The University of the State of New York

The State Education Department
State Review Officer
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No. 12-156

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Office of Andrew K. Cuddy, attorneys for petitioner, Andrew K. Cuddy, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for an order directing respondent (the district) to provide the student with a 12-month program or compensatory additional services. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an 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 school district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student exhibits delays in the areas of cognitive functioning, social skills, language, and fine motor skills (Tr. pp. 135-36; Parent Exs. N; O).[1] For the 2010-11 school year (third grade), the CSE recommended placement in a 12:1+1 special class in a community school, with related services of occupational therapy (OT), speech-language therapy, and counseling (Parent Ex. E at pp. 1, 12).

[1] The student's eligibility for special education and related services as a student with an intellectual disability is not a matter in dispute in this appeal (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

By letter to the district dated June 21, 2011, the parent requested that the district consider a "summer school program" for the student (Parent Ex. K).[2] The parent noted that the student had previously been retained by the district, opined that the student's learning differences made her "more vulnerable" both academically and socially, and urged the district to consider her request because "the summer school program would be very beneficial to [the student]" (id.).

On October 18, 2011, the CSE convened to conduct the student's annual review and to develop her IEP for the 2011-12 school year (fourth grade) (Parent Ex. D). According to the parent, the October 2011 CSE advised her that the student would have to leave the community school that she was attending and enroll in a specialized school in order to participate in a 12-month program (Tr. pp. 137-38).[3] The October 2011 CSE recommended a 12-month program consisting of a 12:1+1 special class in a specialized school, together with related services consisting of once weekly 30-minute sessions of individual speech-language therapy, speech-language therapy in a group of three, OT in a group of two, and counseling in a group of three (Parent Exs. D at pp. 7-8, 12; I). In addition, the October 2011 CSE recommended that the student receive special transportation (Parent Ex. D at p. 11). The CSE also developed annual goals and corresponding short-term objectives to target the student's needs relating to speech, counseling, OT, and academics (id. at pp. 4-7).

By final notice of recommendation to the parent dated December 6, 2011, the district summarized the contents of the October 2011 IEP and notified the parent of the particular specialized public school site to which the student had been assigned (Parent Ex. I).

In January 2012, the student enrolled in the assigned specialized public school (Tr. pp. 45, 77, 81, 124, 127, 133, 138). Shortly thereafter, on February 10, 2012, the CSE reconvened pursuant to the parent's request (Tr. pp. 26-28; Parent Ex. C at p. 15). According to the school psychologist who attended the CSE meeting, the parent requested that the CSE reconvene to address her concerns that the student's transfer from a community school to a specialized school setting was a "mistake" because the student was "unhappy" after she transferred to the specialized school (Tr. pp. 26-28; see Tr. pp. 138-39).[4] The February 2012 CSE recommended that the student return to a 12:1+1 special class in a community school and continue to receive counseling, speech-language therapy, and OT as set forth in the October 2011 IEP; however, the CSE did not

[2] In the context of the hearing record it appears the parent's request that the student attend "summer school" was referring to her desire for the student to receive a "12-month" special education program or what the hearing record refers to as extended school year (ESY) services (see, e.g., Tr. pp. 49-50, 53-55, 137, 147-48; Parent Ex. K; see 8 NYCRR 200.1[eee]; see also 34 CFR 300.106[b]). For consistency within this decision and with State regulations, I will use the term 12-month program.

[3] The hearing record does not contain a discussion of the distinctions between "specialized" and "community" schools.

[4] The district's school psychologist who participated in the February 2012 CSE meeting served in a dual capacity as school psychologist and district representative (Tr. p. 26; Parent Ex. C at p. 18). For purposes of this decision, he will be referred to as the school psychologist.

recommend a 12-month program for the student as it had in October 2011 (Parent Ex. C at pp. 10-11; see Parent Ex. D at pp. 7-8).[5]

A. Due Process Complaint Notice

By due process complaint notice dated May 1, 2012, the parent requested an impartial hearing (Parent Ex. A). The parent alleged, in part, that the district denied the student a free appropriate public education (FAPE) because the October 2011 CSE recommended a placement for the student in a 12:1+1 special class in a specialized school, which the parent argued constituted an overly restrictive setting for the student (id. at p. 2). The parent further maintained that there was no information before the October 2011 CSE that indicated the student required a more restrictive setting than placement in a 12:1+1 special class in a community school (id.). Next, the parent contended that both the October 2011 and February 2012 IEPs lacked "quantified information" with respect to the student's academic levels and abilities, resulting in a lack of "meaningful" and measurable annual goals (id. at pp. 3-4). The parent also argued that the February 2012 CSE removed the provision of a 12-month program and special transportation from the student's IEP without any basis for doing so (id. at pp. 2-4). The parent further asserted that the district's failure to implement the February 2012 IEP also resulted in a denial of a FAPE to the student (id. at p. 2). More specifically, the parent argued that despite the February 2012 CSE's recommendation to place the student in a 12:1+1 special class in a community school, the student had continued to attend a 12:1+1 special class in a specialized school, which the parent maintained did not constitute the least restrictive environment (LRE) for the student (id.).

As relief, the parent sought, among other things: (1) immediate placement of the student in a 12:1+1 special class in the same district community school site that she had previously attended; (2) modification of the February 2012 IEP to include revised present levels of performance, appropriate annual goals and short-term objectives, identification of appropriate methodologies to address the student's needs, and a 12-month program; and (3) additional services to compensate the student for the denial of a FAPE while she was attending the "inappropriately restrictive" 12:1+1 special class in a specialized school (Parent Ex. at p. 4). The parent also invoked the stay put (pendency) provisions of the IDEA (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing which commenced and was concluded on June 14, 2012 (IHO Decision at p. 2; Tr. pp. 1-153). On June 27, 2012, the IHO rendered her decision (IHO Decision at p. 5). With respect to the parent's allegations regarding the February 2012 CSE's failure to recommend a 12-month program for the student, the IHO found, in part, that there was no evidence in the hearing record to support a finding that the student exhibited a regression of skills during the summer (id. at p. 4). She also noted that the CSE recommended a 12-month program solely because the parent requested it (id.). As a result, the IHO concluded that the hearing record lacked "a legal basis" to support a finding that the student required a 12-month program (id.). The IHO also determined that the parent's claims regarding the implementation of the February 2012 IEP had been rendered moot because the 2011-12 school year was ending at the

[5] The February 2012 IEP also did not include a recommendation for special education transportation as had been recommended in the October 2011 IEP (compare Parent Ex. C, with Parent Ex. D).

time that she issued her decision (id. at p. 3). Therefore, the IHO concluded that she was unable to fashion an award of viable relief in this matter (id.). The IHO next determined that with respect to the parent's request for compensatory additional services, the hearing record contained no basis to determine what services, if any, the district failed to provide to the student, or what special education services, if any, the student might require to remediate such a failure by the district (id. at p. 4). Finally, the IHO determined that there was no evidence of a "gross violation of the IDEA" and denied the parent's request for relief (id. at pp. 4-5).

IV. Appeal for State-Level Review

The parent appeals. The parent argues that the district denied the student a FAPE during the 2011-12 school year, and that consequently, the student is entitled to an award of additional compensatory services. Specifically, the parent alleges that the February 2012 CSE denied the student a FAPE by removing the recommendation that the student receive a 12-month program from her IEP without the support of evaluative data on which to base that removal. She further alleges that the district has refused to implement the student's February 2012 IEP, as the student remained in a specialized school, and that the IHO erred to the extent that she did not direct the district to immediately place the student in the community school that the parent requested. The parent asserts that the student is entitled to an award of compensatory additional services because the student was enrolled in an overly restrictive environment and did not receive the program specified by the February 2012 IEP. The parent also contends that the IHO erred to the extent that she denied relief on mootness grounds, because the February 2012 IEP had not yet expired at the time that she rendered her decision and the controversy regarding the implementation of that IEP was capable of repetition. As relief, the parent requests an order directing the district to provide the student with the relief sought in her due process complaint notice and 20 hours of social skills training. The parent further contends that the IHO erred by failing to address the propriety of the annual goals and short-term objectives included in the student's IEP.[6]

In an answer, the district asserts that it provided the student with a FAPE during the 2011-12 school year and that there is no basis in the hearing record to support an award of additional compensatory services. The district argues that the IHO properly denied the parent's request for an order directing it to place the student at a specific community school site for the remainder of the 2011-12 school year. Moreover, the district disputes the parent's claims that it is responsible for a failure to implement the February 2012 IEP, arguing that the parent frustrated its efforts to do so. According to the district, a seat was no longer available for the student at the particular community school site that the student attended during the first portion of the 2011-12 school year and the parent rejected offers by the district to implement the student's IEP at other community school sites within the district. The district contends that its selection of a different community school site than the particular community school site preferred by the parent does not violate LRE requirements and constituted an administrative decision by the district that warrants deference. Next, the district contends that the IHO properly concluded that there was no legal basis to support

[6] The petition does not specify which IEP, the October 2011 or February 2012 IEP, the parent is alleging had inappropriate goals. However, in the context of the preceding information in the petition, it appears that the parent is referring to the February 2012 IEP. Moreover, I note that both the October 2011 and February 2012 IEPs contain the same annual goals and short-term objectives (compare Parent Ex. C at pp.4-9, with Parent Ex. D at pp. 4-7).

a finding that the student required a 12-month program to address her special education needs. Finally, the district alleges that the IHO properly declined to address the parent's claims with respect to the sufficiency of the annual goals and short-term objectives contained in the IEP because the parent failed to present any evidence regarding their adequacy. Alternatively, the district asserts that the annual goals and short-term objectives were sufficient to provide the student with a FAPE and that they addressed the student's identified needs.

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 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., 2010 WL 3242234, at *2 [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, 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, 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 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, 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. February 2012 IEP

1. Adequacy of Annual Goals and Short-Term Objectives

Although not addressed in the IHO's decision, the parent contends on appeal and contended in her due process complaint notice that the annual goals and short-term objectives included in the February 2012 IEP were not "meaningful and measurable" (Parent Ex. A at pp. 3-4). Because the parent raised this allegation in her due process complaint notice and clearly preserves it here, it is appropriate to address it on appeal even though the IHO failed to address it in her decision (8 NYCRR 279.10[d] [noting that as contemplated under State procedures, "in an appeal to [an SRO] from a final determination of an impartial hearing officer, a party may seek review of any interim ruling, decision or refusal to decide an issue"] [emphasis added]). An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

An independent review of the February 2012 IEP shows that the CSE developed eight annual goals and, consistent with the CSE's determination that the student would participate in an alternate assessment, 25 short-term objectives to target the student's needs relating to her social/emotional, receptive and expressive language, fine motor, activities of daily living (ADLs), math, reading, and writing skills, which are all areas of deficit as identified in the February 2012 IEP's present levels of performance (Parent Ex. C at pp. 1-2, 4-9, 13; see 8 NYCRR 200.5[d][2][iv]).

Regarding the student's present levels of performance, the February 2012 IEP indicated that the student "earned an abbreviated IQ of 50" on the Stanford-Binet Intelligence Scales–Fifth Edition, Abbreviated Battery, which is in the moderately delayed range of overall cognitive ability (Parent Ex. C at p. 1; see Parent Ex. N at p. 1). The student's performance on the abbreviated battery placed her nonverbal fluid reasoning skills in the 0.4th percentile and her verbal knowledge abilities in the 0.1st percentile (Parent Ex. C at p. 1). The student's basic reading composite score

fell within the below average range, and the results indicated "significant weaknesses in comprehension and decoding" (id.). According to the February 2012 IEP, the student's reading skills were at a first grade instructional/functional level (id. at p. 15). With regard to writing, the February 2012 IEP indicated that the student's performance fell within the below average range in spelling, and further noted that she exhibited weaknesses in combining sentences and following directions on writing tasks (id. at p. 1). Additionally, regarding math, the February 2012 IEP reflected that the student's math composite score fell within the very low range (id.). Although the student exhibited difficulty with following patterns, sequencing numbers, and applying a basic addition equation to word problems, the February 2012 IEP noted that the student demonstrated the ability to count shapes and point to numbers on a calendar (id.). The February 2012 IEP indicated that the student's math skills were at a first grade instructional/functional level (id. at p. 15).

Socially, the February 2012 IEP described the student as being sensitive, respectful of authority, and "withdrawn from her peers," noting she was often found wandering by herself on the playground during recess (Parent Ex. C at p. 2). Additionally, the social present levels of performance reported on the IEP indicated that when the student became frustrated she would often "shut down" and say, "I don't know" (id.). According to the IEP, the student's tantrums in class were "typical of children who are significantly younger than her" (id.). To address the student's social needs, the IEP indicated that the student should improve her ability to cope with conflict and frustrations as well as improve her ability to relate to peers (id.).

The February 2012 IEP noted that the student's performance on measures of adaptive behavior fell within the low range regarding her daily living skills (Parent Ex. C at p. 1). The physical development present levels of performance section of the IEP indicated that the focus of the student's OT services was to improve her ADL skills (id. at p. 2). In addition, the February 2012 IEP set forth the results of an administration of the Test of Visual Motor Integration (VMI) that yielded standard scores of 70 (visual motor integration) and 59 (visual perception), which were considered to be below average (id.). According to the February 2012 IEP, the student could not complete the VMI because "she felt too exhausted when confronted with the more challenging parts of the assessment;" however, the student's visual perception score might have been higher had she completed the test (id.). In addition, the February 2012 IEP described the student's fine motor skills as "adequate," and also indicated that the student's handwriting was neat and that she wrote with a good regard for line and letter formation, although she did not capitalize the first letter of a new sentence or use proper spacing between words (id.). The student's physical development needs included improving her ability "to initiate and complete a task that requires her to handle various classroom tools" (id.).

In this case, a review of the annual goals and short-term objectives included in the February 2012 IEP demonstrates that they were sufficiently linked to the student's deficits as identified in the present levels of performance contained in the IEP.[7] For example, to address the student's reading needs, the February 2012 IEP provided short-term objectives to improve her ability to decode multisyllabic words through the use of a multisensory approach, read a three-sentence

[7] I note that the parent does not challenge the appropriateness of the present levels of performance on the February 2012 IEP.

paragraph and retell the main idea, and read and master second grade sight words with the use of a multisensory approach (Parent Ex. C at p. 7). To improve the student's math skills, short-term objectives were designed to increase the student's ability to recall basic subtraction facts, solve multi-digit operations with the use of "hand-on" materials, and apply math skills to daily routines (id. at p. 8). Writing skill needs were addressed by short-term objectives that targeted the student's ability to use graphic organizers, write about a picture she drew, and write a sentence using correct capitalization, punctuation and grammar (id. at p. 9).

The February 2012 IEP also contained annual goals that targeted the student's speech-language needs (Parent Ex. C at pp. 5-6). The student's expressive language needs were addressed by short-term objectives designed to improve the student's ability to describe objects using three to four salient details, identify and state problems in given situations, predict possible outcomes and provide missing pieces of information using auditory closures, and respond to "WH" questions based on situations/events and literature (id.). To improve the student's receptive language and auditory processing skills, the February 2012 IEP provided short-term objectives directed at increasing the student's ability to follow two to three-step directions, recall specific details of passages read to her, and compare and contrast two objects using a diagram (id. at p. 6).

In the area of social/emotional functioning, the February 2012 IEP contained an annual goal with corresponding short-term objectives that targeted the student's ability to relate to her peers in a small group setting by maintaining eye contact with other group members during small group conversation, initiating conversation with her group members, staying on topic during conversation with her group members, and joining in an activity four out five times, regardless of whether the student initiated the activity (Parent Ex. C at p. 5). Another social/emotional annual goal included in the February 2012 IEP focused on improving the student's ability to cope with conflict and frustration (id.). Corresponding short-term objectives included increasing the student's ability to use her words to express herself rather than crying or acting out, labeling emotions and feelings appropriately, and gaining attention from adults and peers appropriately (id.). To improve the student's stamina and ability to use classroom tools, the February 2012 IEP provided short-term objectives that addressed the student's need to complete table top activities using tools such as a ruler, stencil, glue stick, etc., with cues and independently (id. at p. 6).

Lastly, regarding the parent's contention that the annual goals and short-term objectives were not measurable, upon review, I find that they included the requisite evaluative criteria, evaluation procedures, and schedules to measure progress (Parent Ex. C at pp. 4-10; see 8 NYCRR 200.4[d][2][iii][b]). The annual goals and short-term objectives provide criteria for measurement to determine if a goal has been achieved (e.g., 50 percent accuracy, 75 percent accuracy, 80 percent accuracy), the method of how progress would be measured (e.g., teacher made materials, teacher/provider observations), and a schedule of when progress toward the goals would be measured (e.g., three times during the year, once per quarter) (Parent Ex. C at pp. 4-10).

Thus, I find that overall the annual goals and short-term objectives contained on the student's February 2012 IEP, when read together, targeted the student's identified areas of need and provided information sufficient to guide a teacher in instructing the student and measuring her progress (see D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at *11 [S.D.N.Y. Sept. 16, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013] [explaining that "[i]n this Circuit, courts are reluctant to find a denial of a FAPE based

on failures in IEPs to [identify] goals or methods of measuring progress"][internal quotations and citations omitted]; D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *13-*14 [S.D.N.Y. Aug. 19, 2013]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146, 147 [S.D.N.Y 2006]; Application of the Dep't of Educ., Appeal No. 12-005; Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096). Accordingly, I decline to find a denial of a FAPE for the 2011-12 school year on this basis.

2. 12-Month Program

Next, I will address the parent's contention that the IHO erroneously determined that the student did not require special education services for a 12-month school year for the 2012-13 school year. The IDEA does not automatically require the provision of school services during the summer months; rather, such services must be provided when they are a necessary element of a FAPE for the student (see Antignano v. Wantagh Union Free Sch. Dist., 2010 WL 55908, at *11 [E.D.N.Y. Jan. 4, 2010]). Pursuant to State regulations, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression " (8 NYCRR 200.6[k][1]). State regulation defines substantial regression as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]; see 34 CFR 300.106).[8]

In this case, in January 2011, while the student was attending a district community school, the parent asked the district to consider the provision of a 12-month program for the student (Tr. pp. 142-43). The parent testified that she was advised by a staff member at the community school that in order for the student to receive a 12-month program, the student must be enrolled in a specialized school (Tr. pp. 137-38, 143). The parent further indicated that despite her desire for a 12-month program, she wanted the student to remain in a community school (Tr. p. 137). In June 2011, the parent renewed her request that the district consider the provision of a 12-month program for the student (Parent Ex. K). As noted above, the October 2011 CSE recommended the provision of 12-month 12:1+1 special class and related services in a specialized school (Parent Exs. D at pp. 7-8, 12; I).

[8] The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) published a guidance memorandum which states the following regarding 12-month special programs:

> A student is eligible for a twelve-month service or program when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year. The typical period of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program a review period of eight weeks or more would indicate that substantial regression has occurred.

("Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at http://www.p12.nysed.gov/specialed/publications/policy/esy/qa06.pdf [emphasis in original]).

The February 2012 CSE terminated the student's 12-month program as provided for in the October 2011 IEP, given the CSE's recommendation that the student should return to a 12:1+1 special class in a community school, and having determined that the student did not require "the restrictive services, the intensive services," of a specialized school (Tr. p. 50; Parent Ex. C at p. 11). However, the school psychologist who attended the CSE meeting could not confirm that he reviewed any evaluative data during the February 2012 CSE meeting that suggested that the student no longer required a 12-month program (Tr. pp. 33, 50). The hearing record further reflects that the February 2012 CSE did not conduct any analysis of whether the student required a 12-month program to prevent substantial regression, and there is no indication in the hearing record to suggest that the district had information before it at the time of the CSE meeting that gave rise to a conclusion that it was appropriate to terminate the student's 12-month program that had been recommended on the October 2011 IEP (Tr. pp. 28, 33, 55-56).[9] Given that the student's October 2011 IEP contained a recommendation for a 12-month program, I find that it was improper for the February 2012 CSE to withdraw the recommendation that the student receive services on a 12-month basis only four months later without any reasoning or information related to whether the student would have exhibited a substantial regression of skills and therefore, no longer required the 12-month program.[10]

Additionally, the school psychologist conceded that it would be "unusual" to see a student enrolled in a community school who received 12-month services (Tr. p. 54). I further note that while the hearing record suggests that the student could not participate in a 12-month program unless she attended a specialized school, during the impartial hearing, the parties stipulated that "a 10-month student [could] have a 12-month program, even if the 10-month student [was] attending a community school" (Tr. pp. 101; see Tr. pp. 137-39). I remind the district that placement decisions must be based on a student's unique needs as reflected in the IEP, rather than IEPs developed on the basis of services already available in the district (34 C.F.R. § 300.116[b][2]; 8 NYCRR 200.6[a][2]; see Adams v. State, 195 F.3d 1141, 1150-51 [9th Cir. 1999]; Reusch v. Fountain, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]). The IDEA further requires that the services to be offered to a student are dictated by the student's needs, not by location of the services (Rowley, 458 U.S. at 203). If a student requires services that are not offered within a specific building, then, as a general rule, a district must ensure that the student has access to the services if such services are needed to provide the student with a FAPE (Placements, 71 Fed. Reg. 46,588 [Aug. 14, 2006] ["Although the Act does not require that each school building in an LEA be able to provide all the special education and related services for all types and severities of disabilities .

[9] Although the school psychologist testified that he met with the student's special education teacher prior to the CSE meeting to discuss the possibility of returning the student to a community school, the hearing record does not indicate whether they discussed the student's need for a 12-month program (Tr. pp. 28-29).

[10] I also note that there is no evidence in the hearing record that the district complied with the procedures requiring that prior written notice be given to the parent, which would have required the district to describe why it changed the student's program from a 12-month program to a 10-month program in addition to a description of each evaluation, procedure, assessment, record or report that was used as a basis for the refused action (see 34 CFR 300.503; 8 NYCRR 200.5[a][5][ii]). Prior written notice should be sent within a "reasonable time" and under the circumstances of this case it would have been reasonable to send it before the date of initiation of the proposed IEP. The district's response to the due process complaint notice, which is required in those cases when prior written notice is not required, fails to show that the district considered the parent's request or the rationale for the district's refusal to provide the student with a 12-month program (Parent Ex. B; see 34 CFR 300.508[e]).

. . In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007] [stating that service delivery determinations must be made by the CSE "based on a child's individual and unique needs, and cannot be made as a matter of general policy by administrators, teachers or others apart from the IEP Team process"]).

Based on all of the above, the IHO's finding that the hearing record did not provide a legal basis demonstrating the student's need for 12-month services must be reversed, and I will remand the matter to the CSE to conduct an assessment of the student's needs to determine whether she requires a 12-month program to prevent substantial regression.

B. Implementation of the February 2012 IEP

The parent next alleges that the IHO erred by failing to consider her claims regarding whether the district failed to implement the student's IEP. In this case, given that the school year had not yet ended and the February 2012 IEP had yet to expire at the time that the impartial hearing officer issued her decision, and the claim at least raises the question of whether relief can be granted due to an alleged deprivation of special education services, the IHO's determination that the parent's claims regarding implementation of the February 2012 IEP were moot was improper and must be reversed (see IHO Decision at p. 3; Parent Ex. C at p. 1 [indicating that the IEP would be reviewed on February 7, 2013]). Accordingly, I will consider whether the district failed to implement substantial or significant provisions of the February 2012 IEP.

In order to show a denial of a FAPE based on a failure to implement an IEP, a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007) [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

Here, the hearing record reflects that the district failed to implement the recommended 12:1+1 special class placement in a community school (see Parent Ex. C at p. 10). As detailed above, the February 2012 CSE recommended that the student return to a 12:1+1 special class in a

community school, with the continuation of her related services as set forth in the October 2011 IEP (Tr. pp. 33, 65; Parent Ex. C at p. 10; compare Parent Ex. C at p. 10, with Parent Ex. D at p. 12).[11] Prior to the February 2012 CSE meeting, the school psychologist testified that he contacted the district placement officer to inquire about the availability of a seat in the community school where the student had previously attended (Tr. pp. 33, 36-37, 43). The placement officer advised the school psychologist that there were no seats available at that particular community school (Tr. p. 37). During the February 2012 CSE meeting, the school psychologist informed the parent that a seat was not available for the student at the community school in which the parent was interested (Tr. pp. 37, 66). The parent explained that she was only interested in returning the student to the same community school site where the student had been previously enrolled (Tr. p. 66). The school psychologist testified that "a few weeks" after the February 2012 CSE, he inquired again about the availability of a seat for the student in her former community school; however, no seats were open in that particular district school (Tr. p. 67). Consequently, the parent opted to continue the student's placement in the 12:1+1 special class in a specialized school, until a seat became available in the community school in which the student had been previously enrolled (id.).

Notwithstanding the district's claim that the parent's unwillingness to consider only the community school that the student had attended prior to January 2012 frustrated its efforts to implement the student's IEP as written, there is no evidence in the hearing record to establish that the district actually assigned the student to an alternative community school, nor does the hearing record offer any details regarding the district's efforts to provide the student with an alternate public community school site (Tr. p. 44).[12] The school psychologist further admitted that he did not inquire about openings at other community schools within the district, and the district placement officer did not suggest enrolling the student in another community school within the district (Tr. p. 68). Moreover, the school psychologist conceded that there must have been a seat available for the student in a different district community school; however, the district did actually provide the student a seat in another community school within the district (Tr. pp. 41, 68).

Under the circumstances, given that the district continued the student's enrollment in a more restrictive specialized school in contravention of the February 2012 IEP by failing to provide the student with a community school placement in conformity with the IEP, I find that the district failed to fully implement the student's IEP for a portion of the 2011-12 school year; namely from February 2012 through June 2012, and failed to adhere to the IDEA's "strong preference" for educating disabled students alongside their non-disabled peers to the maximum extent appropriate;

[11] The hearing record does not offer any details with respect to the October 2011 CSE meeting, other than the parent's testimony that the sole basis for the October 2011 CSE's recommendation to place the student in a 12:1+1 special class in a specialized school was the availability of a 12-month program in a specialized school, which is not rebutted in the hearing record (Tr. pp. 137-38). The hearing record further suggests that while in attendance in the 12:1+1 special class in the district's community school prior to the 2011-12 school year, the student was making progress and advancing from grade to grade, which weighs against a finding that the student required a placement in a specialized school (Tr. p. 48).

[12] Although there was general testimony by the school psychologist that he offered the parent the "possibility" of a different school in which to implement the student's IEP, the hearing record does not reflect that a different school was actually provided to the student (compare Tr. p. 44, with Tr. p. 68).

in other words, in their LRE (M.W. v New York City Dep't of Educ., 725 F.3d 131, 143 [2d Cir 2013]; see Walczak, 142 F.3d at 122).

C. Relief

Having found that the district improperly removed the recommendation for a 12-month program from the February 2012 IEP and thereafter failed to implement the IEP in accordance with its terms, it is necessary to determine the appropriate relief to cure the violation in this case.

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 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).

In her due process complaint notice, for relief, the parent requested "additional services to compensate for the denial of a [FAPE] while [the student] was attending the inappropriately restrictive" 12:1+1 special class in a specialized school (Parent Ex. A at p. 4). On appeal, the parent seeks 20 hours of social skills training (one hour for each week the student spent at the specialized school) to aid the student in recovering some of the social skills that she lost during her enrollment in the specialized school under the February 2012 IEP.

Here, the hearing record contains testimony from the parent indicating that as a result of the student's enrollment in the 12:1+1 special class in the specialized school during the 2011-12 school year, the student was unhappy, and engaged in emotional outbursts toward the parent (Tr. pp. 81, 138-39). According to the parent, the student never engaged in such behavior prior to her enrollment in the district's specialized school (Tr. p. 139). Likewise, the student's special education teacher from the specialized school indicated that the student appeared "depressed," and the special education teacher further recalled one instance where the student engaged in an "outburst" due to separation from her former school and friends (Tr. p. 81; Parent Ex. M at pp. 2, 5). While there is no information in the hearing record to rebut the evidence that the student was unhappy in the district 12:1+1 special class in the specialized school, the hearing record is also very sparsely developed with respect to the educational harm suffered by the student and how to rectify it. The hearing record does not contain any information about the other students who attended the special class in the specialized school where the student enrolled that confirms or refutes the parent's assertion that the student was "deprived . . . of opportunities for social interaction," which caused an adverse impact (Pet ¶ 31). Accordingly, I decline to direct the district to provide the student with 20 hours of social skills training as additional services. However, some award of additional

services may be warranted to remedy the district's failure to implement a provision of the February 2012 IEP for a portion of the 2011-12 school year. Under the circumstances, in the exercise of my discretion, I direct the CSE to reconvene and determine what additional services are necessary in this matter to remediate its failure to fully implement the student's February 2012 IEP for the February 2012 through June 2012 time period in a community school. I believe the parties are in the best position to identify the specific additional services that the student requires and should be afforded an opportunity to do so and, therefore, I encourage the parties to attempt to reach an agreement regarding what types of services would best remedy the district's failure to adhere to the student's IEP in this instance. If the CSE cannot reach consensus (which shall include the parents) regarding the provision of additional services to remediate the failure to provide the student a community school placement from the February 2012 through June 2012 period, the parent shall not be precluded from further challenging the CSE's recommendation in this regard at an impartial hearing if necessary; however, I strongly encourage the parties to work cooperatively.

VII. Conclusion

Because the district improperly terminated the student's 12-month program and failed to fully implement the student's IEP, I remand the matter to the CSE to determine what additional services, if any, are necessary in order to remediate its failures to comply with its obligations under the IDEA. I also direct the district to assess the student's need for the provision of a 12-month program and, if it determines that the student does not require such a program, to provide the parent with prior written notice to that effect.

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

THE APPEAL IS SUSTAINED IN PART.

IT IS ORDERED that the IHO's determination is modified, by reversing those portions which denied the parent's request for relief and found it to be moot; and

IT IS FURTHER ORDERED that the matter be remanded to the CSE to determine if the student is eligible for a 12-month program and the extent to which additional services are necessary to remediate the district's failure to implement the student's February 2012 IEP in a community school.

Dated: **Albany, New York**
September 26, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER