



# The University of the State of New York

The State Education Department

State Review Officer

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No. 14-070

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Shenendehowa Central School District**

## **Appearances:**

Ferrara, Fiorenza, Larrison, Barrett & Reitz, PC, attorneys for respondent, Susan T. Johns, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their son for the 2012-13 and 2013-14 school years was appropriate. The district cross-appeals from that portion of the IHO's decision which found that it improperly initiated services in contravention of the student's recommended educational program. The appeal must be sustained in part. The cross-appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

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

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

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

### **III. Facts and Procedural History**

With respect to the student's educational history, the hearing record shows that the student had attended a district public school since the 2009-10 school year (first grade) (see Dist. Exs. 3 at p. 1; 6 at p. 2; 48 at p. 1). During the 2011-12 school year, the student received integrated co-teaching (ICT) services in English language arts (ELA) and direct consultant teacher services in mathematics, and attended a 15:1 special reading class that utilized the Wilson method of instruction (see Dist. Exs. 14 at pp. 1, 8; 15 at pp. 2-3; 16 at pp. 1, 8; 19 at pp. 1, 8; 48 at p. 2). In addition, commencing in September 2011, the parents obtained private tutoring for the student in

mathematics, as well as in reading using a method known as "alphabet phonics" (see Dist. Ex. 16 at p. 15). At all times relevant to this proceeding, the student was eligible for special education as a student with a learning disability(see Dist. Exs. 24 at p. 1; 29 at p. 1; 38 at p. 1).<sup>1</sup>

On March 6, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (Dist. Ex. 24 at p. 1). The March 2012 CSE recommended placement in a general education classroom with ICT services for ELA five times per week in 60-minute sessions (id. at pp. 1, 9). The CSE also recommended five 30-minute sessions of direct consultant teacher services per week in mathematics and five 30-minute sessions of resource room services per week in a 5:1 ratio (id.). The CSE further recommended eight annual goals targeted to address the student's needs in the areas of reading, writing, and mathematics, as well as supports for the student's management needs, access to assistive technology, supports for school personnel on behalf of the student, and testing accommodations (id. at pp. 7-11). For summer 2012, the March 2012 CSE recommended a 15:1 special academic skill development class for two and a half hours, five days per week (id. at pp. 1, 11).

In a prior written notice, dated March 6, 2012, the district set forth the basis for the CSE's rejection of the BOCES program preferred by the parents, noting that the student "ha[d] been able to progress in general education classes when provided accommodations and/or supports" and that the BOCES program would improperly limit the student's access to nondisabled peers (Dist. Ex. 25 at p. 1). The prior written notice set forth the CSE's belief that the student could achieve his reading goals with the recommended ICT and resource room services (id.). The district reiterated its position in a letter to the parents dated March 22, 2012 (Dist. Ex. 26).

By letter dated October 17, 2012, the district requested the parents' consent to change the student's March 2012 IEP without a meeting in order to remove the recommended ICT services in ELA and substitute a 15:1 special reading class and consultant teacher services in writing (Dist. Ex. 28 at pp. 1-2). The district indicated that the amendment was proposed in order to "reflect a change in the services being provided from [ICT] reading to special class reading" (id. at p. 2). The parents did not agree to the change and requested a CSE meeting (Parent Ex. L4 at p. 2).

On November 13, 2012, the CSE reconvened and amended the March 2012 IEP by removing the ICT services in ELA and the resource room and substituting a 15:1 special class in reading (five 60-minute sessions per week) and direct consultant teacher services for ELA (five 30-minute sessions per week (Dist. Ex. 29 at pp. 1, 8). With respect to the special reading class,

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<sup>1</sup> The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

the November 2012 IEP described the System 44/Read 180 programs in which the student was participating at the time of the CSE (see Dist. Ex. 29 at p. 4).<sup>2</sup>

In a prior written notice dated November 13, 2012, the district summarized the change from the ELA ICT services to the special reading class, noting that the student "responded to the current structure of reading program" and cites evidence of progress (Dist. Ex. 30 at p. 1). The notice stated that the CSE recommended the special reading class "to address parental concerns with [the student's] reading skills and improve [his] word recognition skills and sight word vocabulary" (id.). The prior written notice further indicated the parents' request that the IEP not be changed until the outcome of an "[i]ndependent [e]valuation" (id.).

On April 22, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (Dist. Ex. 38 at p. 1).<sup>3</sup> The April 2013 CSE recommended two 30-minute sessions of resource room services per week; five 30-minute sessions of consultant teacher services per week in ELA; a 15:1 special class in reading to meet five times per week in 60-minute increments; and five 30-minute sessions of consultant teacher services per week in mathematics (id. at pp. 1, 9). The CSE also recommended five annual goals targeted to address the student's needs in the areas of reading, writing, and mathematics, as well as supports for the student's management needs, support for school personnel on behalf of the student, and testing accommodations (id. at pp. 7-12). For summer 2013, the CSE recommended placement in a 15:1 special academic skill development class which would convene five times per week in two and a half hour sessions (id. at pp. 1, 11).

By prior written notice, dated April 22, 2013, the district described the bases for the recommendations in the April 2013 IEP, including the CSE's determination that the parents' preferred BOCES program was too restrictive for the student (Dist. Ex. 38 at pp. 14-15). The notice indicated that, although school staff had not observed the student exhibit anxiety, a counseling evaluation and consultation were recommended due to parental concerns but that the parents declined the same to pursue private counseling for the student (id. at p. 14). In response to the parents' request that the CSE reconsider the April 2013 IEP recommendations, in a letter to the parents dated May 6, 2013, the district reiterated some of the content of the prior written notice and further described the Read 180 program (Dist. Ex. 39 at pp. 1-2; see Dist. Ex. 40 at pp. 2-5).

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<sup>2</sup> The district's CSE chairperson testified that these programs offered "a multidimensional reading approach that work[ed] on phonics, vocabulary, sameness awareness, writing and reading comprehension skills" (Tr. p. 45). She further testified that students would begin by using System 44, which "start[ed] with . . . word study and phonics" (Tr. p. 189). After developing familiarity with System 44, district students utilized the Read 180 program which incorporated "word study" and was "more heavily embedded in comprehension" (id.). An October 2012 district psychoeducational evaluation report further described the System 44 program as a "structured reading program in which students participate in four activities within a 60 minute period: large group instruction, small group instruction, computer-based instruction and quiet reading" (Dist. Ex. 48 at p. 2).

<sup>3</sup> This meeting was preceded by a March 19, 2013 CSE meeting which did not result in an IEP (see Dist. Ex. 33 at p. 1). The CSE agreed to postpone the meeting to review the results of a private psychoeducational evaluation report (id.).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated July 23, 2013, the parents argued that the district failed to offer the student a FAPE in the least restrictive environment (LRE) for the 2012-13 and 2013-14 school years (see generally Dist. Ex. 1).

First, regarding the process by which the March 2012 IEP was developed, the parents contended that the CSE failed to consider an August 2011 neuropsychological evaluation report as well as the parents' concerns related to the student's anxiety (Dist. Ex. 1 at pp. 10, 11). As for the March 2012 IEP, the parents argued that its recommendations were inappropriate because the student did not make progress in a similar program leading up to the time of the CSE meeting (id. at p. 11). The parents also argued that the IEP's annual goals were inappropriate because they were not measurable (id. at p. 15). As for the implementation of the March 2012 IEP, the parents contended that the district unilaterally substituted a different reading program for the student at the beginning of the 2012-13 school year (id. at p. 11). The parents additionally argued that the special reading class recommended by the November 2012 CSE was not appropriate to meet the student's needs (id.).

Regarding the procedure by which the April 2013 IEP was developed, the parents contended that the CSE failed to consider a March 2013 neuropsychological evaluation report (Dist. Ex. 1 at p. 13). The parents further asserted that the CSE did not prescribe supports to address the student's anxiety (id. at pp. 13, 15). As for the April 2013 IEP, the parents argued that its recommendations were inappropriate given the student's lack of progress at the time of the CSE meeting (id. at pp. 13, 14). The parents further contended that the IEP's annual goals were not measurable (id. at p. 15). Finally, the parents asserted that the program offered to the student for the summer of 2013 was not tailored to meet his needs (id. at pp. 13, 15).

For relief, the parents requested "an appropriate IEP" for the student that included several identified services, compensatory additional services, staff training, and "individualized" extended school year (ESY) services (Dist. Ex. 1 at p. 16; IHO Ex. 1).<sup>4</sup>

### **B. Impartial Hearing Officer Decision**

An impartial hearing convened on October 29, 2013 and concluded on December 11, 2013 after five days of proceedings (see Tr. pp. 1-500). In a decision dated April 9, 2014, the IHO found

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<sup>4</sup> The parents withdrew their request for an order requiring placement of the student in a board of cooperative educational services (BOCES) program at the impartial hearing and amended their sought relief with the IHO's permission (IHO Ex. 1; see Tr. pp. 77-78).

that the district offered the student a FAPE for the 2012-13 and 2013-14 school years (IHO Decision at pp. 28-41).<sup>5</sup>

As a preliminary matter, the IHO found that the parents were precluded from arguing whether the April 2013 CSE prescribed appropriate assistive technology services as this claim was not contained in the parents' due process complaint notice (IHO Decision at p. 41 n.5).

Next, as for the March 2012 IEP, the IHO found that it accurately stated the student's present levels of performance, which were consistent with observations contained in the August 2011 neuropsychological evaluation report (IHO Decision at pp. 29-30). Specifically, the IHO found that the district did not observe any anxious behavior in school but nevertheless incorporated a recommendation from a private evaluator in the IEP to address any such anxiety (*id.* at p. 36). The IHO further found that the IEP's annual goals "address[ed] all . . . of the student's needs at the time of the [CSE meeting]" and were measurable (*id.* at p. 30). However, the IHO noted that these annual goals failed to include a "baseline for measuring progress" (*id.* at p. 39). The IHO also found that the March 2012 IEP was reasonably calculated to provide educational benefits, relying, in part, on the progress the student made while being educated under this IEP (*id.* at pp. 32-34). The IHO further found that the program offered in the March 2012 IEP constituted the LRE, finding that the parents' sought program—a "segregated full-time special education program"—did not (*id.* at pp. 34-35).

With regard to the district's decision to enroll the student in a special class for reading at the beginning of the 2012-13 school year, the IHO found that the district unilaterally implemented this service in contravention of the March 2012 IEP (IHO Decision at pp. 30-31). Although the IHO found this a "serious" procedural violation, he did not find that it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (*id.* at p. 31).

Turning to the April 2013 IEP, the IHO found that the IEP was reasonably calculated to provide the student with educational benefits (IHO Decision at pp. 38-39). The IHO found that the materials considered by the CSE supported continuation of the student's current reading program (*id.*). Moreover, the IHO found that the student's progress in reading during the 2012-13 school year supported the CSE's conclusion that the student could continue to be successful in the district's offered program (*id.* at p. 39). The IHO further found that, with regard to anxiety concerns reported by the parents, the CSE offered to conduct an evaluation and provide counseling services, both of which were refused by the parents (*id.* at 37). Thus, the IHO concluded, "no denial of FAPE occurred under these circumstances" (*id.*).

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<sup>5</sup> The IHO also made findings regarding alleged violations of the Americans with Disabilities Act which are beyond the jurisdiction of an SRO and will not be reviewed on appeal (*see* IHO Decision at pp. 35-36; *see also* Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]; *A.M. v. New York City Dep't of Educ.*, 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]).

The IHO next identified several shortcomings with the April 2013 IEP's annual goals, none of which individually or cumulatively resulted in a denial of FAPE to the student (IHO Decision at pp. 39-40). The IHO found that the annual goals failed to specify a "baseline" and improperly omitted math problem solving, writing, and reading fluency goals from the March 2012 IEP (*id.* at 40). As a remedy for the lack of annual goals in the aforementioned areas, the IHO ordered the CSE to reconvene and develop an IEP that identified a "baseline for measuring progress" as to each of the student's annual goals (*id.* at p. 41). The IHO further ordered the CSE to consider the student's need for a math problem solving goal and to "[d]evelop IEP goals for paragraph/composition writing and oral fluency in reading" (*id.*). The IHO additionally ordered the CSE to consider whether the deficiencies with the April 2013 IEP's annual goals "resulted in a deprivation of educational benefit" (*id.*). If the CSE answered this question in the affirmative, the IHO ordered it to "provide . . . appropriate remedial services in addition to the student's current IEP recommendation[s]" (*id.*). As for ESY services during the summer 2013, the IHO found that these services were reasonably calculated to prevent substantial regression and, thus, appropriate (*id.* at pp. 37-38).<sup>6</sup>

#### **IV. Appeal for State-Level Review**

The parents appeal, arguing that the IHO erred by finding that the district offered the student a FAPE for the 2012-13 and 2013-14 school years. The parents contend that the IHO impermissibly shifted the burden of proof, made certain factual errors, and improperly relied upon retrospective testimony to conclude that the student was offered a FAPE for the 2012-13 school year. The parents further allege that the IHO erred by refusing to consider their claim regarding the April 2013 CSE's consideration of assistive technology.

With respect to the process by which the March 2012 IEP was developed, the parents appeal the IHO's findings that the March 2012 CSE considered the August 2011 neuropsychological evaluation report and addressed the parents' concerns regarding the student's anxiety. As for the March 2012 IEP, the parents contend that the IHO erred by finding that its present levels of performance reflected the student's needs. The parents also posit that the IEP's annual goals were inappropriate because they were not measurable. The parents further assert that the IHO erred by finding that the district's initiation of a new reading program during the 2012-13 school year did not result in a denial of FAPE. The parents additionally contend that the IHO erred in finding that the recommended placement constituted the student's LRE.

Turning to the process by which the April 2013 IEP was developed, the parents argue that the IHO erred by rejecting their claim that the CSE failed to consider their concerns regarding the student's anxiety. As for the April 2013 IEP, the parents contend that, while the IHO correctly recognized several deficiencies with the IEP's annual goals, he erred by finding that these shortcomings did not rise to the level of a denial of FAPE. The parents also argue that the recommendations in the April 2013 IEP were inappropriate because the student did not make progress during the 2012-13 school year.

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<sup>6</sup> ESY services are also commonly referred to as 12-month services and provide at least 30 days of services over the course of the months of July and August (8 NYCRR 200.1[eee]).

As for the ESY services offered to the student in summer 2013, the parents aver that the IHO erred in determining that these services were appropriate to meet the student's needs. Finally, with respect to the relief ordered by the IHO, the parents argue that the IHO inappropriately delegated his responsibility to determine whether additional compensatory additional services were necessary to the CSE. Therefore, the parents request reversal of the IHO's decision.

In an answer, the district denies the parents' material assertions and argues that the IHO correctly determined that the district offered the student a FAPE for the 2012-13 and 2013-14 school years for the reasons set forth in his decision. The district also contends that the parents' allegations pertaining to the 2012-13 school year are moot. The district further interposes a cross-appeal asserting that the IHO erred by finding that the district's enrollment of the student in a special reading class in September 2012 violated the IDEA. The parents refute these defenses and allegations in a reply and an answer to the district's cross-appeal.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 180-83, 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 LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; *see* Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], *aff'd*, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding

the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Sufficiency of the IHO Decision**

On appeal, the parents raise two issues regarding the propriety of the IHO's decision. First, the parents argue that the IHO inappropriately placed the burden of proof on the parents regarding the appropriateness of the district's recommended program. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, as noted above, under State law, the burden of proof has been placed 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., 2010 WL 3398256, at \*7).<sup>7</sup> Here, there is no evidence that the IHO misapplied the parties' respective burdens of proof (see IHO Decision at pp. 26-41). The IHO, instead, weighed the evidence adduced at the impartial hearing and resolved the primary disputed issues in the district's favor (see id.). The parents' protestations to the contrary, therefore, are without merit.<sup>8</sup>

Second, the parents argue that the IHO utilized retrospective evidence to support his conclusion that the March 2012 IEP offered the student a FAPE. The parents are correct that the IHO relied upon retrospective evidence to reach this conclusion and that this was improper (IHO Decision at pp. 32-34; see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]). Specifically, the IHO used the progress made by the student while being educated under the March 2012 IEP to conclude that the March 2012 CSE's

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<sup>7</sup> The Schaffer Court left open the question of whether the States may have authority to shift the burden of proof through legislation (Schaffer, 546 U.S. 49, 61-62).

<sup>8</sup> Even assuming for purposes of argument that the IHO allocated the burden of proof to the parents, the harm would be only nominal insofar as there is no indication that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H., 685 F.3d at 225 n.3; A.D. v. New York City Dept. of Educ., 2013 WL 1155570, at \*5 [S.D.N.Y. Mar. 19, 2013]).

recommendations were appropriate (IHO Decision at pp. 32-34; see R.E., 694 F.3d at 193).<sup>9</sup> This portion of the IHO's decision, therefore, must be reversed.<sup>10</sup>

## 2. Scope of the Impartial Hearing

Next, it is necessary to clarify which issues are properly raised in this proceeding. The parents argue that the IHO erred by refusing to consider their claim regarding the April 2013 CSE's consideration of assistive technology. This issue, however, may not be considered because it was not included in the parents' due process complaint notice.

A complaining party may not raise issues at the impartial hearing or for the first time on appeal that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][III]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see, e.g., B.M. v New York City Dep't of Educ., 569 Fed. App'x 57, 59, 2014 WL 2748756 [2d Cir. June 18, 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-586 [S.D.N.Y. 2013]).

In this case, the IHO permitted the parents to amend their request for relief during the course of the impartial hearing and, while the parent requested relief related to assistive technology in their amendment, as the IHO observed, this did not relate to any allegation in the due process complaint notice (see IHO Decision at p. 41 n.5; Tr. pp. 77-82, 348-49; Dist. Ex. 1 at pp. 3-16; IHO Ex. I). Therefore, because this claim was not identified as an issue to be resolved at the impartial hearing, it cannot be considered on appeal.<sup>11</sup>

Relatedly, the district contests the IHO's allowance of an amendment to the parents' sought remedy. This argument, however, is not contained in the district's answer and cross-appeal but, instead, within a memorandum of law. It has long been held that a memorandum of law is not a substitute for a petition for review, which is expected to set forth the petitioner's allegations of the IHO's error with appropriate citation to the IHO's decision and the hearing record (8 NYCRR 279.8[a][3], [b]; Application of a Student with a Disability, Appeal No. 12-113; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of a Student with a Disability, Appeal No. 08-003; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-121; Application of a Child with a Disability,

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<sup>9</sup> To the extent the IHO relied upon the student's progress from September to November 2012 in assessing the design of the November 2012 IEP, this would be inequitable given the district's unilateral implementation of this program, as further explained below.

<sup>10</sup> The parents also argue that the IHO's decision contains numerous factual errors. Even assuming for purposes of argument that each of these assertions of error were true, they would not, by themselves, necessitate reversal of the IHO's conclusions.

<sup>11</sup> Additionally, the district did not open the door to these claims by soliciting testimony from a witness "in support of an affirmative, substantive argument" as to these issues (B.M., 569 Fed. App'x at 59; see M.H., 685 F.3d at 250-51; N.K., 961 F. Supp. 2d at 585; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*9 [S.D.N.Y. Aug. 5, 2013]).

Appeal No. 07-112). To hold otherwise would permit parties to circumvent the page limitations set by State regulation (8 NYCRR 279.8[a][5]). Therefore, this issue is not properly presented and will not be addressed.

### **3. Mootness**

The district argues that the parents' claims pertaining to the 2012-13 school year are moot because the CSE developed a subsequent IEP for the student in April 2013. However, it is generally accepted that a claim for compensatory education or additional services, which the parents assert in this proceeding, presents a live controversy (Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*15 [E.D.N.Y. Oct. 30, 2008]; see Lesesne v. Dist. of Columbia, 447 F.3d 828, 833 [D.C. Cir. 2006]; Lillbask v. State of Conn. Dept. of Educ., 397 F.3d 77, 89-90 [2d Cir 2005]; Sch. Admin. Dist. No. 35 v. Mr. & Mrs. R., 321 F.3d 9, 17-18 [1st Cir. 2003]; Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769, 774 [8th Cir. 2001]; Fullmore v. Dist of Columbia, 40 F. Supp. 3d 174, 178-79 [D.D.C. 2014]), and the resolution of this controversy may have an effect upon the legal relationship between the parties. Therefore, the district's argument is rejected and a discussion on the merits follows.

### **B. March 2012 IEP**

#### **1. CSE Process/Procedure**

The parents challenge the IHO's findings that the March 2012 CSE considered an August 2011 neuropsychological evaluation report and the parents' concerns related to the student's anxiety. A review of the evidence in the hearing record supports the IHO's determinations on these issues.

A CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Moreover, the IDEA "does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP" (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*11 [S.D.N.Y. Aug. 5, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9, 2005 WL 1791553 [2d Cir. July 25, 2005]; see T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 340 [S.D.N.Y. 2013]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010], aff'd, 487 Fed. App'x 619, 2012 WL 2615366 [2d Cir. 2012]).

The evidence in the hearing record reflects that the March 2012 CSE considered the August 2011 neuropsychological evaluation report (Tr. pp. 50, 86, 89-90). Indeed, the March 2012 IEP specifically alluded to the evaluation report and its testing results (Dist. Ex. 24 at p. 4). Moreover, this evaluation report was considered at prior CSE meetings on October 25, 2011 and November 16, 2011 (Dist. Exs. 16 at pp. 2, 14, 17; 19 at pp. 1, 4; see Tr. pp. 422-43). While the parents complain that the March 2012 CSE did not adopt the evaluation report's recommendations, a CSE is not obligated to accede to recommendations made by private evaluators (J.C.S., 2013 WL 3975942, at \*11; Watson, 325 F. Supp. 2d at 145 [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"]; see T.G., 973 F. Supp. 2d at 340; E.S., 742 F. Supp. 2d at 436).

The hearing record further reveals that the March 2012 CSE properly considered the student's social/emotional needs. The March 2012 IEP's present levels of performance indicated that the student "ha[d] many friends in his class and fit[] in well with the other student" but that he "lack[ed] confidence in his academic abilities" and could give up too easily (Dist. Ex. 29 at p. 7). The IEP also noted that the student was "more confident in a group setting" where he "d[id] not give up as easily" (id.). The IEP recommended myriad supports for the student's management needs including, most pertinently, a recommendation that the student not be called on to "read aloud" during class (id. at p. 10).<sup>12</sup> Further, as the IHO correctly observed, district staff did not witness any anxious behavior in the school environment (IHO Decision at p. 36; see Tr. p. 171).

The parents nevertheless contend that the August 2011 neuropsychological report considered by the March 2012 CSE demonstrated a need for greater social/emotional support than the IEP provided. The evaluation report, however, merely indicated that it "may be helpful" for the student to explore more formalized counseling "[s]hould [his] self-consciousness about his academic struggles increase" (Dist. Ex. 15 at p. 15). This conditional recommendation did not obligate the CSE to prescribe a particular support or service. Therefore, the evidence in the hearing record supports the IHO's conclusion as to this issue.

## 2. Annual Goals

Next, the parents argue that the IHO correctly found that the March 2012 IEP's annual goals lacked a "baseline" measure. The parents further assert that this resulted in a denial of FAPE. A review of the March 2012 IEP reveals no deficiencies with its annual goals.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and

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<sup>12</sup> This recommendation was adopted from the August 2011 neuropsychological report (see Dist. Ex. 15 at p. 15).

ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The March 2012 IEP includes eight measurable annual goals which were based on the student's present levels of performance and aligned to the student's identified needs in reading (i.e., decoding skills, fluency), writing (i.e., related sentences within a paragraph, spelling rules and patterns), and mathematics (i.e., solving basic single digit multiplication facts under timed circumstances, identification of numerical operation needed to solve word problems) (Dist. Ex. 24 at pp. 8-9). The IHO's finding that these goals were inappropriate due to their lack of a "baseline" measure is without merit. The March 2012 IEP included detailed information about the student's present levels of performance (Dist. Ex. 24 at pp. 2-7). Furthermore, the annual goals addressed each of the student's areas of need while providing sufficient information for the student's teacher to measure his progress during the 2012-13 school year (id. at pp. 8-9). Therefore, a review of the March 2012 IEP reveals no deficiencies with its annual goals (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*13 [S.D.N.Y. Sept. 27, 2013] [finding that "[c]ontrary to [the parents'] contention . . . nothing in the state or federal statute requires that an IEP contain 'baseline levels of functioning' from which progress can be measured"], aff'd, 589 Fed. App'x 572, 2014 WL 5463084 [2d Cir. Oct. 29, 2014]; see also R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 434 [S.D.N.Y. 2014]; D.J. v. New York City Dep't of Educ., 2013 WL 4400689, at \*4 [S.D.N.Y. Aug. 15, 2013]; D.G. v. Cooperstown Cent. Sch. Dist., 746 F. Supp. 2d 435, 446-47 [N.D.N.Y. 2010]).

### **C. Implementation of March 2012 IEP and LRE Considerations**

On appeal, the parents contend that the IHO correctly recognized the impropriety of the manner in which the district initiated a special reading class for the student beginning in September 2012, but erred by finding that this did not rise to the level of a denial of FAPE. The district cross-appeals this portion of the IHO's decision, arguing that its actions did not violate the IDEA. A review of the evidence in the hearing record supports the parents' argument.

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). Therefore, a district's failure to implement these services will constitute a denial of FAPE if a party establishes that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524, 2008 WL 3523992 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ., 535 F.3d 1243, 1252 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]; T.M. v Dist. of Columbia, 2014 WL 6845495, at \*6 [D.D.C. Dec. 3, 2014]; V.M. v N. Colonie Cent. School Dist., 954 F Supp 2d 102, 118-19 [N.D.N.Y. 2013]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 (D.D.C.

2007) [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

The March 2012 IEP indicated that, beginning in September 2012, the student would receive ICT services within a general education classroom for ELA five times per week in 60-minute sessions (Dist. Ex. 24 at pp. 1, 9). At the beginning of the 2012-13 school year, although not included on the student's May 2012 IEP, the evidence in the hearing record shows that the student attended a special reading class and received consultant teacher services for reading (Parent Ex. T4 at pp. 8, 12; see Tr. pp. 165-66; Dist. Ex. 24 at pp. 1, 9).<sup>13</sup> The district wrote to the parents on October 17, 2012 and proposed amending the student's IEP without a meeting to "[r]emove co-taught ELA" from the student's IEP and replace it with "5x60 [s]pecial [c]lass [r]eading . . . and 5x30 [c]onsultant [t]eacher" services for ELA (Parent Ex. L4 at pp. 1, 2). This letter indicated that the reason for this proposal was "to reflect a change in the services being provided . . ." (id. at p. 2). Implicitly, then, the district recognized that it was not implementing the ICT services in conformity with the March 2012 IEP (id.; see Tr. pp. 460-61). While the CSE eventually convened in November 2012 where it memorialized the 15:1 special reading class on the student's IEP, the district did not show that it adhered to the March 2012 IEP's recommendation of ICT services within a general education classroom for ELA for approximately two months of the 2012-13 school year (see Dist. Ex. 24 at p. 1).

The district contends on appeal that its actions were nevertheless permissible because the reading services delivered in the special class were academic intervention services that did not fall under the aegis of special education.<sup>14</sup> This argument, however, is inapposite because it appears that the district implemented this service at the expense of the provision of the ICT services identified in the March 2012 IEP (see 8 NYCRR 100.1[g] ["[a]cademic intervention services shall be made available to students with disabilities on the same basis as nondisabled students, provided, however, that such services shall be provided to the extent consistent with the [IEP] developed for such student . . .").<sup>15</sup> While at best it is theoretically possible that the district provided these services in conformity with the March 2012 IEP, the evidence in the hearing record is insufficient support this conclusion.<sup>16</sup> Therefore, I find that the district's failure to adhere to the March 2012 IEP's placement recommendation constituted a material failure to implement the IEP.

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<sup>13</sup> While some evidence in the hearing record suggests that the parents were aware of this change, this would not affect my ultimate determination (see Tr. pp. 167-68).

<sup>14</sup> The district offers no persuasive evidence to support its position, such as, for example, a copy of the writing the principal was required to provide the parents notifying them of the commencement of academic intervention services (8 NYCRR 100.2[ee][6]).

<sup>15</sup> The State Education Department has offered interpretive guidance on the relationship between special education and academic intervention services (see "Academic Intervention Services: Questions and Answers," Office of P-12 Mem., at pp. 3-5 [Jan. 2000], available at <http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf>).

<sup>16</sup> While the testimony of several of the district's witnesses as to this point was unclear, this ambiguity does not inure to the district's benefit (see Tr. pp. 48-50, 166-67; see also Educ. Law § 4404[1][c]).

Moreover, while it is not entirely clear from the hearing record whether the "special class" in question was composed exclusively of students with disabilities, the November 2012 IEP described the 15:1 reading class as a "special class," (Dist Ex. 25 at p. 8). Because the district did not offer evidence to the contrary, this phrase is interpreted in accordance with State regulations (8 NYCRR 200.1[uu] [special class defined as "a class consisting of students with disabilities who have been grouped together because of similar individual needs for the purpose of being provided specially designed instruction . . ."). This, in turn, indicates that the district modified the student's educational program in such a way as to remove the student from a general education classroom setting in contravention of the requirement that a district provide the student an appropriate program in the 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 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). Here, the evidence suggests that the student could be satisfactorily educated in a general education classroom with the use of supplemental aids and services (see Newington, 546 F.3d at 119-20). For example, in rejecting the parents' preference for a BOCES program at the March 2012 CSE meeting, a prior written notice sent by the district reflected that the student's "reading goals [could] appropriately [be] met in the district program recommended" and that the student "ha[d] been able to progress in general education classes when provided accommodations and/or supports" (Dist. Ex. 25 at p. 1). In this manner, while the IHO correctly recognized that the segregated special class desired by the parents was inappropriately restrictive, he failed to apply this analysis to the district's recommended program (IHO Decision at pp. 34-35). Therefore, the evidence in the hearing record also supports a determination that the November 2012 IEP failed to offer the student a FAPE in the LRE for the 2012-13 school year.<sup>17</sup>

## **E. April 2013 IEP**

### **1. CSE Process/Procedure**

Next, turning to the April 2013 CSE, a review of the hearing record reveals that, as in the previous school year, the CSE addressed the student's social/emotional needs, including concerns related to anxiety, in the April 2013 IEP.<sup>18</sup> The April 2013 IEP, consistent with testimony from the student's teacher during the 2012-13 school year, the CSE chairperson, and the school psychologist, stated that "[s]chool staff have not observed any type of anxiety during the school day" (Dist. Ex. 38 at p. 7; see Tr. pp. 57-58, 71, 144, 171). The IEP further observed that the student "made many friends in the classroom" in the preceding year, "ha[d] shown an increase in confidence," and "benefit[ted] from encouragement to keep his motivation up" (Dist. Ex. 38 at p. 7). Therefore, the CSE concluded that the student did not evince social/emotional needs requiring special education services (id.).

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<sup>17</sup> Despite this finding, the hearing record reflects that this is not a case where either party harbored bad intentions. It is clear that both the district and parents tried, and are trying, to enhance the student's educational experience. That being said, at the next scheduled CSE meeting, the parties should discuss the potential benefits and/or concerns with the student receiving reading instruction with non-disabled peers.

<sup>18</sup> It is not clear, based upon the parents' petition, whether they continue to assert a denial of FAPE on this basis (see Pet. at p. 16). I have addressed this claim out of an abundance of caution.



Nevertheless, in response to the parents' concerns, the April 2013 CSE offered to conduct a counseling evaluation of the student (Dist. Exs. 38 at pp. 7, 20, 22; 39 at p. 1). According to contemporaneous meeting notes, the parents rejected this offer because they did not want counseling services to be delivered in school (Dist. Ex. 38 at p. 20; see also Parent Ex. T-5 at p. 1). While the parents were free to reject the district's offer, a parent's refusal to provide initial consent or revocation of consent for the provision of special education ensures that a district "[w]ill not be considered to be in violation of the requirement to make FAPE available to the [student]" (20 U.S.C. § 1414[a][1][D][ii][III][aa]; 34 CFR 300.300[b][3][ii], [4][iii]). Therefore, the evidence in the hearing record supports a finding that the April 2013 CSE addressed the student's social/emotional needs.

## 2. Annual Goals

The parents further contend that the IHO correctly identified deficiencies with the IEP's annual goals but erred in concluding that these deficiencies did not result in a denial of FAPE. The evidence in the hearing record does not support the IHO's determination that the April 2013 IEP's annual goals were inappropriate; accordingly, the parents' argument is dismissed.<sup>19</sup>

The April 2013 IEP contained a thorough description of the student's present levels of performance based on then-current evaluative information, including a March 2013 private neuropsychological evaluation report (Dist. Ex. 38 at pp. 2-7; see Tr. pp. 58, 91; Dist. Ex. 32 at pp. 1-17). The IEP identified the student's needs, contained measurable annual goals aligned to the student's needs, and included management strategies, accommodations, and supplementary aids and services to support the student in the classroom (Dist. Ex. 38 at pp. 2-11). Therefore, as with the March 2012 IEP, the IHO's contention that the annual goals were insufficient for lack of a "baseline" measure must be annulled (IHO Decision at p. 39; R.B., 15 F. Supp. 3d at 434; R.B., 2013 WL 5438605, at \*13; D.J., 2013 WL 4400689, at \*4; D.G., 746 F. Supp. 2d at 446-47).

Additionally, the IHO's finding that the annual goals were inappropriate because they did not address the student's needs regarding math problem solving, paragraph/composition writing, and oral fluency in reading is not supported by the evidence in the hearing record (IHO Decision at p. 41). While the student may have benefitted from additional annual goals, the evidence in the hearing reveals that the IEP addressed the student's needs in reading, writing, and math such that the lack of additional goals in these areas did not result in a denial of FAPE to the student (see J.L. v. City Sch. Dist., 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013] [finding that the failure to address each of a student's needs by way of an annual goal does not necessarily constitute a denial of a FAPE]).

Moreover, in the areas identified by IHO, the hearing record reflects that the student had demonstrated progress during the 2012-13 school year leading up to the April 2013 CSE meeting. Testimony by the CSE chairperson indicates that, by the time of the April 2013 CSE meeting, the student made considerable progress in reading and in his classroom performance (Tr. p. 60). He

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<sup>19</sup> Neither party has appealed the portion of the IHO's decision ordering the CSE to consider the student's need for a math problem solving goals and to "[d]evelop IEP goals for paragraph/composition writing and oral fluency in reading" (IHO Decision at p. 41). Nevertheless, because the parents continue to assert a denial of FAPE on this basis, this issue is addressed below.

was approaching grade level standards in his then-current performance, based on district testing, teacher observation of classwork, grades throughout the year, and on his performance with the System 44/Read 180 program (Tr. p. 60). The student's special education teacher during the 2012-13 school year also testified that the student made progress in reading, writing, and math (Tr. pp. 212-16). A review of the third quarter grades on the student's report card for the 2012-13 school year reveals that the student passed all academic subjects (Parent Ex. V6 at p. 1). The student's report card also reveals that the student passed math in the third quarter with a grade of 74 (his second highest grade for the third quarter), demonstrating marked improvement from a grade of 58 for the second quarter (*id.*; *see* Tr. p. 214).<sup>20</sup> The April 2013 IEP further indicated that, based on test results of a January 2013 neuropsychological evaluation, the student performed in the 25th percentile (average range) on applied math problems, as compared to his chronological peers (Dist. Exs. 32 at p. 8; 38 at p. 6).<sup>21</sup>

In consideration of the above, the evidence in the hearing record supports a finding that the annual goals in the April 2013 IEP targeted the student's identified areas of need and provided information sufficient to guide a teacher in instructing the student and measuring his progress (*see, e.g., D.A.B. v. New York City Dep't of Educ.*, 973 F. Supp. 2d 344, 360-61 [S.D.N.Y. 2013]; *E.F. v. New York City Dep't of Educ.*, 2013 WL 4495676, at \*18-\*19 [E.D.N.Y. Aug. 19, 2013]; *D.B. v. New York City Dep't of Educ.*, 966 F. Supp. 2d 315, 334-35 [S.D.N.Y. 2013]; *S.H. v. Eastchester Union Free Sch. Dist.*, 2011 WL 6108523, at \*8 [S.D.N.Y. Dec. 8, 2011]; *W.T. v. Bd. of Educ.*, 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; *Tarlowe*, 2008 WL 2736027, at \*9; *M.C. v. Rye Neck Union Free Sch. Dist.*, 2008 WL 4449338, at \*11 [S.D.N.Y. Sept. 29, 2008]; *W.S. v. Rye City Sch. Dist.*, 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]).

### **3. 15:1 Special Class for Reading**

The parents additionally contend that the student did not make progress in reading during the 2012-13 school year, such that the district's continued recommendation of similar services in the April 2013 IEP was inappropriate. Contrary to the parents' assertions, the evidence in the

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<sup>20</sup> These third-quarter grades were available to the April 2013 CSE and incorporated into the IEP's statement of the student's present levels of performance (*compare* Dist. Ex. 38 at pp. 3-5, *with* Dist. Ex. 43 at p. 1).

<sup>21</sup> It is unclear whether or not the April 2013 CSE had before it an April 2013 annual goals progress report (found in the hearing record as part of a final annual goals progress report for the 2012-13 school year) (*see generally* Dist. Ex. 46). However, with respect to the three areas addressed by the IHO, the hearing record reflects that, while the student did not meet the math problem solving goal included in the March 2012 IEP, as of April 2013, progress toward this goal was "difficult to measure" as the student's "efforts and attention in math ha[d] decreased" throughout the school year (*id.* at p. 5; *see also* Tr. pp. 243-45). In turn, these needs were addressed in the April 2013 IEP, which prescribed various management strategies, academic supports, modifications, and supplementary aids and services that addressed the student's attention and other needs so that he could focus on and complete academic tasks (Dist. Ex. 38 at pp. 7-12). Additionally, the April 2013 IEP prescribed consultant teacher services for mathematics (*id.* at p. 9). As for the student's needs regarding paragraph and composition writing, according to the progress report, as of April 2013, the student achieved this goal (Dist. Ex. 46 at p. 4). Finally, with respect to the student's oral fluency in reading, the evidence in the hearing record reveals that, as of April 2013, the student was "making satisfactory progress and [wa]s expected to achieve the goal" (*id.* at p. 3). Moreover, the April 2013 IEP included a goal that, although not identical to the goal contained in the March 2012 IEP, required the student to demonstrate oral fluency (Dist. Ex. 38 at p. 9 ["[d]uring a co-editing conference, [the student] will read each sentence of his writing piece aloud and will recognize any grammatically incorrect sentences . . ."]).

hearing record supports the IHO's determination that the student made progress in reading during the 2012-13 school year while receiving the special education services noted in the November 2012 IEP prior and up to the April 2013 CSE meeting.<sup>22</sup>

Testimony from the student's special education teacher for the 2012-13 school year reflected the student's progress using the Read 180 program in his special reading class (Tr. pp. 211-12). Quarterly administration of the Scholastic Reading Inventory (SRI) resulted in "Lexiles," the mathematical unit of measurement in regards to the student's ability to read fluently and with comprehension within a reasonable amount of time (Tr. pp. 211-12). The student scored at a Lexile level of 252 in October 2012, progressing to a Lexile level of 307 in January 2013, and progressing even further to a Lexile level of 412 by the end of March 2013 and to a Lexile level of 443 by the April 2013 CSE meeting (Tr. pp. 180, 211; Dist. Ex. 41 at pp. 1-4, 5).<sup>23</sup> Review of the April 2013 IEP reveals that, by March 2013, the student advanced to an independent reading level "P" with satisfactory comprehension on the Fountas and Pinnell assessment, equivalent to beginning fourth grade level (Dist. Ex. 38 at p. 4). By March 2013, the student's instructional reading level had advanced from level "O" (mid third grade) in January 2013 to level "Q" (second quarter of fourth grade) with satisfactory comprehension (*id.*). Multiple administrations of a district literacy profile that required the student to read word lists under timed conditions revealed that, by the time of the April 2013 CSE meeting, the student could read 42 out of 44 words in 37.7 seconds, whereas the mastery level was 39 seconds (Tr. p. 213; Dist. Ex. 38 at p. 4).

The student's report card grades for reading during the 2012-13 school showed progressive improvement from a grade of 60 for the first quarter to a grade of 63 for the second quarter, to a grade of 72 for the third quarter (Parent Ex. V6 at p. 1). The April 2013 IEP contained a description of the student as follows: (1) he participated in a pull-out program to address weaknesses in decoding; (2) he progressed from beginning decoder to developing decoder on a phonics inventory; (3) he was a very active and confident participant during reading groups and he would volunteer to read aloud and answer questions; and (4) the student carried over and incorporated skills learned during his private tutoring sessions outside of school (Dist. Ex. 38 at p. 5).<sup>24</sup>

Therefore, as the IHO correctly determined, the student demonstrated progress during the 2012-13 school year such that the CSE was not required to adopt alternate programming or accede

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<sup>22</sup> In their petition, the parents expressly confine their LRE challenge to the 2012-13 school year (Pet. at p. 14 ¶ 47). Were this issue before me, I would similarly conclude that the district failed to introduce evidence that a special class for reading represented the LRE for the student.

<sup>23</sup> According to testimony by the special education teacher and the CSE chairperson, an expected level of Lexile gain on the SRI during one school year is 75 to 100 Lexiles (Tr. pp. 66, 211). The student's progress reflects that, by March 2013, the student's Lexile level increased more than double that amount approximately one month prior to the April 2013 CSE, and approximately three months prior to the end of the 2012-13 school year (*see* Tr. 211). The hearing record reflects that Lexiles are related to the reading level difficulty of a reading piece (Tr. pp. 181-82).

<sup>24</sup> Once again, while unclear whether or not the April 2013 CSE had before it student's third quarter annual goal progress report, review of the same also demonstrates the student's progress in reading (Dist. Ex. 46 at pp. 2-3).

to the parents' request for placement in a program located outside of the district (Dist. Exs. 1 at pp. 13, 16; 39, 40).<sup>25</sup>

#### 4. Extended School Year Services: Summer 2013

The parents further appeal the IHO's finding that the ESY services offered to the student during July and August of 2013 were appropriate to meet his needs. A review of the hearing record reveals no error in the IHO's disposition of this issue.<sup>26</sup>

State regulations provide that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]). The April 2013 IEP indicated that the student was "eligible to receive special education services and/or [a] program during July/August" and identified this program as a "[s]pecial [c]lass" in a 15:1 ratio (Dist. Ex. 38 at p. 11).<sup>27</sup> At the impartial hearing, the CSE chairperson CSE described the summer program identified in the April 2013 IEP as a "half-day academic skill development program [which] work[ed] on continuing students' reading, math and writing skills" (Tr. p. 63; see also Parent Ex. R6 at pp. 4-5).<sup>28</sup> On appeal, the parents contend that these services were "predetermined" and not aligned with the student's needs. The evidence in the hearing record does not support this contention. The April 2013 identified the student's needs in the areas of reading, math, and writing (Dist. Ex. 38 at pp. 3-5; Tr. p. 63). Therefore, I agree with the IHO that the summer services recommended by the April 2013 CSE were appropriate to meet the student's needs.

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<sup>25</sup> The parents do not point to any evidence in the hearing record that supports their argument that the student's progress was solely due to private tutoring. While one would hope that the student received benefit from the tutoring, as well as from the district special education program, it is not possible and not necessary to parse out how much of the student's progress was attributable to each since, as discussed above, the hearing record supports the conclusion that at least some of the student's progress was attributable to the instruction received in the district program.

<sup>26</sup> Although the parents do not assert an LRE challenge to this recommendation, I observe that a district may not disregard the IDEA's LRE mandate in offering ESY services (T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 163 [2d Cir. 2014] [holding that the LRE requirement applies to ESY services and, further, that the LRE inquiry is not "limited . . . by what programs the school district already offers"]; see Rowley, 458 U.S. at 206-07).

<sup>27</sup> In contrast, contemporaneous meeting minutes of the April 2013 CSE meeting, as well as testimony from district witnesses who attended the April 2013 CSE meeting reflect the position of some CSE members the student did not demonstrate substantial regression and, therefore, was not eligible for special education services on a twelve-month basis (Tr. pp. 63, 142, 269; Dist. Ex. 38 at p. 22). However, as this representation contradicts the language of the April 2013 IEP, it will not be considered (R.E., 694 F.3d at 185 ["testimony regarding state-offered services may only explain or justify what is listed in the written IEP [and] . . . may not support a modification that is materially different from the IEP"]).

<sup>28</sup> This testimony may be considered as it "explain[ed] . . . what [wa]s listed in the written IEP" (R.E., 694 F.3d at 185).

## **F. Remedy**

### **1. Additional Services**

As a remedy for the district's failure to offer the student a FAPE in the LRE for the 2012-13 school year, the parents seek a host of remedies including "additional services in the form of intensive and appropriate remediation" (IHO Ex. 1). The IDEA authorizes "appropriate" relief to be awarded for a denial of a FAPE, including compensatory education or additional services (Reid v. Dist. 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, 2008 WL 4890440, at \*23; 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 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; see, e.g., Application of 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"]; Parents of Student W. v. Puyallup Sch. Dist., No. 3, 31 F.3d 1489, 1497 [9th Cir. 1994]). 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"]).

As an initial matter, the parents correctly argue that the IHO improperly delegated his responsibility to determine whether an award of compensatory education was appropriate to the district. The IHO's decision provided that the CSE should "provide . . . appropriate remedial services" in the event it determined that its recommendations "resulted in a deprivation of educational benefit" (IHO Decision at p. 41). While the IDEA "confers broad discretion on . . . court[s]" and administrative agencies to fashion "appropriate" relief, an agency or court may not delegate this responsibility to a school district (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 [1985]; see also Student X, 2008 WL 4890440, at \*24). Therefore, this portion of the IHO's decision is annulled.

Here, the district's violations of the IDEA were did not center so much upon a lack of special education instruction but, rather, they related to the district's failure to abide by its LRE obligation and its election to implement a reading program at the expense of services identified in the March 2012 IEP. Although the district deviated materially from the March 2013 IEP and offered a placement that was not in the LRE, it is difficult to tell how the exchange of one form of specialized instruction for another affected the student e, if at all, by these particular violations of the Act.<sup>29</sup> Further, the parties did nothing to assist the IHO by developing a record as to what potential remedies would be appropriate under these circumstances. Indeed, neither party ventured to suggest what kind of additional services would be appropriate to remedy an LRE violation in these type of circumstances, and it is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [indicating that appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at \*3 [3rd Cir. Nov. 4, 2009] [noting that a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [finding that a generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at \*2 [E.D.Cal. May 6, 2011] [noting that the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at \*4 n.3 [S.D.Ala. Aug. 23, 2007]).

Moreover, the parents seek an award of additional services based upon their perception that the student did not make adequate progress during the 2012-13 school year such that the April 2013 CSE's recommendations were inappropriate. As detailed above, the student, in fact, did made progress during the 2012-13 school year. Therefore, the parents' assertions about the student's lack of adequate growth do not provide an appropriate basis for an award of additional services in this instance. Therefore, I find that equity does not support an award of compensatory additional services under these circumstances (Reid, 401 F.3d at 524).

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<sup>29</sup> Ironically, although the district deviated from the March 2012 IEP and denied the student a FAPE based upon its failure to offer a recommendation in the LRE, the System 44/Read 180 program the parents complain of offered more intensive instructional services, one of the remedies sought by the parents in this proceeding (see IHO Ex. I).

## 2. Other Relief

As noted above, the parents also seek: (1) amendment of the student's IEP to prescribe, among other things, "[d]irect one-on-one daily instruction for a minimum of 90 minutes per day" using a methodology favored by the parents; (2) staff training; and (3) "individualized" ESY services. Given the above discussion regarding the student's progress within the school district and the extent to which the March 2012, November 2012, and April 2013 IEPs otherwise met his needs, it is unnecessary to order amendment of the student's IEP or staff training. However, in the light of the LRE violation identified above for the 2012-13 school year, the district is ordered to consider the student's eligibility for ESY services at its next annual review and, should it choose to offer ESY services, offer such services in the LRE.<sup>30</sup>

## VII. Conclusion

A review of the hearing record reveals that the district offered insufficient evidence at the impartial hearing to demonstrate that it offered the student a FAPE in the LRE for the 2012-13 school year. Moreover, the district's unilateral enrollment of the student in a special class at the beginning of the 2012-13 school year constituted a material failure to implement the March 2012 IEP. Nevertheless, given the efficacy of the services delivered to the student in the 2012-13 and 2013-14 school years and the fact that they otherwise addressed his needs, I find it unnecessary to award relief in the form of compensatory additional services arising from these violations.

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

**THE CROSS-APPEAL IS DISMISSED.**

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that, at the next regularly scheduled CSE meeting, the district shall determine whether the student demonstrates substantial regression such that twelve-month services are required on the student's IEP. If the district recommends ESY services for the student, it shall consider the student's individual needs and render a recommendation in the LRE.

**Dated:** Albany, New York  
March 24, 2015

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

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<sup>30</sup> The parents appear to request ESY services based upon a recommendation in a March 2013 neuropsychological evaluation (IHO Ex. I; see Dist. Ex. 32). While the CSE remains obligated to consider any private evaluations that meet its criteria, this order shall not be interpreted to require the district to adopt recommendations contained in any such evaluations.