The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 12-182

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 Offices of H. Jeffrey Marcus, PC, attorneys for petitioner, H. Jeffrey Marcus, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, 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 determined that the special education recommended for her daughter for the 2011-12 school year by respondent's (the district's) Committee on Special Education (CSE) was appropriate, declined to decide and/or dismissed certain issues relevant to the 2012-13 school year, and denied her request for additional services. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The evidence in the hearing record reflects that the student attended a general education program at a district public school through the 2007-08 school year (fourth grade) (see Dist. Ex. 9 at p. 1). For the 2008-09 and 2009-10 school years, the evidence in the hearing record indicates that the student attended a smaller classroom setting and received special education teacher support services (SETSS) (see id.). At the beginning of the 2010-11 school year, the student was placed, pursuant to a "Nickerson letter," at the Lorge School, which the Commissioner of Education has approved as a school with which school districts may contract to instruct students with disabilities

(see 8 NYCRR 200.1[d], 200.7).[1] During the 2010-11 school year at the Lorge School, the student received instruction in a 12:1+1 special class (see Dist Ex. 9 at p. 1).

Huntington Learning Center (HLC) evaluated the student on May 28, 2010 (Tr. pp. 144-46; Parent Ex. E at p. 1).[2] Following the diagnostic testing of the student, HLC recommended that the student obtain tutoring services because she was performing significantly below grade level across all of the academic areas tested (Tr. p. 147). From March 2011 through April 2012, the student received a total of 350 hours (approximately six hours per week) of after-school tutoring services from HLC (Tr. pp. 149-50, 165, 168).[3]

On June 9, 2011, the CSE convened to develop the student's IEP for the 2011-12 school year (Dist. Ex. 3 at pp.1-2). Finding the student eligible for special education as a student with a learning disability, the CSE recommended an 8:1+1 special class placement in a 12-month extended school year program at a New York State-approved nonpublic day school (id. at pp. 12-13).[4] The June 2011 CSE recommended 10 annual goals to address the student's areas of need in mathematics, reading, speech and language, and social skills (id. at pp. 8-11). The June 2011 CSE also recommended related services, consisting of one 30-minute session per week of individual counseling; one 45-minute session per week of small group (8:1) counseling; one 30-minute session per week of individual speech-language therapy; and one 30-minute session per week of small group (3:1) speech-language therapy (id. at p. 14). The June 2011 CSE also recommended special transportation, and testing accommodations for the student, as well as modified promotion criteria (id. at pp. 1, 14).

On August 16, 2011, the CSE reconvened to amend the student's June 2011 IEP to reflect that the Lorge School would be the New York State-approved nonpublic day school to which the student would be assigned to attend for the 2011-12 school year (see Dist. Exs. 4 at p. 1; 7 at p. 1; 13 at p. 1).[5] The August 2011 CSE also changed the recommended speech-language therapy services from one individual 30-minute session per week and one 30-minute small group session

[1] A "Nickerson letter" is a remedy for a systemic denial of a free appropriate public education (FAPE) that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]).

[2] According to the hearing record, HLC is a provider of supplemental instruction in basic academic skills, including reading, writing, study skills, and math, typically in a 1:1 or 3:1 setting (Tr. pp. 142-43).

[3] At the impartial hearing, the director of HLC testified that the parent received an award in a prior administrative proceeding for the 350 hours of tutoring services, which was paid for by the district (see Tr. p. 165).

[4] The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute for the 2011-12 school year (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[5] The August 2011 IEP superseded the June 2011 IEP (see McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; Application of the Dep't of Educ., Appeal No. 12-215; see generally Dist. Exs. 3; 4; 7).

per week to two 30-minutes sessions per week in a group of three (compare Dist Ex. 3 at p. 14, with Dist. Ex. 4 at p. 15).[6]

In a final notice of recommendation (FNR) dated August 16, 2011, the district summarized the educational program and related services recommended in the August 2011 IEP and identified the Lorge School as the New York State-approved nonpublic day school to which the district assigned the student to attend for the 2011-12 school year (Dist. Ex. 5 at p. 1). The parent signed the FNR, indicating that she "agree[d] with the recommended services" (id.). The student attended the Lorge School for the 2011-12 school year (see Tr. pp. 80, 176).

On April 30, 2012, the CSE convened for the student's annual review and to develop an IEP for the 2012-13 school year (Parent Exs. A at p. 12). Finding the student eligible for special education as a student with a learning disability, the April 2012 CSE recommended an 8:1+1 special class placement in a 12-month program at a State-approved nonpublic day school (Parent Ex. A at pp. 8-9, 12).[7] The CSE recommended 15 annual goals in mathematics, reading, speech and language, written expression, and counseling (id. at pp. 3-7). The April 2012 CSE also recommended related services consisting of one 30-minute session per week of individual counseling; one 30-minute session per week of group counseling; and two 30-minute sessions per week of group speech-language therapy (id. at p. 8). The April 2012 CSE also recommended special transportation, testing accommodations, and modified promotion criteria for the student (id. at pp. 9-11, 13).

According to the parent, in an FNR dated April 30, 2012, the district summarized the educational program and related services recommended in the April 2012 IEP and identified the Lorge School as the New York State-approved nonpublic day school to which the district assigned the student to attend for the 2012-13 school year (see Tr. pp. 192-94). The parent testified that she signed the April 30, 2012 FNR, indicating that she "agree[d] with the recommended services" (Tr. p. 192).[8]

By letter to the district dated April 30, 2012, the parent requested a copy of the April 2012 IEP, noting that someone informed her that she would not receive a copy until July 2012 (Parent Ex. D). The parent also indicated that she "was asked to sign something at the CSE meeting and did so without knowing exactly what [she] signed" (id.). In addition, the parent noted her disagreement with the student's proposed educational program for the 2012-13 school year (id.). The parent explained that the student was struggling and her needs were not being met at the Lorge School (id.). The parent expressed that the student should be placed in a different school that could address her academic needs (id.).

[6] The evidence in the hearing record shows that the August 2012 CSE modified the student's speech-language therapy mandate in accordance with a recommendation for the same from the district's central based support team (CBST) (see Dist. Exs. 4 at p. 15; 13 at p. 1).

[7] The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute for the 2012-13 school year (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[8] A copy of the April 30, 2012 FNR was not included in the hearing record; however, during the impartial hearing, the parent testified as to its substance while reviewing the document (see Tr. pp. 189-94).

A. Due Process Complaint Notice

By due process complaint notice dated May 1, 2012, the parent alleged that the district failed to offer the student a FAPE for the 2011-12 and 2012-13 school years on both substantive and procedural grounds (Dist. Ex. 1 at pp. 1-4). With regard to August 2011 IEP the parent alleged that (1) the present levels of performance did not accurately reflect the student's needs or describe her levels of performance in meaningful detail and provided very little detail regarding the nature of the student's difficulties with mathematics; and (2) the annual goals failed to effectively address the student's needs, were not measurable, and contained only one mathematics goal, which, according to the parent, was unattainable given the student's deficits in mathematics (id. at pp. 2-3). As to the district's implementation of the August 2011 IEP during the 2011-12 school year, the parent alleged that (1) the student failed to make progress at the Lorge School; (2) to the extent that the student made progress in reading and math during the 2011-12 school year, such progress was attributable to the tutoring services that the student had been receiving at HLC; (3) the Lorge School was not appropriate for the student because the school was designed for children who exhibit "undesirable behaviors," which the student did not exhibit, and, thus, the student was not placed with other students with similar needs; and (4) the instruction that the student received in mathematics and reading was neither appropriate for her skill level nor sufficiently individualized (id. at pp. 1-3).

With regard to the 2012-13 school year, the parent alleged that, "upon information and belief," the April 2012 IEP was "inappropriate for the same reasons" that the parent alleged with regard to the August 2011 IEP (Dist. Ex. 1 at p. 3). The parent further alleged that the parent requested a copy of the student's April 2012 IEP but was informed that she would not receive a copy until July 2012, at the earliest (id.).[9] In addition, the parent asserted that the April 2012 CSE recommended that the student continue to attend the Lorge School for the 2012-13 school year "over the parent's express objection" (id.). The parent asserted the Lorge School was not an appropriate school for the student "for the reasons noted above" with regard to the 2011-12 school year (id.).[10]

As relief, the parent sought compensatory additional services in the form of 450 hours of tutoring services from HLC to remedy the district's alleged failure to offer the student a FAPE "from September 2011 to the date of the hearing request" (Dist. Ex. 1 at p. 4). The parent also sought costs related to both the student's and the parent's travel to and from HLC in the form of a metro card (id.). The parent also requested that the CSE provide the student with "an appropriate IEP that includes meaningful present levels of performance, [and] appropriate goals" (id.). The parent requested a Nickerson letter so that she could find another school for the student (id.).

[9] At the impartial hearing, the parent indicated that she received a copy of the April 2012 IEP and, therefore, withdrew her claim relating thereto (Tr. p. 12; see generally 8 NYCRR 200.4[e][3][iv] [requiring the district to provide a copy of the student's IEP to the parents at no cost to the parents]).

[10] In a footnote, the parent also alleged that the April 2012 CSE "may have been improperly comprised" (Dist. Ex. 1 at p.3 n.2). This allegation was neither addressed by the IHO, nor advanced by the parent on appeal. Under these circumstances, the parent has effectively abandoned this claim by failing to identify it in any fashion or make any legal or factual argument as to how it would rise to the level of a denial of a FAPE. Therefore, this claim will not be further considered (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

Finally, the parent requested "additional tutoring hours" at HLC "for any failure of the district "to provide an appropriate program" during the pendency of the instant matter.

B. Impartial Hearing Officer Decision

An impartial hearing was convened on June 27, 2012 (Tr. pp. 1-209). Initially, the hearing record shows that the IHO sustained an objection raised by the district regarding the scope of the impartial hearing and limited the parent's claims relating to the 2012-13 school year to the parent's objection to the Lorge School as the State-approved nonpublic day school to which the district had assigned the student to attend for the 2012-13 school year (Tr. p. 17). The IHO found that the parent failed to sufficiently raise any issue or claim related to the April 2012 IEP in her due process complaint notice (id.).[11]

In a decision dated August 3, 2012, the IHO determined that the district offered the student a FAPE for the 2011-12 and 2012-13 school years (IHO Decision at pp. 6-12). First, the IHO clarified that he deemed the parent's due process complaint notice to be "a request for services" and not a request for reimbursement or direct payment of tuition or services (id. at p. 6).

Turning to the merits of the 2011-12 school year, the IHO found that the August 2011 IEP was substantively appropriate and reasonably calculated to enable the student to receive meaningful educational benefits (IHO Decision at p. 12). Finding that the August 2011 CSE "properly reviewed all necessary documentation and secured all appropriate information from the attendees at [the CSE] meeting," the IHO determined that the resulting IEP accurately reflected the student's present levels of academic achievement and functional performance (id. at p. 9). In particular, the IHO noted that the August 2011 IEP described the student's difficulty in the area of mathematics, as well as her relatively stronger skills in reading and writing (id.). With regard to the annual goals in the August 2011 IEP, the IHO acknowledged that the there was some merit to the parent's claim that the annual goals were vague, not measurable, and not directed to the student's needs (id.). In particular, the IHO found that some of the annual goals in the August 2011 IEP dealing with language development were "probably unnecessary" and that, in the area of the student's greatest need, mathematics, the August 2011 IEP contained only one annual goal (id.). However, the IHO determined that these deficiencies were procedural in nature and did not rise to the level of a denial of a FAPE (id.).

Next, the IHO found that, in implementing the student's August 2011 IEP at the Lorge School during the 2011-12 school year, the district did not fail to implement the student's IEP in a way that denied the student a FAPE (IHO Decision at pp. 9-12). The IHO concluded that the hearing record established that the student received instruction at an appropriate level and with sufficient individualized attention (id. at p. 10). Moreover, the IHO noted that the parent's testimony that the work at the Lorge School was not challenging enough for the student conflicted with allegations in the parent's due process complaint notice that the pace of the work at the Lorge School was too quick and often over the student's head (id. at p. 11). The IHO also rejected as speculative the parent's contention that any and all progress made by the student while at the Lorge

[11] The IHO informed the parent that she could withdraw any or all of her challenges related to the 2012-13 school year and revisit them in another impartial hearing if she elected to do so by filing another due process complaint notice, but the parent declined to do so (Tr. pp. 17-18).

School during the 2011-12 school year was attributable solely to the tutoring services that the student received at HLC (id. at pp. 11-12). Next, the IHO found that the student was appropriately grouped with the other students in her 8:1+1 special class at the Lorge School, in that the ungraded special class was comprised of students between the ages of 12 and 14, functioning at similar academic levels, and there was nothing in the hearing record that substantiated the parent's claim that the Lorge School was primarily a school for children who exhibited undesirable behaviors (id. at p. 10). Moreover, the IHO noted that the teacher of the student's class used a behavior plan that adequately addressed any inappropriate behaviors, such that there was a minimal impact on the orderliness of the classroom (id.).

Finally, with regard to the parent's challenge to the Lorge School as the State-approved nonpublic day school to which the district assigned the student to attend for the 2012-13 school year, the IHO noted that, during the impartial hearing, the parent claimed that she objected to the school because the student was bullied and picked on by other students in her class (IHO Decision at p. 11). However, the IHO found that, because the parent had failed to state this basis for her objection in her due process complaint notice, it was improper for her to later raise the issue of bullying at the impartial hearing (IHO Decision at p. 11). The IHO also rejected the parent's further objections to the appropriateness of the Lorge School for the student's 2012-13 school year, which mirrored the parent's claims with respect to the 2011-12 school year, as such claims had already been examined and rejected (id. at p. 12).

IV. Appeal for State-Level Review

The parent appeals seeking to overturn the IHO's decision that the district offered the student a FAPE for the 2011-12 and 2012-13 school years. First, the parent asserts that the IHO erred in his determination that the August 2011 CSE developed an appropriate IEP for the student. The parent argues that the present levels of academic achievement and functional performance in the August 2011 IEP contained inaccuracies, contradictions, and lacked meaningful detail. The parent also argues that the annual goals in the August 2011 IEP were inadequate. Specifically, the parent maintains that the annual goals were vague, not measurable, and not directed to the student's needs. The parent also argues that the August 2011 IEP contained only one mathematics goal, which the parent claims was inadequate given the student's deficits in mathematics, and that the seven annual goals relating to ELA skills were overreaching and, like the mathematics goal, unattainable. Furthermore, the parent alleges that, although the IHO found the parent's allegations with regard to the annual goals meritorious, he erred in determining that such deficiencies did not rise to the level of a denial of a FAPE, noting that the IHO offered little or no explanation for this conclusion.

Next, the parent asserts that the IHO erred in his determination that, in implementing the student's August 2011 IEP at the Lorge School, the district did not deviate from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE. Specifically, the parent argues that IHO should have determined that the Lorge School was a "behavior school" that was not appropriate for the student and that the student was not grouped with other students of similar needs during the 2011-12 school year. The parent also contends that, contrary to the findings of the IHO, the student made little-to-no academic progress at the Lorge School because she was not receiving necessary instruction, especially in mathematics. Moreover, to the extent that the student did make progress during the 2011-12 school year, the

parent argues that the IHO erred in rejecting the evidence in the hearing record that such progress was attributable to the private tutoring services that the student had received at HLC.

With regard to the 2012-13 school year, the parent argues that the April 2012 IEP and the district's assignment of the student to the Lorge School resulted in a denial of a FAPE. Specifically, the parent argues that the IHO erred by precluding the parent from developing her claims at the impartial hearing related to the development and content of the April 2012 IEP and by limiting the parent's 2012-13 school year claims to those relating to the district's assignment of the student to attend the Lorge School. The parent maintains that, because she had not yet received a copy of the April 2012 IEP at the time she filed the due process complaint notice, her allegation that the April 2012 IEP was inappropriate, for the same reasons enumerated for the August 2011 IEP, sufficiently preserved her claims challenging the substance of the April 2012 IEP. In addition, the parent argues that the IHO erred in failing to address her claim that she was denied meaningful participation at the April 2012 CSE meeting when the CSE informed her that she would need a different meeting to challenge the student's assignment to the Lorge School for the 2012-13 school year. Relative to the assignment of the student to the Lorge School for the 2012-13 school year, the parent argues that the IHO applied an overly strict pleading standard and should have considered her bullying allegations as the basis for her objection to the district's assignment of the student to attend the Lorge School for the 2012-13 school year.

As relief, the parent requests a vacatur of the IHO's decision and compensatory additional services in the form of 450 hours of tutoring services at HLC to remedy the district's failure to offer the student a FAPE for the 2011-12 school year. The parent also requests that the CSE develop an appropriate IEP for the 2012-13 school year or, in the alternative, requests that the case be remanded to the IHO for a determination, in the first instance, addressing the appropriateness of the April 2012 IEP. The parent also requests an order requiring the district to issue a Nickerson letter or to place the student in a different nonpublic school.[12]

In an answer, the district responds to the parent's petition by admitting or denying the allegations raised and asserting that the IHO's correctly determined that the district offered the student a FAPE for the 2011-12 and 2012-13 school years.

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

[12] Neither an IHO nor an SRO has the jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order, including the remedy of a Nickerson letter (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *17 n.29 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, at *4 [Mar. 28, 2011], aff'd sub nom. R.E., 694 F.3d 167; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. 2010]; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11-*12 [S.D.N.Y. Oct. 16, 2012]; P.K. v. New York City Dept. of Educ. (Region 4), 819 F. Supp. 2d 90, 101 n.3 [E.D.N.Y. 2011]; M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents' rights to enforce the Jose P. consent order]). Therefore, this portion of the parent's request for relief will not be further addressed.

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).

When a school district deprives a disabled child of a FAPE in violation of the IDEA, the IDEA allows "appropriate" relief to be awarded, which includes compensatory education or additional services—specifically, the "replacement of educational services that the child should have received in the first place" (Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005]; accord Newington, 546 F.3d at 123). Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). 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 "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the

Act to make up for denial of a [FAPE]"]; Student X. 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., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

Under State law, 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. 2011-12 School Year

1. August 2011 IEP

a. Present Levels of Performance

Although the IHO found that the "[s]tudent's performance levels were properly obtained from the very current [p]sycho-educational [e]valuation . . . and input of attendees," the parent argues that the IHO failed to sufficiently examine whether the student's present levels of academic achievement and functional performance in the August 2011 IEP were adequate and contained meaningful detail (see IHO Decision at p. 9). A review of the evidence in the hearing record demonstrates that the August 2011 CSE carefully and accurately described the student's present levels of academic achievement, social development, and physical development and that the description of the student's needs was consistent with the evaluative information before the CSE at the time of the June and August 2011 meetings (see F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581-82 [S.D.N.Y. 2013]).

Under the IDEA and State regulations, among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parent for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

In this case, while the district school psychologist who attended the June 2011 CSE meeting could not independently recall the exact documents reviewed, he testified that, based on usual practice, the CSE would have considered certain enumerated documents (Tr. pp. 43, 47-50, 61-62). Consistent with documents described by the district school psychologist, the hearing record includes: a February 14, 2011 classroom observation report; a February 28, 2012 teacher report by the student's special education teacher; a March 15, 2011 social history report; a spring 2011 counseling summary; a March 15, 2011 a psychoeducational evaluation; and a March 23, 2011 speech-language therapy progress report (see id.; see generally Dist. Exs. 8-12; Parent Ex. B). Furthermore, as detailed below, a review of the August 2011 IEP shows that it contained information from the evaluation reports, as well as additional information about the student's achievement and functional performance levels (compare Dist. Ex. 4 at pp. 4-8, with Dist. Exs. 8-12, and Parent Ex. B).

Consistent with the evaluative information, the August 2011 IEP indicates that the student exhibited reading and writing skills within the average range, while her mathematics skills were severely limited (compare Dist. Ex. 4 at p. 4, with Dist. Ex. 9 at p. 3, and Parent Ex. B at p. 1). For example, the August 2011 IEP included the student's standard score and instructional level on certain subtests of the Wechsler Individual Achievement Test, Third Edition (WIAT-III), as reported in the March 2011 psychoeducational evaluation, which revealed that the student's reading comprehension was within the average range and her mathematics skills were within the deficient range (compare Dist. Ex. 4 at p. 4, with Dist. Ex. 9 at p. 3). The parent argues that the March 2011 IEP was internally conflicting, in that the student's instructional level was reported as sixth grade, based on the WIAT-III letter and word identification and reading comprehension subtest results, but as fifth grade "according to her multisensory reading level" (Dist. Ex. 4 at pp. 4-5). A review of the evaluative information reveals that the fifth grade multisensory reading level likely referred to the information in the February 2011 special education teacher report that the student was working in level five of the Wilson language program, which the student's special education teacher testified was a program in which students worked on decoding and encoding skills (see Tr. p. 75; Parent Ex. B at p. 1). Therefore, as the grade levels describe different skills using different measures, the hearing record does not reflect any conflict in the August 2011 IEP in this respect (id.).

As to the student's skills in mathematics, initially, a review of the August 2011 IEP does not support the parent's assertion that the IEP failed to explain in what respects the student's skills were limited or deficient. The August 2011 IEP reported that the student was able to demonstrate place value up to two digits and was working on adding and subtracting two-digit numbers with

regrouping (Dist. Ex. 4 at pp. 4-5). This is consistent with the particular lesson in which the student engaged when the February 2011 classroom observation took place, as well as the student's particular skills described in the February 2011 special education teacher report (see Dist. Ex. 8 at p. 1; Parent Ex. B at p. 1). Also, consistent with the March 2011 psychoeducational evaluation and the February 2011 special education teacher report, the August 2011 IEP reported that the student had not yet mastered telling time or money concepts, but she did know place value (compare Dist. Ex. 4 at p. 4, with Dist. Ex. 9 at pp. 3-4, and Parent Ex. B at p. 1). As reported in the psychoeducational evaluation, the August 2011 IEP also stated that, when attempting to solve verbally presented word problems, as the problems increased in length, the student needed the problem repeated, indicating some attention issues affecting her performance (compare Dist. Ex. 4 at p. 4, with Dist. Ex. 9 at p. 3).

While it does not appear that the description of the student's encoding and decoding skills were taken directly from any of the evaluations in the hearing record, indication that the student was "decoding four-syllable words with closed and VCE syllables" appears to be based on the student's performance relative to her multisensory (Wilson) reading program (Dist. Ex. 4 at p. 5; see Dist Ex. 4 at p. 9).

Relative to the student's social/emotional performance, the August 2011 IEP described the student as "lovely" and "quiet" and stated that, once she was comfortable, she was able to engage in spontaneous conversation (Dist. Ex. 4 at p. 6). Furthermore, the IEP described the student as having good self-esteem and positive friendships (id. at p. 7). The evidence in the hearing record shows that this description of the student's social/emotional performance was consistent with the evaluative information. For example, the classroom observation described the student's appropriate interaction with a peer (Dist. Ex. 8 at p. 2). The special education teacher report described the student as confident, very sensitive, and able to form appropriate relationships with adults and peers (Parent Ex. B at p. 3). Similarly, the spring 2011 counseling summary also reported that the student had made a "good transition" at the Lorge School and that the student was thriving socially and had developed healthy friendships (Dist. Ex. 11). The counseling summary described the student as sensitive, verbal, and displaying a healthy range of moods, and indicated that she continued to benefit from the small class size, structure and support offered at her current school (id.).

As to the student's struggles with relationships with her peers, the August 2011 IEP indicated that that the student said "she [was] happy not to be teased and picked on as ha[d] happened to her in the past" (Dist. Ex. 4 at p. 6). In addition, contrary to the parent's allegation that the IEP failed to identify the student's current concerns with her peers (as opposed to those occurring prior to the student's attendance at Lorge), the August 2011 IEP referenced a situation in which a "female peer 'picked on' [the student]" and indicated that the student "was able to seek out adults and requested conflict resolution" (id. at p. 7). The August 2011 IEP proposed that the student would benefit from working on conflict resolution and increasing her frustration tolerance (id.). Consistent with the August 2011 IEP, the parent's report of the student's social/emotional functioning, set forth in the March 2011 social history report, revealed that "in her previous schools, [the student] was often made to feel like a social outcast[, and] her peers would frequently laugh about her academic struggles" (Dist. Ex. 10 at p. 1). Therefore, the social history report indicated that the student "became very sensitive about her limitations and would often cry when scrutinized by others" but stated that, since attending Lorge, the student has made friends (id.).

The March 2011 psychoeducational report also noted the student's sensitivity, stating that the student "gets hurt when someone 'picks on' her reflecting her sensitivity" (Dist. Ex. 9 at p. 4). Therefore, review of the evidence in the hearing record reveals that the August 2011 IEP adequately described the student's struggles with her relationships with her peers.

Based on the foregoing, a review of the evaluative information in the hearing record relative to the August 2011 IEP shows that the district considered sufficient information relative to the student's present levels of academic achievement and functional performance—including the special education teacher's estimates of the student's current skills levels—in an IEP that appropriately indicated the student's special education needs arising from her disability (34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also P.G. v. New York City Dep't of Educ., 959 F.Supp.2d 499, 512 [S.D.N.Y. 2013] [holding that an IEP need not specify in detail every deficit arising from a student's disability so long as the CSE develops a program that is "designed to address precisely those issues"]).

b. Annual Goals

The parent argues that the annual goals included in the August 2011 IEP failed to align with the student's needs in that the IEP included only one mathematics goal and seven English language arts (ELA) goals that were overreaching. The parent also argues that the IEP included two annual goals related to social skills and self-control strategies that were not necessary. Moreover, the parent asserts that the IHO erred in determining that the deficiencies he identified with respect to the annual goals did not rise to the level of a denial of a FAPE. For the reasons that follow, a review of the evidence in the hearing record shows that the annual goals in the August 2011 IEP targeted the student's identified areas of need.

Under the IDEA and State regulations, 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]).

In this case, the August 2011 IEP contained 10 annual goals to address the student's needs in the areas of reading, math, speech and language, and social/emotional development (see Dist. Ex. 4 at pp. 9-12). According to the school psychologist who attended the June 2011 CSE meeting, the goals were also developed with input from staff from the Lorge School (Tr. p. 51).

Initially, as to the parent's contention about the singular mathematics goal, a review of the August 2011 IEP reveals that the skills targeted in that goal—"multi-step multiplication and division problems with remainders by using multi-sensory manipulative"—easily could have been broken up into several distinct goals (see Dist. Ex. 4 at p. 9). To the extent that the parent cites testimony from the student's classroom teacher during the 2011-12 school year to establish that the mathematics goal in the August 2011 IEP was too difficult for the student, such retrospective

evidence about the student's progress or lack thereof was not before the June or August 2011 CSEs (see Tr. pp. 141-42, 156-57; see also R.E., 694 F.3d at 186-88). However, compared to the student's then present levels of performance, described above at the time the IEP was developed, the mathematics goal appears to be ambitious relative to the student's abilities (see Dist. Ex. 4 at pp. 4, 9). Nonetheless, given that the remaining annual goals were aligned to the student's needs and the fact that the mathematics goal could have been revised before or during the school year pursuant to a request to reconvene a CSE meeting to adjust or revise the IEP (8 NYCRR 200.4[f]), or could have been carried over into the following year if not met during the 2011-12 school year, without more, I decline to conclude that such a deficiency in the math goal rises to the level of a denial of a FAPE.

Next, the parent argues that the annual goals relating to the student's ELA skills were "overreaching." To address the student's needs in the area of decoding and encoding, one annual goal provided that the student would work on segmenting, decoding and encoding up to six syllables, and understanding the principles of syllable division and common suffixes (Dist. Ex. 4at p. 9). Notwithstanding the parent's citation once again to retrospective testimony from the student's teacher for the 2011-12 school year that the student could only read one syllable words at the beginning of the school year (see Tr. p. 91), the information actually before the June or August 2011 CSE, as described above, indicated that the student was performing on grade level in encoding and decoding skills and could read four syllable words at that time (see Dist. Exs. 4 at p. 5; 9 at p. 3; Parent Ex. A at pp. 1-2).

Next, with respect to the specificity of the annual goals, the parent cites a goal that required the student to "in a small group setting, . . . spontaneously follow orally presented directions incorporating basic concepts" as an example of a goal that was too vague (see Dist. Ex. 4 at p. 12). The August 2011 IEP indicates that the goal would be measured by the student's speech-language therapist based on the student's achievement of 80 percent accuracy in four out of five trials (id.). Contrary to the parent's contention, the particular goal appears to provide sufficient information for the student's speech-language therapist to implement the goal and measure the student's progress.

A review of the August 2011 IEP also reveals that the other annual goals were measurable and aligned with the student's present levels of performance, described above (see Dist. Ex. 4 at pp. 4-12). Further, because there is evidence in the hearing record that the student struggled with some social/emotional concerns, as referred to in several of the evaluative reports reviewed by the June and August 2011 CSEs as the student's "sensitivity," and experienced some conflict with peers, the evidence in the hearing record supports the conclusion that the conflict resolution goal and the self-control goal were appropriate for this student (see Dist. Ex. 4 at p. 11; see also Dist. Exs. 4 at p. 7; 9 at p. 4; 10 at p. 1; 11; Parent Ex. B at p. 3).[13]

In view of the foregoing, the hearing record shows that the annual goals contained within the student's August 2011 IEP largely targeted the student's identified areas of need (see P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], aff'd 526

[13] To the extent the parent also asserts that the recommendation for counseling in the August 2011 IEP was not appropriate for the student, the information about the student's social/emotional functioning also supports the CSE's decision to include such a service in the IEP (see Dist. Ex. 4 at p. 15).

Fed. App'x 135, 141 [2d Cir. May 21, 2013] ["Courts have been reluctant to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress"]; see also 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]; 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). Accordingly, the hearing record does not support a finding that the district denied the student a FAPE for the 2011-12 school year on this basis.

Moreover, even if an examination of the annual goals supported a finding that the district engaged in a procedural violation of the IDEA, as the IHO found, the evidence in the hearing record does not support a conclusion that such a violation (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]). The parent's argument to the contrary focuses on her allegation that the future April 2012 CSE denied her an opportunity to participate, which is not simply not relevant to the analysis of the June or August 2011 CSEs. A review of the IHO's decision, however, does reveal that he improperly relied on retrospective evidence to conclude that the deficiencies in the student's annual goals did not rise to the level of a denial of a FAPE because "the lack of additional appropriate math [g]oal[s] did not inhibit [the] [s]tudent's classroom teacher from appropriately addressing [the] [s]tudent's math deficits" (see IHO Decision at p. 9; see also R.E., 694 F.3d at 186-88). Nonetheless, aside from this one misstep in the analysis,[14] a thorough review of all of the evidence in the hearing record, including the program and services recommended on the August 2011 IEP, as a whole, reveals no basis for a finding that the annual goals resulted in a denial of a FAPE and therefore there is no reason to disturb the IHO's conclusions.

2. Implementation of the August 2011 IEP

The parent also argues that the student was denied a FAPE for the 2011-12 school year because the district failed to implement certain elements of the student's August 2011 IEP at the Lorge School. For the reasons that follow, the hearing record does not reflect that the district deviated from the student's August 2011 IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (T.L. v. New York City Dep't of Educ., 2012 WL 1107652, *14 [E.D.N.Y. Mar. 30, 2012]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010];

[14] I note that the IHO's decision in this case predated the Second Circuit's decision in R.E. establishing that retrospective evidence cannot be used to rehabilitate an inappropriate IEP.

Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 821-22 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). 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 Inded. Sch. Dist., 200 F.3d at 349; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524-25, 2008 WL 3523992 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]; V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 118 [N.D.N.Y. 2013]). 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., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822 [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, 76 [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, the student nevertheless 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]). State regulations also provide that the district must provide special education and related services to the student in accordance with the student's IEP and must make a good faith effort to assist the student to achieve the annual goals in the IEP (8 NYCRR 200.4[e][7]). As discussed below, the parent asserts that the district failed to implement the August 2011 IEP, in that the student was inappropriately grouped with children of similar needs, in violation of State regulations, and that the student failed to make progress during the 2011-12 school year while at the Lorge School.

a. Grouping

The parent asserts that the IHO erred in determining that the student was placed with students with similar needs at the Lorge School. In particular, the parent claims that the educational program at the Lorge School was geared toward behavioral control. For the reasons that follow, the hearing record supports the findings of the IHO that the student was appropriately grouped at the Lorge School.

State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [upholding a district's determination to group a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, while the management needs of students may vary, the modifications, adaptations and other resources are to be provided

to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]).

In this case, the student's 2011-12 Lorge School special education teacher testified that the class was comprised of eight students, ages 12 to 15, approximately half of which have been classified as students with learning disabilities and the other half with emotional disturbances, "with some overlaps" (Tr. pp. 74-76). According to the hearing record, the students began each school day with a Wilson language lesson, which focused on decoding and encoding skills, followed by reading comprehension and mathematics (Tr. p. 75). The special education teacher testified that the mathematics abilities of the other students in the class ranged from low fifth grade to high sixth grade, with the student functioning around low fourth grade at the beginning of the school year but progressing to approximately the low fifth grade by the end of the year (Tr. pp. 78-80, 85). According to the special education teacher, in ELA, the students in the class mostly functioned at the sixth grade level in decoding and encoding, but varied more with respect to reading comprehension, with one student functioning at a seventh grade level, three at sixth grade, two at fifth grade, and one at second grade, with the student in this case functioning at about the high fifth grade level (Tr. pp. 80-81). The special education teacher stated that, for ELA instruction, the students were placed into two groups according to ability but that, since the students' reading comprehension skills were more varied, comprehension lessons were completely individualized (Tr. pp. 81-82). In mathematics, she testified that the students were again placed in one of two groups according to ability (Tr. p. 83). She indicated that the students began mathematics instruction with multiplication drills (id.). The special education teacher further explained that she worked primarily with the lower functioning group, in which the student was placed, while the teacher assistant worked with the higher functioning group because they needed less assistance (Tr. p. 83-84).

Turning to the parent's argument that the Lorge School was primarily a behavior school and that academics were not the focus, the hearing record demonstrates that the student's 2011-12 Lorge School special education teacher utilized a classroom behavior plan that appropriately dealt with misbehavior and provided a classroom environment in which there was minimal distraction and disruption to the academic mission. For example, the special education teacher described how behavioral problems were handled in her classroom (Tr. pp. 93-103, 128-31). She stated that all students in the class, including the student in this case, followed the classroom-wide behavior plan (Tr. pp. 129-30). The teacher stated that she gave students three warnings to change their behavior on their own, after which they were escorted out of the classroom for a timeout to decompress or to talk to a counselor prior to being allowed to return to the classroom (Tr. pp. 94-95). She testified that, if a student exhibited "explosive" or "blatantly disrespectful" behavior or interfered with other students in the class, the misbehaving student would be sent to timeout immediately without the benefit of three warnings (Tr. pp. 95-100). The special education teacher also explained that two students in the class presented regularly with behavior problems but that she managed these students' behaviors effectively with the use of the classroom-wide behavior plan and that all students received counseling (Tr. pp. 96-100, 129, 131). Moreover, the special education teacher testified that the behaviors exhibited by the two students included typical behaviors expected of students of their age—giggling, laughing, and other inappropriate interactions with other students in the classroom (Tr. pp. 93-94, 96-97). Furthermore, the hearing record shows that the student also displayed subtle signs of inappropriate behaviors that required, on occasion, the use of the classroom-wide behavior plan (Tr. p. 129). Moreover, evidence cited by the parent that the

student's 2011-12 Lorge School special education teacher possessed an educational background that focused on behavior disorders is irrelevant to the analysis that the student was appropriately grouped in her classroom at the Lorge School (see Tr. p. 119-20).

In consideration of the foregoing, the evidence hearing record supports the IHO's determination that the district appropriately implemented the student's 2011-12 IEP with suitable grouping for instructional purposes in the 8:1+1 special class at the Lorge School for the 2011-12 school year (see M.P.G., 2010 WL 3398256, at *10-*11 [noting that the student was not denied a FAPE when the hearing record showed that the student was suitably grouped for instructional purposes]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 290-92 [S.D.N.Y. 2010] [holding the district did not fail to offer a FAPE where the age range within a student's proposed class exceeded 36 months because the student could have been functionally grouped with other similarly-age students within the class who had sufficiently similar instructional needs and abilities in both reading and math]; R.R. v. Scarsdale Union Free Sch Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]).

b. Progress at the Lorge School

To demonstrate that the district failed to implement the August 2011 IEP at the Lorge School during the 2011-12 school year, the parent argues that the student made little-to-no academic progress at the Lorge School. The parent also argues that, to the extent that the student did make progress, that progress was solely attributable to the tutoring services that the student received at HLC. For the reasons that follow, the hearing record establishes that the student made meaningful progress in multiple domains during the 2011-12 school year that were attributable to the student's instruction at the Lorge School.

Progress, although an important factor in determining whether the student is receiving educational benefit, is not dispositive of all claims brought under the IDEA (see M.S. v. Bd. of Educ. of the City Sch. Dist. of the City of Yonkers, 231 F.3d 96, 103-04 [2d Cir. 2000], abrogated on other grounds, Schaffer, 546 U.S. 49). The goal of the IDEA is to provide opportunities for students with disabilities to access special education and related services that are designed to meet their needs and enable them to access the general education curriculum to the extent possible (20 U.S.C. §§ 1400[d]; 1414[d][1][A]). The IDEA provides no guarantee of any specific amount of progress, so long as the district offers a program that is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192). "[T]he attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress" (Walczak, 142 F.3d at 130; accord Rowley, 458 U.S. at 207 n.28 ["When the [disabled] child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit."]).

In this case, the hearing record demonstrates that the student made progress at the Lorge School during the 2011-12 school year. According to the numerical rating system outlined in the report card, between the first and second terms the student demonstrated progress in reading/writing/language skills such as identifying tone and point of view, using details and examples when answering questions, identifying story elements, and employing structure and grammar rules while writing (Dist. Ex. 15 at p. 2). The student also demonstrated improvement in her classroom readiness skills including her ability to accept classroom responsibilities, adjust

to change and make good use of her time (Dist. Ex. 15 at p. 4). The student's report card for the first two terms of the 2011-12 school year revealed that, as of March 19, 2012, the student displayed great work habits, was always prepared with her homework, was responsible, and was considerate (Dist. Ex. 15 at p. 6). The student also participated in class, listened, and followed directions (id.). The report card further indicated that the student made progress in mathematics and that she progressed to working on multiplication (id.). The report card also recommended that the student practice her multiplication at home every night (id.). Finally, the report noted that the student tended to rush through her work, which compromised the accuracy of her work product, and that she needed to check her work (id.).

The student's 2011-12 Lorge School special education teacher provided extensive testimony at the impartial hearing regarding the student's attainment of meaningful and "clear progress" in reading, writing, and math during the 2011-12 school year (see Tr. p. 114; see generally Tr. pp. 68-138). Relevant here, the teacher stated that, although the student was transferred from another class at the beginning of the year, the student adjusted well during the year to the new group of students and teachers (Tr. pp. 116-17). The special education teacher also stated that the student's reading level at the start of the 2011-12 school year tested on a fifth grade level (Tr. p. 85). At the end of the 2011-12 school year, the special education teacher explained that student again tested at a fifth grade level but with a much higher comprehension rate, which meant that she was ready to proceed to the sixth grade (id.; see also Tr. pp. 113-14). The special education teacher also stated that the student had attained a solid understanding of reading comprehension by the end of the 2011-12 school year (Tr. p. 85). The teacher contended that the student was functioning at about an early fifth grade level in mathematics by end of the school year because she had mastered basic functioning up to multiplication and had begun working on division (Tr. p. 84). As to her multiplication skills, the special education teacher testified that the student could complete problems within five to seven minutes and with greater accuracy, which according to the teacher constituted "great progress" (Tr. p. 90-91; see also Tr. pp. 133-35). The teacher further stated that the student had made "minimal" progress with completing division problems with remainders; however, the teacher also stated that she expected the student to continue to make progress with her division skills, eventually meeting her goal with regard to division (Tr. p. 128).

The student's 2011-12 Lorge School special education teacher also testified regarding the student's progress towards her August 2011 IEP annual goals (Tr. pp. 88-91). Specifically, she stated that the student had met the annual goal relating to understanding the principles of syllable division and common suffixes (Tr. pp. 88, 91). As noted above, the teacher also stated that the student made progress towards achieving her mathematics goal, that the multiplication goal had been achieved, and that she was still working on the division goal (Tr. pp. 90-91). The special education teacher contended that, in addition to the mathematics goal on the student's August 2011 IEP, she also worked with the student on place value (Tr. pp. 108-110). In sum, the student's special education teacher concluded that, based upon the student's assessment scores, the student had made "clear" progress in reading, writing, and mathematics during the 2011-12 school year at the Lorge School (Tr. pp. 114-15).

The hearing record indicates that the student received private tutoring services from the HLC from March 2011 to April 2012 (Tr. pp. 149-50). The parent has not pointed to any evidence in the hearing record that supports her claim that HLC was solely responsible for the student's

progress during the 2011-12 school year.[15] While one would hope that the student received benefit from the tutoring, as well as from the Lorge School, it is not possible and not necessary to parse out how much of the student's progress was attributable to each since, as noted above, the evidence in the hearing record supports the conclusion that at least some of the student's progress was attributable to the instruction she received at the Lorge School.[16]

In view of the foregoing, the evidence in the hearing record supports the IHO's conclusion that the student demonstrated meaningful progress during the 2011-12 school year.

B. The 2012-13 School Year

1. Scope of Impartial Hearing and Review

With regard to the 2012-13 school year, an initial inquiry must be conducted to determine whether the IHO erred in failing to address certain claims that the parent indicates were appropriately raised in the due process complaint notice. Specifically, the parent asserts that the IHO erred in failing to address a claim that she was denied meaningful participation at the April 2012 CSE meeting and in explicitly limited the scope of the impartial hearing relative to the parent's allegations concerning the 2012-13 school year. For the reasons that follow, the parent failed to include the identified claims in her due process complaint notice and the IHO properly declined to consider the issues.

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA provides that a party requesting a due process hearing "shall not be allowed to raise issues at the due process hearing that were not raised in the notice . . . unless the other party agrees" (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[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 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parent] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d at 187 n.4; see also B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 n.2 [S.D.N.Y. May 14, 2013] [noting Second Circuit precedent that the "failure to raise an argument in a due process complaint precludes later review of that argument (whether jurisdictional or not)"]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, [E.D.N.Y. Jan. 6, 2012] [holding that "[t]he scope of the inquiry of the IHO, and therefore the SRO

[15] To the extent that the parent argues that the student's report cards and progress reports misconstrue or exaggerate the progress made by the student during the 2011-12 school year, the evidence in the hearing record, including the testimony of the student's special education teacher, detailed herein, does not support the parent's argument (see Tr. pp. 85, 88-91, 108-10, 113-14, 116-17, 133-35; see generally Tr. pp. 68-138).

[16] For example, the teacher opined that the student's progress in mathematics was attributable to the intensive drills in multiplication that the student practiced on a daily basis at the Lorge School (Tr. pp. 90-91).

. . . , is limited to matters either raised in the [due process complaint notice] or agreed to by [the opposing party]"]).

First, an independent review of the hearing record reveals that the parent failed to allege in her due process complaint notice any claim with regard to her opportunity, or lack thereof, to participate in the development of the April 2012 IEP. Here, the parent points to language in the due process complaint notice that her allegations could be "addressed by" a "finding that the above noted violations significantly impeded the [p]arent's opportunity to participate in the decision making process regarding the provision of a FAPE and caused a deprivation of educational benefits" (Dist. Ex. 1 at p.3). This request sets forth the legal standards for examining whether a procedural violation of the IDEA rises to the level of a denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). However, the parent did not actually articulate any particular claim that the district failed to afford the parent her opportunity to particulate in the development of the student's IEP (see 20 U.S.C. §1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]), because the parent's due process complaint notice failed to contain any factual support or explanation as to how the parent was denied an opportunity to participate in the development of the April 2012 IEP (see Dist. 1 at p. 3).[17] Accordingly, the parent's allegation that she was not provided with an opportunity to participate in the development of the student's April 2012 IEP was outside the scope of the impartial hearing (see R.E. 694 F.3d at 187-88 n.4).

Next, during the impartial hearing, the IHO limited the parent's claims relative to the 2012-13 school year to the parent's challenge to the assignment of the student to attend the Lorge School for the 2012-13 school year (Tr. p. 17), thereby precluding any claims related to the April 2012 IEP or its implementation. The parent asserted in her due process complaint notice that the April 2012 IEP was "inappropriate for the same reasons" set forth relative to the August 2011 IEP (Dist. Ex. 1 at p. 3). No additional specificity was plead because, as the parent asserted as a claim (but later withdrew), at the time of the filing of the due process complaint notice, the parent did not have a copy of the April 2012 IEP (see Tr. p. 12; Dist. Ex. 1 at p. 3). Thus, as the IHO recognized, any challenges to that IEP were premature and the parent lacked "sufficient information to raise" claims relative to the "appropriateness of the [April 2012] IEP" (Tr. p. 17). Moreover, the IHO informed the parent at the impartial hearing that she could withdraw her claims challenging the assignment of the student to the Lorge School for the 2012-13 school year and "revisit it at another time at another due process hearing" but the parent declined to do so (id.). Review of the parent's due process complaint notice supports the IHO's reading in this regard (see Dist. Ex. 1 at p. 3). As the IHO found, however, the parent did set forth some detail with respect to the district's assignment of the student to attend Lorge for the 2012-13 school year and, as such, I find that the IHO properly limited the scope of the impartial hearing to this issue.

[17] On appeal, the parent specifically asserts that she was denied meaningful participation at the April 2012 CSE meeting by virtue of being informed that she would need a different meeting to challenge the placement of her daughter at the Lorge School for the 2012-13 school year. Even if the claim was properly before me, the evidence in the hearing record and, in fact, the allegations in the parent's due process complaint belie the parent's assertion. The parent asserted in the due process complaint notice that she was able to and did raise an "express objection" at the April 2012 CSE meeting to the proposal to assign the student to attend the Lorge School for the 2012-13 school year, evincing her participation at the meeting (Dist. Ex. 1 at p. 3). Further, the parent testified that she (1) participated at the April 30, 2012, CSE meeting and noted her disagreement with the Lorge placement (see Tr. pp. 185-86).

In particular, the parent alleged in her due process complaint notice broadly that the assignment for the student at the Lorge School for the 2012-13 school year was "inappropriate for the reasons noted above" with respect to the 2011-12 school year and more specifically the April 2012 CSE "recommended the Lorge School placement over the parent's express objection" (Dist. Ex. 1 at p. 3). However, a further basis for the parent's objection to the Lorge School for the student for the 2012-13 school year, which was developed during the impartial hearing, arose from the parent's testimony regarding alleged bullying incidents involving the student during the 2011-12 school year. The IHO declined to address this issue in his decision, finding it outside of the scope of the parent's due process complaint notice.[18] The parent argues that the IHO applied an overly strict pleading standard in refusing to consider the parent's assertions about bullying. Specifically, the parent points to assertions in the due process complaint notice that the Lorge School was a "behavior school" to indicate that the issue was sufficiently raised (see Dist. Ex. 1 at p. 2). The reading proposed by the parent is too far broad and I decline to find that reference to student behaviors implies the occurrence of bullying for which the district is held responsible for putting on a case.[19] As such, I find no reason to disturb the IHO's conclusion that the issue was outside the scope of the impartial hearing.

Moreover, with respect to all of these issues, the hearing record shows that the district did not agree to an expansion of the issues in this case and the parent did not attempt to amend her due process complaint notice.[20] Based on the foregoing, I find that the IHO properly declined to address the issues concerning the parent's participation at the April 2012 CSE meeting, any claims concerning the April 2012 IEP or the implementation thereof, and claims regarding the student's experiences with bullying at the Lorge School.

[18] Although the IHO reached the parent's assertions at the impartial hearing relating to bullying within his discussion of the implementation of the August 2011 IEP during the 2011-12 school year, a review of the IHO's discussion of the issue, as well as the manner in which the parent framed her concerns, reveals that the bullying was raised, not as an implementation concern, but as the basis for the parent's contention that the Lorge School was not appropriate for the student for the 2012-13 school year (see IHO Decision at p. 11; Tr. p. 182).

[19] However, in light of the parent's testimony about the alleged bullying experienced by the student (see Tr. pp. 179-82), going forward, the district is reminded that it has an obligation to ensure that the students with disabilities who are targets of peer bullying continue to receive FAPE in accordance with their IEPs (Dear Colleague Letter on Bullying, 61 IDELR 263 [OSEP Aug. 20, 2013]; Dear Colleague Letter, 55 IDELR 174 [OCR 2010]; see also Smith v. Guilford Bd. of Educ., 2007 WL 1725512, at *4-*5 [2d Cir. June 14, 2007] [indicating that bullying might, under some circumstances, implicate IDEA considerations]).

[20] To the extent that the Second Circuit has 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., 2013 WL 4437247, at *6-*7; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270,283-84 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]; B.M., 2013 WL 1972144, at *5-*6), in the present case, where, to a large extent, the IHO squarely ruled upon the scope of the impartial hearing (see Tr. p. 17) and otherwise the district did not pursue the disputed issues through argument or testimony, it cannot be asserted that the district opened the door to these issues under the holding of M.H.

2. Challenge to the Assigned State-Approved Nonpublic Day School Site

As set forth above, the only issue on appeal relative to the 2012-13 school year is the parent's objection to the district's assignment of the student to attend the Lorge School. In turn, the only discernible basis for the parent's allegation, which was articulated in the parent's due process complaint notice and has not already been addressed above with respect to district's implementation of the August 2011 IEP during the 2011-12 school year, is the parent's challenge to the CSE's decision to assign the student to Lorge for the 2012-13 school year over her objections. Contrary to the parent's claim, the assignment of the student to Lorge was an administrative decision that need only be made in conformance with the CSE's educational placement recommendation, and the IDEA and State regulations do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]); see also Deer Val. Unified Sch. Dist. v L.P., 942 F. Supp. 2d 880, 887-89 [D. Ariz Mar. 21, 2013]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). Therefore, the parent's claim is without merit.

VII. Conclusion

For the reasons stated above, the evidence in the hearing record shows that the district offered the student a FAPE for 2011-12 and 2012-13 school years. Accordingly, because there has been no deprivation of instruction to remedy, the student is not eligible for an award of compensatory additional services (see Newington, 546 F.3d at 123). I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 21, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER