



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-215

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:

Friedman & Moses, LLP, attorneys for petitioner, Elisa Hyman, 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 that portion of the decision of an impartial hearing officer (IHO) which denied, in part, her request for compensatory education services for the student, relating to the 2009-10, 2010-11 and 2011-12 school years, and reimbursement for independent educational evaluations (IEEs). Respondent (the district) cross-appeals from that portion of the IHO's decision which found that it failed to offer an appropriate educational program to the student for the school years in question. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student attended a district public school throughout high school, from the 2007-08 school year through the 2010-11 school year and continued to some receive services from the district during the 2011-12 school year (see Dist. Ex. 7).

On December 18, 2008, the CSE convened to develop the student's IEP to be implemented between January 9, 2009 and December 18, 2009 (see Parent Ex. C at pp. 2-3). Finding the student eligible for special education as a student with a speech or language impairment, the December

2008 CSE recommended that the student receive integrated co-teaching (ICT) services in at least three academic subjects, as well as special education teacher support services (SETSS), one 40-minute session of group counseling (8:1) per week, and three 45-minute sessions of group speech-language therapy (3:1) per week (id. at pp. 1, 9, 10). The December 2008 CSE recommended a ten month school year program and promotion based upon standard criteria (id. at pp. 1, 10). The December 2008 IEP indicated that the student had "a history of significant delays in receptive and expressive language" and noted that 2008 test results revealed that his reading comprehension was at the fourth grade instructional level, his math reasoning was at the seventh grade instructional level, and his listening comprehension was at the third grade instructional level (id. at p. 4). The December 2008 CSE also recommended accommodations for assessments, including extended time (x2) and a separate location (id. at p. 10).

On December 19, 2009, the CSE convened to develop the student's IEP to be implemented between January 4, 2010 and December 18, 2010 (see Parent Ex. D at p. 2). The December 2009 CSE modified the student's program and services, as compared to the December 2008 IEP, by increasing the student's speech-language therapy to twice per week for 30-minutes in a group of eight and reducing extended time on assessments to time and a half (id. at p. 2). Thus, the December 2009 CSE recommended ICT services in at least three academic subjects, as well as special education teacher support services (SETSS) for 5 periods per week in a group of eight, counseling once per week for 30-minutes in a group of eight, and speech-language therapy twice per week for 30-minutes in a group of three (id. at pp. 1, 9, 11). In terms of the student's present levels of performance, the December 2009 IEP noted that the student's language skills were "adequate for everyday social communication" but that his expressive language, a strength for him, was below average (id. at p. 3). The December 2009 IEP noted the student's weaknesses in vocabulary skills, reading ability, recall of basic math facts, and easy distractibility (id.). The December 2009 IEP reported instructional levels for the student in reading comprehension, math reasoning, and listening comprehension based upon the 2008 testing, which were the same as reported in the student's December 2008 IEP (id.).

On December 22, 2010 the CSE convened to develop the student's IEP to be implemented between December 22, 2010 and December 21, 2011 (see Parent Ex. I at p. 2). The December 2010 CSE recommended, effective January 2011, ICT services in English and global studies, and two 30-minute sessions of group speech-language therapy (8:1) per week (id. at pp. 1, 10, 12). The December 2010 CSE discontinued the student's SETSS (effective January 2011) and counseling services (id. at pp. 2, 10, 12). The December 2010 IEP noted that the student's instructional level for reading comprehension was at the 4.3 grade level based upon December 14, 2010 testing (id. at p. 4).

In September 2011, the student began attending the district's work study program at Hebrew Home for the Aged ("Hebrew Home"), described as a "work based learning program in a nursing home" (see Dist. Exs. 1 at p. 2; 9 at pp. 1-2). The student received SETSS for purposes of preparing for the Science RCT, the last exam the student was required to pass in order to obtain a local diploma (Dist. Ex. 1 at p. 1; Tr. p. 271).

On November 18, 2011, after the student began attending Hebrew Home, the CSE convened and developed an IEP to be implemented from December 14, 2011 through November 25, 2012 (see Dist. Ex. 1 at pp. 1, 4). The November 2011 IEP memorialized educational program,

including SETSS in science, which the student had already begun to receive at Hebrew Home (id. at p. 4).

The district issued the student a local high school diploma in January 2012 (see generally Dist. Exs. 3; 5; 7).

A. Due Process Complaint Notice

In a due process complaint notice dated March 8, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10, 2010-11, and 2011-12 school years on both substantive and procedural grounds (see Parent Ex. A at p. 2). The parent asserted that the CSEs did not provide her with sufficient CSE meeting notices or prior written notices (id. at pp. 11, 13). The parent alleged that, each school year, the CSEs predetermined the student's educational "program and placement recommendations" and that the district deprived the parent of an opportunity to meaningfully participate in the development of the student's IEPs (id. at pp. 10-11). The parent also alleged that each of the respective CSEs was not properly composed (id. at p. 11). The parent also alleged that the district failed to properly evaluate the student, that the district had not evaluated the student since 2008, and that the 2008 psychological evaluation was not complete and did not include a cognitive or speech-language assessment (id. at pp. 2-3, 7, 9, 10). Therefore, the parent alleged that the student's IEPs did not adequately describe the student's needs (id. at p. 10).

Turning to the appropriateness of the student's IEPs, the parent alleged that: the CSEs failed to recommend appropriate or sufficient special education placements with sufficient support and related services, particularly disputing the specificity with which the ICT services and SETSS were described on the IEPs, the reduction in related services over the school years, and the lack of 1:1 multisensory instruction (Parent Ex. A at pp. 2, 4-7, 11). With respect to each of the disputed IEPs, the parent also alleged that they did not include adequate annual goals or transition plans (id. at pp. 4, 6, 8, 10-11). Furthermore, the parent alleged that the district did not have an IEP in place as of the beginning of the 2011-12 school year (id. at pp. 9, 11).

With respect to implementation of the services included on the student's IEPs, the parent alleged that the student did not receive all or some of the recommended ICT services, SETSS, speech-language therapy, counseling, or testing accommodations (Parent Ex. A at pp. 3, 5-6, 8, 12-13). Furthermore, the parent asserted that the student did not make adequate progress during the relevant school years (id. at pp. 5-6, 8, 13). The parent also alleged that: the district failed to address the student's lack of progress in reading and writing; issued the student grades that did not reflect his actual performance; and improperly intended to graduate the student despite the fact that he was reading at the fourth or fifth grade level and exhibited mathematics skills at the third to fourth grade level (id. at pp. 2-4, 6, 9-10, 13-14). The parent also asserted that the student should remain eligible for special education and be provided with an opportunity to earn a regents diploma, despite the district's issuance of a local diploma (id. at p. 12).

Based on the foregoing allegations, among others, the parent argued that the district failed to offer the student a FAPE, committed gross violations of the IDEA, and violated the student's rights under section 504 of the Rehabilitation Act of 1973 (section 504) and 42 U.S.C. § 1983 (section 1983) (Parent Ex. A at pp. 14-15). The parent argued that the statute of limitations did not bar any of the claims alleged because the district failed to provide the parent with

documentation concerning prior written notice or notices of limitations periods and because the district misled the parent concerning the student's academic performance and available district resources (id. at p. 15).

As relief, the parent requested that the IHO order the district to provide the student with compensatory education and/or equitable additional services, including a bank of private 1:1 tutoring, a bank of 1:1 private speech-language therapy, transition services, and assistive technology supports and services, as well as the cost of the student's transportation to location of such services (Parent Ex. A at p. 16). In addition, the parent requested that the IHO order the district to fund "comprehensive independent evaluations" of the student (id. at pp. 16-17). The parent invoked a right to a pendency placement consisting of "general and special education services, including but not limited to the [five] hours per week of SETSS" (id. at p. 16).

B. IHO Decision

On March 26, 2012, an impartial hearing was convened in this matter and concluded on June 21, 2013, after 21 days of proceedings (Tr. pp. 1-3334). By decision dated October 7, 2013, the IHO found that the district failed to offer the student a FAPE for the 2010-11 and 2011-12 school years (id. at pp. 25-26).

Initially, the IHO concluded that the local diploma granted to the student did not constitute a "regular high school diploma" pursuant to 34 CFR 300.102[3][iv] and that, therefore, the student remained eligible to receive special education pursuant to the IDEA even after his receipt of the local diploma (IHO Decision at pp. 22-23). Next, the IHO determined that the statute of limitations barred the parent's claims related to the development of the December 2008 and December 2009 IEPs and implementation thereof during the challenged 2009-10 school year and that no exceptions to the statute of limitations applied because there was no evidence that the district made specific misrepresentations to the parent or that the district withheld information from the parent that it was required to provide (id. at p. 23-24). The IHO also noted that the parent "was well aware of her due process rights, having successfully commenced a prior due process hearing" (id. at p. 25).

Turning to the parent's request for the costs of private evaluations, the IHO denied reimbursement for two IEEs that were obtained after commencement of the impartial hearing (IHO Decision at pp. 26-30). The IHO found that the December 2010 and November 2011 CSEs had sufficient evaluative information regarding the student's current academic functioning and were not required to conduct further evaluations under all of the circumstances, including the lack of the parent's request therefor or her dispute with an existing district evaluation (id. at p. 27-30). The IHO also noted that the parent hired the two private evaluators subsequent to the relevant CSE meetings and that it would not be appropriate to grant relief based upon evaluations that the CSEs never had an opportunity to consider (id.). Next, the IHO denied the parent's request for an assistive technology evaluation, finding that the parent had never previously raised the issue of assistive technology at any CSE meeting and that no CSE member had ever indicated that the student required assistive technology and the hearing record indicated that he did not (id. at pp. 32-33).

The IHO found that the district failed to offer the student a FAPE for both the 2010-11 and 2011-12 school years (IHO Decision at pp. 25-26). With respect to the December 2010 IEP, the IHO found that the CSE eliminated SETSS from the student's IEP without basis and improperly

modified the recommended speech-language therapy services relative to the December 2009 IEP (id. at pp. 25-26). Turning to the 2011-12 school year, the IHO noted that the parent and the student agreed with the district that the student would attend the work study placement at Hebrew Home and receive SETSS in order to prepare for a remaining RCT exam and that, although a CSE did not develop an IEP that memorialized this agreement until November 2011, the district's failure to "reduce its proposed program to writing d[id] not, by itself, result in a denial of a FAPE where the parent [was] made aware of the substantive components of the school district's proposed program" (id. at p. 26).

The IHO also considered additional issues regarding the district's "[c]ompliance with procedural and substantive requires of the IDEA and regulations" (IHO Decision at p. 30-31). The IHO found that the district did not provide prior written notice to the parent in either the 2010-11 or 2011-12 school years relating to the December 2010 and November 2011 IEPs or the "change in placement" effected by the student's graduation (id.). However, the IHO found that any violations in this regard were de minimus under the circumstances and did not constitute of denial of a FAPE (id.). The IHO also determined that the November 2011 CSE meeting was not properly composed, in that, although other signatures appeared on the IEP, testimony revealed that the CSE meeting occurred over a telephone call and the only attendees were the parent and the SETSS teacher (id. at p. 31). However, the IHO concluded that this procedural violation also did not rise to the level of a denial of a FAPE (id.). The IHO also rejected the parent's claim that the district failed to conduct appropriate vocational assessments of the student or provide the student with sufficient transition services, noting that, at the parent's advice, the student had rejected certain transition services offered by the district (id. at pp. 31-32). Therefore, the IHO found that the parent could not request compensatory transition services (id. at p. 32).

The IHO also found that the district failed to implement all of the student's mandated special education services. Specifically, for the fall term of the 2010-11 school year, the IHO found that the district provided the student with ICT services in only two out of the three academic subjects mandated on the December 2009 IEP (IHO Decision at p. 25). With respect to the 2011-12 school year, the IHO concluded that, while the student received SETSS, he did not receive any other of his mandated special education services, including speech-language therapy (id. at p. 26).

Having found that the district failed to offer the student a FAPE for the 2010-11 and 2011-12 school years, the IHO found that the student was entitled to compensatory education to remedy the district's failure to implement the student's mandated SETSS during the 2010-11 school year, the December 2010 CSE's unjustified reduction in the student's speech-language therapy mandate, the district's failure to implement the student's mandated speech-language therapy during the 2011-12 school year, as well as the November 2011 CSE's unjustified removal of speech-language therapy from the student's IEP (IHO Decision at p. 34). The IHO characterized the district's denial of services to the student as "material," "blatant," and "gross" (id. at 34). The IHO further determined that the student suffered harm as a result of the district's failures, noting that when the student did receive 1:1 instruction, he was able to succeed on exams and make progress (id. at p. 35). Based on the foregoing, the IHO fashioned an award of compensatory services to be provided by the student's then-current SETSS and speech-language therapy providers as follows: (1) five 40-minute sessions of 1:1 SETSS per week for five months; (2) three 30-minute sessions of 1:1 speech-language therapy per week for six months; and (3) five 40-minutes sessions of tutoring by

a SETSS provider per week for eight months (*id.* at p. 35). In addition, the IHO ordered the district to provide the student transportation to and from such services in the form of a Metrocard (*id.*).

IV. Appeal for State-Level Review

The parent appeals the IHO's decision to the extent that the decision either was adverse to the parent or failed to address the parent's arguments.

More particularly, the parent asserts that the IHO erred in determining that the statute of limitations barred the parent's claims relative to the 2009-10 school year. In particular, the parent argues that the district failed to establish when the parent's claims for that school year accrued by establishing when the parent knew or should have known about the claims. Furthermore, the parent asserts that in no event could the parent's implementation claim be deemed untimely for the period of time from March 8, 2010 until the end of the 2009-10 school year and that the IHO erred in concluding that the implementation claims began to accrue on the date set forth on the December 2008 and December 2009 IEPs, respectively, as the initial dates for implementation. In any event, the parent argues that exceptions to the statute of limitations were applicable in light of misrepresentations regarding the student's deficits on the IEPs, the significant violations committed by the district, and the district's failure to prove that it provided the parent with a proper explanation of her due process rights. As to the merits of the parent's allegations regarding 2009-10 school year, the parent argues that the district failed to prove the procedural or substantive adequacy of the student's December 2008 and December 2009 IEPs and also failed to prove that they were implemented during the 2009-10 school year. Regarding the 2010-11 and 2011-12 school years, the parent asserts that the IHO failed to address certain violations common to both school years and, as a result did not order sufficient compensatory relief.

Relative to all three disputed school years, the parent argues that the IHO erred by failing: to find that the CSEs considered outdated, insufficient, and incomplete evaluations of the student; to order interim evaluations in light of the outdated district assessments for the student; and to consider the parent's evaluations, which were obtained during the impartial hearing process.

The parent asserts that the district failed to establish that the ICT, SETSS, and speech-language therapy recommended in the December 2009 IEP constituted specially designed instruction. As to the December 2010 CSE, the parent asserts that the district failed to prove the procedural or substantive adequacy of the student's IEP, emphasizing the different opinions expressed at the December 2010 CSE meeting by two district employees. In addition, the parent asserts that the December 2010 CSE considered insufficient evaluative information and failed to recommend transition services. Next, the parent argues that the IHO should have found that the district inappropriately failed to recommend or provide special education services to the student during the summer 2011.¹ With respect to the November 2011 CSE, the parent alleges that the IHO erred in finding that certain procedural violations were de minimus, including the district's failure to provide prior written notice and the improper composition of the CSE. The parent asserts

¹ To the extent that the parent argues that additional services should have been provided because the student should have been provided with a twelve month school, this claim was never raised in the parent's due process complaint notice, and therefore will not be considered. In addition, the student attended a non-credit test preparation class over summer 2011 (Tr. pp. 336, 338, 341) and this does not establish a concession by the district that the student needs special education services for 12 months a year as the parent seems to argue.

that the IHO erred by failing to find that the district's determination to move the student to Hebrew Home, without further evaluation, a CSE meeting, or a prior written notice constituted a denial of a FAPE. Furthermore, the parent alleges that the Hebrew Home was not an appropriate placement for the student and that the district misled the parent and the student "by informing them that transferring to H[ebrew] H[ome] was the only way for [the student] to earn his diploma. With respect to the SETSS received at Hebrew Home, which consisted of preparing the student for the RCT in science, the parent alleges that the IHO should have determined that such preparation did not constitute specially designed instruction.

Turning to her implementation claims, with respect to the 2009-10 school year, the parent asserts that the district failed to establish that it appropriately delivered the student's ICT services, SETSS, or speech-language therapy mandates. As to the 2010-11, the parent asserts that the IHO erred in finding that the student received ICT services in two academic classes, when, in fact, the student received ICT services in only one class during the spring term. In addition, she asserts that the district did not properly or fully implement the student's speech-language services or SETSS. Turning to the 2011-12 school year, that parent asserts that the IHO should have found that, because the December 2010 IEP remained the operative IEP as of the beginning of the school year, the district failed to implement the program and services mandated thereon.

The parent also argues that the IHO awarded insufficient relief, improperly required the parent to bear the burden of proof regarding the compensatory services, and based the award of compensatory education upon the district's failure to provide the level of services delineated in the IEPs, which were inadequate in the first instance. In addition, the parent asserts that the IHO should have awarded compensatory transition services, as well as compensatory assistive technology services. Next, the parent asserts that the IHO improperly limited the compensatory education award by indicating that they should be delivered to the student by the same providers utilized during the duration of pendency. The parent also requests that compensatory education be ordered as a bank of services and that SETSS, speech language therapy, and tutoring be ordered in excess of amount identified by the IHO.

The parent also appeals the IHO's failure to award additional SETSS during the pendency of this proceeding, the failure of the IHO to find that the student should have been provided a twelve-month school year, the failure of the IHO to extend the student's eligibility for special education services, and the IHO's denial of jurisdiction over Section 504 claims.

The district answers and cross-appeals, denying the parent's allegations and submitting defenses. In addition, the district cross-appeals, arguing: that any pendency award should have been limited to the conclusion of the school year in which the student turned twenty-one, contrary to the IHO's determination. In addition, the district asserts that the IHO improperly made a determination that the local diploma received by the student did not end his eligibility for special education services. Next, the district cites the student's passing grades and receipt of a diploma as evidence that the student receive educational benefit and therefore did not qualify for compensatory education as a result of gross violation of the IDEA and the IHO erred in finding that a FAPE.

The parent answers the district's cross-appeal and argues that the IHO properly determined that the student remained eligible for special education services under IDEA beyond the date of

his graduation with a local diploma; that the local diploma did not provide evidence of FAPE in this case; that the student did not receive a FAPE in the 2010-11 and 2011-12 school years; that the student met the standard required to obtain compensatory education; and that the district is prohibited from appealing the IHO's pendency determinations because it is not aggrieved and it also waived any right to appeal pendency by its representations. The parent requests that the district's cross-appeal be dismissed.

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).

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. Preliminary Matters

1. Scope of Review

Initially, with respect to the IHO's findings and conclusions relative to the district's failure to offer the student a FAPE during the 2010-11 and 2011-12 school years, the district cross-appeals the IHO's ultimate conclusion that the district's failures rose to the level of a gross violation of the IDEA. The district asserts that the student's advancement from grade to grade and his ultimate receipt of a local diploma belie any such conclusion. The district's cross-appeal challenging the IHO's ultimate determination and award, standing alone without any legal or factual arguments or further explanation as to why the IHO erred, is insufficient to raise the more nuanced aspects of the IHO's findings which were adverse to the district. A party appealing must "clearly indicate the reasons for challenging the [IHO's] decision, identifying the findings, conclusions and orders to which exceptions are taken" (see 8 NYCRR 279.4). It is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. Am. Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D.Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D.Ala. Aug. 23, 2007]).

Thus, while the entire hearing record has been carefully reviewed to consider those claims that the district has specifically identified in the answer and cross-appeal (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]), I will not sift through the pleadings, the hearing record, and the IHO's decision for the purpose of asserting claims on the district's behalf and I find the answer and cross-appeal insufficient with respect to those issues that the district has not taken the care to identify in the answer and cross-appeal (8 NYCRR 279.4[b]; see Application of a Student with a Disability, Appeal No. 12-032). Based on the foregoing, those aspects of the IHO's decision adverse to the district and not specifically identified in the district's cross-appeal are final and binding and will not be addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

2. Section 504, 1983, and Other Systemic Claims

The parent appeals the IHO's failure to hear her claims pursuant to section 504 and section 1983, as well as her "systemic claims."² An impartial hearing may be held on issues "relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child" (34 CFR 300.507[a][1]; see 20 U.S.C. § 1415[b][6]). While claims that are systemic in nature are not unable to be addressed in the due process forum, the particular questions

² The parent acknowledges in a footnote in her Petition that an SRO may not assume jurisdiction over a section 504 claim but requests that the SRO "take notice of the fact that the law . . . requires a reevaluation before any 'significant change in placement'" (Pet. ¶ 41 n. 4).

regarding how to address an individual student's needs are within the scope of an IHO's jurisdiction (Levine v. Greece Cent. School Dist., 2009 WL 261470, *9 [W.D.N.Y. 2009]). Compensatory damages are not available in the administrative forum under the IDEA (see Taylor v. Vt. Dep't. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Board of Educ. of Newburgh Enlarged City School Dist., 288 F.3d 478, 483, [2nd Cir. 2002]; see R.B.. v. Board of Educ., 99 F.Supp.2d 411, 418 [S.D.N.Y. 2000]). Furthermore, claims alleging general violations of State or Federal laws or regulations by a district are properly subject to the State complaint procedures set forth in regulation (8 NYCRR 200.5[l]; see 34 CFR 300.151-300.153), rather than the due process impartial hearing system (see Application of a Student with a Disability, Appeal No. 10-031; Application of a Student with a Disability, Appeal No. 09-044). Thus, given the limited scope of an impartial hearing under the IDEA, the parents' claims will be reviewed to the extent that they assert violations of the IDEA and State regulations.

Regarding the section 504 claims, New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and an SRO does not review section 504 claims (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012]; see also Educ. Law § 4404[2] [providing that SROs review determinations of IHOs "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, I have no jurisdiction to review any portion of the parent's claims regarding section 504.

B. Continuing Eligibility for Special Education Programs and Related Services

The district argues both that the IHO erred by failing to limit the student's entitlement to pendency to the conclusion of the school year in which he turned 21 years old and that the IHO improperly determined that the student's local diploma did not end the district's overall obligation to provide him with special education.

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]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), 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]; Application of a Child with a Disability, Appeal No. 04-100).³

1. Pendency

First addressing the district's argument with respect to the student's continuing eligible for special education through pendency, the IDEA and New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the

³ If a student with a disability reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student shall be entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever shall first occur (Educ. Law § 4402[5][a]).

identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050).

In this case, the student turned 21 years old during the 2012-13 school year (Parent Ex. B at p. 1). The IHO issued an interim order, dated April 5, 2012, which constituted the student's pendency until a hearing could be convened on the issue, and required the district to provide the student with five hours per week of SETSS (Apr. 5, 2012 Interim IHO Decision at p. 2). The IHO issued a second interim order, dated April 25, 2012, which noted that the district did not object to the continuing provision of SETSS five hours per week and the parties agreed to district's additional provision of certain related services based upon a prior 2008 IEP, consisting of three 45 minute sessions per week speech-language therapy in a group of 3:1, and one 30-minute session per week of counseling in a group not to exceed 8:1 (Apr. 25, 2012 Interim IHO Decision at p. 2; see Tr. pp. 68-69). The IHO issued a third interim order, dated December 4, 2012, which required the district to pay the student's speech-language therapist for 43 sessions of speech-language therapy, which were not timely provided in compliance with the prior interim order (Dec. 4, 2012 Interim IHO Decision at p. 5).

Notwithstanding that the student turned 21 years old during the 2012-13 school year, the parent correctly asserts that the district failed to object to the IHO's orders on pendency until its cross-appeal and, in fact, agreed to provide the student with pendency services. Furthermore, as set forth below, given the compensatory education relief awarded as a result of the current proceedings, which are available beyond the regular termination of the student's eligibility for special education, the pendency relief is consistent with and serves the intended purpose of pendency—to wit, to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]).

2. Local Diploma

It is undisputed that, in February 2012, the student received a local diploma (Dist. Ex. 5 at p. 1). However, the parties dispute whether receipt of the local diploma ended the student's entitlement to a FAPE because it was obtained through an option offered only to special education students, called the "safety net option." The IHO found and the parent argues that the safety net option should not be considered a regular high school diploma because it was based upon the different standards and was only offered to students with IEPs.

The IHO correctly noted that a "regular high school diploma" does not include alternative degrees that are not fully aligned with the State's academic standards (34 CFR 300.102[a][3][iv]). However, the local diploma does not constitute such an alternative degree (34 CFR §300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]). New York State regulations state, in relevant part, that "[e]arning a Regents or local high school diploma shall be deemed to be equivalent to receipt

of a high school diploma pursuant to Education Law, section 3202 . . . and shall terminate a student's entitlement to a free public education pursuant to such statute" (8 NYCRR 100.5[b][7][iii]; see 34 CFR 300.102[a][3][i]). Therefore, I find that the student's local diploma was the equivalent of a "regular high school diploma" and had the effect of ending the student's statutory eligibility for special education services. However, as set forth below, it may still be possible that the student is nevertheless entitled to compensatory educational services subsequent to graduation (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]).⁴

C. Statute of Limitations

The parent asserts that the IHO erred in determining that the statute of limitations barred her claims relating to the 2009-10 school year because the parent did not understand the scope of the student's delays based upon the information provided by the district and did not know that a portion of the student's mandated services were not implemented during that school year. The district argues the claims are barred and that the district did not engage in any misrepresentation or withhold information that would subject the claims to an exception to the statute of limitations.

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[b][6][B], [f][3][C]; see also Educ. Law §4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza, 538 F.3d at 114 n.8 [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir.2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 (S.D.N.Y. Mar. 29, 2013); R.B. v. Dept. of Educ., 2011 W.L. 4375694, at * 2, *4 [Sept. 16, 2011 S.D.N.Y.]). An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B., 2011 W.L. 4375694, at * 6).

The present proceeding was commenced by due process complaint notice dated March 8, 2012, which asserted substantive and procedural claims applicable to the student's December 2008 and December 2009 IEPs, as well as implementation claims relating to the 2009-10 school year (see generally Parent Ex. A). Initially, as noted by the parent, the statute of limitations did not act to bar her claims relating to implementation of the December 2009 IEP after March 8, 2010 and the IHO should have considered such allegations. With respect to accrual of the parent's claim that the district failed to implement the special education services set forth on the student's December 2008 and December 2009 IEPs during the 2009-10 school year, before March 8, 2010, the parent asserts that she did not know that the district failed to provide the student with all of the services mandated on his IEP until later . The district offered no evidence to establish that the

⁴ However, that the parent's request for additional compensatory education services for alleged violations that took place during the 2011-12 school year after the student's receipt of the local diploma are hereby foreclosed.

parent either knew or should have known of these facts. Furthermore, contrary to the IHO's determination, the parent's presence at the CSE meeting alone would not inform the parent as to whether or not the services recommended on an IEP were actually being delivered to the student thereafter. Based upon the foregoing, the statute of limitations does not act to bar the parent's claims relating to failed implementation of the student's IEPs during the 2009-10 school year.

With respect to the parent's remaining claims relating to the development and content of the December 2008 and December 2009 IEPs (see Parent Ex. A), the hearing record shows that the parent attended the CSE meetings and, therefore, knew or should have known about her claims at the time of such meeting (see Parent Exs. B at p. 2; C at p. 2). Therefore, unless an exception applies, they are time-barred. In order for the specific misrepresentation exception to apply, the district must have intentionally misled or knowingly deceived the parent regarding the relevant fact (see D.K. v. Abington Sch. Dist., 696 F.3d 233, 245-46 [3d Cir. 2012]; Sch. Dist. of Philadelphia v. Deborah A., 2009 WL 778321, at *4 [E.D. Pa. Mar.24, 2009], aff'd 2011 WL 1289145 [3d Cir. Apr. 6, 2011]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *6 [E.D. Pa. Nov. 4, 2008]; see also Application of a Student with a Disability, Appeal No. 11-121). The parent asserts that the district misrepresented the student's reading levels. The hearing record shows that, although the parent may not have understood the information regarding the student's reading levels, the CSE included such information on the student's IEP. This does not rise to the level of a knowing deception of the parent.

Case law interpreting the "withholding of information" exception to the statute of limitations has found that the exception applies only to the requirement that parents be provided with certain procedural safeguards required under the IDEA (see D.K., 696 F.3d at 246; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F.Supp.2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943, 945 [W.D. Tex. 2008]; Evan H., 2008 WL 4791634, at *7; R.B., 2011 W.L. 4375694, at *6). Such safeguards include the prior written notice and the procedural safeguards notice, the latter which, among other things, contains information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3], [d]; 34 CFR 300.503, 300.504; 8 NYCRR 200.5[a], [f]). Furthermore, if a parent is aware of his or her rights in developing a student's educational program, it has been held that the failure to provide the procedural safeguards does not under all circumstances prevent the parent from requesting an impartial hearing (see R.B., 2011 WL 4375694, at *7; El Paso Indep. Sch. Dist., 567 F. Supp. 2d at 945; see also Application of a Child with a Disability, Appeal No. 07-116). Upon review of the evidence in the hearing record, this exception also does not apply to the facts and circumstances of this case. In particular, the parent does not even allege that the district prevented her from requesting an impartial hearing by not providing her with procedural safeguards information. Nor does the parent assert that she was not aware that she had a right to an impartial hearing. Accordingly, the exception to the statute of limitations defense does not apply.

D. Evaluative Information and IEE Reimbursement

Before addressing the parent's other claims, I find it beneficial to address the issues relating to evaluative information about the student first because an understanding of the student's needs at the time of the relevant CSE meetings will facilitate further discussion of the student's December 2010 and November 2011 IEPs. First, the parent appeals the IHO's finding that the CSEs had before them substantial evaluative information about the student (see IHO Decision at p. 27). The

parent also appeals the IHO's denial of her request for reimbursement of the cost of a psychoeducational evaluation and an auditory and language processing evaluation procured during the course of the impartial hearing as well as her request that the district provide an assistive technology evaluation.

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][2]; 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 otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). 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]). Any 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][ii]; 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]). An 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]).

If the district refuses to conduct evaluations of a student in response to a parental request, the district must provide the parent with prior written notice—consistent with State and federal regulations—including a description of the determination it made and the reasons for its determination (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]). In addition to the parent's ability to request a reevaluation by the district, "[i]f the parent disagrees with an evaluation obtained by the school district, the parent has a right to obtain an [IEE] at public expense" (8 NYCRR 200.5[g][1]; see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502[b]; see also K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE [at public expense] is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated the parent's claim for an IEE at public expense]). IEEs are defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Once the parent has requested an IEE at public expense, the district must, "without unnecessary delay," either provide an IEE at public expense or file a due process complaint notice to defend its evaluation as appropriate at an impartial hearing (34 CFR 300.502[b][2]; 8 NYCRR 200.5[g][1]; see C.W. v. Capistrano Unified Sch. Dist., 2012 WL 3217696, at *6 [C.D. Cal. Aug. 3, 2012] [finding that a request for an impartial hearing made 41 days after the parental request for an IEE did not constitute an unnecessary delay]; see also Letter

to Anonymous, 56 IDELR 175 [OSEP 2010] [stating that the phrase "without unnecessary delay" permits school districts "a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an IEE"]. If the school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

Furthermore, as part of a hearing, IHOs are vested with the authority to direct that a student be evaluated at district expense (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2], [j][3][viii]). One Court, after quoting the regulation itself, noted that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process," without further elucidation (Lyons v. Lower Merion Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010]), while another Court has noted with approval an SRO's remand of a proceeding to the CSE in conjunction with direction to reevaluate a student to determine the student's educational needs, based both on the absence of sufficient evaluative data in the record and the length of time since the student had last been evaluated (B.J.S. v. State Educ. Dep't, 815 F. Supp. 2d 601, 615 [W.D.N.Y. 2011]).

The December 2010 and/or November 2011 CSEs had before them a June 2005 speech-language evaluation, a December 2008 psychoeducational evaluation, as well as less formal testing results reported by the student's teachers.

A speech-language evaluation report was prepared by the district in June 2005 (see generally Dist. Ex. 11). The student was 13 years old and attending a district public school at the time (id. at p. 1). The Clinical Evaluation of Language Fundamentals- Fourth Edition (CELF-4) was administered and the student's core language score revealed severe delays (id. at p. 2). The report concluded that the student "demonstrated severe delays in his expressive and receptive language skills which [could] be addressed in a therapeutic setting" (id. at p. 3). The evaluator recommended that the student receive speech-language therapy three times per week in 30-minute sessions in a group of five, with a final recommendation to be determined after all testing was compiled at the student's review (id. at p. 4).

In December 2008, the student underwent triennial psychoeducational evaluation (see generally Dist. Ex. 14). The evaluator administered subtests of the Wechsler Individual Achievement Test, Second Edition (WIAT-II) in reading, math, and listening comprehension (id. at p. 3). The evaluation reported that the student's reading comprehension to be at the 4.1 grade equivalent level. The evaluator noted that the student's class grades suggested that he performed at a higher level than indicated by the testing (id.). The evaluation reported that the student's math skills were higher, at the 7.5 grade level, and that his listening comprehension skills were at the 3.2 grade level (id. at pp. 3-4). His basic writing skills were found to be limited and he was only able to write one grammatically correct sentence in the 15 minutes he was given to write an opinion letter (id. at p. 4).

In December 2010, the student's SETSS teacher administered a reading comprehension subtest to the student (Tr. pp. 1373-75). The student's reading comprehension level was reported to be at the 4.3 grade level based on this testing (Tr. p. 1409).

In November 2011, the student's SETSS teacher at Hebrew Home informally administered testing to the student in an effort to assist in preparing the student for the Science RCT test (Dist. Ex. 1 at p. 1; Tr. pp. 434-40). Although the results of the testing were noted on the November 2011 IEP, the test results or materials were not maintained (id.). The test results reportedly reflected that the student's reading comprehension and word recognition skills were at the fifth grade level (Dist. Ex. 1 at p. 1).

The hearing record supports a finding that the district failed to appropriately reevaluate the student based primarily on concerns expressed during the December 2010 CSE meeting that the student's reading skills were not progressing and had not progressed in any meaningful way for many years. As set forth in further detail below, at the December 2010 CSE meeting, the student's SETSS teacher advocated that he needed further evaluation (see Tr. p. 1460). This voiced concern of one of the student's teachers, in addition to the student's apparent lack of progress in reading over the years, supports the conclusion that a further evaluation of the student was needed at that point in time, if not sooner. Furthermore, the parent provided the December 2010 CSE with the results of a private tutoring evaluation, which set forth the student's reading levels, and expressed her concern about the student's low level of reading ability (see Tr. pp. 2763-64, 2770).

Under these circumstances, while I find that the IHO had the authority to order an evaluation of the student during the course of the impartial hearing in response to the parent's request therefor (Tr. pp. 1100-09), the IHO deferred decision on this issue, effectively denying the request. In light of the district's failure to do an evaluation to understand the nature of the student's language-based disability in December 2010 and as further described below the neuropsychologist opinion was useful in formulating a compensatory education award, I find that the parent is entitled to be reimbursed for the June 2012 neuropsychological evaluation that was performed during the course of the impartial hearing process (see generally Parent Ex. JJ).

While the parent also obtained an auditory and language processing evaluation in August 2012, the hearing record shows that the neuropsychological evaluation provided insight into the facets and nature of the student's language-based disability and, therefore, the additional evaluative information was not required (see generally Parent Ex. PP).

With respect to the requested assistive technology IEE, there is no evidence in the hearing record that the student required assistive technology in order to meaningfully benefit from educational instruction. The assistant principal testified that assistive technology need not be considered at every CSE meeting for a student and the hearing record shows that no member of any of the CSE meetings ever requested that the student undergo an assistive technology evaluation or otherwise indicated that the student may require assistive technology (Tr. pp. 807-08, 864-65).⁵

Based on the foregoing, I find that it is appropriate to order reimbursement for the cost of the neuropsychological evaluation. However, the IHO correctly declined to reimburse the parent

⁵ To the extent that the parent also requests assistive technology in the form of compensatory education, such request is also denied.

for the costs of the auditory and language processing evaluation or to order the district to conduct any other evaluations of the student, including an assistive technology evaluation.

E. December 2010 CSE Meeting and IEP

The IHO made several findings relative to the December 2010 CSE and the resulting IEP, which, as noted above, the district has not cross-appealed. The IHO found that: the district did not rebut allegations that the CSE was not properly constituted; the CSE did not provide the parent with evaluations before the meeting; the district failed to present evidence that the IEP included measurable annual goals; the CSE eliminated SETSS from the student's IEP without discussion; the CSE modified the student's speech-language therapy mandate without discussion or explanation; the CSE failed to discuss transition services; and the district failed to provide the parent prior written notice relating to the December 2010 IEP (IHO Decision at pp. 14-15, 21-22, 25-26, 30). To the extent these findings contributed to the IHO's conclusion that the district failed to offer the student a FAPE is not entirely clear. Those findings set forth in that portion of the IHO's decision identified as "Conclusions of Law" (elimination of SETSS and modification of speech-language therapy), as opposed to those set forth under the heading "Findings of Fact" are more clearly identified as contributing to the conclusion (see IHO Decision at pp. 25-26). In any event, as set forth below, certain failures on the part of the district may warrant additional relief and I will limit my discussion to those issues.

Relative to the December 2009 IEP, the December 2010 CSE reduced the student's ICT services from three academic subject to two, terminated the student's SETSS, and increased the group size in which the received speech language therapy from 3:1 to 8:1 (Parent Ex. I at pp. 10, 12). In addition, despite discussion and request therefor, the December 2010 CSE failed to pursue additional evaluative information about the student, as described above, and declined to recommend tutoring services for the student.

The student received tutoring services at Huntington Learning Center (HLC) between December 2010 and January 2011 as a result of an unrelated prior class action settlement (Tr. pp. 2198-99, 2757-58). The parent testified that she attended the December 2010 CSE meeting and raised her concerns about the student's evaluation results from HLC but that the CSE did not address the parent's request for additional tutoring for the student (Tr. pp. 2763-64, 2770). The parent testified that, when the HLC results were raised, the assistant principal left the room and returned with additional teachers and staff from the district (Tr. pp. 2763-64). At that point, the parent testified that the assistant principal and the student's SETSS teacher argued (Tr. pp. 2784-65, 2893). The parent testified that neither the HLC results nor the content of the student's IEP were reviewed at the CSE meeting (Tr. pp. 2893, 2913-14).

During the December 2010 CSE meeting, the student's SETSS teacher resigned her position as district representative, upon the assistant principal's refusal of her request that the student undergo further evaluations, and the assistant principal took over the role of district representative (Tr. pp. 1365-66, 1371-72, 1384). The SETSS teacher testified that the assistant principal refused the teacher's request for additional evaluations because the student was a senior (Tr. pp. 1363-64, 1367). The SETSS teacher testified that she was concerned about the student's failure to progress with his reading level over the years and felt he may have needed a special class setting (Tr. pp. 1360-61). She considered the parent's concerns and also that, although the student

had been receiving extra tutoring, he was still struggling (Tr. pp. 1361, 1368-69). She testified that she believed the student would do better with more support (Tr. pp. 1406-07). She felt that he needed a special class for English and that further assessment by a psychologist was needed to determine if he needed a special class in other academic subjects (Tr. p. 1460).

The assistant principal testified that she had never referred any student for a neuropsychological evaluation and that neuropsychological testing is not performed at the public high school that the student attended (Tr. pp. 670-71). She testified that most of the students at the high school showed little progress within a three year span because of their older age and, as a result, less testing was pursued (Tr. pp. 870-71). She also testified that private tutoring could not be obtained unless a parent commenced an impartial hearing and that the parent never requested tutoring (Tr. pp. 779-80). The assistant principal testified that the student did not appear to her to suffer from a severe disability and that he had received SETSS and ICT services his entire high school career and that a special class, as endorsed by the SETSS teacher, would not be appropriate because it could result in negative social/emotional consequences for the student (Tr. pp. 776-78).

The district's witnesses provided conflicting testimony as to why the CSE terminated the student's SETSS. The assistant principal testified the student needed few credits to graduate and the CSE terminated SETSS because such services were not credit bearing (Tr. pp. 683, 780). The SETSS teacher testified that there was no discussion regarding SETSS and that she wrote that SETSS would be terminated as a result of her intention to request the reevaluation referenced above (Tr. pp. 1363, 1366).

With regard to the speech-language therapy recommendation, the assistant principal testified that she believed that the student's speech and language impairment was mild to moderate because he was able to complete his classwork (Tr. p. 778). The assistant principal also testified that, although the speech-language therapist did not attend the December 2010 CSE meeting, she submitted information (Tr. p. 706).

As noted by the IHO and as elaborated upon herein, the district engaged in multiple procedural and substantive violations of IDEA relating to the December 2010 IEP. The combination of the violations identified by the IHO and set forth above supports a finding that the district failed to offer to the student a FAPE.

F. November 2011 CSE Meeting and IEP

The parent asserts that the IHO erred in finding that the untimely November 2011 CSE meeting, after the change in the student's placement occurred, did not rise to the level of a denial of a FAPE (see IHO Decision at p. 26). Furthermore, the parent appeals the IHO's conclusion that procedural deficiencies relative to the November 2011 CSE meeting also did not result in a finding that the district failed to offer the student a FAPE. Specifically, the parent cites the IHO's findings that the November 2011 was not duly constituted, the IEP was drafted before the meeting, the CSE did not discuss transition services, the annual goals were not sufficient or measurable, and the district failed to provide prior written notice relative to the November 2011 IEP (see IHO Decision at pp. 18, 21, 31).

The hearing record shows that in September 2011, the parent and student met with the assistant principal and discussed the possibility of the student attending the Hebrew Home (Tr. pp.

266-69). According to the assistant principal, the parent left the meeting with the intent to visit the Hebrew Home and did not make a final decision at that time (Tr. p. 269). The hearing record shows that the parent and the student subsequently visited the Hebrew Home and agreed that the student would attend (Tr. pp. 269-70). The SETSS teacher from Hebrew Home testified that he met with the mother and student and described the work study program, including that the academic portion would consist of science remediation, as he understood that the student only needed to pass the Science Regents or RCT to graduate (Tr. pp. 374-80).

At the time the student began attending at Hebrew Home in September 2011, there was still an IEP in effect from December 2010. A revised IEP was not prepared until November 2011, which memorialized the student's program at Hebrew Home (Tr. pp. 659-60; see generally Dist. Ex. 1). The assistant principal testified that this change was appropriate without a CSE meeting because the student did not still require high school credits (Tr. pp. 659-61). The Hebrew Home SETSS teacher initially testified that the November 2011 IEP was prepared with the two staff from the district, the student in person, and the mother by telephone (Dist. Ex. 1; Tr. p. 383). The SETSS teacher later changed his prior testimony, stating that the student was not present for the meeting, but that the IEP was discussed with the student at other times (Tr. pp. 628-29). The parent testified that the Hebrew Home SETSS teacher called her to discuss the IEP, and to her knowledge, no one else was on the call (Tr. pp. 2862-63).

The unilateral change in student's IEP services in September 2011 without a meeting because of the assistant principal's reasoning that the student no longer required credits was not sufficient and the district did not help its case by thereafter failing to conduct the CSE meeting in an appropriate or timely fashion. In particular, the untimeliness of the CSE meeting ultimately results in a finding, discussed below, that the previous December 2010 IEP remained in effect at the beginning of the 2011-12 school year and the district failed to implement certain aspects thereof. Therefore, while the violations relating to the November 2011 IEP may not provide any further basis for increasing the compensatory relief, the parent properly asserts that the IHO erred in finding that they did not result in a denial of a FAPE.

G. Implementation Claims

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (T.L. v. New York City Dep't of Educ., 2012 WL 1107652, *14 [E.D.N.Y. Mar. 30, 2012]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 821-22 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). In order to show a denial of a FAPE based on a failure to implement an IEP, a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist., 200 F.3d at 349; see also Fisher v. Stafford Township Bd. of

Educ., 289 Fed. App'x 520, 524-25, 2008 WL 3523992 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822 [holding that "[a] material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled [student] and the services required by the [student's] IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]) [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

1. 2009-10 School Year

Having found that the statute of limitations did not bar the parent's implementations claims relating to the 2009-10 school year, I now turn to the merits of the parent's allegations. The parent argues that the district failed to provide the student with required ICT services, SETSS, or speech-language therapy during the 2009-10 school year.

During the 2009-10 school year, the December 2008 IEP constituted the operative IEP until January 4, 2010, the date upon which implementation of the December 2009 IEP commenced (see Parent Exs. C at p. 2; D at p. 2). Both the December 2008 and December 2009 IEPs mandated that the student receive ICT services for three academic subjects and SETSS (Parent Exs. C at p. 9; D at p. 9). In addition, the IEPs recommended speech-language therapy as follows: the December 2008 IEP recommended three 45-minute sessions per week in a group (3:1) and the December 2009 IEP recommended two 30-minute sessions per week in a group (3:1) (Parent Exs. C at p. 10; D at p. 11).

However, the evidence in the hearing record shows that, during the 2009-10 school year, the student only received ICT in two academic classes (Tr. pp. 696-97; Dist. Ex. 7 at p. 1). The assistant principal from the student's high school explained that the classes in which the student received ICT services were delineated as such on the student's transcript by a class code that ended with the letter "T" (Tr. pp. 696-97; see Dist. Ex. 7). The hearing record further indicates that the spring and fall terms of the 2009-10 school year were identified on the document as "2009/1" (fall 2009) and "2009/2" (spring 2010) (Tr. p. 933). Based on this information, as well as the testimony at the impartial hearing, the evidence reveals that the student received ICT services in his mathematics and English classes for the 2009-10 school year (Dist. Ex. 7 at p. 1; see also Tr. p. 1022-23, 1557-59). The hearing record also shows that the district provided the student SETSS during the 2009-10 school year (see Tr. pp. 947-50, 967-70).

Based upon the foregoing, the hearing record shows that the district failed to fully implement the ICT services mandated on the student's December 2008 and December 2009 IEPs during the 2009-10 school year.

2. 2010-11 School Year

The parent asserts that the IHO incorrectly found that the student received ICT services in two academic subjects when, in fact, the student only received such services in one academic subject during the spring term of the 2010-11 school year. The parent also asserts that the IHO should have found that the district provided inadequate SETSS in that the services provided were more akin to a study hall. In addition, the parent argues that the IHO should have found that the district failed to implement appropriate speech-language therapy services.

During the 2010-11 school year, the December 2009 IEP constituted the operative IEP until December 22, 2010, the date upon which implementation of the December 2010 IEP commenced (see Parent Exs. D at p. 2; I at p. 2). According to the two IEPs, the student was mandated to receive ICT services in three academic subjects and SETSS in English until January 2011, at which time, the December 2010 IEP indicated that the student would receive ICT services in English and global studies (Parent Exs. D at p. 9; I at pp. 2, 10). In addition, the IEPs recommended two 30-minute sessions of speech-language therapy per week, except that the December 2010 IEP increased the group size from 3:1 to 8:1 (Parent Exs. D at p. 11; I at p. 12).

The hearing record supports the IHO's conclusion that the student received ICT services in only two academic subjects during both the fall and spring terms, which was inconsistent with the student's IEP mandate before the December 2010 CSE (IHO Decision, pp. 24-25; Dist. Ex. 7; Tr. pp. 1317-18, 1661).

As for speech-language therapy, the parent asserts in her cross-appeal that the district failed to implement the mandate during the fall term of the 2010-11 school year because the service was delivered in a group of eight rather than three as mandated by the December 2009 IEP. While the hearing record supports the parent's assertion that there was nonconformance, I do not find that this constitutes a material deviation from the student's IEP mandate (see Tr. p. 1529; Parent Ex. HH at p. 5; see also T.L., 2012 WL 1107652, *14).

3. 2011-12 School Year

The IHO found that the student was denied a FAPE during the 2011-12 school year, while he was at Hebrew Home. The IHO found that, although the student received SETSS at Hebrew Home, he did not receive any other special education services, including speech language therapy. The IHO noted that the assistant principal at the student's school acknowledged at the hearing that the student was entitled to speech language services during that time (see IHO Decision at p. 26).

The November 2011 IEP provided for the student to receive SETSS for preparation of the Science RCT, but no other special education or related services (see Dist. Ex. 1). The SETSS teacher indicated that the student in fact received more than the mandated 40 minutes of SETSS per day during the fall of 2011 (Tr. pp. 388-89). The SETSS teacher testified that approximately 10 students were in the Hebrew Home program during fall 2011, that all the students had IEPs, that small group instruction was used, and that the students did not work more than two hours per day at the worksite (Tr. pp. 399, 411, 414, 427-28). The SETSS teacher did not inquire if the district had testing results for the student and conducted his own reading comprehension and word recognition testing on the student, which showed that the student was functioning at the fifth grade level (Tr. pp. 434-37).

The assistant principal testified that the student was entitled to speech-language therapy based upon the December 2010 IEP, which was in effect when he commenced at Hebrew Home (Tr. pp. 720-21). It is undisputed that the student did not receive speech-language therapy while at Hebrew Home. Therefore, the hearing record supports the IHO's determination that the student was denied a FAPE by virtue of the lack of any speech language therapy from the beginning of the 2011-12 school year until the November 2011 CSE.

In summary, the hearing record reveals that the district substantially and materially failed to implement all of the student's mandated special education services during the 2009-10, 2010-11, and 2011-12 school years and that, under the circumstances, when coupled with the district's additional procedural and substantive violations during the development of the student's December 2010 and November 2011 IEPs, such failures constituted a gross violation of IDEA. In September 2011, changes were made without convening a CSE meeting, which leads me to the conclusion that while perhaps not in isolation, in this case when viewed cumulatively with the failure to provide the student with IEP services, there was a gross procedural violation of the IDEA (French v. New York State Dept. of Educ., 476 Fed.Appx. 468, 471-72 [2d Cir. Nov. 3, 2011]).

H. Compensatory Education

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 [N.D.N.Y. 1997]; see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). As noted above, 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, 538 F.3d at 109 n.2, 113 n.6; 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).

The hearing record supports the IHO's determination that this case presents the rare situation where a student has graduated with a local diploma and lacks statutory eligibility but has nevertheless met the threshold for compensatory education because the special education services to which he had been entitled were denied to him for a substantial period of time without justification (IHO Decision at p. 34). Under the circumstances of this case, the district's argument that the student passed classes and obtained a local diploma is not dispositive. For both the 2009-10 and 2010-11 school years, the district failed to provide the student with ICT services in one academic class. Furthermore, the December 2010 CSE terminated SETSS and modified the student's speech-language therapy mandate without basis. For the 2011-12 school year, the student received no speech-language therapy or other special education services other than SETSS related to preparing the student for the Science RCT.

In addition, but for the district's other procedural and substantive violations of the IDEA, the CSEs may have recommended additional or different services for the student. The student's services were reduced over the years, including in his area of disability. There was a notable absence of evidence of any reasonable bases for such changes.

Although the student received a local diploma, it is also undisputed that his reading level was at approximately the fourth or fifth grade level upon graduation (Parent Ex. I; Dist. Ex. 1). The diploma the student received was also based upon the safety net for students with IEPs. There appears to be some dispute between district teachers and the parent's witnesses as to whether it was possible for the student to meet the requirements necessary to graduate with a local diploma with a fourth grade reading level. The assistant principal testified that, although she had no personal knowledge of whether the student met the standards for ninth through twelfth grades, she believed that a student could meet such standards while reading at a fourth or fifth grade level (Tr. pp. 737, 761). One of the student's English teachers also testified that a student could read on the fourth or fifth grade level and pass her high school level class (Tr. p. 1590). The parent's expert in neuropsychology testified that it did not appear to him that the district recognized the student's major difficulties, for example, with verbal reasoning and comprehension skills (Tr. pp. 2010-13). The expert testified that the student was not receiving services from the district that were appropriate to address his needs (Tr. p. 2012). He also testified that, in his opinion, a student with third and fourth grade verbal comprehension skills could not master high school material (Tr. p. 2013).

In any event, it is not necessary to resolve that particular issue because, as noted by the IHO, the evidence supports a finding that the student had the ability to advance his reading level with appropriate instruction (IHO Decision at p. 35). Based upon the student's ability to improve his reading level with appropriate instruction, as evidenced during the pendency of the impartial hearing process (Tr. pp. 2664-66, 2749-50), it appears that the student's reading level, rather than remaining at the fourth grade level for what appears to have been years, could have been much improved if he had received appropriate and fully delivered special education services during the 2009-10, 2010-11 and 2011-12 school years. The student was universally described by his teachers as hard working and very motivated (Tr. pp. 919, 948). He went to after-school tutoring on his own volition and requested help from his teachers (Tr. pp. 922-23, 987, 1056). The student's SETSS teacher noted that the student could function at a higher level when receiving support in the form of team teaching, resource room, and tutoring, but that he tested lower without support (Tr. p. 1406). The student himself testified that he gave up sports after his sophomore year of high school to focus on his grades and reading (Tr. pp. 1638-39). The student testified that he enjoyed attending the private tutoring at HLC where they focused on his reading skills, unlike at school where the focus was exams or homework (Tr. pp. 1687-88). The parent's expert in neuropsychology testified that the student would be able to improve his reading and comprehension skills with intervention (Tr. pp. 2456-57). As noted by the IHO, when the student was receiving his mandated ICT services in English, along with SETSS, he passed his English Regents exam, which was the only Regents exam he passed with a grade over 65 (IHO Decision, at p. 35). The IHO also noted that the student was finally able to pass his Science RCT after receiving individualized instruction at Hebrew Home (*id.*).

In light of all of the foregoing factors, I find that the IHO appropriately found that an award of compensatory services was appropriate.

Regarding the parent's request for compensatory transition services, I concur with the IHO and do not find that the lack of transition assistance by the district merits the provision of compensatory services under all the circumstances, including that the student did have access to transition services and chose to avail himself of some of those services. Contrary to the IHO's conclusion that the student did not pursue assessment through VESID, the hearing shows that the student did, in fact, pursue VESID but that his low reading level limited the option he wanted to pursue (Tr. pp. 2795-99). In light of that, I encourage the student to again pursue services through the Office of Adult Career and Counseling Education Services (ACCES, formerly known as VESID), Adult Education Programs and Policy (AEPP), or Vocational Rehabilitation (ACCES-VR) either during or after completion of his award of compensatory services.

Turning to the compensatory services awarded, the nature of such an award does not lend itself to mathematical precision in this case. However, taking into account all of the factors set forth herein and the evidence and testimony adduced at the impartial hearing, an appropriate award may be formulated to address the district's failure to offer the student a FAPE over the school years in question. The parent presented the testimony of experts and a fact witness from HLC who primarily addressed services to remediate the student's reading levels to bring him up to high school reading levels. However, the standard for awarding compensatory services should focus on compensating the student for services not received; it is not intended to bring student's skills to a guaranteed result of a specific level of educational benefit. Considering the multiple school years at issue, the services that were mandated but not provided over those school years, the multiple procedural and substantive violations of IDEA, the failure of the district to provide multiple special education services to the student over those years, the failure of the district to reevaluate the student in the area of his disability in December 2010 despite his lack of meaningful progress in reading, the age of the student, and the fact that he may be pursuing employment and further education while simultaneously receiving the compensatory services awarded, the IHO's award is hereby modified and the district shall provide the student with the following compensatory services: (1) SETSS, as awarded by the IHO, but provided as a bank of services, which the student may use within two years from the date of this decision; (2) a bank of 135 hours 1:1 speech-language services to be funded by the district and used by the student within two years from the date of this decision; and (3) a bank of 180 hours 1:1 tutoring services to be funded by the district and used by the student within two years from the date of this decision. Any services which the student has already received pursuant to the IHO's October 7, 2013 decision are to be deducted from these totals.

Finally, the parent appeals the conditions that the IHO placed on the award of the compensatory services, namely, that a specific provider be used. I concur that such a condition is not appropriate. I revise the IHO's award to reflect that any licensed provider authorized by law to provide the services may be used by the parent for the services awarded.

VII. Conclusion

In summary, having determined that the district failed to offer the student a FAPE or implement the student's mandated special education program or services, the parent is entitled an award compensatory education services in excess of those ordered by the IHO. In addition, the district is ordered to reimburse the parent for the costs of the June 2012 neuropsychological evaluation of the student.

I have considered the parties' remaining contentions and find that they need not be addressed in light of my findings above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated October 7, 2013 decision is modified to the extent that the SETSS services awarded by the IHO may be used as a bank of services, to be used over the next two years from the date of this decision, less any amounts already received by the student pursuant to the IHO's October 7, 2013 decision;

IT IS FURTHER ORDERED that the IHO's decision dated October 7, 2013 is modified to the extent that the student is awarded a bank of 135 hours of 1:1 compensatory speech-language therapy services to be funded by the district and used by the student within two years from the date of this decision, less any amounts already received by the student pursuant to the IHO's October 7, 2013 decision;

IT IS FURTHER ORDERED that the IHO's decision dated October 7, 2013 is modified to the extent that the student is awarded a bank of 180 hours of 1:1 compensatory tutoring services to be funded by the district and used by the student within two years from the date of this decision, less any amounts already received by the student pursuant to the IHO's October 7, 2013 decision;

IT IS FURTHER ORDERED that the IHO's decision dated October 7, 2013 is modified to the extent that the district is ordered to reimburse the parent for the cost of the neuropsychological evaluation within 30 days of the district's receipt of proof of payment by the parent; and

IT IS FURTHER ORDERED that the IHO's decision dated October 7, 2013 is modified to reflect that any authorized and licensed provider may be used by the parent for any of the services awarded.

Dated: Albany, New York
March 6, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER