The University of the State of New York

The State Education Department
State Review Officer
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No. 12-138

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

Appearances:
Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, Daniel Petigrow, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for compensatory education services for their son for the 2010-11 school year and denied their request for reimbursement of their son's tuition costs at a nonpublic residential school (NPS) for the 2011-12 school year. Respondent (the district) cross-appeals from the IHO's determinations that it denied the student a free appropriate public education (FAPE) for the 2010-11 and 2011-12 school years, and that equitable considerations supported the parents' claim for reimbursement for the costs of the student's tuition at the NPS for the 2011-12 school year. The appeal must be dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

According to the hearing record, the student, who was educated in district schools from the 2002-03 through 2010-11 school years, received diagnoses of a migraine headache disorder[1] with

[1] In April 2010, a pediatric neurologist reported his impression that the student had "a mixed headache disorder with a combination of muscle contraction headaches with temporomandibular joint [TMJ] discomfort and migraine headaches" (Joint Ex. 6 at p. 2; see Parent Ex. MM). The condition is interchangeably referred to as "headaches" and "migraines" throughout the hearing record (see, e.g., Joint Exs. 1 at p. 1; 4 at p. 1; 6; 11 at p. 2; 21-23; 28). To maintain consistency, I use the term "headache" throughout this decision.

associated features of school related anxiety and dysthymia (see Tr. pp. 170, 174, 208-09, 348-49, 1632; Dist. Exs. 13; 30; 55 at p. 1; Joint Exs. 6 at p. 2; 11 at p. 2; 39 at p. 6; 40 at p. 1; 50a at pp. 1-2; IHO Ex. IV at pp. 2, 4-5). At the time of the impartial hearing, the student was attending the NPS, which was a nonpublic residential school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 1580, 1822-23; Dist. Exs. 51 at p. 1; 52 at p. 1; IHO Ex. V at p. 1; see 8 NYCRR 200.1[d], 200.7).

After the student performed well academically from elementary school through fifth grade, the parent stated that the student first began experiencing headaches in fall 2009, after which time they became "progressively worse" (Tr. pp. 1632-36, 1639-40, 1960-61; Joint Exs. 4at p. 1; 40 at p. 1; 68-70).[2] In April 2010, the parent referred the student to the district's section 504 committee, which subsequently obtained a psychoeducational evaluation of the student because of his "debilitating headaches" (Tr. p. 1641; Dist. Exs. 1; 43; Joint Ex. 4 at pp. 1, 5).[3]

On June 14, 2010, the section 504 committee convened and developed an accommodation plan for the student's 2010-11 school year which included, among other things, extended time to complete assignments, both in class (1.5) and due to absences, access to the school nurse as needed, access to class notes, access to home tutoring, and testing accommodations which included breaks as needed and a flexible setting (Tr. pp. 1204-14; Joint Ex. 11; see Dist. Ex. 2; Joint Exs. 10; 12). The June 2010 accommodation plan noted the parent's concern that the student's headaches were affecting his educational performance, insofar as they were causing the student's "excessive absences" which impeded his ability to complete assignments (Joint Ex. 11 at p. 2). However, the June 2010 accommodation plan also referenced the results of a May 25, 2010 psychoeducational evaluation of the student, which noted the student's above average overall cognitive functioning, generally average to above average standardized academic scores, generally average social/emotional functioning, and overall description as a "well-related student" (id.; see Joint Ex. 4).

On September 27, 2010, the student experienced his first cycle of headaches during the 2010-11 school year which, according to the hearing record, led to numerous absences from school during the balance of the 2010-11 school year and prompted the parents to request that the district provide him with home instruction services on an as-needed basis (Tr. pp. 471-75, 1887; Dist. Ex. 7; see Tr. pp. 263, 515-17, 519, 649-50, 1250, 1271-72, 1274-77, 1307, 1328, 1354, 1395-96, 1657-59, 1666-72, 1675-76, 1887, 1906-12, 1914-15; Dist. Exs. 9-10; 12; 16; 18; 34; 50 at p. 1; Parent Exs. T at p. 1; U; W; X at p. 1; Y; YY at p. 1; Joint Exs. 25 at p. 1; 67 at pp. 2, 7; 70). The hearing record also reflects that from November 2010 through April 2011, the parents obtained private medical evaluations of the student, in order to ascertain the cause of and provide treatment for the student's headaches (Dist. Ex. 13; Joint Exs. 21-22; 38; see Dist. Ex. 30).

In February 2011, the student and his parents visited the NPS, after which the parents requested that the district forward student's educational records to the school (Tr. p. 1915; Joint

[2] The hearing record contains duplicative exhibits. For purposes of this decision, only Parent exhibits or Joint exhibits are cited in instances where multiple exhibits are identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

[3] "Section 504" refers to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §§ 701-796[*l*] [1998]).

Exs. 20; 20a). In March 2011, the parents submitted an application to the school and the student was accepted to attend the NPS for the 2011-12 school year (Tr. pp. 1810, 1919-20; Dist. Exs. 51-53; Parent Ex. II). On April 11, 2011, the parents signed an enrollment contract reserving the student's seat at the school for the 2011-12 school year (Tr. pp. 1924-25; Parent Ex. B).[4]

On April 12, 2011 the parents requested an "emergency" section 504 committee review meeting, and also referred the student to the CSE (Tr. p. 1927; Dist. Ex. 17; Joint Exs. 28; 32-33; see Tr. pp. 1343-44). On April 15, 2011 the section 504 committee convened and added weekly, in-school individual counseling services to the student's accommodation plan, and, pursuant to the parents' request, also recommended conducting a psychiatric evaluation of the student (Tr. pp. 488-505, 1691-98, 1928, 1973-75; Joint Ex. 35 at p. 2 see Joint Ex. 34). On April 22, 2011, the student again visited the NPS (Tr. pp. 1922-25; see Dist. Ex. 54 at p. 2).

On May 25, 2011, the CSE convened to determine the student's was eligibility for special education and related services (Joint Exs. 42, 45; see Dist. Ex. 30 at p. 1) and concluded that, due to the lack of psychiatric and "hospital" evaluation reports, it was unable to determine whether the student was eligible, and it decided to adjourn without classifying the student, pending receipt and review of those reports and the results of an independent psychiatric evaluation of the student (Tr. pp. 149-52, 506-08, 658-63, 825, 829, 1950-52; Dist. Exs. 22; 25).[5] According to the hearing record, the student's frequent absences from school continued throughout the remainder of the 2010-11 school year and, by the end of June 2011, the student had missed in excess of 100 school days (Tr. p. 263; see Tr. pp. 1250, 1675-76; Joint Exs. 50b; 67).

During summer 2011, due to headaches he allegedly suffered on June 1, 2011 and July 19, 2011, the student was unable to participate in an in-person psychiatric evaluation with an independent psychiatrist as had been agreed to during the May 2011 CSE meeting;[6] however, the student was able to attend a private residential summer camp, which focused on outdoor activities, for four weeks, during which his mother reported that the student was "doing exceptionally well" (Tr. pp. 1030, 1033-34; 1717-18, 1721-23, 1796-97, 1952-54; Dist. Ex. 30; Joint Exs. 21 at p. 1; 49 at p. 1). In July 2011, the parent, the independent psychiatrist, and the district's director of pupil personnel services (director) met and decided that the district would accept information furnished by the private professionals who were working with the student in lieu of an in-person psychiatric evaluation, and would reconvene the CSE (Tr. pp. 154, 158-64). In August 2011, the district received letters from a different private psychiatrist who had conducted an initial consultation with the student on May 18, 2011 and had begun "active neuropsychiatric treatment" of the student, from the student's pediatrician, and from the student's private psychologist, who had met with the student on five occasions from May 2011 through the end of July 2011 (Joint Exs. 50-51a).

[4] The enrollment contract contained in the hearing record bears a handwritten notation "Dep 2,500" which suggests that the parents remitted a $2,500 deposit at the time they signed the enrollment contract (Parent Ex. B; see also Dist. Ex. 53).

[5] The hearing record indicates that on May 5, 2011, an independent psychiatrist prepared a psychiatric consultation report which did not include an in-person assessment of the student, and that the May 2011 CSE reviewed this consultation report at the CSE meeting (Tr. pp. 506-07; Joint Ex. 43).

[6] The hearing record also indicates that the student had been unable to attend a previous psychiatric evaluation, scheduled for May 5, 2011, which had been requested by the student's mother at the April 2011 section 504 committee meeting, also allegedly due to a headache (Tr. pp. 1691, 1695-96, 1698-1703; Joint Ex. 58 at p. 2).

On August 26, 2011, the CSE convened again (Dist. Ex. 30 at p. 1; Joint Exs. 48 at p. 1; 52-53). In attendance were the director, a special education teacher, a general education teacher, a school psychologist, and the student's mother (Dist. Ex. 52; Joint Ex. 53 at p. 1). The August 2011 CSE determined that the student was eligible for special education programs and related services as a student with an other health-impairment, and recommended, among other things, a special education program consisting of an 8:1+1 special class; related services consisting of counseling, twice per week for 30 minutes per session in a 1:1 setting; program modifications consisting of access to class notes, additional time for assignments, and nursing services as needed; and testing accommodations consisting of flexible setting and extended time (1.5) on tests (Joint Ex. 53 at pp. 1-2, 8-9). According to the hearing record, the August 2011 CSE considered recommending placement of the student in the district's high school, but ultimately rejected this option because it determined that the environment would not have provided adequate support for the student; however, "[g]iven his need for counseling, therapeutic supports throughout the day, and opportunities for both academic rigor and socialization with students without disabilities, the CSE recommended referral to [s]pecial [c]lass programs with counseling as a related service," and discussed "expedited referral to two BOCES programs offered at public schools with temporary home instruction placement pending acceptance by one of these programs" (Dist. Ex. 30; IHO Ex. V at p. 2).[7] In the interim, the CSE discussed the student receiving home instruction during the referral process, but the hearing record reflects that the student's mother declined the CSE's proposal for interim home instruction and verbally informed the district that the student would be attending the NPS for the 2011-12 school year and "expressed that the IEP was good to have in case [the NPS] doesn't work out for [the student]" (Tr. pp. 1740-41; Dist. Ex. 30; Joint Ex. 55 at p. 1).

By letter dated August 31, 2011, the parents informed the district that they were withdrawing the student from public school, enrolling him at the NPS for the 2011-12 school year and, because the district had allegedly denied the student a FAPE, would be seeking reimbursement for the costs of the student's tuition at public expense (Joint Ex. 54). In September 2011, the student began the 2011-12 school year at the NPS (Parent Ex. NN; see Tr. p. 1632; Parent Exs. OO-PP; TT).

In a letter dated October 3, 2011, the director requested parental consent to refer the student to two BOCES programs in order to "complete the CSE process" and finalize the "draft" IEP that had been developed at the August 2011 CSE meeting (Joint Ex. 55; see Joint Ex. 53 at p. 1). On October 17, 2011, the student's mother provided her consent and on November 2, 2011, the district sent referral packets to two BOCES programs that it determined were potential placements for the student for the 2011-12 school year (Tr. pp. 196-203; Joint Exs. 56-60). On November 21, 2011, and November 30, 2011, the parents visited the BOCES programs contacted by the district and, in a December 6, 2011 letter to the director, described their concerns as to why they felt that both BOCES programs were inappropriate for the student (Joint Ex. 63).

A. Due Process Complaint Notice

In an amended due process complaint notice dated January 25, 2012, the parents alleged that the district violated section 504 and failed to offer the student with a FAPE during the 2010-

[7] Although not defined in the hearing record, it is sufficiently clear that "BOCES" refers to "Board of Cooperative Educational Services."

11 and 2011-12 school years(IHO Ex. IV). Specifically, relative to the 2010-11 school year, the parents alleged that the district violated its child find obligation by failing to refer the student for evaluation by the CSE prior to their referral of the student in April 2011, and that the district failed to provide the student with home-based instruction and counseling services, thereby denying the student a FAPE (id. at pp. 7-12). As a remedy for the district's alleged failure to offer the student a FAPE for the 2010-11 school year, the parents sought an award of compensatory education and counseling services (id. at p. 26).

Relative to the 2011-12 school year, the parents alleged that the district violated its child find obligation by failing to timely evaluate and classify the student, and that after the CSE did classify the student, the district failed to produce an appropriate IEP for the student prior to the start of the 2011-12 school year (IHO Ex. IV at pp. 17-20). The parents also asserted that the August 2011 CSE was improperly constituted, lacking an additional parent member, and that the August 2011 draft IEP contained deficient annual goals for the student that were "not individualized" (id. at pp. 18, 20). In addition, the parents alleged that the student's unilateral placement at the NPS was appropriate for the 2011-12 school year because it provided the student with a "therapeutic" environment, an appropriate student-teacher ratio, and counseling services, and that equitable considerations weighed in favor of the parents' request for relief (id. at pp. 21-23). As relief for the 2011-12 school year, the parents requested reimbursement for the costs of the student's tuition at the NPS (id. at p. 26).[8]

B. Impartial Hearing Officer Decision

After a prehearing conference held on January 20, 2012, an impartial hearing was convened on February 2, 2012 and concluded on April 2, 2012 after nine days of proceedings (Tr. pp. 1-2069).

On June 21, 2012, the IHO issued a "second corrected" decision[9] addressing the merits of the parents' claims relative to the 2010-11 and 2011-12 school years (IHO Decision).[10] Relative to the 2010-11 school year, the IHO found, among other things, that the district violated its child find obligations by failing to refer the student to the CSE and thereby denied the student a FAPE (id. at pp. 24-28, 40-41). Specifically, the IHO determined that, by January 3, 2011, the district possessed sufficient information to suspect that the student may have been a student with a

[8] The parents also asserted that the district violated the student's right of confidentiality under the IDEA and the Family Educational Rights and Privacy Act (IHO Ex. IV at pp. 23-24; see 20 U.S.C. § 1232g); these claims are not presented for review on appeal. On January 30, 2012, the IHO issued an interim order noting that complaints regarding a breach of the district's duty to enforce the confidentiality provisions are beyond the scope of an impartial hearing but directing the district to take all necessary steps to protect the confidentiality of the student's personally identifiable information (IHO Ex. IX). Neither party appealed this interim decision.

[9] The "second corrected" decision indicates that IHO issued her original decision on May 30, 2012 but, due to computer formatting errors, issued a "corrected" decision on June 1, 2012 and, for reasons not indicated in the "corrected" decision or the hearing record, issued a "second corrected" decision on June 21, 2012; however, review of each version of the IHO's final decision indicates that the IHO's substantive analysis, reasoning, and findings are the same in all three decisions. For clarity in this decision, I reference the pagination as reflected in the most recent version, the IHO's June 21, 2012 decision, as the "IHO decision" at issue in the appeal at bar.

[10] The IHO is encouraged to consecutively paginate her written decisions. In referencing her decision, this decision cites to the text of the decision as beginning on page 4, omitting to number the cover page and the blank page after hearing appearances.

disability and, therefore, may have been in need of special education programs and related services, but failed to evaluate and classify the student (IHO Decision at pp. 24-26). The IHO also found that the information contained in the hearing record indicated that the student met the criteria for classification as a student with an other health-impairment and therefore was eligible to receive special education programs and related services from the district during the 2010-11 school year (id. at p. 27). The IHO found that "the student was certainly entitled to receive counseling from the beginning of January 2011, when the district should have referred the student for evaluation and developed the student's IEP" and awarded the parents reimbursement for privately obtained counseling services, and also awarded the student an additional 15 hours of compensatory counseling services; however, the IHO denied the parents' request for 200 hours of compensatory home instruction, concluding that "the parent has not offered evidence that the student is in need of academic remediation," and finding that "the student's lower grades were due to his failure to turn in work on time and organization issues" (id. at pp. 28, 41; see Joint Ex. 51). The IHO also dismissed the parents' section 504 claims applicable to the student's 2010-11 school year (IHO Decision at pp. 40-41).

With regard to the 2011-12 school year, the IHO found, among other things, that the district violated its child find obligation by failing to timely evaluate the student and failing to have an appropriate IEP in place for him at the start of the 2011-12 school year, and therefore denied the student a FAPE (IHO Decision at pp. 29-32, 41). Specifically, the IHO determined that the district failed to evaluate the student within 60 school days after receipt of parental consent in contravention of State regulations, and that this failure denied the student a FAPE for the 2011-12 school year (id. at pp. 29-30). The IHO also found that both the May 2011 and August 2011 CSEs were improperly constituted in that neither included an additional parent member, but that these deficiencies did not impede the student's right to a FAPE (id. at pp. 30-31). However, the IHO also concluded that the hearing record lacked evidence establishing that either CSE included a special education teacher who was familiar with the student or had experience with the types of programs being considered for the student, or a regular education teacher familiar with the student, and that these deficiencies, taken together, "caused a loss of educational benefit, impacted adversely on the parent's participation and compromised the development of an appropriate IEP" (id. at pp. 31-32). The IHO also found that the district failed to timely offer the student a specific public school placement for the 2011-12 school year, constituting a denial of a FAPE (id. at p. 32).

However, the IHO next found that the parents did not satisfy their burden of proving that the NPS was an appropriate placement for the student for the 2011-12 school year, because they failed to establish that the school "provided educational instruction specially designed to meet the student's unique educational needs during the 2011-12 school year" (IHO Decision at pp. 32-39). Specifically, the IHO noted that the school did not have a psychologist or psychiatrist on staff, and concluded that the hearing record lacked evidence demonstrating that the NPS addressed any of the student's underlying social/emotional or counseling needs, or his needs relating to organization issues and study skills, or that the school provided the student with instruction or services specifically designed to meet his unique special education needs (id. at p. 39).

Additionally, although noting that consideration of equitable considerations was not required in this case in light of her finding that the NPS was not an appropriate unilateral placement for the student, the IHO nevertheless determined that the parents "fully cooperated with the [d]istrict and the CSE process" and actively participated in the CSE meetings, and that while "the

[hearing] record supports the finding that the parents hoped that the student could go to the NPS [they] were open to a recommendation from the [d]istrict" (IHO Decision at p. 39).

Although the IHO denied their request for tuition reimbursement for the costs of the student's attendance at the NPS for the 2011-12 school year, the IHO nevertheless ordered the district to reimburse the parents for evaluative and diagnostic expenses incurred in connection with the preparation of a August 11, 2011 psychiatric evaluation of the student, which was reviewed by the August 2011 CSE (IHO Decision at pp. 28, 41).

IV. Appeal for State-Level Review

The parents appeal from the IHO decision and argue, among other things, that the student was entitled to an award of compensatory education services for the district's failure to provide him with a FAPE for the 2010-11 school year, and that they were entitled to reimbursement of the costs of their son's tuition at the NPS for the 2011-12 school year.[11]

In its answer, the district asserts, among other things,[12] that the hearing record supports the IHO's finding that the NPS was not an appropriate placement for the student for the 2011-12 school year and that the IHO properly denied the parents' request for tuition reimbursement. The district also cross-appeals the portions of the IHO's decision which found that, relative to the 2010-11 school year, the district violated its child find obligations because it possessed sufficient information to reasonably suspect that the student may have been a student with a disability and therefore may have been in need of special education programs and related services and that, relative to the 2011-12 school year, the district failed to timely develop an appropriate IEP for the student's 2011-12 school year and that equitable considerations favored the parents' request for reimbursement. The district seeks dismissal of the parents' petition and reversal of the portions of

[11] In the petition, the parents argue that the NPS was an appropriate placement for the student for the 2011-12 school year; they set forth their remaining arguments—that equitable considerations supported their claims and that that the IHO erred in finding that the student was not entitled to compensatory education services for the 2010-11 school year—in their memorandum of law. These latter two arguments are not properly raised insofar as a memorandum of law may not be used as a substitute for a pleading under State regulations (8 NYCRR 279.4, 279.6; Application of the Dep't of Educ., Appeal No. 11-147; Application of the Bd. of Educ., Appeal No. 11-142; Application of a Student with a Disability, Appeal Nos. 11-059 & 11-061; Application of the Bd. of Educ., Appeal No. 10-122; Application of the Dep't of Educ., Appeal No. 09-051; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-003; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-121; Application of a Child with a Disability, Appeal No. 07-113; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 06-096; Application of the Bd. of Educ., Appeal No. 05-031). Accordingly, for the reasons stated below, the IHO's decision on these issues is final and binding on the parents.

[12] The district also alleges in its answer that the parents impermissibly stated their allegations in footnotes in their petition, rather than in numbered paragraphs as required under State regulations (8 NYCRR 279.8[a][3]). Documents not comporting with the form requirements of the Regulations of the Commissioner governing practice before the Office of State Review may be rejected in the sole discretion of an SRO (8 NYCRR 279.8[a]). In this case, the parents did use extensive footnotes in their petition; however, in the exercise of my discretion, I do not find that the parents, who have appeared pro se in this matter, have inflicted any undue prejudice upon the district by impeding its ability to respond or that it is necessary to reject or not consider the petition on that ground. I do, however, remind the parents to comply with the form requirements in the future (see 8 NYCRR 279.8[a][5]).

the IHO's decision that were adverse to the district. The parents answer the district's cross-appeal, generally realleging the claims raised in their petition and denying the claims raised by the district.

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. 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).

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). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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. Scope of Impartial Hearing

A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][I][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Additionally, although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), it is impermissible for the IHO to raise issues that were not presented by the parties to the hearing and then base his or her determination on the issues raised sua sponte.

In this case, the IHO found that both the May 2011 and the August 2011 CSEs were improperly constituted because they both lacked an additional parent member, but that these deficiencies, standing alone, did not rise to the level of denying the student of a FAPE (IHO Decision at pp. 30-31). Additionally, the IHO also found that both the May 2011 and August 2011 CSEs lacked "an appropriately qualified special education teacher" who "was remotely familiar with the student or had any experience in the types of programs under consideration for the student," and a regular education teacher "who was familiar with the student," and concluded that these deficiencies, taken together, denied the student a FAPE" for the 2011-12 school year (id. at pp. 31-32). Although the parents amended their due process complaint notice to interpose a claim regarding CSE composition, they alleged in that claim only that the August 2011 CSE was improperly constituted because it lacked an additional parent member; the amended due process complaint notice is bereft of any allegations regarding the composition of the May 2011 CSE or the regular education or special education teachers who participated in either the May 2011 or August 2011 CSE meetings, and it cannot reasonably be read to include such allegations (see IHO Ex. IV).[13] Moreover, there is no indication in the hearing record that the parents requested, or that the IHO authorized, a further amendment to the due process complaint notice to include these additional issues. Nor is there any evidence that the district agreed to expand the scope of the

[13] Assuming for the sake of argument that the parents properly asserted this argument in their petition, although the parent testified during the impartial hearing that she "would have benefited" from the presence of an additional parent member and that the presence of an additional parent member "would have been helpful" during both CSE meetings (Tr. pp. 1707-08, 1725-26, 1946-48), she also testified that she neither requested adjournments of the CSE meetings nor raised any concerns with the district after the CSE meetings regarding the absence of an additional parent member (Tr. pp. 1948-49), and there is no evidence in the hearing record that this technical violation impeded the student's right to a FAPE, significantly impeded the parents' meaningful participation in the CSE process, or caused a deprivation of educational benefits in this case (see Tr. pp. 1627, 1630-31; 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; A.H., 2010 WL 3242234, at *2; Application of a Student with a Disability, Appeal No. 12-047; Application of the Dep't of Educ., Appeal No. 10-070).

impartial hearing to cover these new issues.[14] Thus, the IHO should have confined her determination to the issues raised in the parents' January 25, 2012 amended due process complaint notice and it was not necessary to issue findings on these issues (see 20 U.S.C. § 1415[c][2]; [f][3][B]; 34 CFR 300.508[b], [d][3]; 300.511[d]; 8 NYCRR 200.5[i][1][iv], [i][7]; [j][1][ii]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8). The IHO must disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

B. Scope of Review—Jurisdictional and Finality Provisions

I note that, relative to the 2010-11 school year, the parties cannot properly raise the IHO's dismissal of the parents' Section 504 claims,[15] nor do they appeal or cross-appeal the relief of reimbursement for sessions with the student's clinical psychologist and 15 hours of compensatory counseling services for the student. Additionally, relative to the 2011-12 school year, the parties

[14] To the extent that the Second Circuit recently held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K., 2013 WL 4436528, at *5-*7; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S., 2013 WL 3975942, at *9; B.M., 2013 WL 1972144, at *5-*6), I note that reference at the impartial hearing to the composition of the May 2011 CSE was initially made by the parents during direct examination of the student's mother (see Tr. pp. 1705-08, 1725-26); counsel for the district cross-examined the student's mother on this issue only after it was raised by the parents (see Tr. pp. 1946-49). The district did not argue that the composition of the May 2011 CSE was adequate to enable the parent to meaningfully participate in the CSE process in response to a claim properly raised in the parents' amended due process complaint notice and, therefore, I find that the district did not "open the door" to this issue under the holding of M.H..

[15] There is no basis for appealing the section 504 issues to this forum as the New York State Education Law makes no provision for State-level administrative review of IHO decisions in section 504 hearings and an SRO does not review section 504 claims (see A.M. v. NYC Dep't of Educ., 2012 WL 120052, at *7 n.17 [E.D.N.Y. Jan. 17, 2012]; Application of a Student Suspected of Having a Disability, Appeal No. 12-014; Application of the Bd. of Educ., Appeal No. 11-122; Application of a Student with a Disability, Appeal No. 11-098; see also Educ. Law § 4404[2]). Consequently, to the extent that the parents allege section 504 claims against the district in their answer to the district's cross-appeal (see Answer ¶¶ 56-57), I decline to consider them, insofar as they are not properly before me.

do not appeal or cross-appeal the IHO's directive to reimburse the parents for expenses incurred in connection with the preparation of the August 11, 2011 psychiatric evaluation (IHO Decision at pp. 28, 40-41). An IHO decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Consequently, I am without authority to review these findings and they will not be further addressed in this decision.

C. 2010-11 School Year

1. Child Find

I will next consider the district's cross-appeal alleging that the IHO erred when she determined that the district violated its child find obligations by not referring the student to the district's CSE and thereby, denied the student a FAPE. The purposes of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446. F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F.Supp.2d 221, 225 [D. Conn. 2008], aff'd, 2010 WL 1049297 [2d Cir. March 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services," and courts have interpreted the child find obligation as "distinct from the requirement of [a school district] to provide [a] FAPE to its residents" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to find such children (Application of a Student Suspected of Having a Disability, Appeal No. 10-009; Application of a Student Suspected of Having a Disability, Appeal No. 09-132; Application of a Child with a Disability, Appeal No. 07-062; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child with a Disability, Appeal No. 04-054; Application of a Child Suspected of Having a Disability, Appeal No. 01-082; Application of a Child with a Disability, Appeal No. 93-41).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (Application of a Child Suspected of Having a Disability, Appeal No. 05-127; Application of a Child Suspected of Having a Disability, Appeal No. 05-040; Application of a Child with a Disability, Appeal No. 03-043; Application of a Child Suspected of Having a Disability, Appeal No. 01-082). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz, 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]; see Application of a Student Suspected of Having a Disability, Appeal No. 10-128; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child Suspected

of Having a Disability, Appeal No. 06-087; Application of a Child Suspected of Having a Disability, Appeal No. 05-127; Application of a Child Suspected of Having a Disability, Appeal No. 05-040; Application of a Child Suspected of Having a Disability, Appeal No. 04-087; Application of the Bd. of Educ., Appeal No. 04-037; Application of a Child with a Disability, Appeal No. 03-043; Application of a Child with a Disability, Appeal No. 02-092; Application of a Child Suspected of Having a Disability, Appeal No. 01-082). To determine that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate (A.P., 572 F.Supp.2d at 225, citing Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F.Supp.2d 815, 819 [C.D.Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, the school district must initiate a referral and promptly request parental consent to evaluate a student to determine the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention programs (8 NYCRR 200.4[a]).

In this case, the issue presented is not whether the district had procedures in place but whether, upon the facts presented, the student should have been referred to the CSE prior to April 2011 because there was reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. The IHO found that "[i]n early December 2010, the student's mother reached out to [the school psychologist] for counseling and the possibility of other interventions. Even in the face of conflicting signals from the parents, the [d]istrict should have heeded the mother's initial call for help and if was not clear what the parent wanted, under the circumstances of such excessive [student] absenteeism, the [d]istrict had the obligation to find out," and added that, "[b]y January 3[, 2011] the [d]istrict had sufficient information to suspect that the student had a disability and to trigger its child find obligation," and that "the existing [May 25, 2010 d]istrict psycho-educational evaluation coupled with the student's continued absences should have put the [d]istrict on notice that the student might be a student with a disability" prior to the parents' referral of the student to the CSE in April 2011 (IHO Decision at pp. 25-26; see Dist. Ex. 5; Joint Ex. 4). However, a student's failure to perform in school because of absence from school does not by itself constitute a basis to suspect that the student has a disability (Application of a Child with a Disability, Appeal No. 01-082; Application of a Child Suspected of Having a Handicapping Condition, Appeal No. 91-33). On cross-appeal, the district argues that notwithstanding his absences, the student achieved academically during the 2010-11 school year and was performing at expected proficiency levels.

The hearing record reflects that throughout winter 2010 and into spring 2011, the parents and district personnel were in frequent communication about the student's numerous absences from school and his difficulty completing classwork (see, e.g., Tr. pp. 471-75, 1674; Dist. Exs. 6; 7 at p. 2; 9-10; 12; 15; Parent Exs. T-V; X-Y; Joint Exs. 15-17; 19; 23-27). Included among these communications was an early December 2010 telephone call from the student's mother to the school psychologist, regarding which she testified that she "noted that I was very concerned about [the student], he had missed all of November and had constant migraines and there was a cycle and I asked [the school psychologist] if there were any services available that he could recommend . . . or any school-based counseling or any other interventions he could think of" (Tr. pp. 1677-78). Although the student's mother characterized the school psychologist's response as "very dismissive," the hearing record reflects that the school psychologist recommended "private

relaxation counseling," which he explained was based upon the facts that there had existed "a pattern of [the student] resisting going to school," oppositional behavior toward the parents over that issue, a "long history of the somatization[16] and at that point nobody is saying it's a real crisis . . . the teachers in school [were] saying socially and emotionally he wasn't presenting as in crisis," and that the school psychologist "thought that the primary issue resided at home in relationships and that [because of] the oppositional behavior and the somatization I thought the best recommendation was to suggest to the parents [that] they begin private therapy for him" (Tr. pp. 838, 1678-79; see Tr. p. 810). Moreover, the hearing record establishes that shortly after this telephone conversation, the student's mother withdrew her request that the school psychologist meet with her son, noting that "[a]ctually, when he does not have his migraines, he seems happy and well adjusted, so I don't think the talk is necessary," and further stated that "it's probably best to hold off, given that [the student] may feel singled out and really just wants to maintain normalcy" (Dist. Ex. 6; Parent Ex. W).

The evidence also shows that the student's mother requested and received a meeting with the district at the end of December 2010with the student's teachers,[17] during which his teachers "noted they would keep providing the accommodations on the [Section] 504 plan . . . and keep E-mailing assignments and be[ing] flexible," and the hearing record reflects that the student's teachers did, in fact, work within the parameters of the student's June 2010 Section 504 accommodation plan with both the student and his mother to enable the student to catch up on his classwork despite his protracted absences by, among other things, forwarding him class assignments, quizzes, and tests for completion at home, and affording him extra time to complete assignments; these accommodations prompted the student's mother to note that "[m]y only consolation through all of this is how wonderful you and the teachers have been. It means a lot, so thank you for your caring and understanding" and that "[h]is teachers have been very supportive and helpful and I know this is frustrating and difficult for them also" (Tr. pp. 1204-14, 1679-80, 1683; Dist. Exs. 7 at p. 1; 46 at pp. 1-2; 47 at pp. 1-2; 48 at p. 1; 49; 50 at p. 1; Parent Exs. T at p. 1; V; X-Y; Joint Exs. 11; 17 at p. 1; 19; 23). The hearing record also indicates that on January 3, 2011, the student's mother cancelled a section 504 committee program review meeting, scheduled for January 5, 2011, in part because "I think we have everything in place. Our main goal is to keep away the headaches so [the student] can attend school. [The student] had a great break with no headaches and is in a good frame of mind," and added that "I still anticipate that he will struggle with the headaches, but his teachers understand the issues" (Dist. Ex. 7; Joint Exs. 16; 18; but see Tr. pp. 1681-83).

One of the student's counselors, who worked with him in his district placement from the start of the 2010-11 school year until December 1, 2010, explained the process that the district followed for providing home instruction and tutoring to those students medically unable to attend school for protracted time periods and described the additional supports in place to further assist them (Tr. pp. 1176-79). She further testified that from September through November 2010, she was "assisting [the student] at this time [by] providing homework [and] sending it home" and

[16] The school psychologist defined "somatization" as "[p]hysical complaints, complaints of being ill" (Tr. p. 716; see Joint Ex. 4 at p. 4). The director defined "somatization" as "a clinical term that would refer to the physical manifestation of illness prompted by something other than physical, something mental and/or emotional in basis" (Tr. p. 425).

[17] The student's mother testified that she did not inform the district that the student had been seen by a private psychiatrist on December 22, 2010 (Tr. pp. 1938-39).

during November 2010, "[t]here [was] communication between myself and [the student's mother] about the tutoring" and that "my understanding was that he needed his medical condition to be resolved so that he could come back to school" (Tr. pp. 1240-41). The student's pediatric neurologist reported that the student "does have accommodations in school, which are helping at least to mitigate some of the problems with missing school," (Parent Ex. YY at pp. 64-65; see Tr. pp. 1519-21), and the student's private psychologist testified that when the student was physically present in school, "he would function well in the school setting," and that "[m]y understanding was because he is not a student with a learning disability and he is not a student with significant social deficits, that he functions fairly well in school" (Tr. p. 1117). The student's counselor testified that "[w]hen he was in school, [the student] was engaged . . . I saw [the student] playing and he seemed to really enjoy . . . flag football on the soccer field" and also served during the 2010-11 school year as a "peer mediator," assisting to resolve interpersonal conflicts between other students (Tr. pp. 1218, 1237-39). The student's mother testified that, as late as February 2011, despite his missing a few days of school per week due to headaches, the student "would make a real effort . . . [h]e would be excited to go to school, he actually wanted to do the work" (Tr. pp. 1912, 1914).

Furthermore, the hearing record indicates that the student responded to the academic interventions provided by the district and was making progress within the general curriculum despite his absences. The student's 2010-11 report card reflects that he achieved first quarter grades as follows: A- in English, B+ in "enriched" English, A- in social studies, 93 in integrated algebra, 87 in "Lv" Environment, 80 in French, A+ in gym, and A- in orchestra (Joint Ex. 70). His English and enriched English teachers described the student as "a pleasure to have in class," his social studies teacher commended his "good effort," and his integrated algebra teacher noted that the student was "[m]aking good progress" and "seems to be current despite absences" (id.). During the second quarter, according to his report card, the student achieved the following grades: 78 in integrated algebra, 90 in Lv Environment, A- in enriched art, A+ in gym, and A- in orchestra; the student received "medicals" in English, social studies, and French, which, according to the hearing record, signified that "no grade will be given" (id.; Parent Ex. CC). During the second quarter, the student's integrated algebra teacher noted that he was "[o]utstanding when in class," his French teacher indicated that he did "[g]ood work when present," and his enriched art teacher commented "[g]ood effort. Actively participates in class discussions and projects. Assignments meet or exceed project requirements" (Joint Ex. 70). The student received medicals for all classes during third quarter, although his French teacher noted "[g]ood classwork when present;" during fourth quarter, the student received an A in social studies (as well as for a final subject grade), scored an 82 on his June 2011 integrated algebra Regents examination (and an 85 final subject grade), and received medicals for the balance of his subjects (id.; see Tr. pp. 1685-91; Dist. Ex. 32; Parent Exs. CC-GG). The hearing record indicates that it was during the third quarter—when the frequency of the student's absences began to compromise his ability to achieve academically—that the student was ultimately referred to the CSE for evaluation as a student suspected of having a disability and potentially eligible to receive special education and related services (see Dist. Exs. 32-33; Joint Ex. 39). The hearing record also reflects that the student achieved a scaled score of 680, equivalent to the State-designated performance level 3 (proficient), on the May 2011 administration of the State English Language Arts (ELA) examination (Tr. pp. 420-21; Dist. Ex. 32; see "New York State Testing Program Grades 3-8 English Language Arts Tests School Administrator's Manual [2011 Edition], available at http://www.p12.nysed.gov/assessment/sam/ela/archive/elaei-sam-11.pdf). Additionally, in June

2011, the student achieved a score of 82 on the Regents Integrated Algebra examination (Dist. Ex. 32).

The student's English teacher during the 2010-11 school year, when providing the student with a reference for his the NPS application, stated that the student "could be among very top of my students, but due to his absences, he has not accumulated enough grades to demonstrate this" (Dist. Ex. 51 at p. 2). When describing his social/emotional functioning, she commented that the student "is a level-headed and controlled adolescent. His behavior is appropriate at all times," and stated that his character could be relied upon "[a]lways" (id.). She also indicated that the student "has a passion for reading that is unique," possessed an "exceptional" intellectual curiosity and desire for learning, and, in comparison to his same age peers, rated the student as an "excellent" person and an "outstanding" student (id.). She also added that "[s]ince September [2010], [the student] has distinguished himself as a young man with impressive abilities – to write thoughtfully, to soak up sophisticated vocabulary, and to read voraciously," and that "[w]hile [the student] has not been a consistent physical presence in class due to his absences, [his] ability to seamlessly return to class, his classmates, and whatever task is currently at hand has been impressive" (id. at p. 3). In addition to noting the student's "upbeat mood" and "sharp intellect," the student's English teacher also indicated that "enough cannot be said of his ability to write clearly and cohesively, and far above the range of the typical [eighth] grader" (id.). In his reference on behalf of the student to the NPS, the student's 2010-11 integrated algebra teacher noted that the student placed in the upper half of his honors-level algebra class, characterized the student as "very cooperative," possessing "outstanding" character, and as "excellent" person and student (Dist. Ex. 52 at p. 2). He also described the student as a "strong, hard working student," and observed that, "[o]ften working on his own, he has reached a high level of conceptualization on the topics covered thus far" (id. at p. 3). He also characterized the student as "a young person of outstanding integrity and compassion" who "can always be counted on to be on task and working until the job is done" and "is also willing to help those in need of assistance in the class" (id.).

Based upon the evidence contained in the hearing record as discussed above, I find that despite the student's recurring headaches and resulting absences during the 2010-11 school year, the hearing record supports a finding that the even if the district had reason to suspect that the student had a disability, the district had no reason to suspect that the student required special education to address such disability prior to April 2011 because the student progressed very well in the general education curriculum with the accommodations provided by the district in its June 2010 section 504 plan (Tr. pp. 1117, 1218, 1519-21; Dist. Exs. 32; 51 at pp. 2-3; 52 at pp. 2-3; Parent Ex. YY at pp. 64-65; Joint Ex. 70; see D.K., 696 F.3d at 252; J.S., 826 F. Supp. 2d at 662-63; A.P., 572 F. Supp. 2d at 225-26).

Nor do I concur with the IHO's finding that the contents of the May 25, 2010 psychoeducational evaluation report (Joint Ex. 4) gave the district reason to suspect that the student required special education services in order to address a disability. This report, which was generated during the course of the section 504 committee's evaluation of the student following the parents' referral in April 2010, indicated no history of academic difficulties and no current intervention services, and noted that the student's current grades for seventh grade were "mostly [on] an upward trend over the course of the year" (Tr. pp. 700, 703; Joint Ex. 4 at p. 1). Behaviorally, the evaluating school psychologist noted that: the student spoke intelligibly, used age-appropriate vocabulary, and exhibited no difficulty following directions; displayed consistent attention to task and demonstrated no difficulty initiating, shifting, or maintaining attention and

concentration during the evaluation; possessed adequate gross motor skills and appropriate posture, pencil grip, and legible handwriting, but demonstrated relatively weaker fine motor skills; and displayed no unusual behaviors or language during the evaluation (id. at p. 2).

On the Woodcock-Johnson III Tests of Cognitive Abilities (WJ-III COG), the report indicated that the student achieved a general intellectual ability standard score of 121, placing him in the 92nd percentile and in the above average range in comparison to same age peers (Joint Ex. 4 at p. 2). Specifically, the student's WJ-III COG results indicated, among other things, that relative to language, the student possessed age appropriate vocabulary, was consistent in following directions, exhibited "strong potential" on formal language tests, achieved above average scores in his awareness of word usage and vocabulary, demonstrated strong potential for abstract thinking, and, relative to his above average range skills for simple auditory processing and phonemic awareness, the school psychologist characterized the student's performance as "impressive" (id.). The student exhibited average to above average attention on tasks requiring attention and concentration (id.). He showed average skills relative to short-term auditory recall and auditory working memory, and high average long term memory when presented with new verbal and visual information (id.). The student also exhibited above average reasoning skills when presented with verbal information and achieved "well above the average range" on conceptual tasks involving visual information, while demonstrating "excellent potential for abstract and conceptual thinking skills" (id. at pp. 2-3). Test results in the visual-spatial area suggested average skills in identifying components of geometric figures and processing speed for visual fine motor tasks, and although he demonstrated an "unevenly developed" ability to process visual information quickly and efficiently, the school psychologist noted that the test results were not suggestive of any visual-spatial deficits (id. at p. 3).

The student's scores on administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH), used to assess the student's academic functioning, fell in the low average to above average range across multiple domains (Joint Ex. 4 at p. 3). His broad reading standard score of 109 placed him in the 72nd percentile, within the average range for his age, displayed adequate decoding skills and sight-word vocabulary, was sufficiently effective in reading simple sentences for meaning within time limits, and exhibited high average comprehension of longer reading passages; in summary, the evaluating school psychologist concluded that "[g]rade level reading material should be manageable for [the student]" (id.). In math, the student achieved a standard score of 113, in the 80th percentile, which placed him in the high average range for his age (id.). Although the student experienced some difficulty processing simple math under time limits, he exhibited above average calculation skills, good accuracy, albeit at a slow pace, was "highly successful in completing word problems," made effective use of scrap paper, and appeared to be efficient when negotiating multiple step problems (id.). Relative to written language, the student achieved a standard score of 125, placing him in the 95th percentile and in the above average range for his age (id. at p. 4). The student exhibited average spelling skills and written expression skills that were assessed as well above average, and the evaluating school psychologist noted that the student proved "highly effective in creating well-constructed meaningful sentences under time pressure" with sufficiently legible handwriting (id.).

Relative to the student's social/emotional functioning, the school psychologist characterized the student as "pleasant and cooperative," and "soft-spoken throughout the evaluation, but appropriately related and emotionally stable" (Joint Ex. 4 at p. 4). The student and two of his teachers supplied information during administration of the Behavior Assessment System

for Children-Second Edition (BASC-2), and, according to the report, on the teachers' information produced scores in the average range, with the exception of somatization; on the student's form, two areas produced scores in the "at risk" range—relations to parents, which the school psychologist noted "is reflective of the difficult communication patterns that often exist between parents and young teenagers," and attitude toward school, which suggested that the student felt bored and disliked school (id.; see Tr. pp. 709-20; Dist. Exs. 5a-c).

In summary, the school psychologist described the student as: intellectually, possessing above average intellectual potential, with strong language and conceptual thinking skills, and relatively weak fine motor skills; possessing academic skills ranging from low average (fluency tasks involving numbers) to average (reading comprehension) to above average (mathematics and written expression); and socially/emotionally, although presenting "a high level of physical complaints during academics . . . a negative attitude about school and mild oppositional behavior at home," the student exhibited "no serious social-emotional concerns . . . at this time" and noted that "[a]ll other areas of social-emotional functioning are reported to be average for his age" (Joint Ex. 4 at p. 5; see Tr. pp. 703-07). The school psychologist recommended, among other things, that "[t]eachers' input about daily functioning and behavior will be essential in determining the impact of [the student's] headaches" and that the student's [a]ttitude toward school and oppositional behavior should be monitored for possible intervention" (id.).

In summary, based upon the evidence contained in the hearing record discussed above,[18] most notably the accommodations already provided to the student by the district under its section 504 plan to address his headaches, the student's level of academic performance, and the results of the May 25, 2010 psychoeducational evaluation of the student conducted by the district, I find that the hearing record does not support the IHO's finding that the district had sufficient reason to believe that the student had a disability requiring special education and related services prior to the parents' referral of the student to the CSE for evaluation in April 2011 (J.S., 826 F. Supp. 2d

[18] In addition to the evidence described above, I note that the hearing record indicates that, prior to the parents' referral of the student to the CSE in April 2011, the parent indicated that in March 2011, she provided the school nurse at the student's public school with a copy of a physician's report, dated March 6, 2011, from a headache specialist (Tr. pp. 1933-35; Joint Ex. 22). A review of the physician's report indicates that, although the student confirmed that "stress" triggered his headaches, the student also denied experiencing anxiety, depression, panic attacks, suicidal ideation, irritability, or mood swings, and the March 6, 2011 physician's report did not otherwise suggest a psychological component to the student's difficulties (Joint Ex. 22 at pp. 2-3). The physician's recommendations contained in the March 6, 2011 report, such as scheduling an MRI of the brain, completing of laboratory examinations, and prescribing various medications to alleviate the onset of impending headaches, were medical in nature and did not suggest the existence of a disability requiring special education programs and related services (see id. at p. 5). I also note that the hearing record contains a neurological report documenting a November 22, 2010 "consultation for headaches" which indicated that there "may be stress and exercise precipitants" for the student's headaches, but described the student as "pleasant, conversational, and in no distress," noted that he exhibited no changes in behavior or attention problems, no focal weaknesses, sensory changes, or seizures, appeared "alert and interactive," and demonstrated age appropriate vocabulary, attention, and concentration (Joint Ex. 21), and a February 3, 2011 physician's report relative to a January 31, 2011 evaluation of the student for Lyme disease which noted the student's history of headaches, described him as alert and oriented, and included among its recommendations laboratory examinations, antibiotics, and dietary modifications (Dist. Ex. 13). After careful review of these physician's reports, however, I find that their content was also insufficient to have placed the district on notice that the student had a disability requiring special education programs and related services.

at 662). In light of my determination, I will reverse the IHO's finding that the district violated its child find obligations for the 2010-11 school year.

2. Compensatory Home Instruction Services

Next I will address the parents' appeal from the IHO's denial of their claim for 200 hours of compensatory home instruction for the student for the 2010-11 school year and the district's cross-appeal from the IHO's finding that the district denied the student a FAPE for a part of the 2010-11 school year.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case and may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (Wenger v. Canastota, 979 F. Supp. 147, 151 [N.D.N.Y. 1997]; see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see French v. New York State Dep't of Educ., 2011 WL 5222856, at *2-*3 [2d Cir. Nov. 3, 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078).

Compensatory relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory 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 the "IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a" FAPE]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd of Educ., 108 LRP 49659, [S.D.N.Y. March 6, 2008], adopted at 50 IDELR 225 [July 7, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible under the IDEA 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 services under the IDEA 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]; see, e.g., Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091.

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see 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 [DC Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "(a)ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't of Educ., Appeal No. 11-075; Application of a Student with a Disability, Appeal No. 10-052). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; 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, 525 [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 ["There is no obligation to provide a day-for-day compensation for time missed"]; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

For a student not previously identified as having a disability, the district must arrange for the appropriate special education programs and services to be provided within 60 school days of the receipt of consent to evaluate (8 NYCRR 200.4[d]). In this case, the IHO determined that the district denied the student a FAPE for "a portion of the 2010-11 school year" because of its "failure to classify the student or provide him with services in the required time frame"—ostensibly 60 school days from the date that the district should have evaluated the student—which, according to the IHO, would have been approximately January 3, 2011 (IHO Decision at pp. 27, 40-41).[19] However, the IHO also denied the parents' request for 200 hours of compensatory home instruction

[19] The IHO concluded in the decision that "[b]ased on the information available to the [d]istrict, the evidence in the [hearing] record supports a finding that if the CSE had convened, the student met the criteria for the classification of other health impairment" (IHO Decision at p. 27). Under the State regulations, an "other health impairment" is defined as:

> having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems, including but not limited to a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, diabetes, attention deficit disorder or attention deficit hyperactivity disorder or tourette syndrome, which adversely affects a student's educational performance.

(8 NYCRR 200.1[zz][10]; see 34 CFR 300.8[c][9]).

services on the sole ground that the hearing record lacked evidence establishing that the student required "academic remediation" (id. at p. 28).

According to the hearing record, the parents referred of the student to the CSE for evaluation on April 12, 2011; on April 15, 2011, they provided consent for the district to evaluate the student; on April 29, 2011, the district received the student's CSE referral form; and on May 25, 2011, the CSE convened for an initial CSE meeting (see Tr. pp. 132-74, 506, 1343-44, 1705; Dist. Exs. 17; 30; Joint Exs. 28-29; 31-33; 45). Per State regulations, however, the district was not required to arrange for the appropriate special education programs and services to be provided to the student until 60 school days after receiving consent to evaluate the student, which, in this case, expired after the 2010-11 school year ended.[20] Consequently, because the district was not obligated to provide the student with special education programs and services during the remaining balance of the 2010-11 school year, there was no denial of a FAPE to the student for the 2010-11 school year, and the student was therefore not entitled to an award of compensatory home instruction services (see Newington, 546 F.3d at 123; S.M., 2013 WL 773098, at *6). In consideration of the foregoing, although I will reverse the IHO's finding that the district denied the student a FAPE for a portion of the 2010-11 school year, the IHO nevertheless correctly reached the conclusion that the parents' claim for 200 hours of compensatory home instruction for the 2010-11 school year must be denied.

D. 2011-12 School Year

1. August 2011 Draft IEP

I now turn to the district's argument on cross-appeal that the IHO erred when she determined that the district failed to timely develop an appropriate IEP for the student's 2011-12 school year, and therefore denied the student a FAPE. As discussed above, the CSE convened on May 25, 2011 and August 26, 2011 to develop an IEP for the student's 2011-12 school year (see Dist. Ex. 30; Joint Exs. 45; 52-53). Although the hearing record reflects that the May 2011 reviewed some evaluative information relative to the student, including a May 5, 2011 psychiatric "consultation" report (see Tr. pp. 359, 361-64, 373-74, 390, 533-34, 652, 657-58; Dist. Ex. 30; Joint Exs. 4-5; 22; 40; 43-44; 65-67), and, according to the testimony of the district's assistant director of pupil personnel services (assistant director), while " [i]t would have been possible" to classify the student as a student with an other health impairment at the May 2011 CSE meeting, the evaluative information that the CSE possessed at the time of the May 2011 meeting "did not clearly indicate [the student's] needs . . . and what his disability was" and, therefore, the committee agreed to adjourn the initial meeting without formally classifying the student pending completion of a psychiatric evaluation and receipt of an additional hospital report (see Tr. pp. 364-69, 488-505, 662-63, 666, 676-84, 825, 829, 1950-52; Dist. Ex. 25). The hearing record reflects that after the May 2011 CSE meeting, the district undertook to schedule the psychiatric evaluation, but due to recurrences of the student's headaches, the evaluation did not occur, and the CSE's August 2011 meeting proceeded without it, resulting in a determination that the student was eligible for special education programs and related services as a student with an other health impairment and therefore, was entitled to an IEP (Tr. pp. 141-62, 488-505, 1699-1703, 1717-23, 1952-54; Dist. Exs. 29-30).

[20] As a matter of State law, the school year runs from July 1 through June 30 (Educ. Law § 2[15]).

Although the August 2011 CSE developed a "draft" IEP for the student's 2011-12 school year, the hearing record reflects that the August 2011 IEP was never finalized, as the student's mother had already informed the CSE during the meeting that the student would be attending the NPS for the 2011-12 school year (Tr. pp. 404, see Tr. pp. 1740-41; Dist. Ex. 30; Joint Ex. 55 at p. 1). However, this information regarding the parents' intention to enroll their son at the NPS did not relieve the district of its obligation under the IDEA to offer the student a FAPE for the 2011-12 school year. At the beginning of each school year, a school district is required to have an IEP in effect "for each child with a disability in [its] jurisdiction" (20 U.S.C. § 1414[d][2][A]; see also 34 CFR 300.323[a]; Cerra, 427 F.3d at 194 ("the District fulfilled its legal obligations by providing the IEP before the first day of school"). Federal regulations specifically direct that a school district must have an IEP in place at the beginning of the school year (34 CFR 300.323[a]; see also Letter to Reyes, 59 IDELR 49 [OSEP 2012]). In this case, the hearing record demonstrates that the district failed to have a finalized IEP in place for the student at the start of the 2011-12 school year, in contravention of the IDEA and federal regulations; consequently, I find that the IHO correctly determined that the district denied the student a FAPE for the 2011-12 school year.

2. Unilateral Placement

Having found above that the district failed to offer the student a FAPE for the 2011-12 school year, I will now consider the parents appeal from the IHO's finding that the NPS was not an appropriate placement for the student because the school did not provide educational instruction specially designed to meet the student's unique educational needs.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs

of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

The parties do not contest the IHO's description of the student's special education needs identified in the hearing record. The hearing record indicates that although the student historically achieved high grades, he was in need of assistance with organization and study skills (Joint Exs. 40 at p. 3; 44 at pp. 2, 4-6; 53 at p. 4; 68-70; see Joint Exs. 4 at pp. 3-4; 7). According to the hearing record, the student required counseling services to address social/emotional needs, including interventions to address his attitude toward school, difficulty with anxiety, and problems related to stress as an underlying factor contributing to his headaches (Joint Exs. 50a; 51a). The hearing record further establishes that the student needed to improve his ability to cope with and manage stress related to academics and social situations (Joint Ex. 51a). The parties agreed that for the 2011-12 school year, the student required an educational placement outside the district's high school (Dist. Ex. 30; Joint Ex. 53 at p. 1).

On May 5, 2011, an independent psychiatrist retained by the district conducted a review of the student's special education records, participated in a telephone discussion with the student's mother, and prepared a psychiatric consultation report "in order to understand the impact of any underlying psychiatric issues upon this student's behavioral/academic functioning" in advance of the scheduled May 2011 CSE initial review meeting (Joint Ex. 43 at p. 1). After considering various interventions addressing the student's headaches and the affect of their symptoms on his life, the independent psychiatrist recommended to the student's mother that "it would be wise to re-frame [the student's] case and view his symptoms as pain induced by chronic stressors" (id. at p. 2). The independent psychiatrist spoke "at length" about considering cognitive-behavioral approaches as a component to help manage pain, and he suggested that the student may benefit

from an approach "incorporating bio-feedback/relaxation techniques, mindfulness training, [and] play therapy" (id. at pp. 2-3). The independent psychiatrist also suggested that the student "may respond better to behavioral approaches to teach him how to self-modulate his pain response," that the parents consult with a pain management team at an area hospital, and that they provide the student with access to an outdoor adventure-based program to engage him in learning to cope with stress (id. at p. 3).

On August 10, 2011, the student's pediatrician wrote to the CSE that the student's headaches rendered him unable to attend school and that although prescribed therapies did not control the headaches, when the school year ended, the headaches stopped (Joint Ex. 50b). He opined that the student's attendance at a large public school, such as the district's middle school, was a trigger for the student's headaches, and that a "smaller, supportive school environment" would be less likely to trigger headaches in the upcoming school year, and, during testimony at the impartial hearing, further described the ideal school environment for the student as one in which "the classes are small, [and] there is comradery and a support that each of the students will feel both from the staff and from the other students;" according to the pediatrician, these attributes would allow the student to be successful at learning and not trigger the headaches (Tr. pp. 1495, 1512-13; Joint Ex. 50b).

In an August 11, 2011 letter to the CSE, the student's private psychiatrist, who initially consulted with the student on May 18, 2011, reported that the student had a "history of chronic and significantly impairing physical symptoms," which, despite extensive medical workup, did not yield an organic diagnosis (Joint Ex. 50a at p. 1). He further reported that "[t]here eventually accrued evidence of a component of anxiety [and] school avoidance as a significant secondary component of these impairing headaches, prompting both psychotherapeutic [and] psychopharmacological interventions, which regrettably were also not effective in curtailing the headaches and school absences" (id.). According to the private psychiatrist, the cessation of the student's headaches, contemporaneous with the end of school in June 2011, together with the "other atypical features of [the student's] headache pattern," were "strongly suggestive of the major role of anxiety and school avoidance in the evolution and persistence of the headaches" (id.). Noting the student's "intrinsic vulnerability to anxiety," the private psychiatrist also noted indications of the student's social anxiety with peers, and indicated that during sessions, the student exhibited a "sustained reluctance to discuss emotional issues of likely relevance to the psychogenic [contributors] to his headaches and to his school avoidance," and that the student was unwilling to elaborate on parental reports indicating the possible presence of teasing and rejection by peers (id. at pp. 1-2; see Tr. pp. 891-93). As of August 2011, the private psychiatrist offered the student diagnoses including a headache disorder with both physical and psychological contributors, and associated features of both anxiety and dysthymia (Joint Ex. 50a at p. 2).[21]

The private psychiatrist recommended that the student attend a smaller school environment away from home, which offered small classes and provided "supportive counseling and educational services that enable him to return to normal social and educational functioning" and stated that the student would require "neurological, medical [and] psychiatric follow-up" (Joint Ex. 50a at p. 2). During the impartial hearing, the private psychiatrist testified that "[the student's]

[21] The private psychiatrist's diagnostic impressions of the student at that time included the internalizing of personality features, migraine headaches and TMJ by history, possible Lyme disease exposure, and school and social adjustment problems (Joint Ex. 50a at p. 2).

"problems are not primarily psychiatric in the domains of conduct disorders, anxiety, depression and schizophrenia, that would be more suitable for an emotionally disturbed population of psychiatrically based patients," who were "ordinarily referred for residential settings in psychiatrically accommodated boarding schools;" rather, the private psychiatrist testified, the "best solution" for the student would be to attend "a boarding school setting where there was a supportive environment with small class size, guidance available on a more frequent and regular basis, [and] the availability of outdoor activities" (Tr. pp. 874, 882, 922-24).

In an August 19, 2011 letter to the CSE, a private psychologist, who had worked with the student on five occasions between May 2011 and July 2011, indicated that he had observed the student "in a range of contexts" and "got to know him relatively well" (Joint Ex. 51a at p. 1). The private psychologist described the student's internalizing personality style and his difficulty coping with stress caused by academic and social pressures at school, and noted that when the student experienced a headache, he became "overwhelmed by the basic demands of life" and "was absolutely unable to attend school and interact socially when he had a headache" (id.). The private psychologist reported that "medical consensus has only agreed that [the student] has a biological propensity to get migraine headaches, there is some physiological trigger, and that these headaches are partly triggered and exacerbated by both physiological and emotional stresses," and that the student's headache pattern suggested that stress from school was a "major contributor to his problem" (id. at p. 2). The private psychologist testified during the impartial hearing that that the student exhibited "limited insight" into the potential stressors, but that the student identified school performance, such as tests and large projects, and the stresses of falling behind with peers and school work, as headache triggers (Tr. pp. 1046-47).

The private psychologist indicated that it was unlikely that the student would succeed if he continued in the mainstream public school system, even in a modified program or self-contained class, as it would not be the '"right fit"' for him academically or emotionally; rather, the student's needs required a "small, individualized learning environment that reduces stress and supports [the student's] emotional development," and a clearly structured day/evening, the "on-going provision of support from teachers and staff that can focus on his unique needs," and both social and academic support due to the amount of school the student missed during the 2010-11 school year and due to the extent to which he had isolated himself socially (Joint Ex. 51a at p. 2). The private psychologist suggested that living away from home would help prevent the student from "falling back into old habits" and would provide him with opportunity for outdoor activities (id.). During the impartial hearing, the private psychologist testified that the student required a smaller program where he could receive small group and individualized attention, where his time was well structured, and where he could engage in physical activity similar to his summer camp experiences (Tr. pp. 1017-18, 1029-30, 1055-58).

According to the parent, after the initial visit to the NPS in February 2011, the school appeared to be a "perfect fit" for the student, and testified that she liked the school culture, supportive atmosphere, small classes, the individuals she met with, the opportunity for the student to partake in outdoor activities, and the school staff who "seemed to be really interested [in] and caring about the students and monitoring them" (Tr. pp. 1805-06). She further testified that the NPS was a "therapeutic environment without being overtly therapeutic because [the student] could not be in a therapeutic residential program, he didn't have needs that would qualify him for that," and that at the school, the student would receive counseling, be in classes numbering six to seven

students, and be exposed to academics that were "rigorous . . . but not overly competitive" (Tr. pp. 1806-07).

The NPS is described in the hearing record as an "independent, co-educational college preparatory school serving a boarding and day population of 175 students in grades 9 to 12," which sought applications "from motivated, positive young men and women who seek a challenging academic environment, a competitive athletic experience, and involvement in community service" (Tr. pp. 1552-58; Parent Ex. L at pp. 2, 21). The ninth grade class during the 2011-12 school year consisted of 20 students, with class sizes ranging between 9 and 12 students (Tr. p. 1560). The NPS did not have a consulting psychiatrist or psychologist on staff (Tr. pp. 1774-75). The "wellness team" at the NPS consisted of registered nurses, an athletic trainer, and a NPS counselor, whose role, as described in the hearing record, was to oversee the "social and personal well-being of students," and whose job duties included working one-on-one with students, arranging referrals to outside counseling agencies, overseeing faculty advising, facilitating conflict resolution, and advising student organizations (Parent Ex. L at p. 17).

In a July 20, 2011 e-mail to the NPS's school counselor (the NPS counselor), the parents requested that the student receive approximately 30 minutes per week of "mandatory counseling" built into his schedule, and, in a July 24, 2011 e-mail response, the NPS counselor indicated that it "makes sense for [the student] to start with a regular check in with someone," which could either be the NPS counselor or outside independent counselors (Parent Ex. UU). In a September 2, 2011 e-mail to the parent, the NPS counselor indicated that the school assigned a nurse as the student's advisor, but that the NPS counselor would be "the main component of regular weekly chats/counseling," and stated that, "we don't call ourselves a therapeutic school, yet we have a lot of faith in the school's therapeutic culture" (Parent Ex. VV).

On August 30, 2011, the NPS developed an "official accommodation plan" based upon the student's June 2010 section 504 accommodation plan (compare Parent Ex. MM, with Joint Ex. 11). The NPS's accommodation plan provided the student with extended time for in-class assignments, preferential seating, graphic organizers or guided notes to support information presented verbally, and regular counseling sessions with the NPS counselor (Tr. pp. 1562-63; Parent Ex. MM). The NPS counselor testified that his regular counseling sessions with the student "started very structured. [W]eekly conversations, as I said to all parents I am not going to provide therapy, I am a coach here . . . so in the first marking period I am going to guess . . . we met five times," and added that "[t]hen we certainly got less formal about it. I stopped down to his room frequently [to] find a chair and chat . . . so I judged the need, I let that become much less formalized" (Tr. pp. 1564, 1791; see Parent Ex. JJ).

The NPS counselor testified that, although the counseling conversations with the student "went well," they were "more superficial" in an office setting than he expected, and that the conversations improved when he talked with the student in the student's room (Tr. p. 1572). The NPS counselor further testified that when the student was not manifesting problems, he did not remind or discuss with the student past difficulties, although he did "check" with the student to determine whether the student was feeling "academic stress," especially on the three occasions the student experienced a headache; however, the NPS counselor testified that he did not keep a written log or notes about his meetings with the student, and that at the time that he gave testimony during the impartial hearing in March 2012, he and the student were no longer meeting on a weekly basis (Tr. pp. 1572, 1769, 1785-86; Parent Ex. JJ). The NPS counselor also testified that, in

addition to the meeting with the student, as he did with all students under his care, he also spoke with the student "a couple of times a day," adding that "as with all kids, this isn't just specific to [the student], all kids, we pull them aside and make a little comment about the way they interact and how is it going," and that he asked questions of them, such as whether the students had completed specific class assignments, and stated that the NPS staff "constantly" assessed how the students were doing and addressed problems as needed (Tr. pp. 1565-66, 1770; see Parent Ex. JJ).

According to the NPS counselor, based upon the information about the student that the school gathered during the admissions process, the NPS assigned a school nurse to serve as the student's advisor, and her role was to provide a contact person for parents and to ensure adult monitoring of every student, and not to provide formal academic or personal advising to students; the NPS counselor also testified that nurses were available to the student at the school and that there was a system in place to monitor his medication (Tr. pp. 1560-61, 1573-75, 1784-85). The NPS counselor described the school not as a "therapeutic school," but rather as "a college prep school with a heavy emphasis on physical activity;" however, he further testified that "all of the factors that go into a therapeutic school [the NPS] happen[s] to have, honesty, predictable cause/effect patterns, integration into social groups, learning one's role as part of a larger community bigger than one's self" (Tr. p. 1581).

Turning to the student's organizational and study skill needs, the NPS counselor testified that the school expected ninth grade students to complete approximately 30 minutes of homework per night per course, and that the school provided a 2 hour evening study session in the dormitory, and a 40-minute structured study hall period per day in the library where "younger students" could receive faculty assistance with reviewing their planners and structuring homework assignments; because the structured study hall was offered to all freshman students, the NPS counselor "presumed" that the student was a part of that program (Tr. pp. 1558-60, 1771-73, 1778-80, 1783-84; see Parent Ex. SS). When asked what additional supports the NPS provided to the student beyond study halls, the NPS counselor testified that the student received "[j]ust what every kid gets, which is a busy little hive here with all adult contact," and stated that "I can't think of anything formalized" (Tr. p. 1571).

The NPS counselor testified that the NPS's official accommodation plan for the student was "more academic" and provided accommodations such as preferential seating and extended time, and noted that he was responsible to implement was the counseling component of the student's official accommodation plan (Tr. pp. 1562-63, 1789-90; Parent Ex. MM); he explained that because "the nature of our regular offering covers a lot of typical requests [and accommodations]" found in IEPs and section 504 accommodation plans, accommodations enumerated on the school's official accommodation plan for the student, such as preferential seating and extended time, were already built in to the school's curriculum, and those accommodations "just happen anyway" (Tr. pp. 1790-91). He testified that, although he knew the student's teachers each possessed a copy of the student's official accommodation plan, "I am not familiar with what the particular teachers did with that particular document" (id.).

The NPS counselor testified that during informal "encounters," he and the student's teachers shared their observations about how students generally performed in class, and denied that he specifically met with the student's teachers to discuss the amount of time the student required to complete assignments; rather, the NPS counselor and the student's teachers "talked a lot about all of the kids," but he did not have formal conversations with the student's teachers to

develop strategies to enable the student to improve his organizational skills relative to school work (Tr. pp. 1767-68, 1751-53). Although he acknowledged that the student exhibited organizational difficulties, the NPS counselor testified that the school "turn[ed] up the heat" on its students by increasing its academic demands steadily every year (Tr. pp. 1568-69). The NPS counselor testified that he was unaware if the student had difficulties keeping track of his papers and handing in assignments on time, but noted that the student's organizational problems were evident outside of the classroom, and that he had "leaned on [the student]" about his untidy room, but was unaware if his efforts were successful (Tr. pp. 1570-71, 1765-67).

Academically, the student's report card contained in the hearing record, which covered the two quarters spanning September 2011 through February 2012, reflected grades ranging from "A" to "C," and effort designations ranging from "P" (poor) to "E" (excellent) (Parent Ex. TT). Teacher comments contained on the report card illustrated the student's variable effort and academic performance; relative to the student's organizational and study skills, his English teacher reported that the student appeared to struggle most with writing and essay assignments; his Spanish teacher noted that a considerable amount of homework assignments were either missing or incomplete, and he was urged to do a better job staying on top of daily homework assignments and participating in class; his math teacher commented that the student needed to put more time in preparing for the final examination than he did for his midterm examination; his biology teacher remarked that, despite small improvements the student still struggled with organization, but suggested that he could improve his grades with more study time, by attending extra help sessions, and by completing the midterm review packet; and his world cultures teacher identified the student's "issue" as with his diligence in classwork preparation, and indicated that that, although the student was ill on two quiz days, he was "very lackadaisical about making them up," and while the student's world cultures teacher acknowledged that the student "gets stressed out by the pressure of work, . . . that does not release him from his responsibilities" (id.). The NPS counselor testified that he was unaware of specific teacher comments contained on the student's report card (Tr. pp. 1754-66). He testified that the student was doing "okay" academically, and probably ranked above average in comparison to the rest of the NPS's freshman class, but that he was unaware as to whether the student had progressed academically, and commented that the student was in need of "a little discipline academically" (Tr. pp. 1568, 1579, 1754-66).

While the hearing record supports a finding that the student's social/emotional and academic functioning improved since the end of the 2010-11 school year, apparently due in large part to the fact he was no longer required to engage in activities at the public school that he perceived as stressful (compare Tr. pp. 1662, 1721-23; Joint Exs. 43; 50a; 50b; 51a; 67 at p. 1; 70, with Tr. pp. 1079-80, 1465-66; Parent Exs. HH, TT), and that the student achieved some progress academically during the 2011-12 school year,[22] the hearing record lacks evidence demonstrating that the NPS provided instruction that was designed to address the student's tendencies to develop

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

physical symptoms and exhibit school avoidance when under stress, or his need to develop coping skills to manage stress related to academics and social interactions, and to improve his organizational/study skills related to academics, and, that the instruction that the student received during the 2011-12 school year was, in fact, available to all students enrolled at the NPS. The hearing record fully supports the IHO's determination that the parents presented no evidence that the student's underlying emotional issues, organizational issues, or study skills were addressed by the NPS (IHO Decision at p. 41).[23] In particular, the IHO noted that the NPS counselor offered no testimony regarding the student's social/emotional or counseling needs, such that the hearing record contained no evidence that the NPS counselor was familiar with the student's needs (id.). Placing the student in the NPS's residential setting—which merely eliminated his exposure to the public school environment and to activities that he perceived as stressful—is not sufficient in this case to meet the parents' burden to establish that the NPS's program provided the student with educational instruction specially designed to meet his unique needs (see Gagliardo, 489 F.3d at 113-15; Frank G., 459 F.3d at 365; see also Rowley, 458 U.S. at 188-89; Application of the Dep't of Educ., Appeal No. 09-031; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of a Student with a Disability, Appeal No. 08-021). Rather, it appears that the student's placement at the NPS provided him with "the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not" (Gagliardo, 489 F.3d at 115). Consequently, I find that the parents did not establish that the NPS was an appropriate placement for the student for the 2011-12 school year, and that the IHO's determination was correct.

Having determined that the parents did not meet the second criterion for an award of tuition reimbursement, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations supported the parents' claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011; Application of the Dep't of Educ., Appeal No. 12-005; Application of the Dep't of Educ., Appeal No. 11-147; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).]).

VII. Conclusion

In summary, upon due consideration of the evidence contained in the hearing record, I find that, relative to the 2010-11 school year, the district did not violate its child find obligations and the parents were not entitled to an award of compensatory home instruction services; relative to the 2011-12 school year, I agree with the conclusions reached by the IHO and find that the district failed to offer the student a FAPE for the 2011-12 school year and that the parents failed to establish that the NPS was appropriate for the student, and, consequently, it is unnecessary for me to address whether equitable considerations supported the parents' tuition reimbursement claim.

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my determinations herein.

[23] This should not suggest that the NPS was responsible for "curing" the student or guaranty him a specific level of benefit or progress, but it should have clearly shown what efforts of the NPS were specially designed to address the deficits.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated June 21, 2012 is modified, by reversing that portion which found that the district violated its child find obligation consequently denied the student a FAPE for the 2010-11 school year.

Dated: **Albany, New York**
January 31, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER