The University of the State of New York

The State Education Department
State Review Officer
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No. 13-172

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

Appearances:
Morgan, Lewis & Bockius LLP, attorneys for petitioner, Ariel Gursky, Esq., and Heather Fuentes, Esq., of counsel

Advocates for Children of New York, attorneys for petitioner, Abja Midha, Esq., of counsel

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

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

According to a neuropsychological evaluation report, the student achieved early language and motor milestones "on time" (Dist. Ex. 6 at p. 1). The hearing record indicates that the student developed normally until, when he was four years old, he "sustained [a] mild head injury when he fell down several concrete stairs while at the playground" (id.; Parent Ex. EE at p. 1). The parent reported that following the injury, the student exhibited changes in his cognitive functioning and behavior, such that he became depressed and withdrawn, showed limited interest in social interactions, developed anxiety with panic attacks, displayed inattention, impulsivity, hyperactivity, and began stuttering (Dist. Ex. 6 at p. 1). The student thereafter received related

services from his kindergarten through fourth grade years (Parent Exs. A at pp. 1, 10; B at p. 5; C at p. 4; D at pp. 1, 12; see Parent Ex. GG at p. 4). According to the parent, the student was enrolled in a general education setting with related services through the beginning of the 2010-11 school year (fourth grade), at which time he changed schools (Parent Ex. GG at pp. 3-4).[1]

In December 2010, the CSE convened and recommended that the student receive integrated co-teaching (ICT) services combined with the provision of twice weekly 30-minute sessions of speech-language therapy in a small group, and one 30-minute session per week of counseling in a small group (Parent Ex. E at pp. 1, 10).[2]

On October 19, 2011, a district school psychologist conducted a psychoeducational evaluation of the student, and on October 20, 2011, the CSE convened to develop the student's IEP for the remainder of the 2011-12 school year (fifth grade) (Dist. Exs. 3; 10 at p. 2). The October 2011 CSE meeting attendees included the student's special education teacher, a regular education teacher, a district school psychologist who also acted as the district representative, the student's speech-language therapist, the parent, and a translator (Dist. Exs. 1 at p. 12; 10 at p. 4). The October 2011 CSE determined that the student was eligible for special education and related services as a student with a learning disability and recommended the provision of ICT services as a direct service in English language arts (ELA), mathematics, and science classes, in conjunction with related services consisting of two 30-minute sessions per week of group speech-language therapy and one 30-minute session per week of group counseling **(**Dist. Ex. 1 at p. 5-6, 9-10).[3] The October 2011 CSE also developed annual goals in relation to the student's transition needs, pragmatic language skills, mathematics, and with respect to ELA (id. at pp. 3-5).

By final notice of recommendation (FNR) dated October 20, 2011, the district summarized the services recommended by the October 20, 2011 CSE and notified the parent of the particular public school site to which the student was assigned and at which his IEP would be implemented from November 3, 2011 through October 2012 (Dist. Exs. 1 at p. 1; 2). The FNR provided contact information for an individual who could arrange a site visit for the parent (Dist. Ex. 2).

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[1] The parent alleged that the student was bullied at the school that he attended during the 2010-11 school year (Parent Ex. GG at pp. 4-6).

[2] For the sake of clarity, this decision will refer to this placement on the continuum of services as a classroom providing integrated co-teaching (ICT) services even though the hearing record, at times, refers to the recommended placement as a "collaborative team teaching" or "CTT" classroom (see, e.g., Parent Ex. E). State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that school personnel assigned to a classroom providing ICT services shall "minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The State Education Department has issued policy guidance document which provides more information about these services ("Continuum of Special Education Services for School-Age Students with Disabilities," VESID Mem. [Apr. 2008], at pp. 11-15, available at http://www.p12.nysed.gov/specialed/ publications/policy/schoolagecontinuum.pdf).

[3] The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this appeal (34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

Over the course of two days, January 13 and February 23, 2012, the parent obtained a private neuropsychological evaluation of the student (Parent Ex. I). In a letter dated April 19, 2012, the parent's advocate forwarded the private neuropsychological evaluation report to the district, and requested that the CSE reconvene to consider the report's recommendations (Parent Ex. J at p. 3).

In a letter to the district school psychologist dated June 13, 2012, the parent's advocate reiterated her request for a copy of the district's October 2011 psychoeducational evaluation report (Dist. Ex. 7 at pp. 1-4). The next day, the parents obtained an assessment of the student from Lindamood-Bell Learning Processes (Lindamood-Bell), which recommended that he receive between 160-200 hours of individual tutoring at Lindamood-Bell to address reading weaknesses (Parent Ex. L at pp. 1-4). In a letter to the student's fifth grade special education reading teacher dated June 15, 2012, the parent's advocate inquired about the student's progress and stated that she "would like to get a sense of how [the student is] doing, what programs you are using with him, and how he's testing on classroom and state exams" (Parent Ex. P at p. 2).

By letter dated August 22, 2012, the parent informed the district of her plans to enroll the student at Winston Preparatory School (Winston) and seek tuition reimbursement from the district (Parent Ex. K at p. 1).[4] She further advised the district that the private neuropsychological evaluation obtained in January and February 2012 resulted in new diagnoses of an expressive language disorder, a reading disorder, and depression (id. at p. 2). The parent explained to the district that despite multiple requests, "the school refused to reconvene [the student's] IEP team to incorporate this information into his educational program" (id.). The student attended Winston Prep during the 2012-13 school year (Parent Exs. M at pp. 6-7; S).

A. Due Process Complaint Notice

In a due process complaint notice dated April 4, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 and 2012-13 school years (Parent Ex. M at p. 1).

Relative to the student's October 2011 IEP, the parent alleged that the district failed to identify the parent's "language of communication" and failed to "translate" the student's IEP into the parent's native language, which effectively denied her the ability to participate in the development of the student's educational program (Parent Ex. M at p. 5). In addition, the parent contended that the district failed to reconvene the CSE to consider the January 2012 private neuropsychological evaluation report, "update" the student's educational program, and adjust his "class size" (id. at pp. 1, 5-6). Next, the parent asserted that despite a recommendation from the student's physician, the district failed to conduct either a psycho-educational speech-language evaluation, which she maintained had not been conducted for the student "since February 2007" (id. at pp. 4-5). Furthermore, the parent alleged that the October 2011 CSE failed to test the student in all areas of need and memorialize the student's testing results on the resultant IEP (id. at p. 4). In addition, the parent contended that the October 2011 IEP contained inadequate goals for reading, writing, and counseling (id. at p. 5).

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

As to the district's recommendation that the student receive ICT services, the parent alleged that as a result of the district's continued failure to recommend an appropriate program for the student, the student never made an appropriate amount of academic progress in public school and continued to fall further behind as his needs remained unaddressed (Parent Ex. M at p. 2). Moreover, the parent maintained that the CSE "refused to provide [the student with] additional academic or social emotional support" (id. at p. 4). She further asserted that the student became increasingly reluctant to attend school, because he was subjected to bullying (id.).

Under the circumstances, the parent alleged that in light of the district's failure to offer an appropriate program for the student, she enrolled the student at Winston for the 2012-13 school year (Parent Ex. M at p. 1, 6-7). Specifically, the parent alleged that Winston constituted an appropriate unilateral private placement for the student, because it provided him with an "academically rigorous program" in addition to the necessary social/emotional support (id. at p. 6). She further maintained that the student made progress at Winston (id. at pp. 2, 6).

As a remedy for the district's alleged failure to offer a FAPE for the 2011-12 school year, the parent requested that the district provide the student compensatory additional services in the form of 200 hours of 1:1 instruction at Lindamood-Bell and provide the student with transportation to and from Lindamood-Bell (Parent Ex. M at p. 7). The parent further requested that the district provide the student with a comprehensive speech-language evaluation (id.). As to the district's alleged failure to offer the student a FAPE for the 2012-13 school year, the parent sought, among other things, tuition reimbursement, for the student's placement at Winston for the 2012-13 school year (id.).

B. Impartial Hearing Officer Decision

On June 18, 2013, an impartial hearing convened and concluded after one day of proceedings (Tr. pp. 1-284). At the impartial hearing, the parent confirmed her request for compensatory additional services to remedy the district's alleged denial of a FAPE for the 2011-12 school year and withdrew all other claims—including all claims arising out of the 2012-13 school year (IHO Decision at p. 2; Tr. pp. 181-82).[5]

In a decision dated August 6, 2013, the IHO determined that the district offered the student a FAPE for the 2011-12 school year and there was no "gross violation" of the IDEA that would support an award of compensatory additional services (IHO Decision at p. 8). With regard to the appropriateness of the October 2011 IEP and its development, the IHO first found that the parent's complaints regarding the district's failure to provide her with a copy of the procedural safeguards were not raised in her parent's due process complaint notice and, in any event, the parent was aware of her due process rights, because the parent was familiar with the student's evaluations and the CSE process as the student had received special education services since 2005 (id. at p. 10). The IHO further noted that two months prior to the October 2011 CSE meeting, the parent retained the services of an advocate (id.). Next, with respect to the parent's challenge surrounding the CSE's failure to reconvene to consider the results of the January 2012 private neuropsychological evaluation, the IHO found that there was no basis to reconvene the CSE because the privately

[5] The hearing record indicates that the parties were in the process of reaching a settlement agreement with regard to the parent's claims arising out of the 2012-13 school year (Tr. pp. 181-82).

obtained neuropsychological evaluation was substantially similar to the psychoeducational evaluation conducted by the district and the information regarding the student's functioning contained in the October 2011 IEP (id. at p. 11). Lastly, with regard to the parent's challenge to the ICT placement recommendation in the October 2011 IEP, the IHO described the parent's request for placement of the student in a 12:1 class as "unnecessarily restrictive," based on the student's academic performance (id.).

The IHO rejected the parent's claims that the student had not made progress during the 2011-12 school year and found that the student "progressed not as a student without a disability but as a student with a disability" (IHO Decision at p. 10). The IHO also found that the hearing record contained no evidence that the student did not receive his recommended level of related services (id. at p. 8). Finally, the IHO found that there was no credible evidence in the hearing record to support the parent's claims that the student was bullied (id. at p. 9).[6]

IV. Appeal for State-Level Review

The parent appeals, seeking to overturn the IHO's determination that the district offered the student a FAPE for the 2011-12 school year and that there was no gross violation of the IDEA that would support an award of compensatory additional services. First, regarding the IHO's finding that the parent was aware of her due process rights, the parent argues that the IHO based her assumption that the parent understood her due process rights on an incorrect fact. The parent next contends that the IHO erred in concluding that there was no basis to reconvene the CSE. Specifically, the parent alleges that the results of the private neuropsychological evaluation differed in substance from the psychoeducational evaluation and that the CSE should have reconvened to consider the private evaluation report and revise the IEP accordingly.

The parent also submits that the IHO failed to address her allegations regarding the appropriateness of the single reading goal contained in the student's IEP. Next, the parent maintains that the ICT placement recommendation was not appropriate for the student, alleging that the hearing record demonstrated that the student regressed during the 2010-11 school year and that the district should not have recommended the exact same program for the 2011-12 school year. She further argues that the student continued not to make progress and regressed under the October 2011 IEP during the 2011-12 school year. Moreover, the parent asserts that the testing accommodations included in the October 2011 IEP resulted in the appearance of progress by compensating for the student's disability. Lastly, with regard to social/emotional concerns, the parent argues that the IHO improperly discredited her allegation that the student was bullied while in attendance at the public school.

The district answers, generally denying the parent's assertions and requesting that the IHO's decision be upheld for the reasons stated by the IHO. Initially, the district argues that the parent failed to properly preserve on appeal her challenges to the IHO's findings that she was aware of her due process rights and that there was no basis for the CSE to reconvene upon receipt of the January 2012 private neuropsychological evaluation, because the parent failed to raise these contentions in her petition for review. Second, the district argues that the parent also failed to

[6] The IHO did not address the parent's claim that the district failed to provide the parent with a translation of the student's October 2011 IEP.

preserve her challenge to the IHO's finding that there was no basis for the CSE to reconvene the CSE because the parent also failed to raise her challenge in her petition for review. Regardless of whether such claims were properly preserved on appeal, the district alternatively argues that there was no need for the CSE to reconvene to consider the private neuropsychological evaluation report, because it did not contain any information that conflicted with the district's understanding of the student's deficits or needs and because the only new information contained in the evaluation report was a statement from the parent that the student showed signs of depression at home.

Next, the district asserts that although the IHO failed to address the appropriateness of the goals in the October 2011 IEP, the IEP included appropriate annual goals drafted by the special education teacher who would have been responsible for implementing the goals during the 2011-12 school year. The district also argues that the reading goal was appropriate because it targeted the student's deficit in reading comprehension and that no one objected at the CSE meeting to any of the goals. The district also notes that the student mastered the reading goal and made progress during the 2011-12 school year. The district further submits that the student's IEP was appropriate because the October 2011 CSE utilized the October 2011 psychoeducational evaluation report, which included an interview of the student and his then-current service providers, and because the IEP included detailed reports of the student's present levels of performance. The district next argues that the October 2011 CSE's recommendation to place the student in an ICT classroom was appropriate, in part because the student's learning and social deficits required the adult support available to him in the ICT classroom. The district further maintains that the student was making educational gains in the ICT classroom at the time of the October 2011 CSE, and under the circumstances, the CSE did not have a reason to modify the student's program recommendation. The district also claims that the student made progress during the two months leading up to the October 2011 CSE meeting and throughout the remainder of the 2011-12 school year. In addition, the district alleges that the hearing record fails to substantiate the parent's contention that testing accommodations prevented the student from showing that he could make progress independently. Next, regarding the parent's claims that during the 2011-12 school year, the student was bullied, the district submits that the hearing record fails to support her allegations. Specifically, the district points to evidence that the student's fifth-grade teacher never observed bullying and further notes that the student made social/emotional progress during the 2011-12 school year. Finally, the district argues that although the hearing record does not support an award of compensatory additional services, if such an award is ordered, the district requests that its district personnel be allowed to provide the additional services.

In a reply, the parent denies that she abandoned any issues on appeal as asserted in the district's answer and cites to the paragraphs in her petition for review where she challenged the IHO's finding that the district's failure to reconvene the CSE did not result in the denial of a FAPE.[7]

[7] Pursuant to State regulations, a reply is limited to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, most of the district's allegations to which the parent replied do not assert a procedural defense to the State-level appeal (see Answer ¶¶ 29-44). Accordingly, those portions of the reply are beyond the scope of the State regulations and will not be considered on appeal.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not

regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

VI. Discussion

A. Scope of Impartial Hearing and Review

With regard to the parties' dispute on appeal regarding whether the parent received a procedural safeguards notice and whether the IHO erred in finding that the parent was aware of her rights, the IHO correctly noted that the issue was not identified in the parent's due process complaint notice, and for the reasons that follow, this allegation will not be considered on appeal.

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA provides that a party requesting a due process hearing "shall not be allowed to raise issues at the due process hearing that were not raised in the notice . . . unless the other party agrees" (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parent] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 n.2 [S.D.N.Y. May 14, 2013] [noting Second Circuit precedent that the "failure to raise an argument in a due process complaint precludes later review of that argument (whether jurisdictional or not)"]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, [E.D.N.Y. Jan. 6, 2012] [holding that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the [due process complaint notice] or agreed to by [the opposing party]"]).

An independent review of the hearing record demonstrates that the parent failed to allege in her due process complaint notice that she did not receive a procedural safeguards notice or that she was unaware of her due process rights (see Parent Ex. M at pp. 1-7). Accordingly, the IHO should not have addressed the issue, which was not properly before her for resolution at the impartial hearing, and the parent cannot now raise this issue for the first time on appeal (R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *6-*7 [S.D.N.Y., Sept. 16, 2011] [finding the parent's claim regarding the lack of a procedural safeguards notice was waived because it was not included in the due process complaint and noting, in the alternative, that it would not result in a denial of a FAPE]; see Dirocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013] [holding that the parents' failure to identify a claim related to spelling goals in their due process complaint precluded consideration on appeal]).[8]

[8] In addition, while the parent raised her argument in a footnote in her memorandum of law, the parent's petition for review does not assert any argument or challenge as to the IHO's finding that the parent was aware of her due process rights (Parent Mem. of Law at p. 14 n.5). A memorandum of law is not a substitute for a petition for review, which is expected to set forth the petitioner's allegations of the IHO's error and include citations to the record on appeal (8 NYCRR 279.8[a][3], [b]; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of a Student with a Disability, Appeal No. 08-003; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-121; Application of a Child with a Disability, Appeal No. 07-112). A memorandum of law does not cure a failure to comply with 8 NYCRR

The parent's due process complaint notice also contained the following allegations that were neither addressed by the IHO nor advanced on appeal by the parent: (1) the district failed to identify the parent's "language of communication" and failed to translate the IEP into the parent's native language, thereby denying the parent the opportunity to participate meaningfully in the development of the October 2011 IEP; (2) the district failed to conduct a psychoeducational evaluation or speech-language evaluation of the student; (3) the October 2011 CSE failed to ensure that the student was tested in all applicable areas; and (4) the October 2011 IEP failed to set forth the results of evaluations administered to the student (Parent Ex. M at pp. 4-5). In this instance, the IHO did not address these claims, nor has the parent advanced them on appeal. Under the circumstances, the parent has effectively abandoned such claims by failing to identify them in any fashion or make any legal or factual argument as to how certain unaddressed issues would rise to the level of a denial of a FAPE. Therefore, these claims will not be further considered (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).[9]

B. October 2011 IEP

1. Annual Goals

Turning to the parent's challenge to the October 2011 IEP, on appeal, the parent argues that the IHO erred in failing to address the adequacy of the "single, vague reading goal" on the student's October 2011 IEP. For the reasons that follow, the annual goals in the October 2011 IEP, including the reading goal, targeted the student's identified areas of need and provided information sufficient to guide a teacher in instructing the student and measuring his progress.

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

279.4(a), and it is not a substitute for either a pleading or an properly drafted petition for review (see 8 NYCRR 279.4, 279.6 [stating that State regulations direct that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer except a reply by the petition to the answer"]; Application of a Child with a Disability, Appeal No. 06-096; Application of the Bd. of Educ., Appeal No. 05-031).

[9] However, even if the claims had not been abandoned, I briefly note that the parent's allegations with regard to the district's failure to translate the IEP into her native language is not supported by any requirement in the IDEA or State and federal regulations that the district do so. although State regulations require that a district provide parents with certain educational documents in their native language, ensure that consent and procedural notices are provided in the parent's native language, and provide a translator at all times during the impartial hearing process (see 8 NYCRR 200.1[*l*][1]; 200.4[a][9][ii], [b][6][xii], [g][2][ii]; 200.5[a][4], [f][2], [j][3][vi]), neither the IDEA's implementing regulations nor State regulations require that the IEP be provided to the parent in his or her native language (Letter to Boswell, 49 IDELR 196 [OSEP 2007] [noting that "[t]here is no requirement in IDEA or in its accompanying regulations that all IEP documents must be translated" and that schools are still required to provide parents with full information, in the native language, of all information relevant to activities for which consent is sought]).

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]).

Here, in preparation for the October 2011 CSE meeting, the student's ICT special education teacher during the 2011-12 school year stated that she reviewed the results of the student's latest "educational performance test," which indicated to her that the student had "made a lot of gains in only a short time" and by October 2011 had already shown improved academic performance during fifth grade (Dist. Ex. 9 at p. 2).[10] The special education teacher noted gains in skills such as the student's reading stamina, vocabulary, understanding of various text genres, and math place value (id.). The special education teacher testified that she also reviewed the goals from the student's 2010-11 IEP (Tr. pp. 99-100).

The special education teacher stated that she attended the October 2011 CSE meeting and prepared the academic annual goals for the IEP (Dist. Ex. 9 at pp. 1-2). She indicated that the goals were based upon her observation of the student, the results of his educational performance test, and the goals he had mastered since the prior IEP (id. at p. 3). The hearing record shows that during the meeting, the special education teacher and the student's speech-language therapist discussed the student's academic and social/emotional performance and progress and the proposed IEP goals with the parent through a translator (id. at p. 2; Dist. Ex. 10 at p. 4). The special education teacher and the district's school psychologist who attended the October 2011 CSE meeting indicated that the goals reflected the October 2011 CSE's discussion about the student's abilities and needs (id.). According to the district special education teacher, none of the participants at the October 2011 CSE meeting raised any objections to the proposed goals (Dist. Ex. 9 at p. 3).

The October 2011 IEP included annual goals to address the student's ability to maintain conversation by staying on or appropriately changing a topic, initiate conversation, maintain appropriate eye contact, identify a variety of geometry concepts, complete geometry calculations, and, after reading fifth grade material, demonstrate the ability to summarize, predict, question and clarify the information (Parent Ex. G at pp. 4-5). Regarding the parent's assertion on appeal that the IHO failed to address the "inappropriateness of the single, vague reading goal" contained in the October 2011 IEP, the special education teacher indicated that the student's "most immediate issue" was his difficulty with reading comprehension (Dist. Ex. 9 at p. 3).[11] In particular, the special education teacher indicated that while the student demonstrated understanding of the literal information in a text, he exhibited difficulty making inferences (id.). The special education teacher stated that she accordingly developed the reading goal to address the student's ability to recall and summarize information, to make predictions, and to ask questions, all of which she indicated related to the student's ability to make inferences from the fifth grade level material he read (id.). The special education teacher further indicated that at a fifth grade level, students were expected to exhibit a "greater ability to pick up context clues and understand plot, setting and character motivation" than they did as fourth grade students (id. at pp. 3-4). Furthermore, a review of the

[10] All direct examination was taken by way of affidavit in lieu of testimony (see 8 NYCRR 200.5[j][3][xii][f]).

[11] To the extent that the parent's assertion on appeal relates to the student's decoding skills (see Tr. pp. 105-06, 145-46), the district special education teacher testified that the student would not be able to demonstrate gains in reading comprehension without also having worked on his decoding skills (Tr. p. 105). As discussed further below, addressing decoding skills was a focus of the student's reading instruction during the 2011-12 school year (Tr. pp. 130, 153-54).

annual goal shows that it was measurable, because it provided criteria for measurement (four out of five times), and described how progress would be measured (running records, informal and formal assessments; and teacher observation) and a schedule of when progress would be measured (two times per year) (Dist. Ex. 1 at p. 5). Given the description of the student's most pressing reading need provided by his then-current special education teacher—who was also charged with implementing the student's reading goal—the hearing record does not support a determination that there is any vagueness in the wording of the reading comprehension annual goal or that any deficiency in the reading goal rose to the level of a denial of a FAPE.

Thus, overall the annual goals and short-term objectives contained on the student's October 2011 IEP, when read together, targeted the student's identified areas of need and provided information sufficient to guide a teacher in instructing the student and measuring his progress (see D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at *11 [S.D.N.Y. Sept. 16, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013] [explaining that "[i]n this Circuit, courts are reluctant to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress"] [internal quotations, punctuation, and citations omitted]; D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *13-*14 [S.D.N.Y. Aug. 19, 2013]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146, 147 [S.D.N.Y 2006]; Application of the Dep't of Educ., Appeal No. 12-005; Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096). Accordingly, the hearing record does not support a finding of a denial of a FAPE for the 2011-12 school year on this basis.

2. ICT Services

Turning next to the parent's contention that the CSE's placement recommendation was inappropriate, the parent maintains that the hearing record shows that the student failed to make progress under the 2010-11 IEP and that the October 2011 CSE should not have continued to recommend ICT services for the 2011-12 school year. For the reasons set forth below, in this instance, the hearing record supports a finding that the CSE's recommendation that the student receive ICT services during his academic instruction in the subject areas of ELA, math, and sciences was reasonably calculated to enable the student to receive educational benefits (Dist. Ex. 1 at p. 6).

The parent has consistently asserted that the student failed to make progress in an ICT class during the 2010-11 school year and, therefore, the October 2011 CSE erred in recommending a similar program (see Dist. Ex. 1 at pp. 5-6; Parent Ex. E at pp. 1-2). A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2013 WL 3155869, at *2 [2d Cir. June 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C., 2008 WL 4449338, at *14-*16; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. [Dec. 2010], at p. 18, available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP

offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir. 2008]; Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D.D-S., 2011 WL 3919040, at *12; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]; Schroll v. Bd. of Educ. Champaign Cmty. Unit Sch. Dist. #4, 2007 WL 2681207, at *3 [C.D. Ill. Aug. 10, 2007]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

Here, a review of the present levels of performance contained in the October 2011 IEP developed during the student's fifth grade school year indicated that, consistent with the results of the October 19, 2011 psychoeducational evaluation, the student's reading and math skills were within a fourth grade level (compare Dist. Ex. 3 at p. 2, with Dist. Ex. at pp. 1, 9-10). According to the October 2011 IEP, the student enjoyed learning new things including reading and math, exhibited "a lot" of background knowledge, articulated his ideas and made connections with new/old knowledge (Dist. Ex. 1 at p. 1). The student also enjoyed learning while using manipulatives and visual aids (id. at p. 2). The October 2011 IEP further indicated that academically the student "continue[d] to show progress" and the motivation to learn, and that he put forth a "tremendous amount of effort" (id. at p. 1). Moreover, the October 2011 IEP reflected that the student was cognizant about his own learning and comprehension of a skill, and asked for help when needed (id.). According to the October 2011 IEP, it was important to scaffold and differentiate the student's assignments, which should be provided as he appeared ready to take on the task, as at times, the student became overwhelmed when given more than two assignments or directions at one time (id.). The October 2011 IEP also indicated that the student worked on following through with classroom jobs and responsibilities (id.).

The October 2011 IEP described the student as "well mannered" and "an excellent role model for other students," and further indicated that he enjoyed teaching his peers about what he knows (Dist. Ex. 1 at pp. 1-2). Information included in the October 2011 IEP identified that the student worked on initiating conversations, used a cue card placed on his desk as a reminder to greet a friend in the morning, asked questions about that friend's interests, likes and dislikes, and made eye contact—all skills that were a focus of the student's speech-language therapy sessions (id.). According to the October 2011 IEP, the student had positive relationships at school and home, was friendly with all the students in his class, and after he developed a comfort level with people and situations, he became "willing to open up more socially" (id. at p. 2). The October 2011 IEP also identified the student's need to learn how to socialize and "'read'" responses from peers and adults (id.). Parent concerns included in the October 2011 IEP were the student's need to further develop appropriate skills for interacting with peers, develop more independence in daily living, and that the student could become aggressive (id.).

The district school psychologist who conducted the October 19, 2011 psychoeducational evaluation attended the October 20, 2011 CSE meeting and stated that he prepared for the meeting by reviewing the student's prior psychoeducational evaluation reports and IEPs (Dist. Ex. 10 at p. 2). According to the district school psychologist, although the student continued to exhibit

academic delays, academic achievement assessment results suggested that the student had made progress in the areas of math and ELA from the time the student was in third grade to the beginning of fifth grade (id. at p. 3). The district school psychologist stated that he consulted with the student's speech-language therapist, who indicated that the student was making progress in the area of social and pragmatic language skills with the mandated level of services provided (id. at pp. 3-4).

According to the district school psychologist and the district special education teacher, during the October 2011 CSE meeting the CSE discussed the results of the October 2011 psychoeducational evaluation and the student's performance and progress in the ICT class and speech-language therapy thus far (Dist. Exs. 9 at p. 2; 10 at p. 4). For the remainder of the 2011-12 school year, the CSE recommended that the student continue to receive ICT services as a direct service in his then-current classroom, as well as speech-language therapy and counseling services (Dist. Exs. 1 at pp. 5-6; 9 at p. 3; 10 at p. 5). The district school psychologist stated that continuing the student's ICT services was appropriate because the student needed a structured class with special education instruction during academic subjects in order to receive the necessary support to meaningfully progress (Dist. Ex. 10 at p. 5). The district school psychologist further stated that the student's learning difficulties and social interaction inhibitions necessitated the provision of additional adult support such as that available from ICT services (id.). Likewise, the district special education teacher stated that the student benefitted from the supports that she provided, which included differentiated instruction, individual and small group attention, scaffolding of instruction from smallest task to overall skill, and from having two adults to support him during academic instruction (Dist. Ex. 9 at p. 3). She further stated that the student needed and benefitted from exposure to nondisabled peers, which the ICT class provided (id.).

The district special education teacher testified that from the beginning of the school year to the October 2011 CSE meeting, the student exhibited progress in his ability to exhibit confidence, complete "morning work," prepare for the first lesson of the day, complete homework, and increase his reading stamina, vocabulary skills, and understanding of various genres (Tr. pp. 111-12, 131). At the time of the October 2011 CSE meeting, the district school psychologist and the district special education teacher indicated that the student was making good progress in the ICT class and that he was one of the special education teacher's "higher performing students," such that the CSE saw no reason to alter the placement recommendation (Dist. Exs. 9 at p. 3; 10 at p. 5). Likewise, the special education teacher noted that the student was making progress where he was (Dist. Ex. 9 at p. 3). The hearing record also demonstrates that while receiving ICT services during the 2010-11 school year, the student achieved a Level "3" (meets proficiency standards) and a Level "4" (exceeds proficiency standards) on the New York State assessments in ELA and mathematics, respectively (Dist. Ex. 4 at pp. 5-8; see Parent Ex. GG at p. 5).

Although the parent claims that the October 2011 CSE had proof that the student experienced academic regression and needed reading services because the special education teacher's stated that at the beginning of the 2011-12 school year the student struggled to complete one well-developed paragraph using appropriate grammar, the hearing record does not support the parent's contention. For example, the student's December 2010 IEP indicated that with support and scaffolding, he was able to produce "at least 3 paragraphs with logical presentation of ideas" (Tr. pp. 149-50; Dist. Ex. 9 at p. 5; Parent Ex. E at p. 3). Moreover, the December 2010 IEP present levels of performance indicated that "overall in the classroom," the student was performing at approximately a third grade level, and at the time of the October 2011 IEP, the student's

performance was within a fourth grade level (compare Parent Ex. E at p. 3, with Dist. Ex. 1 at p. 1). While during the 2010-11 school year the student produced three well-developed paragraphs with support and scaffolding at a third grade level, the student's production of one paragraph with scaffolding at a fourth grade level at the beginning of the 2011-12 school year does not, as the parent contends, lead to the conclusion that the student's writing skills had "regressed" (Tr. pp. 149-50; Dist. Ex. 9 at p. 5; Parent Ex. E at p. 3). Moreover, this is the only example of the student's alleged "regression", and it does not outweigh the evidence to the contrary.

The October 2011 IEP indicated that the CSE considered providing only special education teacher support services (SETSS) to the student and also considered placement in a special class in a community school, but the October 2011 CSE rejected these options as not suiting the student's needs (Dist. Ex. 1 at p. 11). During the October 2011 CSE meeting, the parent requested a "smaller class size" for the student, but according to the district school psychologist and the district special education teacher, the CSE did not believe a small "specialized" class setting was appropriate (Dist. Ex. 9 at p. 3; 10 at p. 4; Parent Ex. GG at p. 6). Among the reasons for this determination, the district school psychologist stated that a smaller class would be too restrictive for the student, given that the student exhibited the ability to make progress with the supports he had and the number of students with which he was grouped (Dist. Ex. 10 at p. 5). The district school psychologist noted that reducing the size of the class, providing more adults or limiting the exposure to nondisabled peers would be an "unnecessary limitation," which he opined could lead to heighten the student's dependence on such supports, inhibit his ability to function independently, and restrict his access to positive, nondisabled peer role models (id.). The district special education teacher similarly stated that in a smaller specialized class, the student might have been grouped with "lower functioning and/or only special needs students" (Dist. Ex. 9 at p. 3). Under the circumstances, the student would not have had the opportunity to develop the independence skills he had exhibited in the ICT class and in the non-academic "non-ICT" classes that he attended (id.). Moreover, even if the student would make some progress in a special class setting, the fact that a student could make greater academic progress than in the offered placement does not dictate the conclusion that a less restrictive setting is therefore inappropriate under the IDEA (Newington, 546 F.3d at 120; Oberti v. Bd. of Educ., 995 F.2d 1204, 1217 [3d Cir. 1993] [noting that a determination that a child with disabilities might make greater academic progress in a segregated, special education class may not warrant excluding that child from a regular classroom environment]).

As noted above, in conjunction with the supports inherently provided in an ICT classroom, the October 2011 IEP also provided the student with group speech-language therapy and counseling to address his social skill and pragmatic language deficits (Dist. Ex. 1 at pp. 1-2, 6). The October 2011 IEP also provided the student with testing accommodations including extended time, administration in a separate location/room, and revised test format (questions read and re-read aloud) (Parent Ex. G at p. 7).

In summary, a review of the hearing record as a whole supports a finding that the student's October 2011 IEP was reasonably calculated to provide him with educational benefits, and the IHO did not err in finding that a special class placement would be unnecessarily restrictive based on the student's academic performance. There is no reason to disturb the finding of the IHO or to remove the student from his nondisabled peers in an ICT classroom when he could be educated

satisfactorily in that setting.[12] The hearing record also supports the CSE's recommendation that an ICT classroom with related services was the LRE for the student (M.W. ex rel. S.W. v New York City Dept. of Educ., 725 F3d 131, 143 [2d Cir 2013] [noting the that the "IDEA 'expresses a strong preference' for educating disabled students alongside their non-disabled peers; that is, in their least restrictive environment"]). Thus, based upon the foregoing, the evidence contained in the hearing record supports the IHO's conclusion that the district's recommendation for ICT and related services was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year.

C. Bullying

The parent further asserts that the student was the subject of "incessant" and "relentless" bullying after changing schools at the beginning of the 2010-11 school year (fourth grade).

Although I sympathize with the parent's concerns with respect to the student's social/emotional needs, a review of the hearing record shows that it contains conflicting information about the district's awareness of the parent's concerns that the student was being bullied during the course of the 2011-12 school year (compare Tr. pp. 239-40, 243-44, 249; Dist. Exs. 9 at pp. 3, 5; 10 at pp. 4, 6-7, with Tr. pp. 195-211; see Parent Ex. GG at pp. 6-7). Moreover, the October 2011 psychoeducational evaluation report, the February 2012 private neuropsychological evaluation report, and the parent's April 2011 letter requesting that the CSE reconvene all lack any reference to the parent's concerns that the student was bullied at school (see Dist. Ex. 3; Parent Ex. J). Although the parent indicated that in fall 2010 she discussed bullying of the student with the student's fourth-grade teacher, the district school psychologist stated that at the CSE meeting, the parent "expressed no concerns as to bullying or inappropriate interactions [that the student] was experiencing with classmates, nor did [the parent] relate any negative behaviors related to [the] school" (Dist. Ex. 10 at p. 4; Parent Ex. GG at pp. 4-5).[13]

[12] The parent further argues that the IHO's decision failed to address the June 2012 Lindamood-Bell assessment results and recommendations provided in the affidavit of the director of the Lindamood-Bell Center (Parent Ex. II). There is no indication in the hearing record, however, that the district received the Lindamood-Bell assessment report during the 2011-12 school year, that any person from Lindamood-Bell was in contact with district personnel about the student during that school year, or that Lindamood-Bell assessed the student at any time prior to June 14, 2012—nearly eight months after the October 2011 CSE meeting. Because the Lindamood-Bell assessment results and recommendations were not provided to the October 2011 CSE, the affidavit of the director of the Lindamood-Bell Center may not be used to call into question any aspect of the October 2011 IEP (see D.A.B., 2013 WL 5178267, at *13 [finding that where certain witnesses were not at the CSE meeting, did not submit exhibits to the CSE, and did not examine the student prior to the CSE meeting, the testimony of those witnesses "should not be considered as a basis to declare the IEP substantively inadequate" because (1) "it would be inappropriate to allow the [parent] to attack the IEP with retrospective testimony while prohibiting the [district] from retrospective bolstering" and because (2) the adequacy of the IEP "should be based solely upon testimony of the witnesses and exhibits that were before the CSE"]; see also R.E., 694 F.3d at 186-88).

[13] The hearing record also establishes that the student's December 2010 IEP did not make any reference to bullying (Parent Ex. 4 at pp. 1-10). However, the December 2010 IEP noted that the student had not yet "bonded with any students up to th[at] point" and that the student had difficulty letting go of situations which bothered him, particularly with peers, and that the student required teacher support to not overact, and to move forward (id. at p. 4).

The district special education teacher also stated that during the 2011-12 school year, the student made "great progress" socially, emotionally, and communicatively (Dist. Ex. 9 at p. 5). She indicated that the student's eye contact with others improved from "rare to consistent" and despite his initial hesitance to initiate conversation, by the end of the year, he initiated greetings and conversations with both peers and teachers (id.). The district special education teacher further indicated that the student became "quite popular" with his classmates, who sought out the student in part due to his artistic talents (id.). By the end of the school year, according to the district special education teacher, the student was "enthusiastically participating in social situations" (id.). She opined that by facilitating and encouraging the student's interactions over the year, she, the speech-language therapist, and the counselor "made great progress with [the student] socially and emotionally" (id.). The district special education teacher stated that by the end of the school year, the student appeared to be "very comfortable in class," which she opined would not have been the case had the student been bullied outside her presence (id.). She added that she never saw the student act depressed or unhappy; rather, he frequently joked around and was motivated to learn (id.). The district special education teacher testified that she never had any indication from her observations of the student or from what other people said about the student that he was ever "bullied" (Tr. p. 143).

Moreover, assuming for the sake of argument that the hearing record in this case contained evidence specifically showing the bullying to the extent described by the parent, there is no indication from the evidence in hearing record that the bullying was having an effect upon the student's special education services that resulted in the denial of a FAPE or that the student did not receive meaningful educational benefit (see Dear Colleague Letter, 61 IDELR 263 [OSEP Aug. 20, 2013] [noting that district have an obligation to ensure that students who are targeted by bullying behavior continue to receive FAPE pursuant to their IEPs]; Dear Colleague Letter, 55 IDELR 174 [OCR 2010]; see also Smith v. Guilford Bd. of Educ., 2007 WL 1725512, at *4-*5 [2d Cir. June 14, 2007] [indicating that bullying might, under some circumstances, implicate IDEA considerations]). There is also no indication from the hearing record that any bullying resulted in the district's failure to implement substantial or significant provisions of the IEP or that the student was denied educational benefits or failed to make academic progress under the October 2011 IEP. If the parent continues to have concerns going forward that the student is being bullied and that the bullying that is affecting the student's special education needs or services, she can request that the CSE reconvene. Should the CSE then determine that modification of the services are not warranted to address the parent's concerns, it must then provide her with prior written notice on the form prescribed by the Commissioner that, among other things, provides an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and State regulations (34 CFR 300.503[b][1]-[2]; see 8 NYCRR 200.1[oo]).

D. Request to Reconvene the CSE

Next, regardless of my finding that the district otherwise offered the student a FAPE by providing an appropriate IEP, for the reasons that follow, the hearing record supports the parent's contention that the district impeded the parent's right to participate in the development of the student's program by failing to reconvene the CSE in response to the parent's request.

In addition to the district's general obligation to review the IEP of a student with a disability at least annually, federal and State regulations require the CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the

course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, in a recent guidance letter the United States Department of Education indicated that parents may request a CSE meeting at any time and that if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). However, a district's failure to comply with procedural requirements of the IDEA only constitutes a denial of a FAPE if the procedural violation deprived the student of educational benefits or significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

In this case, by letter to the district on April 19, 2012, the parent requested that the CSE reconvene in order to consider the recommendations made in the February 2012 neuropsychological evaluation report (Parent Ex. J at p. 3). The district's failure to respond to the parent's request to reconvene the CSE impeded her right to participate in the development of the student's program (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]). Accordingly, the district violated the IDEA by failing to either reconvene the CSE in response to the parent's request or responding with written notice stating the reasons why the district did not believe a reconvening of the CSE to be necessary (cf. Application of a Student with a Disability, Appeal No. 12-071 [finding no violation where the parents stated only that they were "willing to meet" with the CSE to discuss their concerns]). By failing to even acknowledge the parent's concerns—supported, she believed, by new evaluative information not previously available to the CSE—the district undermined the "cooperative process" between parents and districts that the Supreme Court has held constitutes the "core of the [IDEA]" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06; see also 20 U.S.C. § 1400[c][5] [stating Congress' finding that the education of students with disabilities can be improved by "strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home"]). The district's failure to respond to the parent's request to convene and consider updated information in fact significantly impeded the parent's ability to participate in the decision-making process regarding the student's placement and thereby denied the student a FAPE (20 U.S.C. § 1415[f][3][E][ii][II]; 34 CFR 300.513[a][2][ii]; 8 NYCRR 200.5[j][4][ii]).[14]

E. Compensatory Additional Services

Having found that the district denied the student a FAPE in light of its failure to reconvene pursuant to the parent's request, I must next determine what relief, if any, is warranted. For the

[14] Notwithstanding the district's failure to respond to the parent's request to reconvene the CSE, it is of note that the district would have been required to reconvene the CSE within 60 school days after the request was made (8 NYCRR 200.4[d], [f]). Here, because the request to reconvene was made near the end of the 2011-12 school year, and because the parent informed the district of her unilateral placement of the student on August 22, 2012—prior to the expiration of the 60 school days within which the CSE should have convened—the district was not afforded a full opportunity to reconvene the CSE within the prescribed time limit to address the parent's concerns raised in the April 19, 2012 letter (8 NYCRR 200.4[d], [f]).

reasons detailed below, the hearing record does not support a conclusion that the student is entitled to relief in the form of compensatory additional services due to the district's failure to reconvene the CSE in response to the parent's April 19, 2012 letter.

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

Compensatory relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that the "IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a" FAPE]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd of Educ., 108 LRP 49659, [S.D.N.Y. March 6, 2008], adopted at 50 IDELR 225 [July 7, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible under the IDEA and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for services under the IDEA by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; see, e.g., Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [DC Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that

"(a)ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't of Educ., Appeal No. 11-075; Application of a Student with a Disability, Appeal No. 10-052). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "(c)ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address (the student's) educational problems successfully"]; Reid, 401 F.3d at 518, 525 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 ["There is no obligation to provide a day-for-day compensation for time missed"]; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

Here, as detailed more fully below, the hearing record does not support a conclusion that the district failed to implement the October 2011 IEP by not providing the student with all of the recommended services or that the district grossly failed to meet its obligations under the IDEA. The IDEA provides no guarantee of any specific amount of progress, so long as the district offers a program that is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192). Although in this instance the district denied the student a FAPE for the 2011-12 school year by failing to respond to the parent's April 2012 request to reconvene the CSE, the hearing record demonstrates that the student made progress while attending the district's program during the 2011-12 school year, and therefore, the hearing record supports the IHO's denial of the parent's request for an award of additional services.[15] For example, the district special education teacher stated that during the 2011-12 school year, the student exhibited "wonderful progress" while in her ICT class (Dist. Ex. 9 at p. 4). As stated previously, the student's ELA and math skills at the beginning of the school year were within a fourth grade level, and according to the district special education teacher, by the end of the school year the student "had progressed a year in skill level to a 5th grade level in both [ELA and math] at the very least, if not beyond" (id.). She also provided specific examples of the student's progress during the 2011-12 school year, including in math (id.). For example, the district special education teacher noted that, by the end of the year, the student exhibited the ability to multiply and divide three digit numbers by one and two digit numbers, and his overall ability to complete multiplication and division computations improved (id.). Moreover the student demonstrated an understanding of and could complete multi-step word problems (id.). Lastly, the district special education teacher stated that the student could identify geometric shapes

[15] Even assuming the student had not made progress, the hearing record establishes that although the private neuropsychological evaluation contained some information not previously before the CSE, such as the student's episodes of depression, this information did not reflect a change in the student's needs and abilities to such an extent that the placement recommended by the October 2011 CSE became inappropriate as a result. (Parent Ex. I at p. 4).

and use multiple steps to find the measurements of the angles (id.). She further commented that these gains were all skills that the student did not exhibit at the beginning of the school year (id.).

Regarding the student's ELA skills, the district special education teacher stated that during the course of the 2011-12 school year, the student's vocabulary skills and reading level improved, in that by the end of the year the student had achieved his ELA annual goal by exhibiting the ability to describe the plot, setting, and character motivation over numerous paragraphs containing fifth grade level multi-syllabic vocabulary (Dist. Ex. 9 at p. 5). To address decoding and encoding skills, during the school year students worked in small groups on "word study" (Tr. p. 130). The district special education teacher testified that the student exhibited "a lot of progress" in word study, in that he "averaged about 100" on weekly tests, and also that his word-attack skills improved (Tr. pp. 130, 153-54). In writing, the district special education teacher stated that by the end of the school year, the student wrote up to three well-developed and grammatically correct paragraphs, two of which did not require scaffolding, thereby demonstrating an improvement in written language skills from the beginning of the school year (Tr. pp. 150-51; Dist. Ex. 9 at p. 5).

According to the district special education teacher, the student's 2011-12 report card reflected progress in that although his numerical indicators remained the same, as the year progressed, the standards and expectations within the indicators rose (Tr. pp. 124-25; Parent Ex. Z). The district special education teacher testified that as the expectations increased during the year, the student did "a great job keeping up" and continued to approach the grade level standard, which is consistent with her observation that despite his progress, the student remained approximately one year behind grade level academically (Tr. pp. 124, 130-33; see Dist. Ex. 10 at p. 3). Consistent with his performance during the 2010-11 school year, during the 2011-12 school year the student achieved a Level "3" (meets proficiency standards) and a Level "4" (exceeds proficiency standards) on the New York State assessments in ELA and mathematics, respectively, which the district special education teacher described as "very meaningful progress" (Tr. pp. 141-43; Dist. Ex. 4). Finally, I note that both the district special education teacher and the district school psychologist denied that the parent contacted them during the 2011-12 school year to discuss her belief that the student was not making progress (Dist. Exs. 9 at p. 5; 10 at p. 6).

The parent also alleges that the IHO's reliance on the student's performance on standardized tests to show that the student made progress was improper, due to the district's implementation of the student's IEP testing accommodations. However, the parent's suggestion that the student's performance on standardized testing was invalid because of the accommodations provided is misplaced. Rather, by definition, the CSE is required to provide testing accommodations "to be used consistently by the student in the recommended educational program and in the administration of districtwide assessments of student achievement and, in accordance with department policy, State assessments of student achievement that are necessary to measure the academic achievement and functional performance of the student" (8 NYCRR 200.4[d][2][vi]). This regulatory definition comports with the district special education teacher's testimony that it was appropriate to provide the student with testing accommodations because the student "knew the information" and needed the support or language revision "so that he could show his knowledge" (Tr. p. 153). She further indicated that testing accommodations did not hinder the student from completing the task because "it's the task we are assessing," not necessarily the language used in the assessment (id.).

Although in this instance the district denied the student a FAPE for a portion of the 2011-12 school year by failing to reconvene the CSE in response to the parent's April 2012 request, based on the student's progress while in the district's program, as discussed above, there is no reason in the hearing record to conclude that the student does not already occupy "the same position [he] would have occupied but for the school district's violations of IDEA" (Reid, 401 F.3d at 518). Accordingly, the IHO's decision denying the parent's request for compensatory additional services need not be disturbed.

VII. Conclusion

Progress, although an important factor in determining whether the student is receiving educational benefit, is not dispositive of all claims brought under the IDEA (see M.S. v. Bd. of Educ. of the City Sch. Dist. of the City of Yonkers, 231 F.3d 96, 103-04 [2d Cir. 2000] abrogated on other grounds, Schaffer, 546 U.S. 49). The goal of the IDEA is to provide opportunities for students with disabilities to access special education and related services that are designed to meet their needs and enable them to access the general education curriculum to the extent possible (20 U.S.C. §§ 1400[d]; 1414[d][1][A]). In this instance, the district significantly impeded the parent's opportunity to participate in the decision-making process by failing to respond to the parent's April 2012 request to reconvene the CSE, which, under these circumstances was a denial of a FAPE for the 2011-12 school year. However, the district offered the student an appropriate educational program for the 2011-12 school year, and evidence of the student's progress weighs against awarding equitable relief in the form of additional services due to the district's failure to provide the parent with an opportunity to participate in the decision-making process.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 21, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER