The University of the State of New York

The State Education Department
State Review Officer
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No. 14-013

**Application of the BOARD OF EDUCATION OF THE SHENENDEHOWA CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

**Appearances:**
Ferrara, Fiorenza, Larrison, Barrett & Reitz, PC, attorneys for petitioner, Susan T. Johns, Esq., of counsel

Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, attorneys for respondents, Kenneth S. Ritzenberg, 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 district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondents' (the parents') daughter for the 2010-11, 2011-12, 2012-13, and 2013-14 school years were not appropriate and which ordered the district to immediately place the student in the Riverview School (Riverview). The parents cross-appeal from that portion of the IHO's decision which denied their request for compensatory education and services to remedy the district's denial of a FAPE for the 2010-11, 2011-12, and 2012-13 school years. The appeal must be sustained in part. The cross-appeal must be sustained in part.

### II. Overview—Administrative Procedures

A party aggrieved by the decision of an IHO may 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]).[1]

## III. Facts and Procedural History

The parties' familiarity with the extensive factual and procedural history of the case, the IHO's decision, and the specification of issues for review on appeal, is presumed and will not be recited here.[2] The student has multiple developmental disabilities and was 15 years old at the commencement of the underlying proceedings (Parent Ex. 1A at p. 2).[3] In a 20-page amended due process complaint notice, dated May 29, 2013, the parents requested an impartial hearing to address over 100 claims raised by the parents relative to the 2009-10, 2010-11, 2011-12, and 2013-14 school years and each individualized education program (IEP) developed and amended by the CSE for those school years (see Parent Ex. 1A at pp. 1-20).[4] The parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for each of the four school years in question (id. at pp. 17-18). For relief, the parents requested immediate placement of the student at Riverview at public expense for the 2013-14 school year (id.).[5] In addition, to remedy the district's alleged denial of a FAPE arising from claims that the district denied the student

[1] The administrative procedures applicable to the review of disputes 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 are well established and described in broader detail in previous decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., 12-228; Application of the Dep't of Educ., Appeal No. 12-087; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 09-092).

[2] Any additional facts necessary to the disposition of the parties' arguments will be set forth below as necessary to resolution of the issues presented in this appeal.

[3] The hearing record reflects the student has received a diagnosis of FG syndrome in August 2004 (Dist. Ex. 20 at p. 1). The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute in this appeal (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]). The student's IEPs have consistently listed, and the parties do not dispute, the student's eligibility for special education and services on a 12-month (extended school year) basis (IHO Decision at p. 3; see Dist. Exs. 7; 9; 10; 14; 18; 19; 25; 28; 30; 32; 39).

[4] The parents initially filed a due process complaint notice dated December 21, 2012 (Dist. Ex. 1), which was superseded by the amended due process complaint notice dated May 29, 2013 (Parent Ex. 1A).

[5] Riverview is an out-of-state nonpublic residential school (see Tr. pp. 1082-83, 1259-60). The Commissioner of Education has approved Riverview as a school with which school districts may contract to instruct students with disabilities (see id.; see also 8 NYCRR 200.1[d][7], 200.7).

particular related services during the 2010-11, 2011-12, and 2012-13 school years, the parents requested compensatory education and services (id. at 19).

On March 14, 2013, an impartial hearing convened in this matter and concluded on July 30, 2013, after eight days of proceedings (see Tr. pp. 1-1362). By decision dated December 18, 2013, the IHO found that the district denied the student a FAPE for the second half of the 2010-11 school year and the 2011-12, 2012-13, and 2013-14 school years (IHO Decision at pp. 11-27). As relief, the IHO ordered the district to immediately place the student in the residential program at Riverview at public expense for the 2013-14 school year, beginning with the student's first day of attendance after September 1, 2013 (id. at p. 36). The IHO also directed the district to reimburse the parents for a portion of the costs of the student's tuition at Riverview for the summer of 2013 (id. at p. 37).

The IHO further directed the district to fund a comprehensive independent occupational therapy (OT) evaluation in order to provide the basis for developing appropriate long-term goals and short-term objectives to address all of the student's OT needs (IHO Decision at p. 36). Relative to the IHO's finding that the district recommended an insufficient level of related services during the 2010-11, 2011-12, and 2012-13 school years, the IHO directed the district to convene a CSE meeting to prepare an IEP for the student that included related services with corresponding long term goals and short-term objectives, to be provided on a 12-month basis, consisting of: two sessions per week of 1:1 (direct) OT; three sessions per week of small group speech-language therapy; one session per week of 1:1 speech-language therapy; one session per week of 1:1 assistive technology services; and an unspecified amount of individual and group counseling services to address social skills (id. at pp. 36-37). The IHO denied, however, the parents' request for compensatory education in the form of three years of post-secondary education at Riverview (id. at p. 27-29, 37). The IHO reasoned that, although the district did not offer the student a FAPE for the 2010-11, 2011-12, and 2012-13 school years, and the district offered the student an insufficient level of related services, this did not rise to the level of a gross violation of the IDEA or a denial of, or exclusion from, educational services that would justify a compensatory education award (id. at pp. 28-29).

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2010-2011, 2011-2012, 2012-2013, and 2013-14 school years and that the parents were entitled to the particular relief awarded. In an answer and cross-appeal, the parents assert that the erred IHO insofar as she denied the parents' request for compensatory education and services to remedy the district's denial of a FAPE for the 2010-11, 2011-12, and 2012-13 school years. The parties' familiarity with the particular issues for review on appeal in the district's petition and in the parents' answer and cross-appeal is once again presumed and will be addressed during the course of the analysis below.

## IV. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such

students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit"

(Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

**V. Discussion**

The issues presented in this appeal pertain in large part to whether or not the district offered the student an appropriate and sufficient level and type of related services from the 2010-11 through 2013-14 school years and, if not, what relief is available for such violations. Each of the

challenged related services and the relief awarded and denied by the IHO are addressed below seriatim.

### A. Scope of Review

With regard to the first school year at issue, there is a statute of limitations defense raised by the district. 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[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [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]).[6] In this instance, given that the parents filed their due process complaint notice on December 21, 2012 (see Dist. Ex. 1), claims relating to an IEP developed or implemented prior to December 21, 2010 were barred by the statute of limitations. Thus, to the extent that the parents raised claims or sought relief relating to any unique features of the April 1, 2010 or September 28, 2010 IEPs or have alleged a failure by the district to offer or to provide services to the student prior to December 21, 2010, the IHO properly found that such claims were outside of the limitations period (IHO Decision at p. 27 n.5; see Dist. Exs. 7; 9). While the district is correct that an IEP "must be evaluated prospectively as of the time of its drafting" (see R.E., 694 F.3d at 185), the January 18, 2011 IEP superseded the student's previous IEPs, and therefore any of the parents' claims and relief awarded by the IHO relating to alleged deficiencies found in the January 2011 IEP (or its implementation) were properly addressed by the IHO (see Dist. Ex. 10).

### B. CSE Process - Parental Participation and Input

Next, the parents contend in their cross-appeal that the IHO erred in finding that the district did not ignore parental input or systematically engage in due process violations and that the parents were afforded the opportunity to participate (IHO Decision at pp. 11-12). The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). However, the IDEA "only requires that the parents have an opportunity to participate in the drafting process" and does not permit parents to unilaterally dictate the provisions of a student's IEP (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006], aff'd, 251 Fed. App'x 685, 2007 WL 3037346 [2d Cir. 2007]; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17-*18 [E.D.N.Y. Aug. 19, 2013] [explaining that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents'

[6] New York State has not explicitly established a different limitations period for IDEA claims since Congress adopted the two-year limitations period.

suggestions"]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]; Doe v. East Lyme Bd. of Educ., 2012 WL 4344301, at * 4 [D. Conn. Sept. 21, 2012]; J.C. v. New Fairfield Bd. of Educ., 2011 WL 1322563, at*16 [D. Conn. Mar. 31, 2011]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008]; Sch. for Language and Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006]).

Here, the IHO found that, although there were minimal differences between many of the draft IEPs and the final IEPs that were prepared for the student, the testimonial and documentary evidence in the hearing record demonstrated that the parents were included in the IEP development process and had the opportunity to provide input and offer suggestions at the CSE meetings (IHO Decision at p. 11). The IHO also found that the CSE agreed to some of the parents' suggestions and that the CSE considered evaluations obtained by the parents (id.). Consistent with the well-reasoned determinations of the IHO, the evidence in the hearing record demonstrates that the district on several occasions considered the input of the parents and incorporated the parents' suggestions into the student's IEP. For example, in response to the parents' requests, the district: included: a multi-sensory, phonics-based reading program in the student's January 2011 IEP (Dist. Ex. 10 at pp. 2, 15); added assistive technology services to the student's April 27, 2012 IEP (Dist. Ex. 25 at pp. 12, 17); and amended the student's IEP on January 8, 2013 to add an OT consult (Dist. Ex. 32 at p. 18). The parents have failed to cite to any evidence in the hearing record suggesting that the IHO erred or that the district significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student or that the basis of the parents' argument extends beyond their disagreement with the recommendations of the CSE during the school years in dispute (see D.D-S., 2011 WL 3919040, at * 11 [stating that "[n]othing in the IDEA requires the parents' consent to finalize an IEP. Instead, the IDEA only requires that the parents have an opportunity to participate in the drafting process."]). Accordingly, the IHO's finding that that the parents were afforded an opportunity to participate in the development of the student's IEPs is adopted.

**C. Occupational Therapy Services**

In her decision, the IHO found that the CSE's recommendations to remove OT services for the 2010-11 and 2011-12 school years, and to provide an OT consult for the 2012-2013 and 2013-2014 school years, was "substantively deficient" because the district failed to meet the OT needs of the student, which included fine motor skills, visual perceptual skills, visual motor skills, and visual memory skills (IHO Decision at p. 14). On appeal, the district argues that the IHO erred in finding that the student required OT to improve the student's school functioning to an optimal level and that the IHO disregarded evidence in the hearing record that the student's fine motor skills in the school setting were already functional. The parents argue that the IHO correctly determined that the student was entitled to OT services to achieve maximal physical and mental functioning in her daily life tasks, which were not limited to functioning within the classroom.

Here, the evidence in the hearing record demonstrates that the student required OT to develop her skills to function within the classroom and to benefit from instruction. For example, the hearing record reflects that the student demonstrated delays in fine motor skills, including difficulties with visual-perceptual skills, visual-motor skills, motor coordination, upper body

strength, low muscle tone, writing, and cutting foods, as well as the use of zippers, fasteners, and buttons (Tr. pp. 1182-83; Dist. Exs. 20; 31; 57). Despite the student's fine motor deficits, the hearing record reflects that the CSE did not recommend direct OT services for the student (see Dist. Exs. 7; 9; 10; 14; 18; 19; 25; 28; 30; 32).[7] Namely, the hearing record reflects that the evaluative information before the CSE indicated that the student demonstrated well below average fine motor skills compared to same age-peers as indicated by her performance on standardized assessments (Dist. Ex. 20 at pp. 2-3; 31 at pp. 2-4).[8] For example, an April 2012 administration of the Beery-Buktenica Developmental Test of Visual Motor Integration (VMI) to the student yielded standard scores of 61 (very low range) in visual-motor integration, 77 (low range) in visual-perception, and 62 (very low range) in motor coordination (Dist. Ex. 20 at pp. 2-3; see Dist. Exs. 30 at pp. 2-3; 32 at pp. 2-3). Furthermore, the results of a December 2012 OT evaluation to assess the student's fine motor skills were consistent with the April 2012 OT evaluation of the student (see Dist. Exs. 20; 31). Specifically, the December 2012 administration of the VMI to the student yielded standard scores in the low to very low range in the areas of visual-motor integration, visual-perceptual skills, and motor coordination (see Dist. Ex. 31 at p. 2). In addition, an administration of the Test of Visual Perceptual Skills-Third Edition to the student yielded standard scores (percentile rank) of 52 (<1) in complex processing, <51 (<1) in basic processing, <55 (<1) in sequencing, and <55 (<1) overall functioning all of which reflect well below average performance (id. at p. 3). Specifically, the results indicated that the student demonstrated well below average skills related to visual discrimination, visual memory, spatial relations, form constancy, sequential memory, figure ground, and visual closure compared to same-age peers (id. at pp. 3-4).

The occupational therapist who completed the December 2012 OT evaluation also assessed the student using the School Function Assessment (SFA), the results of which indicated that the student might have been functionally independent within the classroom setting (Dist. Ex. 31 at p. 5). However, contrary to this conclusion, the evaluating occupational therapist also noted that the student's performance on the SFA indicated that the student exhibited visual perceptual deficits that might negatively affect her ability to process information within the educational setting (id. at p. 6). Despite the student's visual perceptual deficits, the evaluating occupational therapist declined to recommend direct OT services and noted that the special education team met the

[7] The student's IEPs for the 2010-11, 2011-12, 2012-13, and 2013-14 school years indicate that the CSE never recommend direct OT for the student (see Dist. Exs. 7; 9; 10; 14; 18; 19; 25; 28; 30; 32). The evidence in the hearing record shows that the CSE first recommended an OT consult on the student's November 2012 IEP, which the CSE continued to recommend through 2013-14 school year, as indicated on the student's May 2013 IEP (see Dist. Exs. 30; 32; 39).

[8] Despite the student's significantly below average standard scores in the area of fine motor skills, the occupational therapist who completed the April 2012 OT evaluation concluded that the standard scores were not an accurate representation of the student's ability to perform school-related tasks but provided no explanation regarding the student's low to very low performance in fine motor tasks compared to same-age peers (Dist. Ex. 20 at p. 3) In addition, the occupational therapist who completed the December 2012 OT evaluation provided two sets of standard scores for two of the subtests, one higher, one lower, and stated that the higher standard scores were an accurate representation of the student's fine motor skills, and the lower standard scores were less accurate because of the student's inability to focus during testing (Dist. Ex. 31 at p. 2). However, both sets of scores were in the low to very low range compared to same-age peers and the evaluator noted that the student did exhibit visual perceptual deficits (see id. at pp. 2, 4).

student's need for adaptations and modifications through such services as a slant board (id. at p. 7).[9]

Notwithstanding the occupational therapist's view that the student did not require OT, the standardized test results, in addition to testimonial evidence in the hearing record demonstrates that the district should have recommended OT for the student to address her fine motor needs. The private psychologist testified that, based upon the student's educational profile and OT related needs, the student would benefit from OT services (Tr. pp. 1351, 1353). Additionally, the student's private occupational therapist testified that the purpose of OT services was to address skills deficits related to visual-perceptual, visual-motor, and motor coordination, all of which were documented areas of need of the student (see Tr. pp. 1169-70, 1172). The private occupational therapist further testified that the student's OT related deficits in the skill areas of visual-perceptual, visual-motor, and motor coordination would negatively affect a student's ability to learn within the classroom setting (see Tr. pp. 1170-71, 1176-77).

Thus, the hearing record indicates that, despite the student's identified delays in fine motor skills, including difficulties with visual-perceptual skills, visual-motor skills, motor coordination, upper body strength, low muscle tone, writing, and cutting foods as well as the use of zippers, fasteners, and buttons (see Tr. pp. 1182-83; Dist. Exs. 20; 31; 57), the district did not provide OT to address any of these needs.[10] Accordingly, to the extent that the IHO found the level of OT services recommended by the district insufficient for the school years in question, that finding is adopted.

In her decision, the IHO also granted the parents' request for a comprehensive OT evaluation to assess the student's needs and ordered the district to fund that evaluation because the district's OT evaluations of April 18, 2012 and December 3, 2012 "covered only a subset of the [s]tudent's occupational therapy needs" (IHO Decision at p. 36). An IHO is vested under federal and State law with the discretionary authority to order an independent educational evaluation of the student at district expense (see 34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Application of the Bd. of Educ., Appeal No. 12-033). Here, an independent review of the district's OT evaluations reveals that the evaluations assessed the student's needs related to: visual motor integration; visual perceptual skills; motor coordination; self-care skills, including clothing management, eating and drinking, and personal- care awareness; written work; computer and equipment use; task completion; social conventions; and safety (Dist. Exs. 21; 31). Notwithstanding the apparent breadth and comprehensiveness of the district's OT evaluations, because each was completed in 2012 and because the IHO had concern about whether the student's special education needs were being addressed, there is insufficient reason to overturn the IHO's decision to direct the district to provide for a comprehensive independent OT evaluation.

[9] The occupational therapist recommended OT consultation services of four sessions per year for modifications and adaptations in relation to the student's visual-perceptual deficits (Dist. Ex. 31 at p. 7).

[10] The district's recommendations in the IEP for supports, such as use of a computer and a slant board, were inadequate to address the full range of the student's significant OT needs within the classroom and school setting (see Dist. Ex. 32 at p. 15).

Accordingly, the district's challenge to the IHO's directive to provide for the independent OT evaluation is rejected.

**D. Social Skills and Socialization Opportunities**

The IHO found that the recommended programs were reasonably calculated to enable the student to make meaningful progress within the social skills domain at the time that each of the student's IEPs was drafted for the 2010-11, 2011-12, and 2012-13 school years (see IHO Decision at p. 16).[11] The IHO reasoned that the student's social skills goals were addressed on the student's IEPs for the 2010-11, 2011-12, and 2012-13 school years and that the functional skills development class recommended for the student each year also included daily social skills training each day for 30 minutes (id. at p. 15; see also Dist. Exs. 10; 14; 18; 19; 25; 28; 30; 32; 39).[12] However, as to the 2013-14 school year, the IHO found that the IEP did not appropriately address the student's social skills deficits and social needs, reasoning, in part, that, because the 30-minute social skills training recommended in the student's previous IEPs did not enable the student to achieve independent mastery of her 2011-12 and 2012-13 social skills goals, the same recommendation for the 2013-14 school year was therefore inappropriate (IHO Decision at p. 17; see Dist. Ex. 39 at p. 15). On appeal, the district challenges the IHO's findings relative to the 2013-14 school year and, conversely, the parents argue that, contrary to the IHO's findings, the district failed to address the student's social deficits and provide an appropriate social environment for the student because the student failed to make meaningful progress within the social skills domain during the 2010-11, 2011-12, and 2012-13 school years. A review of the evidence in the hearing record demonstrates that the district's recommended program was reasonably calculated to enable the student to make meaningful progress with her social skills at the time of the development of the student's IEPs for the 2010-11, 2011-12, and 2012-13 school years, as well as the 2013-14 school year.

The student's 2010-11, 2011-12, and 2012-13 IEPs identified and addressed the student's needs related to social skills (see Dist. Exs. 7: 9-10; 14; 18-19; 25; 28; 30; 32; 39). With respect to the student's needs related to social skills, a October 2009 neuropsychological evaluation of the student, completed during the student's fifth grade, described her as friendly, cooperative, and engaging regarding conversations and social interactions (Dist. Ex. 5 at p. 2). The student's social skills remained a relative strength for her throughout the 2010-11, 2011-2012, and 2012-2013 school years as reflected in documentary evidence (see Dist. Exs. 29; 45). For example, as part of an August 2012 neuropsychological report, the parent reported the student social interaction skills "have improved over the past few years" (Dist. Ex. 29 at p. 1). In addition, as reflected in the 2012 neuropsychological evaluation, based upon observation, the student had shown improvement in her social communication skills (id. at p. 7). Further, the neuropsychological evaluation report indicated the student was well adjusted, emotionally stable, friendly, polite, and helpful (id.). As a whole, the evidence in the hearing record reflects that the student lacked more complex social

[11] With regard to the 2010-11, 2011-12, and 2012-13 school years, the IHO also found that the district worked cooperatively with the parents during those school years in a good-faith attempt to provide the student with appropriate peer interactions (IHO Decision at p. 16).

[12] The student's January 8, 2011 IEP also recommended one 30-minute session per week of social skills training in a group of five (5:1) (Dist. Ex. 10).

skills, such as interpreting social cues and maintaining the course of a conversations and interests of others, but that social skills were a relative strength of the student (see Dist. Exs. 7; 9-10; 14; 18-19; 25; 28; 30; 32; 39 at pp. 8, 13; 45 at p. 4). Consistent with the evaluative reports, the present levels of performance identified the student's needs in this area, and the IEPs addressed these needs with annual goals, the structure offered within a special class, and/or social skills instruction, and the student demonstrated progress (see Dist. Exs. 7; 9-10; 14; 18-19; 25; 28; 30; 32; 39).

The IHO concluded that the level of services recommended by the CSE in the May 2013 IEP (2013-14 school year) was inappropriate because the student failed to demonstrate progress during the previous two school years (see IHO Decision at pp. 16-17). The evidence in the hearing record, however, demonstrates that the student's 2013-14 IEP recommended by the CSE was appropriate to address the student's needs related to social skills. In addition, the hearing record reflects the student demonstrated progress the previous two school years in the area of social skills, as well as the 2010-11 school year. During the 2010-11 school year, the student exhibited progress regarding her social skills as shown in her advancement toward achieving her IEP annual goals and short-term objectives (see Dist. Ex. 35 at pp. 9-10). A June 30, 2011 progress report reflected the student's progress towards achieving her two annual goals and six short-term objectives related to social/emotional functioning (id.). The annual goal and short-term objectives indicated that the student would initiate interactions by verbally making a request and accept a rejected request using self-generated strategies (id.). The progress report indicated that, in June 2011, the student achieved both of her annual goals (id.). In addition, at set forth below, the student demonstrated progress with her annual goals for the 2011-12 and 2012-13 school years. For the next year, a June 30, 2012 progress report reflected the student's progress towards achieving her annual goal and four short-term objectives related to social/emotional functioning (Dist. Ex. 36 at p. 5). The annual goal and short-term objectives indicated that the student would work through problems with others without walking away with 90 percent success over three occasions with fading prompts (id. at p. 5). The progress report indicated that, in June 2012, the student was progressing satisfactorily with her annual goal, achieved three of her short-term objectives, and did not achieve one short-term objective (id.). With respect to the 2012-13 school year, a May 20, 2013 progress report reflected the student's progress regarding her three annual goals and nine corresponding short-term objectives related to social/emotional functioning (Dist. Ex. 37 at pp. 20-23). The annual goals and short-term objectives indicated that the student would navigate difficult social situations, follow the social rules during conversation, and recall and converse about the interests of others (id.). The progress report reflected that, in April 2013, the student had achieved two of the annual goals and was progressing satisfactorily with one annual goal (id.).

Contrary to the IHO's conclusion that the student "did not master her 2011-12 social skills goal" and failed to master all of her short-term objectives for the 2012-13 school year (IHO Decision at p. 16), a review of the progress reports relative to the 2011-12 and 2012-13 school years reveals that the student exhibited adequate progress and, thus, the May 2013 IEP may not be deemed insufficient to address the student's needs related to social skills on the basis that the student failed to master all goals (see Dist. Ex. 39). While the student might not have achieved every annual goal or short-term objective included in her IEPs for the 2011-12 and 2012-13 school years, the IDEA does not guarantee that a student will achieve a specific level of benefit and focus must be placed on the extent to which the student progressed toward achieving the annual goals, rather than on the number of IEP goals the student "achieved" (see Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *31, *36 [N.D.N.Y. Sept. 29, 2009] [noting the student's progress

despite not meeting some goals and explaining that the CSE was obligated to provide the student the opportunity to make meaningful progress in the LRE]; see also Application of a Student with a Disability, Appeal No. 12-126).

With regard to the IHO's conclusion that the "single social/behavioral goal" contained in the May 2013 IEP was insufficient to address the student's needs and only addressed a subset of the student's social issues, the evidence in the hearing record reveals that, although the May 2013 IEP contained one annual goal, the IEP also contained three short-term objectives related to social skills (IHO Decision at p. 17; Dist. Ex. 39 at p. 13). Specifically, the annual goal and short-term objectives indicated the student would learn and utilize strategies to interpret social cues, as well as maintain attention during a conversation and respond appropriately (Dist. Ex. 39 at p. 13). The annual goal and short-term objectives were in alignment with the present levels of social development that indicated the student engaged in reciprocal conversations, used a range of facial expressions, gestures, and body language to facilitate communication but exhibited difficulty with interpreting ambiguous and abstract language (see id. at pp. 8, 13). Moreover, the IEP indicated that the student demonstrated basic social interactive skills, and it was, therefore, appropriate for the CSE to develop an annual goal relating to the development of more advanced skills such as interpreting social cues (see id.).

The IHO also indicated that the May 2013 IEP did not indicate a group size for social skills and that the recommended of 12:1+1 special class in which the social skills group would take place was a less supportive ratio than the previous 12:1+4 special class placement, indicating there was, therefore, also a "lower level of staff support" offered for the social skills group (IHO Decision at p. 17). The evidence in the hearing record, however, reflects that a daily 30-minute social skills group addressed the student's identified social needs. By way of background, during the 2011-12 and 2012-13 school years, the student participated in a daily social skills group within the special education class (see Tr. pp. 48-49, 79). According to the student's special education teacher, the student's providers addressed the student's needs related to social skills as they arose in the classroom, which demonstrates that the student had access to the necessary social skills instruction (see Tr. pp. 81-82, 91-93). Accordingly, there is no reason in the hearing record to suggest that upon implementation of the IEP teacher was unable to provide the student with social skills instruction within a classroom setting.

The IHO also indicated that the student required individual and group counseling to address social skill deficits rather than a social skills instruction provided by a special education teacher (IHO Decision at p. 17).[13] As noted above, the student's social skills were a relative strength and accordingly could be addressed using social skills instruction within the classroom setting. An April/May 2013 psychological evaluation described the student's needs related to socialization by indicating that the student was happy and well-adjusted in the school setting, thrived on social contact, readily initiated social contact, maintained eye contact, referenced peers for social information, and shared affect when she was excited, but did not always interpret social cues or maintain attention to peer comments (Dist. Ex. 45 at p. 4). The May 2013 IEP also described that the student engaged with peers and maintained a conversation using fluent and comprehensible

[13] The district special education teacher testified that the May 2013 IEP provided for daily social skills group instruction as part of the school day rather than as a related service (Tr. pp. 163-64).

speech as well as normal tone, volume, and prosody (Dist. Ex. 39 at p. 8). Therefore, based on the evidence in the hearing record—namely, the student's documented ability to socialize—the social skills instruction occurring within the classroom setting was sufficient to address the student's social skills needs.

To the extent the parents assert that the student was socially isolated at the time of the May 2013 CSE meeting, the parents referred to the student's lack of engagement in extracurricular and social events outside of school; however, as set forth above, the evidence in the hearing record demonstrates that the student's IEP for the 2013-14 school year addressed the student's social needs within the school setting through identification of the student's social needs and provision of a social supports and social skills instruction (Dist. Ex. 39 at pp. 8, 15). Thus, the CSE recommendation of daily 30-minute social skills instruction addressed the student's needs as identified in the recent April/May 2013 psychological evaluation, the August 2012 neuropsychological report, and in the May 2013 IEP present levels of social development (see Dist. Exs. 29 at pp. 1, 7; 39 at pp. 8, 15; 45 at p. 4).

**E. Assistive Technology and Services**

In this case, the IHO found that, although the IEPs for the school years at issue provided for assistive technology devices, the CSEs failed to include an appropriate level of supportive direct assistive technology services in the student's IEPs for the years in dispute (see IHO Decision at p. 18). Given the student's substantial cognitive impairments and developmental delays, the IHO reasoned that the student's IEPs should have included training or technical assistance to assist the student with the use of the assistive technology devices recommended for her in the IEPs (id.). The district appeals this finding.

Under State regulations, an assistive technology device is defined as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a student with a disability" (8 NYCRR 200.1[e]; see also 34 CFR 300.5). An assistive technology service "means any service that directly assists a student with a disability in the selection, acquisition, or use of any assistive technology device" (8 NYCRR 200.1[f]; see also 34 CFR 300.6). Relevant here, an assistive technology service includes training or technical assistance for a student with a disability (8 NYCRR 200.1[f][5]). State regulations also require that that a student's IEP include "any assistive technology device or services needed for the student to benefit from education including the use of such devices in the student's home or in other settings" (8 NYCRR 200.4[d][2][v][b][6]).

Challenging the IHO's findings on appeal, the district argues that an assistive technology service is not a related service and does not require annual goals or direct teaching of typing (Dist. Mem. of Law at p. 6). While federal regulations do not define an assistive technology service as a related service (see 34 CFR 300.34[c][1]-[c][15]), federal regulations do require that a CSE, when developing a student's IEP, consider "special factors," which includes whether the child needs assistive technology devices and services" (34 CFR 300.324[a][2][v]). Moreover, State regulations expressly state that an assistive technology service constitutes related service (8 NYCRR 200.1[qq]). Nevertheless, contrary to the findings of the IHO, the evidence in the hearing record demonstrates that the student did not require any further assistive technology services in

order to receive educational benefit. The recommendation for a particular assistive technology device does not necessarily indicate the necessity for an assistive technology service.

In the student's April 2012 student technology consultation, which assessed the student's need for assistive technology, the evaluator recommended that the CSE include two hours of assistive technology consultant time in the student's 2012-13 IEP but did not recommended direct assistive technology services (Dist. Ex. 21 at p. 4). The evaluator recommended access to a computer, use of computer software, and text-to-speech technology (id.).

The student's IEPs provided for assistive technologies, such as use of text-to-speech and use of computer/software (see Dist. Exs. 7; 9-10; 14; 18-19; 25; 28; 30; 32; 39). Having reviewed the assistive technologies recommended in the student's IEPs—such as access to computer and text-to-speech software—I find no reason that assistive technology services were required to enable the student to benefit from the recommended devices within the classroom setting (see 8 NYCRR 200.4[d][2][v][b][6]). This is particularly so given that the June 2012 through May 2013 IEPs recommended the assistive technology consult for staff (Dist. Exs. 25 at p. 11; 28 at p. 11; 30 at p. 16; 32 at p. 16; 39 at p. 15).[14] In addition, for the school years the CSE did not recommend an assistive technology consult, the particular devices recommended on the IEP included computer and text-to-speech software—each of which is of such a degree of complexity that a teacher could instruct and/or assist the student regarding the use thereof.[15]

The IHO also found that the student required instruction related to the skills needed for typing writing assignments on the computer (IHO Decision at p. 18).[16] However, in the April 2012 student technology consultation, the evaluator noted that, when using the computer, the student typed five sentences with specialist support for details, indicating that the student could navigate a computer, as well as type (see Dist. Ex. 21 at p. 2). In addition, based on the student's educational profile, including her delays in cognitive abilities, academics, and language, there is no reason apparent from the hearing record that she could not access the recommended assistive technologies in her IEPs in order to benefit from instruction within the classroom setting.

**F. Speech-Language Therapy Services**

The district appeals the IHO's finding that the CSE's recommendations for speech-language therapy over the 2010-11, 2011-12, 2012-13, and 2013-14 school years were not appropriate and that the student made only trivial progress during those school years. In her decision, the IHO analyzed the student's speech-language therapy service recommendations for the school years at issue and her standard testing scores since 2010, and found that CSE recommendations were not

[14] The June 2012 IEP indicated that the assistive technology consult was for the student and the staff (Dist. Ex. 28 at p. 11).

[15] The argument in favor of assistive technology services in this case seems to rely upon a false assumption—that once a student has been offered an assistive technology device on an IEP then assistive technology services are also automatically mandated, but the parties point to no authority for that proposition and I have found none.

[16] The special education teacher testified that the student demonstrated some difficulty with typing but it does not appear form the hearing record that the student lacked the potential to learn typing skills when instructed by the teacher (Tr. p. 189).

appropriate for the student (see IHO Decision at p. 20). By way of background, the IHO noted that the CSE recommended that the student receive four sessions per week, including one individual session, of speech-language therapy during the 2009-10 school year (id.). However, the IHO noted that, starting in the 2010-11 school year, the student's speech-language therapy recommendation was reduced to two 40-minute small-group sessions per week and reduced again to two 30-minute small-group sessions for the subsequent 2012-13 and 2013-14 school years (see id. at p. 19). The IHO found that the CSE's reduction of the student's small-group sessions and elimination of the student's individual session did not afford the student the opportunity to make meaningful progress (see id. at pp. 20-21). The IHO also found that reducing services by 50 percent during the summer months due to district policy, without any other basis, was contributed to a finding of a denial of FAPE (see id. at p. 21).

With respect to the student's progress in this area, the evidence in the hearing record as a whole shows that the student maintained and even progressed in her speech-language skills as she advanced from year to year but that, despite her progress, the student's performance in the area of language processing was well below average compared to same age peers, which necessitated the need for more intensive speech-language therapy services than the level offered by the district (see Dist. Exs. 11; 22; 38-39). For example, the evidence in the hearing record reflects the student's needs related to speech-language included delays in receptive, expressive, and pragmatic language (see id.). The hearing record contains several evaluative reports, which provided standardized assessment results of the student in the area of speech-language over the school years at issue (see Dist. Exs. 11; 22; 38). In February 2011, the student achieved standard scores of 62 and 63 in the Peabody Picture Vocabulary-Fourth Edition Test (PPVT-4) and Expressive One Word Picture Vocabulary Test-Fourth Edition (EOWPVT-4), respectively (Dist. Ex. 11).[17] In April 2012, the student achieved standard scores (percentile rank) of 57 (.1) and 61 (1) in the PPVT-4 and EOWPVT-4, respectively (Dist. Ex 22 at p.1).[18] In February 2013, the student achieved standard scores of 68 and 64 in the PPVT-4 and EOWPVT-4, respectively (Dist. Ex. 38 at pp. 1-2). In a May 2013 speech-language report, the speech therapist provided a summary of the student's standard scores related to her performance on the PPVT-4 and EOWPVT-4 from January 2004 through February 2013 (id.). The speech therapist noted that the student's standard scores had remained generally consistent from 2004 thought 2013, as she has advanced from grade to grade, ranging from standard scores of 60 through 73 (id.). The speech therapist also reported that the student progressed in both receptive and expressive language areas as indicated by the increase in the standard scores of 60 in January 2004 to 68 in February 2013 in the PPVT-4 and an increase in the standard scores of 57 in January 2004 to 64 in February 2013 in the EOWPVT-4 (id.). Contrary to the district's argument that the student's abilities in language were reduced due to the student's low cognitive abilities and deficits, the evidence in the hearing record showed that the student still had the potential to improve in the area of language skills as shown by her progress in the past.

In view of the foregoing, although the student maintained her language skills and exhibited slight progress, the student's performance on standardized measures was consistently well below

[17] The PPVT-4 and EOWPVT-4 measure receptive and expressive language skills.

[18] With respect to the Clinical Evaluation of Language Fundamentals-fourth Edition (CELF-4), overall the student's scaled scores were well below the average compared to same age peers (Dist. Ex. 22 at pp. 1-2).

the average compared to same age peers. Therefore, the evidence in the hearing record supports the IHO's conclusion that the student required additional speech-language therapy to address her significant deficits in receptive, expressive, and pragmatic language. Similarly, consistent with the finding of the IHO (IHO Decision at p. 21), the CSE's decision to reduce the student's level of speech-language therapy services by 50 percent during the summer months without any basis contributes to a finding that the district failed to offer the student a FAPE. Accordingly, the finding of the IHO that the district failed to offer an appropriate amount of speech-language therapy to the student during the school years in question is sustained.

**G. Reading Services/Reading Program**

The district also challenges the IHO's finding that the reading program recommended by the CSE for the 2012-13 and 2013-14 school years was inappropriate (IHO Decision at p. 22). By way of background, in response to the parents' request, on January 18, 2011 the CSE amended the student's 2010-11 IEP to add a reading class (15:1) that would meet every other day for 40-minute sessions and that would utilize multi-sensory–phonics-based instruction (the "phonics intervention program") (Dist. Ex. 10 at pp. 1-2, 15; see also Dist. Ex. 8). The CSE also recommended the special 15:1 reading class for the 2011-12 school year for five 40-minute sessions every two weeks (Dist. Ex. 14 at pp. 1, 8). For the 2012-13 school year, however, the CSE recommended a different reading program—namely, a comprehensive and explicit instructional reading program (the "disputed reading program" or "disputed program") in a 15:1 special reading class for five 40-minute sessions per week (Dist. Ex. 25 at p. 1, 11, 18), which was subsequently changed on the student's November 2012 IEP to a 10:1 ratio (Dist. Ex. 30 at p. 22). Subsequently, the student's IEP for the 2013-14 school year included a daily 40-minute session of the disputed reading program in a 12:1+1 special class (Dist. Ex. 39 at pp. 1, 14).

Although the IHO found that the phonics intervention program recommended by the CSE for the 2010-2011 and 2011-12 school years was appropriate for the student at the time that those IEPs were drafted and/or amended (Dist. Exs. 10; 14; 18; 19), the IHO found that the disputed reading program recommended by the CSE for the 2012-13 and 2013-14 school years was inappropriate because the student failed to make progress in decoding with the disputed reading program during the 2012-13 school year and because the special reading class sizes recommended by the district for the 2012-13 and 2013-14 school years were too large for the student (see IHO Decision at pp. 24-26). The IHO also found that the district's decision to switch the student's reading program for the 2012-13 school year from the phonics intervention program to the disputed reading program was not appropriate for the student because the disputed reading program primarily addressed decoding, and the student required a reading program that addressed both decoding and reading comprehension (id. at p. 24). The IHO further found, consistent with the position of the parents, that the student had been making progress with the phonics intervention program recommended by the CSE for the second half of the 2010-11 school year and for the 2011-12 school year (id.). The IHO also noted that, although there was evidence that the student's decoding skills had improved through the 2011-12 school year, there was no evidence of any significant improvement in the student's reading comprehension skills (id. at p. 27). On appeal, the district challenges the finding of the IHO that the special reading class sizes were too large for the student. The parents assert, however, that the student's reading comprehension level remained at the first grade level and that the IHO correctly determined that the district should not have recommended a larger special reading class (Tr. p. 944; Dist. Ex. 19; Parent Ex. 72).

The evidence in the hearing record reflects that the student's reading skills were well below average in both reading comprehension and decoding compared to same age peers (Dist. Ex. 10 at pp. 5-6). The hearing record also indicates that the student benefited from a systematic and supportive approach to reading that included accommodations, such as previewing of unfamiliar text and comprehension cues (id. at p. 5). The hearing record reflects that the student demonstrated progress in reading during the 2010-11 and 2011-12 school years. The January 2011 IEP indicated that the student was reading at a beginning first-grade reading level (Dist. Ex. 10 at p. 5). The April 2011 IEP indicted that the student reading skills had progressed to end of second grade level (Dist. Ex. 14 at p. 3). The April 2012 IEP noted that the student decoded at a fourth-grade level but that her comprehension skills were not as well developed (Dist. Ex. 25 at p. 5).

Furthermore, in May 2013, the student's pure decoding skills were identified to be at the fifth grade level (Dist. Ex. 39 at p. 7). The student's comprehension skills were at the first grade level; however, the student's difficulty with attention and dysfluency negatively affected her overall reading performance (id. at p. 7). The student demonstrated well below grade level skills in reading, including decoding and reading comprehension, as described in the student's IEPs for the 2012-13 and 2013-14 school years (see Dist. Ex. 32 at p. 7; 39 at p. 7). The January 2013 IEP indicated the student consistently applied reading comprehension strategies during group reading activities and demonstrated good comprehension of the texts through in-class discussion and homework assignments (Dist. Ex. 32 at p. 7). The student's May 2013 IEP indicated the student was a slow reader making many omissions as well as repeating words/phrases but was able to self-correct (Dist. Ex. 39 at p. 7). The May 2013 IEP indicated that the student's decoding and basic reading skills were an area of personal strength (Dist. Ex. 39 at p. 7). Accordingly, based on the student's progress and reading needs at the time that the student's IEPs were drafted for the 2012-13 and 2013-14 school years, the class-size recommendations for reading instruction were appropriate because, as noted above, the student had already demonstrated an ability to make, and did make, progress in a special 15:1 reading class during the 2011-12 school year and exhibited relative strengths in reading, despite her overall delays in decoding and comprehension.

With regard to the change from the phonics intervention program to the disputed reading program, the district director of special education and the special education teacher both testified that, compared to the phonics intervention program, the disputed reading program would address both the decoding and comprehension (see Tr. pp. 274, 874).[19] The evidence in the hearing record indicates the student demonstrated significant delays in both decoding and reading comprehension and, accordingly, recommendation for a reading program that addressed both deficits was more than appropriate.

The IHO also concluded that the student did not make meaningful progress with the daily special class reading instruction, which utilized the disputed reading program during the 2012-13 school year (IHO Decision at pp. 24-26). Contrary to the IHO's assertion, during the 2012-13 school year, the student's performance in the area of reading increased from a Lexile of 0 in September 2012 to 266 in April 2013 (Parent Ex. 79 at p. 1). Additionally, the student's special education teacher testified that, by summer 2013, the student was decoding at end of fourth

[19] At the February 2012 CSE meeting the parents and the district discussed the disputed reading program, and the CSE recommended the student undergo an evaluation for the disputed reading program (Dist. Ex. 19 at p. 12).

grade/beginning fifth grade level and reading comprehension skills were at a second grade level (Tr. p. 127). The special education teacher also testified that, in relation to the student's reading skills, in February 2013, the student achieved a fifth grade level compared to being at a second grade/end of third grade level in June 2012 (Tr. p. 134; Dist. Exs. 39 p. 27; 40).

In view of the foregoing, the IHO's findings relative to the district's recommendation of the phonics intervention program for the 2010-11 and 2011-12 school year are sustained, and the IHO's findings that the CSE inappropriately recommended the disputed reading program for the 2012-13 and 2013-14 school year are annulled.

**H. Relief**

Having found that the district denied the student a FAPE in light of the insufficient level of OT and speech-language therapy services that it offered the student during the 2010-11, 2011-12, 2012-13, and 2013-14 school years, a determination must be made with regard to what relief, if any, is warranted in this case and whether the relief awarded by the IHO, which is challenged by both the district and the parents in their respective appeal and cross-appeal, was appropriate.

**1. Summer 2013 Tuition Reimbursement**

The IHO's directed the district to reimburse the parents for a portion of the student's tuition at Riverview relative to the student's attendance during the summer 2013 (IHO Decision at p. 37).

**a. Unilateral Placement**

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S.

at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

Initially, while, as discussed below, a residential placement is quite restrictive for this student, as discussed below relative to the IHO's placement order for the 2013-14 school year, the Second Circuit recently held that while the restrictiveness of a unilateral parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement, parents are not held as strictly to the standard of placement in the LRE as school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836-37 [2d Cir. 2014]; Frank G., 459 F.3d at 364 ; Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000] [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 552 [S.D.N.Y. 2010]; W.S. v. Rye City School Dist., 454 F. Supp. 2d 134,138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]). Consequently, under the facts and circumstances of relating to the parents' unilateral placement of the student at Riverview during the summer of 2013, the restrictiveness of the residential school does not otherwise preclude a finding that it was appropriate to meet the student's needs in this instance.

The parents' have otherwise satisfied their burden of demonstrating that the unilateral placement of the student for the summer at Riverview was appropriate because Riverview addressed the unique needs of the student during those months (Gagliardo, 489 F.3d at 112). For example, the evidence in the hearing record reflects that the student demonstrated particular needs in the areas of cognition, academics language processing, and fine motor skills (see Dist. Exs. 7; 9-10; 14; 18-19; 25; 28; 30; 32; 39). Riverview, an out-of-state nonpublic school designed for the

students with language based learning disabilities with IQs ranging from 65-90 (Tr. pp. 1108-10, 1260), addressed the student's cognitive, academic, and social needs (Tr. pp. 1004-08, 1064-67, 1071-72, 1077-80, 1112-13, 1124-25, 1132, 1339-40). In addition, to address the student's language needs, Riverview typically followed the student's IEP and increased the frequency of speech-language services when needed (Tr. pp. 1068-69, 1151-52).[20] In addition to the reasons stated by the IHO, the evidence in the hearing record demonstrates that Riverview offered specially designed instruction that addressed the student's needs in the areas of academics, cognition, and language during the summer 2013, and therefore, constituted an appropriate unilateral placement.

**b. Equitable Considerations**

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

Here, as found by the IHO, there are no equitable considerations that would bar tuition reimbursement for the cost of the student's summer 2013 attendance at Riverview (see IHO Decision at pp. 33-35). However, the IHO found that the parents solicited and acquired donations to front the cost of the summer 2013 Riverview placement through fundraising in the local community (IHO Decision at p. 35; see Tr. pp. 1025-26, 1051; Parent Ex. 85). The IHO's reduction of the amount of tuition reimbursement because the parents needed to engage in local fundraising efforts was not a proper basis to reduce the parents' award of tuition reimbursement. Parents often take loans, receive gifts and donations from friends and family, or make other financial arrangements to pay a private school, none of which offends the principles of equity, state law or the IDEA. Moreover there is no evidence that Riverview, which gained the benefits of the student's enrollment, had any relationship at all to the private donors in this instance. In short, all involved

[20] The hearing record indicates that Riverview did not have an occupational therapist working in summer 2013 (Tr. pp. 1068-69). However, a parent need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens, 2010 WL 1005165, at *9).

appeared to be acting out of interest in the student's education alone. Accordingly, the IHO's inquiry into the source of the parents' funding in this case, and rationale for the reduction of the reimbursement award for the amount raised through the parents' fundraising efforts was improper, and the parents are entitled to full reimbursement for the entire cost of the student's tuition at Riverview for the summer (Parent Ex. 85).[21]

**2. 2013-14 IEP and Placement**

As noted above, the IHO ordered the district to immediately place the student in a residential program at Riverview and to fund that out-of-state placement, at public expense, for the 2013-14 school year beginning with the student's first day of attendance after September 1, 2013 (IHO Decision at p. 36). The IHO additionally ordered the CSE to convene and prepare an IEP for the student to include certain levels of related services. On appeal, the district argues that the IHO erred in ordering the district to immediately place the student in the residential program at Riverview and to fund the cost of the placement.

Initially, as to the student's IEP, the CSE should develop the student's IEP going forward and recommend such related services which are warranted at the time based on the student's then-current and evolving needs and deficits, rather than being required to adhere to the particular levels specified by the IHO. Nonetheless, as noted below, a remedy is warranted relative to the relative services omitted from the student's various IEPs.

As to placement at Riverview, the district is correct, in that there is no evidence in the hearing record demonstrating that the district was incapable of offering and providing those related services required by the student going forward or that the related services were not available at the district. As noted above, the CSE is empowered to recommend appropriate services for a student and, as such, the CSE should be the first to determine the extent to which the student can be educated with nondisabled peers in a public school setting before considering a more restrictive placement, such as the residential program at the out-of-state nonpublic school at issue in this case (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]).

While on the one hand the LRE standard for reimbursement of a unilateral placement is relatively low, on the other hand requiring the District to return the student to the out-of-state residential program at Riverview is particularly inappropriate based on LRE considerations.[22]

[21] There is nothing to prohibit the parents from reimbursing the source(s) of their fundraising efforts should they elect to do so.

[22] In contrast to the review of Riverview as the student's unilateral placement for the summer 2013, here, where the IHO ordered the district to place the student, it is necessary to take into account LRE considerations.

While the parties disagreed over the student's related services, the hearing record provides no basis for a finding that the student could not have been educated in the school environment within the school she would otherwise attend which affords her access to her nondisabled peers (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). Moreover, contrary to the IHO's view that Riverview was "not too restrictive a setting for [the student]" (IHO Decision at p. 32), a residential placement is one of the most restrictive educational placements available for a student, and such a restrictive placement is not appropriate unless it is required for a student to benefit from his or her educational program (Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22). The Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. . . . The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132).

The evidence in the hearing record does not support the conclusion that this student required a residential placement. On the contrary, the evidence in the hearing record establishes that the student did make progress in the district during the 2010-11, 2011-12, and 2012-13 school years commensurate with her cognitive abilities, and the student was capable of continuing to make progress with the appropriate level of related services in place. Accordingly, that portion of the IHO's decision ordering the district to remove the student from the public school and immediately place the student out-of-state at Riverview for the 2013-14 school year is reversed.

**3. Compensatory Education**

As compensatory education or additional services is available as another equitable remedy to make up for a denial of FAPE, consideration must be given as to how the parents' request for compensatory education might make up for the insufficient related services in this case (see Newington, 546 F.3d at 122-23; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005]).

The IDEA authorizes "appropriate" relief to be awarded for a denial of a FAPE, including compensatory education or additional services—specifically, the "replacement of educational services that the child should have received in the first place" (Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005]; accord Newington, 546 F.3d at 123). Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Within the Second Circuit, compensatory relief in the form of supplemental special education or related services has been awarded to students who are eligible for continued instruction under the IDEA if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at

*23 [E.D.N.Y. Oct. 30, 2008]; see generally R.C. v. Bd of Educ., 2008 WL 9731053, at *12-13 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; see. e.g., Application of a Student with a Disability, Appeal No. 12-209; Application of the Dep't of Educ., Appeal No. 12-135).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid, 401 F.3d at 524 [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Puyallup, 31 F.3d at 1497). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[ ] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518, 525 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 ["There is no obligation to provide a day-for-day compensation for time missed"]).

There is no sense in waiting years to initiate a compensatory education award until after the student as exited the secondary education system. In this case, for substantially the same the reasons stated by the IHO (see IHO Decision at pp. 27-29), the IHO properly denied the parents' request, renewed in their cross-appeal, for compensatory education consisting of three years of post-secondary education at Riverview because compensatory education in that form would not be the appropriate relief to compensate the student for the district's failure to include direct OT services in the student's IEPs for the years in question and failure to recommend an appropriate level of speech-language therapy services. Rather, the parents are entitled to compensatory additional services, as directed below, equivalent to the level of OT and speech-language therapy from which the student was deprived for the second half of 2010-11 and the 2011-12, 2012-13, and 2013-14 school years.

As the parties have prepared little argument with respect to the development of a compensatory education award, a quantitative approach will be used rather than a qualitative approach. The compensatory additional services that will be awarded to the student for speech-language therapy are calculated to remedy the deprivation of the appropriate levels of speech-

language therapy that the student should have received during the 2010-11, 2011-12, 2012-13, and 2013-14school years.[23] The calculation, in minutes, is set forth below, where there are 36 weeks during a 10-month school year and six additional weeks in an extended 12-month school year (for a total of 42 weeks in a 12-month or extended school year), and where the amount and rate of compensatory additional speech-language therapy services is awarded at the same level that the IHO found appropriate for the 2013-14 school year, which was three 30-minute small-group sessions per week.[24]

Thus, the total amount of compensatory additional speech and language services is: three 30-minute small-group sessions per week (the appropriate amount of speech-language therapy services found by the IHO) for three and a half 12-month school years (but only the period of deprivation that the district is responsible for), in minutes, minus the amount of speech-language therapy, in minutes, recommended by the district during the second half of the 2010-11 school year, the 2011-12, and 2012-13 school years, and the 10-month portion of the 2013-14 school year. Accordingly, three-and-a-half years of compensatory additional services at the rate awarded by the IHO would total the following in minutes, where the student would receive three, 30-minute sessions of therapy per week on a 12-month basis: 18 weeks (half of 2010-11 school year) + 6 weeks (summer 2011) + 36 weeks (2011-12) + 6 weeks (summer 2012) + 36 weeks (2012-13) + 36 weeks (2013-14) = 138 weeks. Three 30-minute sessions per week for 138 weeks amounts to a total of 414 30-minute sessions of speech-language therapy, which in turn equals 12,420 minutes (414 sessions x 30 minutes) to remedy the deprivation of speech-language therapy services during the disputed school years. However, the compensatory additional services award must be reduced by the number of minutes of speech-language therapy services recommended by the district during the years in question. Accordingly, subtracted from the bank total of 12,420 minutes are the following:

2010-11 School Year (January 2011–June 2011):

Two 40-minute sessions per week (80 minutes) x 18 weeks = 1440 minutes

2011-12 School Year (Summer: July 2011–August 2011):

One 30-minute session per week (30 minutes) x 6 weeks = 180 minutes

2011-12 School Year (September 2011–June 2012):

Two 30-minute sessions per week (60 minutes) x 36 weeks = 2160 minutes

2012-13 School Year (Summer: July 2012–August 2012):

[23] Because the parents unilaterally placed the student at Riverview for the summer 2013 period, and because the parents' are being reimbursed for the entire cost of the student's summer 2013 attendance at Riverview, the district is not obligated to remedy any deprivation of speech-language therapy or OT for the 6 weeks of summer 2013, and the compensatory additional services award is adjusted accordingly herein.

[24] The school year consists of 180 school days, which equals 36 weeks.

One 30-minute session per week (30 minutes) x 6 weeks = 180 minutes

2012-13 School Year (September 2012–June 2013):

Two 30-minute sessions per week (60 minutes) x 36 weeks = 2160 minutes

2013-14 School Year (September 2013–June 2014):

Two 30-minute sessions per week (60 minutes) x 36 weeks = 2160 minutes

**4140 minutes**

Accordingly, the district is ordered to provide compensatory additional speech-language therapy services in a small group in the amount of 69 hours (4,140 minutes / 60 minutes). If the district elects to do so, and the parents agree, the speech-language therapy may be provided as direct 1:1 therapy for all or any portion of the 4,140 minutes.

In addition, the compensatory additional 1:1 direct OT services are calculated in the same manner as the speech-language therapy services and are awarded to remedy the deprivation of 1:1 direct OT that the student should have received during the 2010-11, 2011-12, 2012-13, and 2013-14 school years. Thus, the total amount of compensatory additional 1:1 direct OT services that the district shall provide is equal to the sum total of two sessions per week of 1:1 direct OT (the appropriate amount found by the IHO) for three-and-a-half 12-month school years (not including summer 2013), as follows (in minutes):

2010-11 School Year (January 2011–June 2011):

Two 30 minute sessions per week (60 minutes) x 18 weeks = 1080 minutes

2011-12 School Year (July 2011–June 2012):

Two 30-minute sessions per week (60 minutes) x 42 weeks = 2520 minutes

2012-13 School Year (July 2012–June 2013):

Two 30-minute sessions per week (60 minutes) x 42 weeks = 2520 minutes

2013-14 School Year (September 2013–June 2014):

Two 30-minute sessions per week (60 minutes) x 36 weeks = 2160 minutes

**8280 minutes**

Accordingly, the district is ordered to provide compensatory additional 1:1 direct OT services in the amount of 138 hours (8,280 minutes / 60 minutes).

## VI. Conclusion

In summary, a review of the evidence in the hearing record shows: that that the district did not offer the student a FAPE for the 2010-11, 2011-12, 2012-13, and 2013-14 school years due to the district's failure to recommend a sufficient level of OT and speech-language therapy for the student for the school years in question; that the parents' unilateral placement of the student at Riverview for the summer 2013 months was appropriate and that equitable considerations do not weigh against the parents' request for relief for the summer 2013 tuition costs; relief in the form of placement at Riverview for the 2013-14 school year was inappropriate; but compensatory additional services in the form of OT and speech-language therapy services constitutes an appropriate remedy in this instance.

**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 of December 18, 2013 is modified, by reversing that portion which reduced the amount of tuition reimbursement owed to the parent for the summer 2013;

**IT IS FURTHER ORDERED** that district shall reimburse the parents for the entire cost of the student's tuition at the Riverview School for the summer 2013 program in the amount of $7,725;

**IT IS FURTHER ORDERED** that the IHO's decision of December 18, 2013 is modified, by reversing those portions which ordered the district to immediately place the student at Riverview at public expense;

**IT IS FURTHER ORDERED** that the district shall provide additional services to the student for the deprivation of 1:1 direct OT services during the 2010-11, 2011-12, 2012-13, and 2013-14 school years, which shall be provided as a bank equal to the sum total of 138 hours, which shall be used by the student before June 31, 2017, unless the parties otherwise agree; and

**IT IS FURTHER ORDERED** that the district shall provide additional services to the student for the deprivation of an appropriate amount of speech-language therapy during the 2010-11, 2011-12, 2012-13, and 2013-14 school years, which shall be provided as a bank equal to the sum total of 69 hours, which shall be used by the student before June 31, 2017, unless the parties otherwise agree.

**Dated:** **Albany, New York**
**September 26, 2014**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**