The University of the State of New York

The State Education Department
State Review Officer
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No. 13-082

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Brian J. Reimels, Esq., of counsel

Nancy A. Hampton, Esq., attorney for respondent

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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to pay the parents for the costs of the student's home-based educational program and place the student at the Rebecca School for the remainder of the 2012-13 school year. The parents cross-appeal from the IHO's determination which denied their request for additional services. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

With regard to the student's educational history, the hearing record reflects that the she began receiving special education services as an infant, attended nonpublic schools for several years, and received home instruction from April 2009 to December 2009 (Tr. pp. 125, 129, 131,

133, 134, 135-36).[1] The student also attended the Rebecca School from December 2009 through June 2012 (see Tr. pp. 137-39).[2]

On May 30, 2012, the CSE convened to develop an IEP for the 2012-2013 school year (Parent Ex. E at pp. 1, 13). Finding the student eligible for special education as a student with autism, the May 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school, as well as the following related services: two 45-minute sessions per week of individual speech-language therapy; one 45-minute session per week of speech-language therapy in a small group (2:1); three 45-minute sessions per week of individual occupational therapy (OT); one 45-minute session per week of OT in a small group (2:1); two 45-sessions per week of individual counseling; and two 45-minute sessions per week of counseling in a small group (3:1) (id. at pp. 1, 9-10, 14). In the resulting IEP, the May 2012 CSE also proposed support for management needs, a transition plan, annual goals, and special education transportation (id. at pp. 2-8, 11, 13).

In a final notice of recommendation (FNR) dated June 18, 2012, the district summarized the 6:1+1 special class and related services recommended in the May 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Parent Ex. G).

By letter dated July 19, 2012, the parents informed the district that, in response to receiving the FNR, they attempted to contact the assigned public school site on numerous occasions in order to make an appointment to visit the school and eventually succeeded (Parent Ex. H at p. 1). According to the letter, the parents visited the assigned public school site on July 18, 2012 and rejected it as not appropriate for the student due to the student's severe seizure disorder (id.). The parents also notified the district that, because they were without the financial means to keep the student at Rebecca, the student was "currently home without services" (id.). The parents requested that the district "[p]lease advise" (id.). In a letter to the district dated August 6, 2012, the parents reiterated the content of the July 19, 2012 letter and emphasized to the district that they had not received a response to that letter (Parent Ex. I at p. 1). In a letter to the district dated August 29, 2012, the parents again reiterated the content of their letters of July 19 and August 6, 2012 and informed the district that, due to its failure to respond to the parents' letters, the student had "been home the entire summer without services," and did not have a "placement for the upcoming school year" (Parent Ex. J at p. 1). The parents again asked that the district "please advise" (id.).

The student did not attend a school placement for the 2012-13 school year; however, the student received home-based instruction through SKIP (an independent not-for-profit organization

[1] The student was the subject of a prior administrative appeal related to the 2010-11 and 2011-12 school years and, as a result, the parties' familiarity with her earlier educational history and prior due process proceeding is assumed and will not be repeated here in detail (Application of the Dep't of Educ., Appeal No. 12-157). Furthermore, to the extent necessary for a thorough review of the issues relevant to this proceeding, relevant evidence in the hearing record underlying Application of the Dep't of Educ., Appeal No. 12-157 may be considered (cf. Anderson v. Rochester-Genesee Reg'l Transp. Auth., 337 F.3d 201, 205 n.4 [2d Cir. 2003] [taking judicial notice of record in prior litigation between same parties]).

[2] The Commissioner of Education has not approved the Rebecca School as a nonpublic school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

that assists families with various services), as well as, at parental expense, a home tutor (the student's former Rebecca teacher), counseling, and eventually speech-language therapy services from a speech pathology and audiology student (Tr. pp. 4-5, 30, 175-76, 180; Parent Exs. O; P; R-U).

A. Due Process Complaint Notice

In an amended due process complaint notice dated October 22, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Dist. Ex. 1 at p. 2). Initially, the parents alleged the May 2012 CSE was not properly composed (id.). In addition, the parents asserted that the district failed to conduct the required triennial evaluations and observations of the student prior to convening the May 2012 CSE (id.). The parents also assert that the May 2012 CSE did not discuss how it would manage the student's severe seizure disorder (id.).

With respect to the May 2012 IEP, the parents asserted that the IEP did not include a description of the student's history of a severe seizure disorder and did not include strategies or supports, including staff training, to address the student's seizure disorder (Dist. Ex. 1 at p. 2). The parents also assert that the IEP did not include accommodations to address the student's regulation and sensory integration needs (id.). Furthermore, the parents indicated that the student required accommodations with her special education transportation, which the May 2012 IEP failed to specify (id.). Next, the parents alleged that, at the time of the May 2012 CSE meeting, the student had already achieved many of the annual goals included in the IEP and the IEP included an insufficient number of goals addressing the student's educational, social, and management needs and no annual goals that addressed the student's dysregulation and sensory needs (id.). Finally, the parents asserted that the May 2012 IEP lacked "a transitional or vocational program" and the provision of parent counseling and training (id.).

With respect to the assigned public school site, the parents objected to the fact that the May 2012 CSE did not advise the parents as to which school the student would be assigned to attend or identify such a school in the IEP (Dist. Ex. 1 at p. 2). In addition, the parents also alleged that the assigned public school was not appropriate for the student because the school was too large, could not accommodate the student's seizure disorder or her need for emotional regulation and sensory integration, and utilized a methodology that was not appropriate for the student (id.).

As relief, the parents requested that the IHO order the district to reimburse them for the costs of the student's home-based educational and related services, which the student received during the 2012-13 school year, and place the student at Rebecca for the remainder of the 2012-13 school year (Dist. Ex. 1 at p. 3). In addition, the parents requested that the IHO order the district to provide additional services for the educational and related services that the student was "denied" (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 24, 2012 and concluded on February 28, 2013 after six days of proceedings (Tr. pp. 1-405). In a decision dated April 8, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year (IHO Decision at pp. 11-15, 20-21).

Initially, the IHO found that the May 2012 CSE did not perform any new evaluations of the student due to computer related problems and that the CSE relied on a "single measure" when creating the student's IEP (IHO Decision at p. 12). The IHO also found that the May 2012 CSE copied the student's annual goals from the December 2011 Rebecca School progress report, which were designed as six month goals expected to be achieved by the end of the 2011-12 school year, and that the student had mastered some of them by the May 2012 CSE meeting (id. at p. 13). The IHO further found that some of the annual goals copied from the Rebecca School progress report contained terminology related to the Developmental, Individual-difference, Relationship-based (DIR) Floortime model but that the IEP did not contemplate the use of such a model (id. at pp. 13-14). The IHO also found that the May 2012 IEP failed to adequately provide for the student's sensory needs, noting that, although the IEP indicated that the student required a great deal of sensory input, it did not address how such sensory input would be provided and, further, that the IEP did not provide for sensory breaks, and did not address the student's sensitivity to noise (id. at p. 15). Next, the IHO found that the May 2012 IEP inappropriately stated that the student required a structured environment, when in fact the student reacted to a structured environment with anxiety and seizures (id. at p. 12). The IHO observed that, instead, "the IEP provide[d] that the [s]tudent's sensory needs [would] be addressed through a structured 6:1[+]1 [special] class in a [s]pecialized school" (id. at p. 15). Further, the IHO found that the May IEP did not state how staff and teachers would recognize and react to the student's seizure disorder and did not include supports or strategies to address the student's disorder (id. at p. 13). The IHO also determined that the May 2012 IEP did not include an adequate transition plan for the student, noting that the plan offered no specifics or particulars as to instruction, programming, related services, or community experiences (id. at p. 14). Finally, the IHO determined that the May 2012 IEP also failed to include parent counseling and training (id. at p. 15).

Turning to the student's home-based educational program, the IHO found that the unilateral placement was appropriate for the student "given [the parents] resources" (IHO Decision at p. 16). Next, based on the program the student attended during the 2011-12 school year, the IHO found that the Rebecca School would be an appropriate placement for the student for the remainder of the 2012-13 school year (id. at p. 17). The IHO based this conclusion on evidence that the student responded well to the DIR/Floortime model utilized by the Rebecca School and that the Rebecca School would provide the student with sensory input and sensory breaks, as well as related services of speech-language therapy, OT, and counseling (id. at pp. 17-18). Furthermore, the IHO found that the parents offered a sufficiently detailed description of the program at the Rebecca School to conclude that it offered specially designed instruction for the student (id. at p. 18). The IHO also found that the student made progress at the Rebecca School during the 2011-12 school year (id.). Finally, the IHO determined that equitable considerations weighed in favor of the parents' request for relief because the parents "gave the [d]istrict fair notice of their position at the CSE meeting, where they raised concerns about the [s]tudent's seizure disorder," attempted to resolve the matter through the resolution process, and expressed genuine interest in visiting the assigned public school site (id. at p. 20). Furthermore, in response to the district's position to the contrary, the IHO determined that the parents were entitled to direct payment of the student's tuition at the Rebecca School and found that "[w]hile the parents were not specific in terms of their finances," they indicated their inability to afford the Rebecca School (id.).

To remedy the district's failure to offer the student a FAPE for the 2012-13 school year, the IHO ordered the district to reimburse the parents for the costs of the student's home-based

educational and related services and to place the student at the Rebecca School for the remainder of the school year (IHO Decision at pp. 20-21). However, the IHO denied the parents' request for the district to provide additional services on the basis that the parents did not specify the type or amount of services they sought, who would provide such services, or how the services would make up for the district's failure to offer the student a FAPE (id. at p. 19).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year, that the home-based educational and related services constituted an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief. With respect to the IHO's findings regarding the district's failure to evaluate the student, the district asserts that the IHO misunderstood the testimony of the district school psychologist and, in fact, he testified that, due to a computer error, information concerning the evaluations for some students was not transferred, but that he was not aware why the student was not evaluated. In any event, the district asserts that even if the student should have received a triennial evaluation, such an error did not result in a denial of a FAPE since the May 2012 CSE utilized the Rebecca School progress report and discussed the student's deficits and strengths.

With respect to the annual goals in the May 2012 IEP, the district asserts that the IHO erred, in that: the CSE properly relied upon the Rebecca School progress reports to create the student's annual goals; even if the student mastered some of the goals, she was still working on making progress on the rest of them; and, with respect to the annual goals perceived by the IHO as employing the DIR/Floortime method, the CSE was not required to specify a methodology on the IEP and the goals could have been implemented in conjunction with other methodologies. Next, the district argues that the IHO erred in reaching the issue of the 6:1+1 special class because the parents failed to raise such an issue in their due process complaint notice. In any event, the district argues that, even if the May 2012 CSE did not specifically discuss the student's response to a structured environment, it did discuss "different programmatic options with varying degrees of structure and supports" and neither the parents nor the Rebecca School staff objected at the CSE meeting to such a structured environment. Contrary to the IHO's conclusions, the district also asserts that the May 2012 IEP contained information regarding the student's self-regulation issues and need for sensory breaks and that the IEP, as a whole, addressed the student's noise sensitivity. Furthermore, the district argues that the CSE discussed and the IEP adequately addressed the student's seizure disorder. The district alleges that the IHO erred in his determination that the transition plan included in the May 2012 IEP lacked specificity. Moreover, the district asserts that the IHO should have read the transition plan in the context of the IEP, as a whole, which addressed the student's needs, including her post-secondary transition needs. The district also asserts that, although the May 2012 IEP did not include a recommendation for parent counseling and training, such an error does not rise to the level of a deprivation of a FAPE. Finally, the district points out several issues asserted in the parents' due process complaint notice that the IHO did not reach and asserts that the they are without merit, including improper CSE composition, the lack of a classroom observation, adequacy of the recommendation for special education transportation, discussion and/or identification of the student's assigned public school site at the May 2012 CSE meeting or in the IEP, and the parents' concerns with the assigned public school site. More

specifically, the district asserts that the parents' claims related to the assigned public school site were speculative, as the student did not attend.

The district also alleges that the IHO erred in finding the home-instruction program to be an appropriate unilateral placement because the program was inadequate to provide the student with an appropriate level of educational services, the student received counseling at no cost as part of a separate at-home program, not related to the student's education, the evidence in the hearing record did not offer insight into the curriculum, materials, modifications, or strategies employed as part of the program, and the parents did not offer evidence of the student's progress in the program.

Next, the district asserts that the IHO erred in ordering the district to place the student at the Rebecca School for the remainder of the 2012-13 school year. The district argues that, absent a unilateral placement by the parents, the IHO did not have legal authority to order such a prospective placement. In any event, the district asserts that the IHO erred in addressing the appropriateness of the Rebecca School in that, because the student did not attend during the 2012-13 school year, such an analysis was speculative. Further, the district asserts that the hearing record does not adequately demonstrate that Rebecca was an appropriate placement.

With respect to equitable considerations, the district asserts that: neither the parents nor the Rebecca School staff who attended the May 2012 CSE meeting objected to the 6:1+1 special class placement; the parents did not cooperate in the CSE process; the parents' three letters to the district did not cite to any specific objections to the May 2012 IEP; and that the parents made arrangements for the student's home-instruction program prior to visiting the assigned public school site. The district also asserts that, to the extent that the IHO made a determination that the parents were entitled to direct payment of the student's prospective tuition at the Rebecca School, he erred because the parents failed to demonstrate their inability to afford the tuition.

In an answer and cross-appeal, the parents respond to the district's petition by denying the material allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2012-13 school year, that the home-instruction program was an appropriate unilateral placement for the student, that the Rebecca School was an appropriate prospective placement for the student, and that equitable considerations weighed in favor of awarding the parents the relief requested. The parents also interpose a cross-appeal, alleging that the IHO erred by denying their request for additional services.

Responding to the district's argument that the IHO erred in reaching the issue of the appropriateness of the 6:1+1 special class recommended in the May 2012 IEP, the parents assert that their amended due process complaint notice "list[ed] several concerns about the IEP" and, therefore, sufficiently raised the issue of "the program recommended by the CSE." The parents provide further elaboration regarding some of their claims and, in particular, those unaddressed by the IHO. For instance, the parents particularize their allegation that the May 2012 CSE was improperly composed by asserting that the CSE lacked both a nurse and special education teacher with knowledge of the district's programs. As to the classroom observation, the parents assert that the district failed to conduct a triennial evaluation of the student and that the district did not observe the student and possessed no "independent knowledge of her skills or needs." With respect to the assigned public school site, the parents assert that, because of the safety issues involved, the district

was required to demonstrate that the chosen site was appropriate. The parents further assert that the district failed to afford them an opportunity to participate in the development of the student's educational program in that the CSE failed to discuss the type of public school site to which the student would be assigned.

As to their cross-appeal, the parents assert that the IHO erred in denying their request for additional services because both parties agreed as to the type and frequency of related services that the student required and the parents requested that the district provide those services while the student was home schooled and did not.

In an answer to the parents' cross-appeal, the district asserts that the IHO properly denied the parents' request for compensatory services because the claim, as asserted in the parents' due process complaint notice, was overbroad and vague and, as such, not properly raised. The district also asserts that the parents' request was not, in fact, a request for additional services; rather, the district asserts that the request was "for services notwithstanding [the parents'] rejection of the [district's] recommended program for [the student]." The district asserts that the parents may not "cherry pick" which portion of an IEP they want implemented. Finally, the district asserts that, regardless, the hearing record does not support a finding that the student was entitled to additional services.

V. Applicable Standards

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

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

impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

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

Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of the Impartial Hearing

The district asserts that the IHO erred in deciding whether the 6:1+1 placement special class recommended in the May 2012 IEP meeting was appropriate. The parents assert that, because the amended due process complaint notice lists several concerns about the May 2012 IEP, an objection to the recommended program was necessarily implied.

Notwithstanding the parties' positions, a review of the IHO's decision reveals that the IHO did not, in fact, address whether a 6:1+1 special class was an appropriate setting on the continuum of educational placements but rather refers to the 6:1+1 special class only to the extent that he examined whether or not the May 2012 IEP contained provisions that addressed the student's sensory needs (see IHO Decision at p. 15). In any event, the parents' amended due process complaint notice cannot be reasonably read to include a claim that a 6:1+1 special class placement was inappropriate and the student should have been placed in a different type of class (see generally Dist. Ex. 1).[3] In addition, while the hearing record reveals some testimony regarding a 6:1+1 special class, it appears that it was the parents' attorneys, not the district, that solicited most of this testimony (see Tr. pp. 138, 145, 183-84). Therefore, an independent review of the hearing record does not provide any indication that the district "opened the door" regarding the issue of the 6:1+1 special class placement so as to expand the scope of the impartial hearing (M.H., 685 F.3d at 250-51). Moreover, in their answer, other than asserting that the claim was properly raised, the parents do not elaborate as to the grounds of the purported claim other than to assert a similar reasoning

[3] Most of the complaint alleges that the parent was dissatisfied with the particular "bricks and mortar" site selected by the district, not the educational placement described in the IEP (see generally Dist. Ex. 1).

as the IHO with regard to the student's sensory needs (see Answer ¶ 24). As this matter was not in the due process complaint notice and the IHO did not rule on it in any meaningful way, this issue is not properly before me, and I decline to address it for the first time on appeal (20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.508[d][3][i]-[ii], 300.511[d]; 8 NYCRR 200.5[i][7][i][b], [j][1][ii]; see R.E., 694 F.3d at 187-88 n.4 [noting the requirement that parents "state all of the alleged deficiencies in the IEP in their . . . due process complaint"]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 n.2 [S.D.N.Y. May 14, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [S.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO …, is limited to matters either raised in the . . . impartial hearing request or agreed to" by the opposing party]).

B. May 2012 CSE Process

1. CSE Composition

While the IHO did not address this issue, the evidence in the hearing record shows that all required members attended the May 2012 CSE, as well as staff from the Rebecca School, who attended and participated (Parent Exs. E at p. 16; F at pp. 1-4; see 8 NYCRR 200.3[a][1]). To the extent that the parents assert that a nurse was an essential member of the CSE team, that appeared to be a concern that they were bringing to the table and the parents were free to invite or request either a school physician or other person with knowledge or special expertise of the student to attend the CSE (such as the student's nurse) (see 8 NYCRR 200.3[a][1][vii], [ix]). Nothing in the hearing record indicates that the parents availed themselves of such an opportunity. Therefore, the parents' claim in this regard fails.

Furthermore, contrary to the parents' position, the special education teacher who attends a CSE meeting is not the member who is required to have knowledge of the district's special education programs; rather, that role lies with the district representative (see 8 NYCRR 200.3 [a][1][v]). As a district representative attended the meeting (see Parent Ex. E at p. 16), the parents' contentions regarding the improper composition of the May 2012 IEP are without merit and, even if there was a procedural violation, there is nothing to indicate that it resulted in a denial of a FAPE.

2. Sufficiency of Evaluative Information

While the IHO did not specifically address the claim of whether the district failed to conduct a triennial reevaluation; less directly, he noted the district school psychologist's testimony that the district did not conduct a reevaluation of the student due to computer problems (IHO Decision at pp. 8, 12). The IHO also determined that the district relied on "a single measure" when formulating the student's May 2012 IEP (id. at p. 12). The district asserts that the computer problem was not the reason the district did not conduct further evaluations of the student. Moreover, the district asserts that, even if it failed to conduct required evaluations of the student, such an error did not result in a denial of a FAPE, as the student's Rebecca School teacher participated in the May 2012 CSE and the CSE used a Rebecca School progress report when developing the IEP.

An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other

things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district agree otherwise and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (34 CFR 300.303[b]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).

No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]). 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 parents 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]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]).

The district school psychologist testified that he "believed [the student] might have been" due for a reevaluation (Tr. pp. 71-72). The parents testified that the student had not been evaluated by the district since April 2009 (Tr. pp. 134-35). Consistent with the parents' testimony, as discussed in the previous State-level review involving this student the district conducted a psychoeducational reevaluation of the student at the parents' request in April 2009 (see Application of the Dep't of Educ., Appeal No. 12-157).[4] It appears, therefore, that the district was required to

[4] The April 2009 psychoeducational evaluation is not included in this hearing record and the district school psychologist testified that the May 2012 CSE did not review it at that time (see Tr. p. 77). However, the hearing record in the prior State-level appeal between the parties that was brought to the SRO includes the exhibit and the parties' familiarity with it is presumed (see Application of the Dep't of Educ., Appeal No. 12-157, Dist. Ex. 7). That exhibit shows that the psychoeducational evaluation was completed April 23, 2009 and was a reevaluation conducted by the district, at the parents' request, for the purpose of determining if the student required the support of a 1:1 paraprofessional (see Application of the Dep't of Educ., Appeal No. 12-157, Dist. Ex. 7).

complete a triennial reevaluation of the student prior to the May 2012 CSE meeting (see 8 NYCRR 200.4[b][4]; 34 CFR 300.303[b][1]-[2]). Moreover, the evidence in the hearing record shows that the parents signed a district consent form to reevaluate the student as early as October 3, 2011 but that the district did not complete the reevaluation by the time of the May 2012 CSE meeting (see Tr. pp. 71-72, 77-79; Parent Ex. C).[5] Therefore, based on the information available, it appears that the district failed to conduct a needed reevaluation as required by the regulations (see 8 NYCRR 200.4[b][4]; 34 CFR 300.303[b][1]-[2]).

As a result, the evidence shows that the May 2012 CSE did not have before it a psychoeducational evaluation, a social history, or a classroom observation (see Tr. pp. 77, 79). However, on the other hand, the district school psychologist testified that he "believed" the May 2012 CSE considered the December 2011 Rebecca School progress report, verbal input from the parents and the Rebecca School staff at the time of the May 2012 CSE meeting, as well as the student's IEP from the previous school year (Tr. pp. 66-67, 77; see generally Dist. Ex. 7).[6] The hearing record also shows that December 2011 progress report consisted of reports by the student's related service providers, including the student's occupational therapist, speech-language pathologist, and licensed clinical social worker, as well as a transition plan that included post-secondary goals (see Dist. Ex. 7 at pp. 5-13). The progress report also reflected the student's progress and performance with regard to academics, language, transition, ADL skills, and social/emotional functioning (id. at pp. 1-13). The hearing record also shows that May 2012 IEP accurately reflected the student's then-current functioning consistent with information included in the December 2011 Rebecca School progress report (compare Dist. Ex. 7 at pp. 1-13, with Parent Ex. E at pp. 1-3).

The district school psychologist testified that the May 2012 IEP contained information specific to the student and that the CSE developed the document based upon the discussions at the CSE meeting, which focused on the student's functioning, her needs, and what services the department might offer to address those needs (Tr. p. 73). The district school psychologist further testified that the student's Rebecca School teacher and other Rebecca School staff confirmed that the December 2011 progress report constituted the most recent report available and that the Rebecca School teacher informed the CSE that the report continued to be an accurate description of the student's functioning (Tr. pp. 73-74; see also Dist. Ex. 6 at p. 1; Parent Ex. F at p. 1). With respect to the December 2011 progress report, the district school psychologist testified that the May 2012 CSE discussed the report at the meeting with everyone in attendance, including the Rebecca School staff and the parents (Tr. p. 73; see generally Dist. Ex. 7). Although the district school psychologist testified that he believed the May 2012 CSE reviewed the student's IEP for the previous school year (Tr. p. 77), a review of the student's March 2011 IEP, included in the hearing record corresponding to the prior administrative proceeding involving this student, reveals that the May 2012 IEP did not appear to rely or build upon the student's present level of

[5] I caution the district that, if it determines that it does not require further evaluative data after obtaining parental consent, it must comply with procedures requiring that it notify the student's parents of that determination, its reasons for making the determination, and the parent's right to request additional assessments (34 CFR 300.305[d][1]; 300.503; 8 NYCRR 200.4[b][5][iv]; 200.5[a][6][i]).

[6] The student's IEP from the prior school year was not included in this hearing record.

performance and individual needs described in the March 2011 IEP (see Parent Ex. E at pp. 1-2; Application of the Dep't of Educ., Appeal No. 12-157, Dist. Ex. 3).

In view of the forgoing evidence, the district's failure to conduct a triennial reevaluation of the student constitutes a procedural violation. As the hearing record shows that the May 2012 CSE had significant amounts of information from the student's providers to consider in the development of the IEP, and the parents have not disputed the student's present level of performance described in the May 2012 IEP (besides the description of the student's seizure disorder, discussed below), on its own, this violation may not rise to the level of a denial of a FAPE. However, as described below, I find it necessary in this instance to consider the matter in light of the cumulative effect of the district's failure to conduct a triennial evaluation of the student together with the other deficiencies identified below, in order to determine whether or not the district failed to offer the student a FAPE.

C. May 2012 IEP

1. Annual Goals

The district asserts that the IHO erred in determining that the May 2012 CSE's dependence on the December 2011 Rebecca School progress report in developing the annual goals contained in the May 2012 IEP was a violation of the IDEA.

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]).

The May 2012 IEP included 11 annual goals and approximately 33 associated short-term objectives that addressed the student's needs with respect to reading, mathematics, daily living skills, OT, sensory integration and regulation, and communication and interaction (Parent Ex. E at pp. 3-8).

Initially, with respect to the IHO's finding that the annual goals in the May 2012 IEP were not appropriate because they were intended for implementation in conjunction with the use of a particular methodology (the DIR/Floortime model), under the IDEA and State and federal regulations, a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability for a particular methodology, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (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]). There is nothing in the hearing record to indicate that the May 2012 IEP annual goals could not be implemented in a setting that used a model other than the DIR/Floortime (see Parent Ex. E at pp. 4-8; cf. A.D. v. New York City Dep't of Educ., 2013 WL 1155570 [S.D.N.Y. Mar. 19, 2013] [affirming the SRO's rejection of the parents'

contention that the assigned TEACH classroom could not implement the annual goals in the IEP, which contention noted that they were also related to the DIR methodology]).

Next, turning to the May 2012 CSE's use of the December 2011 Rebecca School progress report to develop the annual goals, there is no authority for the proposition that a CSE cannot incorporate annual goals into a student's IEP that were developed by the student's nonpublic school teachers and/or providers (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 284 [S.D.N.Y. 2013] [noting that the parent cited "no authority for the proposition that drawing goals from a teacher's progress report is a violation of the statute or regulations"]).

The IHO and the parents primarily object to the use of the goals from the Rebecca School progress report on the ground that the student had or was expected to achieve some of those goals prior to the anticipated implementation of the May 2012 IEP. A review of the hearing record reveals that, while the student had achieved some of the annual goals and short-term objectives included in the May 2012 IEP, many remained relevant and targeted to the student's identified areas of need.

The Rebecca School teacher who attended the May 2012 CSE meeting testified that "some" of the goals had been achieved or were expected to be achieved by the end of the 2011-12 school year (Tr. pp. 223-24). The parent testified that a "fair amount" of the goals had already been met at the time of the May 2012 CSE meeting (Tr. p. 147). The special education teacher notes reflected that, at the time of the May 2012 CSE meeting, the parent and the Rebecca School teacher agreed with the goals, "went over" them, and articulated the student's progress towards achieving them (Dist. Ex. 6 at p. 1). With regard to the CSE's development of the student's annual goals, the district school psychologist testified that he "would read the goals that were included in the school report [aloud] to the group" and inquire of the student's teacher as to whether the student had achieved or continued to work towards a particular goal and if the teacher believed "that the goal should be continued" (Tr. pp. 74-75; 82-83). Consistent with this, the Rebecca School teacher testified that, at the May 2012 CSE meeting, she commented on the student's progress towards achieving the goals from the progress report and explained to the CSE that the goals were written for a six-month time frame (Tr. p. 224).

More specifically, the evidence in the hearing record reflects that, of the annual goals included in the May 2012 IEP, the six short-term objectives associated with the annual literacy goal, six short-term objectives associated with the annual mathematic goal (with an increase in the criteria for mastery for one), and three short-term objectives associated with the annual life skills goal were carried over from the December 2011 progress report (compare Dist. Ex. 7 at pp. 3-5, with Parent Ex. E at pp. 4-5). As to the student's progress towards achieving these goals at the time of the May 2012 CSE, the Rebecca School teacher testified that the student had achieved three of the six literacy short-term objectives (two goals related to sight words and one related to the student's ability to answer "wh" questions), two of the six mathematics short-term objectives (along with progress on two others), and all three of the life skills short-term objectives (Tr. pp. 276-79).[7] Furthermore, the evidence in the hearing records also reflects that the short-term

[7] The Rebecca School teacher's testimony did not address the student's progress on one of the short-term objectives associated with the mathematics goal (see Tr. pp. 277-78).

objectives associated with the student's annual goals addressing her related services needs were taken almost verbatim from the December 2011 Rebecca School progress report (compare Dist. Ex 7 at pp. 9-13, with Parent Ex. E at pp. 5-8).[8]

Therefore, although the IHO was correct to express concern that the student had already achieved some of the short-term objectives included in the May 2012 IEP, such level of achievement "does not render the goals in the IEP per se inappropriate" (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013] [emphasis in the original], citing A.M., 964 F. Supp. 2d at 284; see also C.L.K., 2013 WL 6818376, at *13). Furthermore, under a similar set of facts, it has been recognized, that "the IEP would be repetitive or redundant only if it repeated goals from [the student's] prior IEP, not a progress report prepared by her teachers" (A.M., 964 F. Supp. 2d at 284).

With regard to the parents' contention that the May 2012 IEP did not include any annual goals to address the student's regulation and sensory needs, the claim is without merit as a review of the IEP indicates otherwise. With respect to regulation, one of the annual goals addressed the student's ability to remain regulated across a broad range of emotions and settings and included three related short-term objectives that addressed the student's ability to remain regulated for a specific time period (20 minutes), to remain regulated while she verbally expressed feelings of frustration and anger towards peers, and to process the origin of her breathing and tolerate co-regulation (Parent Ex. E at p. 8). With regard to the student's sensory needs, one of the annual goals addressed improving the student's ability to use sensory information to understand and effectively interact with people and objects in both school and home environments (id. at p. 5). This goal included two related short-term objectives which addressed the student's ability to state, for example, "I'm upset because it's too loud," and to sustain nonverbal interaction with peers, such as a game of catch (id.). Furthermore, a careful review of all of the annual goals and short-term objectives on the IEP reveals that several other annual goals in the areas of life skills, OT, speech-language, and counseling would also address the student's needs related to sensory integration and regulation (see id. at pp. 5-8). For example, with regard to life skills, a short-term objective addressed the student's ability to tolerate her peers' challenging emotions and unpredictable actions by not becoming aggressive or self-injurious (id. at p. 5). With regard to OT related skills, short-term objectives addressed the student's ability to engage in an interaction with an adult in a problem solving way, while maintaining a high level of engagement and intentionality, and addressed the student's ability to make a visual image/map in her head by verbally sequencing a community outing (id. at p. 6). With regard to speech-language engagement/pragmatic skills, the short-term objectives addressed the student's ability to engage and sustain continuous back and forth interactions and increase her ability to communicate both receptively and expressively (id. at pp. 6-7). With regard to social/emotional skills (counseling), a short-term objective addressed the student's ability to remain engaged in two way purposeful interactions around emotional exploration (id. at p. 8). Although these annual goals and short-term objectives are not specifically

[8] While the hearing record does not reflect an account of the student's progress toward the related services annual goals and short-term objectives at the time of the May 2012 CSE meeting, the June 2012 progress report, while not available to the May 2012 CSE, reflects that, shortly after the meeting, the student had met only one of the five OT short-term objectives, one of the seven speech-language short-term objectives, and none of the six counseling short-term objectives (Dist. Ex. 9 at pp. 9-11, 13).

labeled or identified as pertaining to regulation or sensory integration, they do address the student's needs in this domain.

Thus, overall, the evidence in the hearing record supports a finding that the annual goals in the May 2012 IEP targeted the student's identified areas of need and appropriately addressed the student's needs (see, e.g., D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at *11 [S.D.N.Y. Sept. 16, 2013]). Of course the parties are continually encouraged to communicate and, if it becomes necessary, to reconvene the CSE more than the minimum annual review in order to update any goals or short-term objectives, especially if at some point after the CSE has developed the IEP it becomes clear that the student has actually achieved a significant portion of such goals or objectives thereunder, as such a practice is encouraged under the IDEA.

2. Sensory Needs

The district asserts that the IHO erred in his determination that the May 2012 IEP did not address the student's sensory needs. Specifically, the district asserts that the May 2012 EIP contained information regarding the student's self-regulation deficits and need for sensory breaks and that the IEP, as a whole, addressed the student's noise sensitivity.

A review of the evidence in the hearing record demonstrates that the student's sensory integration and regulation needs were adequately addressed in the May 2012 IEP. Specifically, the May 2012 IEP identified the student's sensory integration and regulation needs in the present levels of performance and management needs section, including that the student was "very sensory seeking," that she "she gravitate[d] to sensory support throughout the day when she need[ed] breaks," that "when dysregulated the student . . . displayed aggressive behaviors such as scratching, throwing things, and hitting" which could be triggered by seizures, feeling overwhelmed, boredom, or when the student encountered a busy environment (Parent Ex. E at p. 2). The May 2012 IEP further reflected that the student: would try to self-regulate and co-regulate with a brush or thera-putty to provide sensory input, as directed by an adult; required clear and simple choices in order to remain regulated; benefited from verbal co-regulation and mirroring deep breathing when waiting or responding verbally; benefited from the provision of extra time to process information, verbal and/or visual prompts, and a great deal of verbal encouragement and praise; and required a "great deal of sensory input as well as the opportunity to take frequent breaks throughout the day" (id.). The May 2012 IEP also indicated that the student needed clear and simple choices and a clear, structured, routine daily plan in order to remain regulated (id.). Although the IHO noted that the student's sensitivity to noise was not addressed, as noted above, the May 2012 IEP did indicate that the student's behaviors could be triggered by a busy environment (id.). Furthermore, the May 2012 CSE recommended three 45-minute individual sessions and one 45-minute group (2:1) session of OT per week, as well as annual goals and short-term objectives, discussed above, that would have addressed the student's regulation and sensory integration needs (id. at pp. 5-6, 9).

Based on the foregoing, the evidence in the hearing record does not support the IHO's conclusion that the May 2012 IEP failed to address the student's sensory needs.[9]

[9] Moreover, the IHO determined that the May 2012 IEP inaccurately described the student's need for a "clear, structured, routine daily plan in order to best remain regulated" (IHO Decision at p. 12; see Parent Ex. E at p. 2). The IHO reached this conclusion by impermissibly relying, in part, on retrospective testimony describing the

3. Medical Needs

With respect to the student's seizure disorder, the IHO indicated that the May 2012 IEP, including the management needs section, provided no information or protocol as to how to recognize and address a seizure, except for the general statement that the student needed time to recover after having a seizure (IHO Decision at p. 13). The district argues that the CSE discussed the student's seizure disorder during the May 2012 CSE meeting and that the IHO erred in his determination that the May IEP did not state how staff and teachers would recognize and react to the student's seizure disorder and did not include supports or strategies to address the student's disorder.[10]

The parents testified that the student had a severe retractable seizure disorder, which was identified around the age of seven, for which she received medication on a daily basis (Tr. pp. 121, 122, 130). Initially, while the severity of the student's seizure disorder may be characterized differently by the parties, neither the parents nor the district raise the question of the how the student's seizure disorder affects her ability to access and receive educational benefit. Nevertheless, assuming an educational impact, the evidence in the hearing record supports the IHO's conclusion that the May 2012 IEP failed to adequately address the student's seizure disorder.

The parents testified that the student's seizure disorder was discussed "infinitum" at the May 2012 CSE meeting (Tr. p. 141). Similarly, the Rebecca school teacher testified that discussion took place and it was made clear to the CSE that the seizure disorder was a "big concern" (Tr. pp. 141, 220-21). Although the district school psychologist testified that he did not recall the "specific" discussion at the May 2012 CSE meeting regarding the student's seizure disorder and "what was specifically shared by whom," with respect to the information about the student's disorder in the May 2012 IEP, he testified that it was mentioned in the social development needs and physical development sections of the IEP (Tr. pp. 75-76).

Based on the foregoing, as well as the May 2012 CSE meeting minutes and the special education teacher notes, the hearing record shows that the CSE engaged in detailed discussions related to the student's seizure disorder; however the IEP failed to include this information (see Dist. Ex. 6 at p. 2; Parent Exs. E at p. 2; F at p. 2). The May 2012 IEP only briefly noted that the student had a seizure disorder and that the student required "time to recover/process after experiencing a seizure (Parent Ex. E at p. 2). The information included in the CSE meeting minutes and the special education teacher notes reflected additional critical information such as: (1) the student had epilepsy; (2) there was no pattern to her seizures; (3) the student might display signs or clues prior to a seizure, such as touching her head or heavy breathing; (4) the student could not independently identify or express when she would have a seizure; (5) the student's disorder likely

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student's experiences with a "structured program" while she was attending the Imagine Academy during the 2007-08 and 2008-09 school years; information that was offered at the impartial hearing by the parents' witness, but there is no evidence suggesting this information about Imagine Academy was made available by the parents to the May 2012 CSE (Tr. pp. 358-373; R.E., 694 F.3d at 186-88).

[10] To the extent that the parents' due process complaint notice raised a claim that the district failed to afford the parents an opportunity to participate in the development of the student's May 2012 IEP, based upon the parents' allegation that the CSE did not discuss how it would manage the student's severe seizure disorder (see Dist. Ex. 1 at p. 2), and to the extent that such claim remains viable on appeal, I address it here.

required her to have medication dispensed to her at school by the closest adult and not just a school nurse; and (6) as a result, the school staff would require training in how to recognize that the student was having a seizure and intervene, including administering the student's medication (Dist. Ex. 6 at p. 2; Parent Ex. F at p. 2).

Furthermore, the district school psychologist believed that the May 2012 CSE had the student's March 2011 IEP before them when they developed the student's IEP for 2012-13 school year (Tr. p. 77); however, the May 2012 CSE did not include information related to the student's seizure disorder on the IEP, which was included on this previous IEP. In contrast to the May 2012 IEP, the March 2011 IEP identified the student's seizure disorder as a "special/medical/physical alert," described certain characteristics of her seizures, indicated that her seizure activity could result in behavioral concerns, and acknowledged the student's need for an on-site nurse to administer medication if needed" (Application of the Dep't of Educ., 12-157, Dist. Ex. 3). The parent testified that she was concerned that the May 2012 IEP did not include that the student needed medical supports and medication for her seizures (Tr. p. 145). The Rebecca school teacher also testified that there was a discussion regarding the student's medical needs with respect to the seizures at the May 2012 CSE meeting (Tr. pp. 220-21; see also Dist. Ex. 6 at p. 2; Parent Ex. F at p. 2). However, a review of the "summary of recommendations" section on the May 2012 IEP reflects that: the medical alert section was not completed; the boxes on the IEP that would denote that the student had a medical condition and/or physical limitations which affect her learning, behavior and/or, participation in school activities were not completed; and, further, the boxes which would indicate that the student may have required medical and/or health care treatment(s) or procedures during the school day were also not completed, all of which sections clearly should have been completed on the IEP in light of the information before the CSE (Parent Ex. E at p. 14).

Finally, the IHO noted that the language in the May 2012 IEP that "staff have been trained in best practices to employ when [the student] has one of her frequent seizures . . . " referred to the training of Rebecca School staff and not district staff, which is consistent with the Rebecca School teacher's testimony (IHO Decision at p. 13; see Tr. at p. 222; Parent Ex. E at p. 2). However, there is nothing in the hearing record that suggests that, had the student attended a district school, the district would not have appropriately trained its staff to adequately address the student's needs. Therefore, while this particular rationale regarding staff training does not factor into my finding, the evidence in the hearing record overall supports the IHO's conclusion that the May 2012 IEP failed to adequately address the student' needs with respect to her seizure disorder.

4. Transition Plan

The district asserts that the IHO erred in his determination that the transition plan was inadequate based on a lack of specificity with respect to the programming and activities contained in the IEP, as well as the lack of a nexus between the goals and transition services listed.

The IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34][A]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals

based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]). As recently noted by one district court, "the failure to provide a transition plan is a procedural flaw" (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]).

The parents testified that the May 2012 CSE did not review any vocational assessment of the student and that the CSE did not discuss the student's transition goals (see Tr. pp. 146-47).[11] However, the December 2011 Rebecca School progress report did include information summarizing a "transition meeting" and setting forth a "transition plan" for the student (Dist. Ex. 7 at pp. 5-7). The progress report indicated that, at home, the student "complete[d] hygiene routines with minimal support," "enjoy[ed] entertaining and help[ing] with chores," and "goes out into the community with her parents" (id. at p. 5). The report also stated that the student was becoming more independent but, at times, could "become aggressive if her environment bec[a]me[] overwhelming or if she [was] not able to have what she want[ed]" (id.). The progress report concluded that the student's transition program should "focus on developing her self-regulation, autonomy, and flexibility," which the transition plan included in the report addressed (id.). A review of the transition plan in the May 2012 IEP reveals that the CSE did not incorporate the information set forth in the summary or transition plan from the progress report (compare Dist. Ex. 7 at pp. 5-7, with Parent Ex. E at pp. 3-4, 11).

However, the May 2012 IEP did include postsecondary goals for the student (Parent Ex. E at pp. 3-4). Specific to education/training, the May 2012 IEP stated that the student would "learn how to make financial transactions during trips into the community to make purchases" (id. at p. 3). With respect to employment, the May 2012 IEP specified that "[a]gencies such as AHRC [would] be explored for potential employment opportunities" (id.). Finally, with respect to independent living skills, the May 2012 IEP stated that the student would "increase her independent living skills by planning for and making her own lunch on a daily basis" (id. at pp. 3-4).

With respect to activities or services to facilitate the student's movement from school to post-school activities, the May 2012 IEP set forth transition services, which included that the student would: "engage in a vocational training program"; "participate in all mandated [r]elated [s]ervices"; "integrate into the community with maximum supports"; and "become employed within a workshop setting" (Parent Ex. E at p. 11). The May 2012 IEP did not list any service or activity relating to the acquisition of daily living skills, or otherwise indicate that the student should participate in a functional vocational assessment (id.). The transition plan did designate that the

[11] The parents did not raise the issue of the district's failure to conduct a vocational assessment in their due process complaint notice (see generally Dist. Ex. 1).

parties responsible for implementing each transition service would be the school and the student (id.; see 8 NYCRR 200.4[d][2][ix][e]).

Contrary to the IHO's conclusions, the transition plan included in the May 2012 IEP provided sufficient information with regard to the student's long-term goals and transition services (see Parent Ex. E at pp. 3-4, 11). Furthermore, the parents object to the statement in the postsecondary employment goal that an agency, such as AHRC, would be explored for potential employment opportunities, particularly because no representative from such an agency attended the May 2011 CSE meeting. While the parent correctly notes that the district failed to describe such agency in the IEP or at the impartial hearing, the context of the goal itself provides enough information to indicate that the AHRC is an employment agency (see id. at p. 3).[12] Furthermore, nothing in the IDEA or the federal and State regulations requires the participation of such an agency at a CSE meeting.

Based on the foregoing, the evidence in the hearing record shows that the transition plan developed by the May 2012 CSE contains some deficiencies, which, by themselves, constitute technical defects that would not render the May 2012 IEP, as a whole, inappropriate. To the extent such deficiencies might contribute to a finding that the district failed to offer the student a FAPE, that question will be addressed further below.

5. Parent Counseling and Training

With respect to the IHO's determination that the May 2012 IEP lacked the provision of parent counseling and training, the district concedes that the May 2012 IEP failed to contain such a provision but asserts that the error is not a per se denial of a FAPE.

State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M. v. New York City Dep't of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]). The Second Circuit has explained that, "because school districts are required by [State regulation][13] to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service (M.W. v. New York City Dep't of Educ., 725 F.3d 131, 142 [2d Cir. 2013];

[12] The same specific agency was also referenced in the transition plan on the student's March 2011 IEP (Application of the Dep't of Educ., Appeal No. 12-157, Dist. Ex. 3 at p. 16).

[13] 8 NYCRR 200.13[d].

R.E., 694 F.3d at 191). The Second Circuit further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191).

Since the district conceded that the May 2012 IEP did not include provision for parent counseling and training and an independent review of the document confirms the same (see Parent Ex. E), however, the effect of this violation is discussed further below.

D. Challenges to the Assigned Public School Site

Although not addressed by the IHO, the district asserts that, if considered, the parents' claims regarding the assigned public school site are speculative in nature and, therefore, must fail. The parents assert that, because of the safety issues involved as a result of the student's seizure disorder, the district was required to demonstrate that the school was appropriate. In addition, the parents assert that the district could not have implemented the student's May 2012 IEP at the assigned public site school, in that the school was too large and the cafeteria too crowded, the school had a history of not meeting students' related services mandates for the students, and the district failed to show how the school would address the student's sensory needs or her needs relating to her seizure disorder. The parents further assert that the district failed to afford them an opportunity to participate in the development of the student's educational program in that the CSE failed to discuss the type of public school site to which the student would be assigned.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

Several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014] [finding that "[t]he proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). However, I continue to find it necessary to depart from those cases. Since a number of these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ. (Region 4), 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained most recently, "[i]t would be inconsistent with R.E. to require the [district] to proffer evidence regarding the actual classroom [the student] would have attended, where it had become clear that the student would attend private school and not be educated under the IEP (M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]). Instead, "[t]he Second Circuit has been clear . . . that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 964 F. Supp. 2d at 286; see R.B., 2013 WL 5438605, at *17; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP was "entirely speculative"]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"]). When the Second Circuit spoke most recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as

inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 2014 WL 53264, at *6, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, I find that the parents cannot prevail on their claim that the district would have failed to implement the May 2012 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's May 2012 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of her choosing (see Parent Exs. H-J). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K., 2013 WL 6818376, at *13 [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parent cannot prevail on her claim that the assigned public school site would not have properly implemented the May 2013 IEP.

Furthermore, to the extent the parents continue to allege the district failed to afford them an opportunity to participate in the development of the student's educational program on the basis that the CSE failed to discuss the type of public school site to which the student would be assigned, the parents' right to meaningfully participate in the educational placement process—that is, the development of the student's IEP—does not extend to the selection of the student's specific school building or classroom (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 416, 419-20 [2d Cir. 2009]; J.L. v. City Sch. Dist., 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]). Therefore, the parents cannot prevail on a claim that the student was denied a FAPE because she was deprived of the opportunity to participate in the selection of the student's specific public school site or classroom because neither the IDEA nor its implementing regulations provides them this right, and their assertion is without merit (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]).

E. Cumulative Impact

To the extent the district's violations described above constitute procedural violations, a finding that the district denied the student a FAPE is appropriate 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]). Under the circumstances of this case, I find it appropriate to consider the cumulative impact of the identified deficiencies in order to determine whether or not the district offered the student a FAPE (T.M. v. Cornwall Cent. Sch. Dist., 2014 WL 1303156 [2d Cir. Apr. 2, 2014]; R.E., 694 F.3d at 191 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also M.L., 12014 WL 1301957, at *10; R.B. v. New York City Dep't of Educ., 2014 WL 1618383, at *10 [S.D.N.Y. Mar. 26, 2014]).

In the present case, the evidence in the hearing record shows that the district failed to conduct a timely triennial evaluation of the student, failed to include a provision of parent counseling and training in the May 2012 IEP, and failed to sufficiently describe or address the student's needs relating to her seizure disorder. Under the circumstances of this case, the former two violations, alone or in combination, do not appear to have risen to the level of a denial of a FAPE. However, the May 2012 IEP's omissions with respect to the student's medical needs, particularly in light of the level of discussion in which the CSE engaged, the contrast to the student's IEP from the previous school year, and the potential safety concerns relating to the omissions, in addition to the other violations, supports a finding that the cumulative effect of the violations tilted the calculus in favor of the parents insofar as the IEP, viewed as a whole, was no longer reasonably calculated to enable the student to receive educational benefits and resulted in a denial of a FAPE to the student for the 2012-13 school year (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 190-91; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192).

F. Unilateral Placement

The parents do not seek funding for the student's tuition at a nonpublic school, as has been sought in other cases. Instead, the parents seek reimbursement for the costs of home-schooling via a private tutor and the provision of privately funded related services. Nonetheless, the analysis of the appropriateness of the unilaterally obtained special education services remains the same.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and

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

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

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

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

1. Specially Designed Instruction

The hearing record reflects that the student's home instruction program for the 2012-13 school year included special education services provided by two teachers, one from the SKIP program and one from the Rebecca School, both of whom held a master's degree in special education (Parent Ex. S at p. 2).[14] The SKIP teacher worked with the student beginning on July 1, 2012 for 10 to 14 hours per week, or four hours per day, three days per week (Tr. pp. 180-81; Parent Exs. S at p. 2; U at p. 1). The parent testified that the services provided by SKIP were outlined in the community habilitation annual plan (Tr. p. 177). The community habilitation annual plan reflected the specific skills that the teacher worked on with the student to improve her independence with activities of daily living and improve her communication/socialization skills (Parent Ex. U at p. 2). Specifically, the plan addressed the student's abilities related to bathing, teeth brushing, toileting, meal preparation, and table setting, and also addressed the student's ability to perform these skills independently by providing gradually faded prompts (id.). The plan also

[14] Although the parents were not financially responsible for the costs of the educational services delivered by SKIP (see Parent Ex. S at p. 2), they are nonetheless relevant to the examination of the student's unilateral placement in its entirety (cf. C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 837-38 [2d Cir. 2014] [finding the unilateral placement appropriate because, among other reasons, the parents had privately secured the required related services that the unilateral placement for which they sought reimbursement did not provide]).

addressed the student's abilities related to peer interaction (initiating and sustaining a conversation), interaction with various community members, making eye contact, turn taking and sharing, and travel training, and also indicated that the student would visit a variety of community locations (id.). In turn, a review of the annual goals and short-term objectives in the May 2012 IEP, reveals that the SKIP teacher addressed many of the student's needs identified in the IEP, such as toileting, sustaining interaction, appropriate play (turn taking), and visiting the community (see Parent Ex. E at pp. 5, 6, 11).

The Rebecca School teacher provided special education instruction to the student in the home four to five hours per week beginning on September 23, 2012 (Tr. pp. 245-46; Parent Ex. S at p. 2).[15] The hearing record reflects that the Rebecca School teacher was the student's teacher when she attended the Rebecca School (Tr. pp. 207, 245). The Rebecca School teacher testified that she worked with the student four to six hours per week, typically two sessions per week (Tr. p. 246; see Tr. p. 248). She testified that the first time she worked with the student she "went through each area to see where [the student] was functioning and what kind of activities [she] would do to help [the student] progress further in those areas," for example, in writing, typing, and recalling sight words (Tr. p. 250). The Rebecca School teacher testified that she addressed the student's reading needs by reading to maintain and increase the student's sight word bank, reading short sentences with some support, recognizing sight words in sentences, and through reading comprehension (Tr. pp. 236-37). Her testimony further indicated that part of the home instruction services included taking walks to the library where she would encourage the student to pick out books of interest and new books (Tr. p. 237). She indicated that she would use the books to ask comprehension questions and practice writing some of the words from the story (id.).

The student's home instruction program also included a community component (Tr. pp. 237-38, 251). The Rebecca School teacher testified that she worked with the student on skills to help her become more independent in the community, such as safely crossing the street, navigating the community around her, directionality, and being more aware of her surroundings (Tr. p. 238). For example, they practiced sight words such as "Stop" and "Walk" and the Rebecca School teacher narrated "Okay, we're on the corner. We're looking for something to help us cross the street" (id.). In addition, the Rebecca School teacher addressed the student's math needs in the community by encouraging her to practice paying for items independently, such as grocery items (Tr. pp. 237, 251).

With regard to regulation, the Rebecca School teacher testified that, when she would come to the student's house, she informally assessed the student's regulation state because the student needed to work on being engaged and regulated first (Tr. pp. 249-50). She testified that she then moved on to addressing academics, such as reading, math, and whatever they were working on for that day (Tr. p. 250). As such, consistent with the needs targeted by the annual goals and short-term objectives in the May 2012 IEP, the Rebecca School teacher addressed the student's needs related to comprehension, sight words, regulation, directionality and sequencing in a community outing, and her ability to pay for items (Parent Ex. E at pp. 4- 8).

[15] A letter from the parents to the district's office of homeschooling dated December 14, 2012 documented the services provided to the student in her home instruction program up to that date (Parent Ex. S at pp. 1-2).

The student's home instruction program also included counseling services that were provided by a clinical social worker (Parent Ex. S at p. 2). The social worker testified that she provided services to the student twice per month beginning in September 2012 (Tr. pp. 288, 296).[16] The clinical social worker testified that the student had a limited ability to express what was happening in her life, so she would assist her in those expressions through the use of visuals, drawing out what the student described, or introducing words so that the student could be more communicative in her social world (Tr. p. 297; see also Tr. p. 290). She further testified that the student missed her teachers and she was able to write a letter by dictating it as the clinical social worker wrote it down (Tr. p. 298). The social worker testified that the student exhibited rigidity in her interests and, as such, it was important to expand on her repertoire and introduce and expose her to more age appropriate activities, projects, and themes (Tr. pp. 296-97). She stated that she worked on strengthening the student's problem solving capacity, motor planning, and pragmatic skills (Tr. pp. 296-97). The clinical social worker also testified that they worked with the iPad, using it in a sequential manner with themes of interest for the student (Tr. p. 299). She further indicated that she tried to bridge what was familiar to the student to what's new, novel, and challenging, as well as interesting (id.). Thus, the hearing record reflects that the clinical social worker addressed the student's needs in the areas of expressing her emotions, problem solving, and pragmatics, similar to those needs addressed in the May 2012 IEP (Parent Ex. E at pp. 5-7).

The parent testified that the home program did not include OT because she had been unable to find an occupational therapist (Tr. pp. 175-76). With regard to speech-language therapy services, the parent testified that, although she was unable to find a therapist, the student received speech-language therapy services four hours per week beginning November 20, 2012 from a speech pathology and audiology student (Tr. pp. 175-76; Parent Ex. S at p. 2). A review of the IEP goals reflects that the social worker also addressed several of the OT and speech-language annual goals and short-term objectives included in the May 2012 IEP, including expressing her emotions, communication/interaction, motor planning, problem solving, directionality, verbally sequencing a community outing, and pragmatics (see Parent Ex. E at pp. 5-7). Moreover, while the hearing record does not include specific information with regard to how the student's seizure disorder was addressed in the home-based educational program, because a home setting differs so greatly from a school setting,[17] this lack of evidence in the student's home environment does not factor heavily in this instance.

Once the district failed to offer the student a FAPE, although it may have been more in keeping with the principles underlying LRE considerations for the parents to consider options other than a home-based instructional program for the student, under the circumstances of this case, the hearing record demonstrates that the home-based educational and related services that the student

[16] The hearing record reflects that the counselor provided services to the student once per week from September 18, 2012 to October 9, 2012 and provided services every other week beginning October 23, 2012 (Tr. p. 296; Parent Exs. S at p. 2; T at pp. 6-8).

[17] For example, in our society it is the norm that parents having custodial care obligations for their children hold the primary responsibility for obtaining and administering medication as directed by their child's physician, but schools, whether public or private, do not have such primary obligations except in unusual circumstances and they typically administer medication only when necessary and, as such, schools must demonstrate more care in planning when medication is required in a school-based context than what parents must show with regard to medication administration in the child's home environment.

received offered specially designed instruction that was reasonably calculated to confer educational benefits on the student, and therefore, constituted an appropriate unilateral placement for the student. The district's contentions to the contrary must be rejected.

2. Progress

The district also cites a lack of evidence regarding the student's progress in the home-instruction program as a ground for finding it an inappropriate unilateral placement. A finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D. D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82, 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 491-92 [S.D.N.Y. 2013]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364). A finding of progress is nevertheless a relevant factor to be considered in determining whether the unilateral placement is appropriate for the student (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Contrary to the district's arguments, an independent review of the evidence in the hearing record reflects that the student made progress in the home instruction program. The Rebecca School teacher testified that the student made some progress in her ability to read words expressively instead of having to pick them out from a field of three (Tr. p. 236). Although the student had initially found going to the library "really scary" she became able to "go there and stay for between 45 minutes to an hour and a half" (Tr. p. 237). With regard to mathematics, the Rebecca School teacher testified that the student initially was unable to approach the register and wanted an adult to pay for items but became "able to go up to the register and give the money" with the teacher standing next to her (Tr. pp. 237-38). In addition, the Rebecca School teacher indicated that student became more independent in her ability to remember the route to various places in the community (Tr. p. 238). The clinical social worker testified that the student's progress was slow but steady and that she was able to see movement and gains (Tr. p. 298).

While the hearing record lacks documentary evidence reflecting the student's progress in the home-based instructional program, the testimonial evidence sufficiently establishes some progress in the program, particularly in light of the weight to be afforded such evidence. Accordingly, the IHO correctly found that the parents met their burden to establish that the student's home-based educational program provided the student with instruction specially designed to meet her unique needs (see Gagliardo, 489 F.3d at 113-15; Frank G., 459 F.3d at 365; see also Rowley, 458 U.S. at 188-89).

G. Equitable Considerations

Having determined that the district failed to offer the student a FAPE for the 2011-12 school year and that the home-schooling and related services constituted an appropriate unilateral placement for the student, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning

relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826 [2d Cir., 2014]; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist., 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The district asserts that the equitable considerations do not weigh in favor of the parents' request for relief because: the parents did not object to the IEP during the May 2012 CSE meeting; they were unwilling to cooperate with the CSE; and their letters of withdrawal from the public school did not address their concerns about the May 2012 IEP.

As to the district's first contention, "the mere fact that the [p]arents did not formally object to the IEP at the CSE meeting does not factor" into the analysis (B.K., 2014 WL 1330891, at *18 n.14). Based upon the evidence contained in the hearing record, the parents acted reasonably under the circumstances of this case and cooperated with the district in good faith to develop an appropriate IEP for the student. Furthermore, the parents did nothing to hinder the district from developing an appropriate IEP. As to the parents' 10-day notice, the evidence in the hearing record shows that the parents provided timely notice to the district of their intent to unilaterally place the student but failed to set forth parents' objections to the May 2012 IEP, other than to reference their

concerns relating to the student's seizure disorder in relation to, at least, the assigned public school site (see Parent Exs. H-J). In any event, I decline to exercise my discretion to reduce the amount of reimbursement on equitable grounds in this instance.

H. Relief

1. Prospective Placement

The district asserts that the IHO improperly ordered the district to prospectively place the student at the Rebecca School and that the IHO's analysis of the Rebecca School as a unilateral placement was speculative since the student did not attend the school during the 2012-13 school year. Furthermore, the district alleges that, to the extent, that the IHO ordered the district to directly fund the cost of the student's tuition at Rebecca, the parents did not prove a lack of financial resources.

The IHO incorrectly examined the Rebecca School as a unilateral placement since the student was not placed there during the 2012-13 school year at issue. Furthermore, the parents cite Mr. & Mrs. A. as authority for the relief sought: a case that addressed the court's authority under the IDEA to grant retroactive direct payment of tuition (as opposed to reimbursement), which is only available when a student has been enrolled in an appropriate private school but the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. & Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). This case is unlike Mr. & Mrs. A. or the principles enunciated in Burlington in which the student actually attended the nonpublic school program in question, and, in the present case, because the student did not enroll in the Rebecca School for the 2012-13 school year at all, and sought reimbursement for different relief that they obtained. Therefore the relief sought by the parents can only be properly characterized as an unrealized prospective unilateral placement.

As described above, CSE is empowered to recommend appropriate services for a student and, as such, the CSE should be the first to determine the extent to which the student can be educated with nondisabled peers in a public school setting before considering a more restrictive nonpublic school option (see E.F., 2013 WL 4495676, at *15 [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"; A.D., 2013 WL 1155570, at *8 [finding that "[o]nce the CSE determined that [public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]). Thus, a directive to prospectively require placement of a student in a nonpublic school unnecessarily runs roughshod over the important statutory purpose of attempting, whenever possible, to have disabled students meaningfully access the public school system each year by first attempting placement in a public school (see Cooke Center for Learning and Dev. v. Mills, 19 A.D.3d 834, 836 [3rd Dep't 2005] ["The federal law prefers a 'public' education, where a 'child is educated in the school that he or she would attend if nondisabled,' if possible"]; Matter of Pelose, 66 A.D.3d 1342, 1344 [4th Dep't 2009] ["Indeed, the central purpose of the IDEA …and article 89 of the Education Law is to afford a 'public' education for children with disabilities"]). Moreover, the discussion of the student's needs during the CSE meeting and the Rebecca School progress report, do not suggest that removal

from the public school was warranted at the time the CSE meeting was conducted in order to provide the student with a FAPE (see, e.g., Dist. Ex. 7; see also Application of the Dep't of Educ., Appeal No. 12-157). As such, prospective placement relief was not appropriate under the circumstances of this case.

2. Additional Services

The parents requested and the IHO denied a request for additional services in the form of speech-language therapy. The district asserts that the parents' request is not, in fact, for additional services, but rather constitutes a request for services included in the May 2012 IEP notwithstanding the parents' rejection of the district's program for the student.

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).

In the present case, there is no allegation that the district failed to deliver mandated services to the student. The district correctly asserts that, once the parents rejected the May 2012 IEP and unilaterally placed the student, the district was no longer obligated to implement the student's IEP. The parents chose their remedy by crafting an educational program for the student and requesting reimbursement therefor. To the extent the parents allege that the home-based educational program

they fashioned for the student was lacking in any particular service, such an omission does not warrant an award of additional services under these circumstances (in fact such an assertion is contrary to the parents' own argument that the unilateral placement was appropriate). Moreover, the district's failure to offer the student a FAPE in this instance did not arise from the May 2012 CSE's failure to recommend appropriate related services for the student. As such, the additional services requested by the parent bear no relationship to the district's violations described above. Therefore, the parents' request for additional services is denied. However, to the extent that the district failed to offer the student a FAPE, and as a consequence the parents actually procured appropriate speech-language therapy for the student as part of the student's home-based educational program during the 2012-13 school year, the district will be directed to reimburse the parents for the cost thereof, upon the parents' submission of proof of payment. This approach strikes an equitable balance that accounts for the parties' respective conduct and the reasons therefore.

VII. Conclusion

Based on the above, I find that the district failed to offer the student a FAPE for the 2012-13 school year, the home-based educational placement constituted an appropriate unilateral placement, and equitable considerations weigh in favor of the parents' request for reimbursement. However, I find that the IHO's order directing the district to prospectively place the student at Rebecca for the remainder of the 2012-13 school year and to provide direct funding for that placement was in error and should be annulled. Finally, I find that the parents are not entitled to additional services.

I have considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated April 8, 2013 is modified to the extent that it ordered the district to prospectively place the student at the Rebecca School for the remainder of the 2012-13 school year and to provide direct funding for that placement; and

IT IS FURTHER ORDERED that, upon submission of proof of payment, the district shall reimburse the parents for speech-language therapy actually provided to the student as part of her home-based educational program during the 2012-13 school year.

Dated: **Albany, New York**
May 14, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER