Student X, 2008 WL 4890440, at *16 [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). The appropriate course is to require the parties to come into compliance with the statutory process envisioned under the IDEA and to effectuate equitable relief to remediate past harms that have been explored through the development of an appropriate evidentiary record. Therefore, the parents' request that certain services be enshrined on a future IEP is denied.

#### 2. Tuition Reimbursement

The parent also asserts that the IHO erred in failing to order reimbursement for the total cost of a summer camp which the student attended for the 2014-15 school year. A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). Parents bear the burdens of proof and persuasion as to the appropriateness of a unilateral parental placement (Educ. Law § 4404[1][c]). Here, the hearing record contains no evidence pertaining to the nature of the summer camp or whether it offered services that met the student's needs. Therefore, the IHO appropriately denied the parent reimbursement for the summer camp based upon a lack of evidence.

#### 3. Reimbursement for Evaluations

The parent requests reimbursement for evaluations which she procured without the assistance of the district. The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to

disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]).

Here, the parent did not include this claim in her due process complaint notice and, thus, it is outside the scope of review and will not be considered (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]; see, e.g., T.M., 752 F.3d at 170; B.P., 841 F. Supp. 2d at 611).[19] In any event, the parent fails to identify what evaluations had actually been conducted. For those reasons the parent's request for reimbursement is denied.

**4. Search to Find an Appropriate Placement**

Finally, the parent requests that she be allowed to be part of the search for an appropriate out-of-district placement for the student. The Supreme Court has stated that "[t]he core of the [IDEA] is the cooperative process that it establishes between parents and schools" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06). Furthermore, the IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). In short, the parent has every right to be part of the district's search for an appropriate placement, and the parent should be reassured that she is a critical part of the process even when, in cases such as this, there is no guarantee that the student will ultimately be placed in an "out of district placement," as that is a decision to be determined by the CSE. Additionally, as the parent's request for additional compensatory services is being remanded to the CSE, the parent should also be involved in the CSE's determination as to compensatory education as a member of the CSE. While, it is evident from the hearing record that the relationship between the parties has not been harmonious over the course of the 2013-14 and 2014-15 school years and the subsequent impartial hearing, the parties have an opportunity to meet and work out their differences and it would be beneficial to the parent, school district, and most importantly, the student, if they can find an agreeable solution.

## VII. Conclusion

Based on a review of the evidence in the hearing record, I remand the matter to the CSE to determine what additional services, if any, are necessary in order to remedy the district's failure to provide a FAPE for portions of the 2013-14 and 2014-15 school years, and to determine the amount of pendency services the student was entitled to but was not provided during the course of the proceeding.

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

**THE APPEAL IS SUSTAINED IN PART.**

[19] However, the parent is not barred from requesting reimbursement for evaluations in a new due process complaint (see 34 CFR 300.508; 8 NYCRR 200.5[i]-[j]).

**IT IS ORDERED** that the IHO's determination is modified, by reversing those portions which denied the parent's request for pendency and additional compensatory education; and

**IT IS FURTHER ORDERED** that the district shall, within 15 days from the date of this decision, begin to provide the student with 386 hours of 1:1 instruction, 19 and one-half hours of OT services, 58 and one-half hours of speech-language therapy services, and 19 and one-half hours of counseling services at the student's home or at a location agreed to by the parties, less those services already provided to the student during the pendency of this proceeding; and

**IT IS FURTHER ORDERED** that the matter be remanded to the CSE to determine to what extent additional services are necessary to remediate the district's failure to provide a FAPE for the 2013-14 and 2014-15 school years.

**Dated:** **Albany, New York**
**April 15, 2016**

**STEVEN KROLAK**
**STATE REVIEW OFFICER**