The University of the State of New York

The State Education Department
State Review Officer
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No. 16-050

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Williamsville Central School District

Appearances:
Hodgson Russ, LLP, attorneys for respondent, Andrew J. Freedman, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for compensatory services and to be reimbursed for the cost of her son's tuition at the Elmwood Franklin School (Elmwood) for the 2012-13, 2013-14 and 2014-15 school years, at the Gow School (Gow) for summer 2015, and at the Buffalo Academy of Scholars (Buffalo Academy) for the 2015-16 school year. Respondent (the district) cross-appeals from the IHO's award of reimbursement for the costs of the student's transportation for the 2015-16 school year. The appeal must be sustained in part. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The hearing record reflects that the student's earlier educational history indicated that his native language was other than English, and included diagnoses of an attention deficit disorder (ADD) and oppositional defiant disorder (ODD); and that the student "displayed characteristics of an anxiety disorder" (Dist. Ex. 18 at pp. 3-4; Parent Ex. C-2). The student's more recent evaluation and physician reports reflect a diagnosis of epilepsy, and describe the student as presenting with hyperlexia, significant cerebral dysfunction, and attention problems as a function of organizational issues and significant anxiety (Parent Exs. E-14 at pp. 3-5; E-17 at pp. 1-2).[1] The student's

[1]There are a number of duplicate exhibits in the hearing record (compare Dist. Exs. 1-7, 10-13, and 18-19, with Parent Exs. A-4, A-6, A-7, A-9, A-10, C-13, C-16, C-17, D-1, E-1, E-2, F-5, F-6, and G-1). The parties are

cognitive functioning is significantly suppressed, with his performance on the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) falling at the first percentile (Parent Ex. E-14 at p. 6). With respect to academics, in September 2013, the student demonstrated skills ranging from the kindergarten level to the 10.9 grade level (Parent Ex. E-14 at pp. 1, 4-5). While the student's letter-word identification and math fluency (9.1 grade level), as well as spelling skills (10.9 grade level), were in the average range, the student's passage comprehension skills (1.9 grade level) and ability to understand directions (K.7 grade level) were significantly impaired (id. at pp. 4-5). The student performed in the "impaired range" on two motor planning tasks, and on measures of fine motor coordination and dexterity, the student's performance was "exceptionally weak" (id. at p. 5). A 2013 psychological evaluation report indicated that the student demonstrated pronounced difficulty with respect to organizational skills, which the evaluator opined adversely affected his ability to "understand language, express language effectively, as well as his ability to comprehend what he is able to read" (id. at pp. 5-6). With respect to social/emotional and personal adjustment skills, the student demonstrated increased anxiety, "motoric hyperactivity," reduced adaptability to changes, and a functional language delay which reflected the student's distinct and severe language impairments (id. at p. 6).

Based on a review of the hearing record, the student received special education services in preschool, and was found eligible for speech-language therapy and occupational therapy (OT) as a student with a speech or language impairment upon entering the district in kindergarten (Dist. Ex. 18 at p. 1). The student repeated kindergarten and continued to attend district public schools through fifth grade, where he received various combinations of consultant teacher and resource room services, special class placement for some academic classes, and OT and speech-language therapy (Dist. Exs. 18; 19; Parent Ex. A-7).[2]

On December 21, 2011, a subcommittee on special education (CSE subcommittee) convened for the student's annual review and to develop the student's IEP for the remainder of the 2011-12 school year (sixth grade) as well as a portion of the 2012-13 school year (Dist. Ex. 21 at p. 1). The December 2011 CSE subcommittee recommended a 15:1 special class placement in a community school for reading, mathematics, and English, a daily 5:1 resource room program, and the following related services: two 30-minute sessions per week of speech-language therapy in a small group, and one 30-minute session per week of counseling in a small group (id. at pp. 2, 7). In addition, the December 2011 CSE subcommittee developed six annual goals to address the student's areas of need, and recommended approximately 17 environmental and human or material resources to further address the student's management needs (id. at pp. 4-8). Further, the December

encouraged to confer beforehand and submit joint exhibits to the extent practicable (8 NYCRR 200.5[j][3][xii][b]). The IHO is also reminded of his obligation to exclude from the hearing record any evidence he "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). Unless otherwise specified, where exhibits are duplicated, the corresponding district exhibit will be cited.

[2] During the 2007-08 school year, the CSE changed the student's classification to a student with a learning disability (Dist. Ex. 18 at p. 1). The student's eligibility for special education and related services as a student with a learning disability during the years at issue in this appeal is not in dispute. The hearing record does not indicate the special education and related services, if any, the student received during the 2008-09 (third grade) school year.

2011 CSE subcommittee recommended that the student receive shared aide support, several program modifications and accommodations, and testing accommodations (id. at pp. 8-9).

On September 6, 2012, a CSE subcommittee convened to amend the December 2011 IEP to indicate that the student had been parentally placed at a nonpublic school (Dist. Ex. 24 at pp. 1, 10; see Tr. pp. 330-33). The meeting minutes indicated that the CSE recommended that the student "continue to be classified and receive services as outlined on his IEP" (Dist. Ex. 25).[3] During the remainder of the period at issue in this appeal, the district did not evaluate the student, convene a CSE or develop an IEP for the student, or provide him with any special education programs or services (Tr. pp. 85-86, 148-52).

The student was parentally placed in Elmwood—a nonpublic, general education school located outside of the district—for the 2012-13 school year, during which he repeated sixth grade, and continued to attend during the 2013-14 (seventh grade) and 2014-15 (eighth grade) school years (Dist. Exs. 5; 6; Parent Exs. F-3; F-4). In September 2013, the parent obtained a private psychological evaluation of the student, which indicated significant cognitive impairments in most areas but also "splinter skills" in some areas beyond what would be expected based on his cognitive profile, leading to a significant degree of "scatter" amongst his achievement scores (Parent Ex. E-14). In October 2013, the parent obtained a speech-language evaluation of the student, which reported delays in the student's receptive-expressive language and auditory processing skills (Parent Ex. E-15). During the 2013-14 and 2014-15 school years, the parent privately obtained the services of a 1:1 aide to work with the student at Elmwood, and both speech-language therapy and OT for the student outside of school (Tr. pp. 503-05, 628-29; Parent Exs. B-3; B-4; B-6; F-4). The student attended "learning lab" at Elmwood, and the student's seventh and eighth grade progress reports indicated that his curriculum was modified (Tr. pp. 504-05; Dist. Ex. 5 at p. 3; Parent Ex. F-4).

The parent privately placed the student in Gow, a nonpublic school, for summer 2015 (Tr. pp. 545, 630-31; Parent Exs. F-7-F-10). In May and June 2015, the parent obtained a private OT evaluation of the student, the report of which indicated that the student exhibited delays in the areas of visual perceptual, gross motor, fine motor, motor planning, and functional performance skills, and recommended that the student receive OT (Parent Ex. E-16). During summer 2015, the parent sought to enroll the student in the respondent district, and the district generated a class schedule for the 2015-16 school year (Tr. pp. 422-27; Dist. Exs. 1-4; 7; 10). The parent placed the student in Buffalo Academy, a nonpublic school located outside of the district, for the 2015-16 school year and agreed to pay additional tuition for Buffalo Academy to hire a special education teacher specifically for the student to follow the school's existing model of one to one instruction in core academic areas (Tr. pp. 515-18, 535-38, see Parent Ex. F-11; IHO Ex. 3 at p. 26).[4]

[3] The school psychologist testified that the September 2012 IEP did not include a recommendation for a 15:1 special class for reading, but that due to a change in the student's schedule it did not constitute a substantive change in the services being provided to him, and that there were no other changes made to the IEP (Tr. pp. 357-59, 392-94; compare Dist. Ex. 21 at p. 7, with Dist. Ex. 24 at p. 7).

[4] During the impartial hearing, the IHO marked the parties' memoranda on pendency into evidence as IHO Exhibits; however, the numbering is inconsistent with that contained in the IHO's decision (compare Tr. p. 47, with IHO Decision at p. 28). For purposes of this decision, the exhibits are cited as referenced in the IHO decision: the parent's memorandum on pendency is IHO Exhibit 1; the district's memorandum on pendency is IHO Exhibit

In a letter to the district dated September 4, 2015, the parent indicated that the CSE failed to meet and recommend an appropriate IEP for the student for the 2013-14, 2014-15, and 2015-16 school years (Dist. Ex. 7 at p. 1). The parent notified the district that due to the failure to develop an IEP for the 2015-16 school year, she was unilaterally placing the student at Buffalo Academy and intended to seek reimbursement for all related expenses (id.). The parent also requested "that the district provide any and all special education and related services, including transportation" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated September 4, 2015, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13, 2013-14, 2014-15, and 2015-16 school years (Dist. Ex. 7 at pp. 2-8).[5] Specifically, the parent alleged that the district failed to have an IEP in place prior to each school year for the past three school years (id. at p. 3). The parent alleged that the district failed to complete an annual review for the 2013-14, 2014-15, and 2015-16 school years (id.). The parent asserted that an annual review was projected to occur on December 14, 2012, but that no such review was scheduled or took place (id.). The parent further alleged that the district failed to conduct evaluations of the student in all areas of suspected disability, and that the student was due to be reevaluated in December 2013 but no evaluation took place (id. at pp. 3-4). The parent alleged the district failed to provide her with required prior written notice and procedural safeguards notice at least once a year (id. at p. 3). Generally, the parent alleged that the district failed to arrange for the student to receive appropriate special education and related services (id. at pp. 3-4).

As relief, the parent requested independent educational evaluations (IEEs) and that the CSE make specific program recommendations (Dist. Ex. 7 at pp. 4-6). The parent also requested reimbursement for the costs of the student's tuition at Elmwood for the 2013-14 and 2014-15 school years, at Gow for summer 2015, and at Buffalo Academy for the 2015-16 school year (id. at p. 6). The parent requested reimbursement for the costs of privately-obtained speech-language therapy and OT services; evaluations; and related travel expenses (id.). The parent further requested "day for day corrective action services" and three years of compensatory education (id.). Finally, the parent requested that the district fund the student's continued attendance at Buffalo Academy, along with services recommended in the September 2012 IEP, pursuant to the pendency provision of the IDEA (id. at p. 7).

B. Impartial Hearing Officer Decision

On February 11, 2016, the parties proceeded to an impartial hearing which concluded on April 22, 2016, after four days of proceedings (see Tr. pp. 1-655).[6] In a decision dated June 22,

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2; the parent's reply memorandum is IHO Exhibit 3; and the district's reply memorandum is IHO Exhibit 4.

[5] The due process complaint notice was entered into evidence together with the letter notifying the district that the parent had unilaterally placed the student at Buffalo Academy; for purposes of this decision citation is to the pagination of the combined documents as entered into evidence rather than to the separate pagination of the due process complaint notice (Dist. Ex. 7).

[6] The IHO issued an interim decision on pendency on February 1, 2016, the substance of which is not in dispute

2016, the IHO granted reimbursement for transportation costs incurred during the 2015-16 school year but denied the parent's request for reimbursement for IEEs, tuition, and transportation costs incurred during other school years (see IHO Decision at pp. 18-27).

Initially, the IHO found that the parent failed to establish that an exception to the limitations period applied on the basis that she did not receive the required procedural safeguards notice in her native language (IHO Decision at pp. 18-20). The IHO found credible the testimony of the district coordinator of special education and middle school psychologist that a copy of the procedural safeguards notice was sent to the parent together with every meeting notice and with every IEP (id. at p. 19). The IHO found that the evidence in the hearing record demonstrated that the parent had participated in the CSE process since the student was in kindergarten, that the district staff communicated to the parent in English, and the parent never requested an interpreter, and concluded that the parent could speak and comprehend English to the extent that the district's failure to provide the procedural safeguards notice in the parent's native language did not impede the parent's ability to understand her rights or the student's rights under the IDEA and thus prevent her from timely requesting an impartial hearing (id. at pp. 19-20). The IHO found that the hearing record demonstrated that the parent never objected to the district providing her with documents written in English, never requested that documents be translated into a language other than English, or inform the district she did not understand any information presented to her by the district due to a language barrier (id. at p. 20). Additionally, the IHO noted that the parent spoke to the student in English at home and chose to testify at the impartial hearing without the assistance of an interpreter (id.). The IHO determined that the parent never exercised her right to receive the procedural safeguards notice and have the student's IEPs translated into her native language, and that the parent led the district to believe she could communicate in English (id.). In any event, the IHO also found that the parent did not allege any facts to support her claim that the district failed to provide the student a FAPE for the 2012-13 school year and did not request any relief related to that year, such that the claims were not properly raised in her due process complaint notice (id. at p. 19).[7]

With regard to the 2013-14 and 2014-15 school years, the IHO found that the district was not required to develop IEPs because the parent never requested an IEP and "the parent made it very clear that she was keeping [the student] enrolled in the private school outside the [d]istrict" (IHO Decision at p. 22). In the alternative, the IHO found that if the district was required to offer the student a FAPE and develop an IEP and for those two school years, the district failed to offer the student a FAPE because it failed to develop IEPs (id.).

However, even if the district was required to and failed to offer the student a FAPE, the IHO found that the parent failed to prove that the education services provided by Elmwood were appropriate or that the student obtained an educational benefit from Elmwood because Elmwood did not provide any specialized instruction to meet the student's individual education needs (IHO Decision at p. 23). The IHO denied the parent's request for tuition and transportation during the

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on appeal (IHO Ex. 5 at pp. 2-5).

[7] The IHO found that the parent did not raise in her due process complaint notice the claim that the student's classification should be changed and therefore the issue was beyond the scope of the impartial hearing (IHO Decision at pp. 20-21). The parent did not appeal this finding in her petition.

period the student attended Elmwood (id.). Having found that the parent failed to establish that the student's unilateral placement at Elmwood was appropriate, the IHO further found that equitable considerations did not support the parent's request for relief because she did not notify the district that she would be seeking tuition reimbursement until September 2015 (id.).[8]

Regarding the parent's request for reimbursement for tuition and transportation to Gow during summer 2015, the IHO found there was insufficient evidence that the student's placement at Gow was appropriate to meet his needs (IHO Decision at pp. 23-24). The IHO also found that the parent failed to provide the district with notice of the student's placement at Gow until she filed the due process complaint notice in September 2015, such that her request must also be denied on equitable grounds (id.).

With respect to the 2015-16 school year, the IHO found that the district did not develop an IEP for the student for this school year because the parent and the student's brother failed to adequately communicate to the district that the student had been previously classified as a student with a disability and required an IEP (IHO Decision at p. 24). The IHO found that because the district requested to evaluate the student shortly after receiving the parent's due process complaint notice, and the parent delayed three months in providing consent, that the district's failure to develop an IEP before the beginning of the 2015-16 school year did not constitute a denial of a FAPE (id.).

The IHO also found that the parent failed to establish that the student's program at Buffalo Academy was appropriate to meet his special education needs (IHO Decision at p. 25). The IHO found that Buffalo Academy was a general education program, the student was only admitted because the parent agreed to pay for a private teacher to instruct the student, the student made minimal academic progress, and he had very limited success socially (id.). The IHO also denied the parent's request for tuition reimbursement for Buffalo Academy on equitable grounds, finding that the parent failed to provide the district with adequate notice prior to placing the student at Buffalo Academy, thereby denying the district the opportunity to evaluate the student and develop an appropriate program (id.). The IHO also found that "the parent's alleged interest in actually placing [the student] within the [d]istrict was insincere" because the student was only enrolled in the district on the advice of the parent's advocates (id.). However, regarding the parent's request for transportation for the 2015-16 school year, the IHO found that the parent requested transportation services for the student during his attendance at Buffalo Academy, and that it was undisputed that the student was entitled to transportation services and the district failed to provide them (id.). Accordingly, the IHO granted the parent's request for reimbursement for transportation services from the date of her request (id. at pp. 25, 26).

With respect to the parent's request for reimbursement for her privately-obtained evaluations, the IHO found that the parent did not request an IEE prior to filing her due process complaint notice and failed to identify any district evaluation with which she disagreed (IHO

[8] The IHO wrote (in an apparent typographical error) that the parent placed the student at Elmwood in September 2014 and notified the district in September 2012 that she would be seeking tuition reimbursement (see IHO Decision at p. 23).

Decision at p. 26). Accordingly, the IHO found that the parent was not entitled to public funding for any of the private evaluations she obtained (id.).

IV. Appeal for State-Level Review

The parent appeals, seeking the relief not granted by the IHO. The parent asserts that she is aggrieved by several errors the IHO committed in conducting the impartial hearing, including failing to provide a written decision on pendency, sequestering the student's brother during witness testimony, directing her to respond to questioning in English, and failing to render a timely decision. With respect to her claims regarding the 2012-13 school year, the parent contends that the IHO erred in finding that the parent's claims were beyond the two-year limitations period, that the district provided her with the procedural safeguards notice in English, that the parent understood English, and that the district had no obligation to provide the procedural safeguards notice in the parent's native language. The parent asserts that the IHO erred in finding that the parent did not allege any facts to support her claim that the district failed to offer the student a FAPE for the 2012-13 school year and that the IHO erred in not finding that the district failed to offer the student a FAPE for the 2012-13 school year. The parent next asserts the IHO erred in finding that the district did not deny the student a FAPE for the 2015-16 school year because the parent failed to inform the district that the student required special education when she reenrolled the student and did not timely provide the district with consent to evaluate the student. The parent contends that the IHO erred in finding that Elmwood and Gow were not appropriate placements for the student and in finding that equitable considerations did not support her request for tuition reimbursement because she did not give timely notice of her unilateral placements of the student. The parent also argues that the IHO erred in not awarding reimbursement for the costs of transportation for the 2012-13, 2013-14, and 2014-15 school years. The parent asserts that the IHO erred in finding that she was not entitled to reimbursement for the costs of privately-obtained evaluations. The parent asserts that the IHO erred in failing to address her claim that the student was not evaluated in all areas of suspected disability every three years and her request for "correction action and/or compensatory education services to make up for" the denial of a FAPE.

As relief, the parent requests that the district be ordered to provide the procedural safeguards notice to the parent at least once per year in her native language. The parent also requests reimbursement for the costs of the student's tuition at Elmwood, Gow, and Buffalo Academy; reimbursement for privately-obtained related services; reimbursement for privately-obtained psychological, speech-language, and OT evaluations; and reimbursement for the costs of transportation for the 2012-13 through 2014-15 school years. In addition to reimbursement for her expenses, the parent also requests "corrective action of supplying additional special education instruction and related services for the period of time the [s]tudent was denied FAPE (4 years) now during times and places convenient to the [parent] and beyond the age of 21." Finally, the parent requests that the IHO be "eliminate[d]" from the list of IHOs to be selected by school districts.

In an answer, the district denies the parent's material allegations and argues that those portions of the IHO decision appealed by the parent should be upheld. The district cross-appeals

the IHO's award of reimbursement for the costs of transportation for the 2015-16 school year, asserting that the parent's request for transportation was not timely made.[9]

V. Applicable Standards

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

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

[9] The parent objects to consideration of the district's answer and cross-appeal on the basis that it was not served and filed within the time provided by State regulations, and that the district's request for an extension of time to file did not comply with State regulations because it did not provide the basis for the request. State regulations provide that any request for an extension of time to answer the petition "shall set forth in full the reasons for the request, and shall briefly state whether the other party consents to or opposes the application for extension" (8 NYCRR 279.10[e]). The parent is correct that the request for an extension does not set forward the basis for the request; however, consent of the opposing party is not required and the request was granted despite the defect in form as a matter within the discretion of a State Review Officer (see, e.g., Application of the Board of Education, Appeal No. 16-023). Accordingly, the answer and cross-appeal were timely served and have been considered. The parent also answers the district's cross-appeal, asserting that the IHO correctly awarded reimbursement for transportation for the 2015-16 school year.

718, 720 [2d Cir. Aug. 16, 2010]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20 [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]). 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).

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]).

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

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

VI. Discussion

A. Preliminary Matters

1. Conduct of the Impartial Hearing Officer

An IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075). It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability; Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097). An independent review of the hearing record demonstrates that the parent was provided an opportunity to be heard at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see 20 U.S.C. § 1415[g][2]; Educ. Law § 4404[2]; 34 CFR 300.514[b][2]; 8 NYCRR 200.5[j]).

a. Written Pendency Decision

The parent asserts that the IHO violated her due process rights by failing to provide a written decision concerning pendency. Contrary to the parent's position, there is no specific statutory or regulatory requirement that a pendency decision must be provided to the parent in written form; rather, the IDEA and federal and State regulations give parents the option to receive the final decision of the IHO in either written or electronic form (20 U.S.C. § 1415[h][4]; 34 CFR 300.512[a][4]; 8 NYCRR 200.5[j][5]). In any event, even if there was such a requirement, the parent suffered no harm from not receiving the interim decision on pendency in written form at the time it was rendered. On the first day of the impartial hearing, when the parent's advocates informed the IHO that they had not received his e-mail transmitting the pendency decision, counsel for the district provided them with a copy of the decision and the IHO gave the advocates an opportunity to review the decision (Tr. pp. 48-51). Accordingly, because the parent was made aware of the IHO's pendency decision and does not challenge the pendency determination on appeal, any error by the IHO did not infringe the parent's due process rights.

b. Sequestering of the Student's Brother

The parent asserts that the IHO violated her due process rights by not allowing the student's brother to attend the hearing, arguing that the student's brother was a person in parental relation to the student and a party to the due process complaint notice. Under the IDEA and New York State law, in addition to the student's natural parents, the term "parent" can include an adoptive parent, foster parent, guardian, an individual acting in the place of a parent with legal responsibility for the student, and an individual assigned as a surrogate parent (20 U.S.C. § 1401[23]; 34 CFR 300.30[a]; 8 NYCRR 200.1[ii]; see Fuentes v. Bd. of Educ., 569 F.3d 46 [2d Cir. 2009]; Fuentes

v. Bd. of Educ. 12 N.Y.3d 309, 314 [2009]). The Second Circuit has held that although the IDEA provides for a range of individuals who may be considered a parent, it does not require that all such persons must be granted statutory rights (see Fuentes v. Bd. of Educ. of City of New York, 540 F.3d 145, 149 [2d Cir. 2008]; Taylor v. Vermont Dep't. of Educ., 313 F.3d 768, 777-78 [2d Cir. 2002]). When confronted with situations where multiple individuals may meet the definition of a parent, courts have deferred to state law to determine who retains educational decision-making authority and statutory rights under the IDEA (Fuentes, 540 F.3d at 148; citing Taylor 313 F.3d at 779). Federal and State regulations have further clarified that when more than one party qualifies as a parent, the biological or adoptive parent is presumed to be the parent for purposes of exercising statutory rights under the IDEA, unless that individual does not have legal authority to make educational decisions for the student, or if a judicial order or decree specifically identifies another specific person as the parent or as having educational decision-making authority (34 CFR 300.30[b]; 8 NYCRR 200.1[ii][3]-[4]). Here, the hearing record does not indicate that the student's older brother had any legal responsibility for the student so as to qualify as a "parent" under the IDEA in addition to the student's mother. At the impartial hearing, the district requested that the student's brother be sequestered during the testimony of other witnesses (Tr. p. 493). When the IHO asked if the student's older brother had custody of the student, the parent's advocate indicated that the student's brother was a "person in parental relation" to the student and had been assisting his mother, and that he would be called as a witness (Tr. pp. 493-94). However, while a parent can include "an individual designated as a person in parental relation pursuant to title 15-A of the General Obligations Law" (8 NYCRR 200.1[ii][1]; see Educ. Law § 2[10]), the hearing record includes no evidence of any such designation, which is required to be made in a signed writing (General Obligations Law § 5-1551; see General Obligations Law § 5-1552). Accordingly, the IHO did not violate the parent's due process rights by sequestering the student's older brother until after he testified (see Tr. pp. 493-95). In any event, the parent does not indicate in what way she was harmed by the absence of the student's brother from the hearing room during the testimony of one witness, during which she was accompanied by advocates.

c. Direction to Respond to Questioning in English

The parent asserts that she was aggrieved by the IHO directing her to respond to questioning in English. However, the hearing record does not support the parent's assertion. Shortly after the parent began testifying with the assistance of an interpreter, the IHO indicated that the parties agreed that "simple questions" on direct examination would be asked in English and the parent would respond in English if she was able to, and that if there was any issue with her comprehension of the questions in English, the parent could so indicate and the question would be posed in her native language (Tr. pp. 610-14; see IHO Decision at p. 14 n.3). Contrary to the parent's assertion, the hearing record does not reflect that the IHO directed the parent to respond in English but that the parent agreed to testify in English if she was able to do so. Furthermore, the parent and her advocate did not object to this procedure at the time it was established, nor is there any indication in the hearing record that the parent at any point requested to have a question translated and the IHO directed her to answer in English.

d. Timeliness of the IHO Decision

The parent asserts that she is aggrieved by the IHO's failure to render a timely decision, that the IHO's decision was issued 20 days past the expiration of the timeline in which he was

required to render the decision, and that the IHO improperly solicited an extension. The parent asserts that the IHO requested by e-mail that the parties request an extension of time in which he was required to render his decision from May 20, 2016 until June 22, 2016, and the district complied. The parent argues that the record should have been closed when the parties submitted their closing briefs, with the decision due 14 days thereafter.

If an IHO has granted an extension to the regulatory timelines, State regulations provide that the IHO must issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). The IHO's decision indicates that the record close date was June 20, 2016; however, during the impartial hearing the IHO directed the parties to submit their post-hearing briefs by May 19, 2016, and the decision indicates the IHO received the parties' briefs on May 24, 2016 (IHO Decision at p. 3; Tr. pp. 650-52). According to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]). State regulation also requires the hearing record to include "all written orders, rulings or decisions issued in the case including . . . an order granting or denying an extension of the time in which to issue a final decision in the matter" (8 NYCRR 200.5[j][5][vi][c]).

Nothing in the hearing record explains the reason for the delay between the IHO's receipt of the closing briefs and when the IHO determined the record to be closed on June 20, 2016 (IHO Decision at p. 3). While an IHO determines when the record is closed, guidance from the Office of Special Education explains that "[a] record is closed when all post-hearing submissions are received by the IHO. Once a record is closed, there may be no further extensions to the hearing timelines [and] the written decision of the IHO must be rendered and mailed within 14 days" of the record close date ("Changes in the Impartial Hearing Reporting System," Office of Special Educ. [Aug. 2011], available at http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf; see 8 NYCRR 200.5[j][5][iii]). Following the above guidance, the IHO's decision in this matter should have been rendered and mailed within 14 days of May 24, 2016 (to wit, June 7, 2016).

Based on the foregoing, the IHO did not render a decision in compliance with the 14-day rule. Even so, there is no evidence to suggest that the parent or student suffered any prejudice as a result of this delay. Moreover, the parent has not alleged that the IHO's failure to render a timely decision has resulted in a denial of a FAPE to the student. Nevertheless, the IHO is reminded that a student may be prejudiced by delays in decision issuance and that he must comply with the applicable timelines for rendering a decision.[10]

2. Statute of Limitations and Scope of Review

The parent asserts that the IHO erred in finding that the parent's claims regarding the 2012-13 school year were beyond the two-year limitations period for requesting a hearing, and that the withholding information exception to the statute of limitations applies because the district failed

[10] With regard to parent's request that the IHO be eliminated from the list of IHOs to be selected by school districts on the basis of the alleged errors discussed above, an SRO does not have the sanctioning authority to remove an IHO from the State-approved list; rather, such authority rests solely with the Commissioner of Education (8 NYCRR 200.21[b]; Application of a Child with a Disability, Appeal No. 02-098). Nonetheless, the parent is free to pursue the matter further as she sees fit with the Office of Special Education.

to provide the parent with a copy of the procedural safeguards notice in English or her native language. The hearing record does not support the IHO's finding that the parent's claims regarding the 2012-13 school year were time-barred.

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]). New York State has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]). An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). Case law interpreting the "withholding of information" exception to the limitations period has found that the exception applies only to the requirement that parents be provided with certain procedural safeguards required under the IDEA (see D.K. v. Abington Sch. Dist., 696 F. 3d 233, 246 [3rd Cir. 2012]; Avila v. Spokane Sch. Dist. No. 81, 2014 WL 5585349, at *8-*9 [E.D. Wash. Nov. 3, 2014]; C.H. v. Northwest Indep. Sch. Dist., 815 F. Supp. 2d 977, 986 [E.D. Tex. 2011]; R.B. v. Dept. of Educ., 2011 WL 4375694, at *4, *6 [S.D.N.Y. Sept. 16, 2011]; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943-45 [W.D. Tex. 2008]; Evan H v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *7 [E.D.Pa Nov. 4, 2008]). Such safeguards include the requirement to provide parents with a procedural safeguards notice containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[d]; 34 CFR 300.504; 8 NYCRR 200.5[f]). Under the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, if a parent is otherwise aware of his or her procedural due process rights, the district's failure to provide the procedural safeguards notice will not necessarily prevent the parent from requesting an impartial hearing (see D.K., 696 F.3d at 246-47; R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

Under New York State regulation, "the school district must ensure that the procedural safeguards notice is provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so" (8 NYCRR 200.5[f][2]; see also 20 U.S.C. § 1415[d][2]; 34 CFR 300.504[d]). The hearing record contains a home language questionnaire completed on September 16, 2004, that indicated that the language spoken in the student's home was a language other than English and the student understood a language other than English (Parent Ex. G-2).[11] The December 2011 IEP and the September 2012 IEP, along with meeting information from the December 2011 CSE and September 2012 CSE meetings, state that the parent's native language is other than English and that an interpreter was required (Dist. Exs. 21 at p. 1; 22; 24 at p. 1; 25; see Tr. p. 405; see also 8 NYCRR 200.5[d][5] [providing that a "district must take whatever action is necessary to ensure that the parent understands the proceedings at the meetings of the committee on special education, including arranging for an

[11] A home language questionnaire completed on July 31, 2015 similarly stated that the student understood a language other than English (Dist. Ex. 1).

interpreter for parents with deafness or whose native language is other than English"]). These documents indicate that the district was aware that the parent's native language is other than English (see Application of a Student with a Disability, Appeal No. 13-047; but see Application of a Student with a Disability, Appeal No. 13-136 [finding that the evidence demonstrated that the CSE was not on notice of the parent's need for an interpreter]).[12] The district did not assert at the impartial hearing, and does not argue on appeal, that it was "clearly not feasible" for the district to provide the procedural safeguards notice in the parent's native language. Instead, the district middle school psychologist testified that had the parent asked for the procedural safeguards notice to be provided in her native language, the psychologist would have done so (Tr. p. 390). The district coordinator of special education and the district middle school psychologist testified that the procedural safeguards notice was not provided to the parent in the parent's native language (Tr. pp. 113, 122, 141, 344), and the parent testified that she never received a copy of procedural safeguards notice in her native language (Tr. pp. 611, 627). Therefore, the hearing record demonstrates that the district failed to provide the parent with the procedural safeguards notice in her native language (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 306-07 [S.D.N.Y. 2014] [denying a district's motion to dismiss because, among other reasons, the parents' claims were "plausibly" timely in light of the allegation that the parents did not receive due process notices in their native language]).

For the withholding of information exception to the statute of limitations to apply, the hearing record must demonstrate that the parent was prevented from requesting a hearing as a result of the district's failure to provide required information (D.K., 696 F.3d at 246-48). Here, there is nothing in the hearing record to indicate that the parent was aware of her rights until shortly prior to her commencement of the present proceeding (see Richard R., 567 F. Supp. 2d at 944-45). The parent testified that she understands spoken English well but has difficulty comprehending written English and cannot understand legal documents (Tr. pp. 613-15). The district school psychologist testified that although the parent did not appear to have any difficulty communicating in English at the December 2011 CSE meeting, other than documents relating to the CSE process the psychologist had not communicated with the parent in writing and was not aware if other district staff had done so (Tr. pp. 334-36). Similarly, the district coordinator of special education testified that other than the September 2015 letter giving notice of the parent's unilateral placement of the student at Buffalo Academy, it was her understanding that the parent had not written any correspondence to the district (Tr. p. 113). The parent testified that in 2012 when she enrolled the student at Elmwood she was not aware that she could request special education programs or related services and did not know she could request an impartial hearing because she disagreed with the district's recommendations (Tr. pp. 621, 624). The parent further testified that she never requested to have documents translated and did not know she had a right to have an interpreter present at CSE meetings (Tr. pp. 646-47). The hearing record indicates that the student's private tutor attended the December 2011 CSE meeting along with the parent, and the parent testified that she requested that the student's private tutor come with her to the meeting so that she could understand what was happening (Tr. pp. 321, 625; Dist. Exs. 21 at p. 1; 22). While obtaining the assistance of an individual with expertise in special education procedures would create some record basis for a finding that knowledge of the limitations period and other due process rights could be imputed

[12] The district concedes that it is "undisputed" the parent's native language is other than English (Dist. Mem. of Law at p. 11).

to the parent, in this case the hearing record does not indicate that the student's private tutor had such expertise and the parent did not obtain the services of the advocates who represented her at the impartial hearing until summer 2015 (Tr. pp. 598, 625, 638, 641-42; see Richard R., 567 F. Supp. 2d at 945 [noting that the hearing record contained "no documentation of [the student's] parents having direct, actual knowledge of their right to a due process hearing" and holding that "in the absence of some other source of IDEA information, a [district's] withholding of procedural safeguards would act to prevent parents from requesting a due process hearing to administratively contest IDEA violations until such time as an intervening source apprised them of their rights"]; cf. R.B., 2011 WL 4375694, at *7 [finding that the withholding of information exception did not apply where the parent attended a CSE meeting with an "attorney who specialize[d] in education law"]).

Therefore, the hearing record supports a finding that the withholding of information exception to the IDEA's limitations period applies in this instance and, contrary to the IHO's determination, the parent's claim regarding the 2012-13 school year is not barred by the two-year limitations period for requesting a hearing (20 U.S.C. § 1415[f][3][D]; see Application of the Dep't of Educ., Appeal No. 12-221 [concluding that the withholding of information exception applied where the district failed to provide the parent with copies of the procedural safeguards notice or prior written notice in the parent's native language and the hearing record did not indicate that the parent was aware of his rights prior to the commencement of the proceeding]; see also Application of a Student with a Disability, Appeal No. 15-088 [concluding that the withholding of information exception applied because the hearing record did not indicate that the district provided the parents with the procedural safeguards notice or that the parents were aware of their right to request a due process hearing]; Application of the Bd. of Educ., Appeal No. 14-109 [finding that the withholding of information exception applied because the evidence in the hearing record revealed that the district did not provide the parent with a procedural safeguards notice in the manner required by the IDEA and no information suggested that the parent was aware of her right to request a due process hearing]; but see Application of a Student with a Disability, Appeal No. 16-012 [concluding that the exception did not apply because the parent was sufficiently aware of her rights]).[13] Furthermore, to the extent the IHO found that the parent failed to plead the exception to the limitations period in her due process complaint notice (IHO Decision at p. 19), the IDEA's statute of limitations is an affirmative defense which only applies if raised at an impartial hearing (M.G., 15 F. Supp. 3d at 304). Thus, the parent could not be required to plead in her due process complaint notice specific exceptions to an affirmative defense which the district may or may not assert.

[13] The district is reminded of its obligation under the IDEA and State and federal regulations that the following information must be translated into a parent's native language: any information relevant to an activity for which consent is sought; evaluation results; prior written notice; the procedural safeguards notice; CSE meetings, if necessary for the parent to understand the proceedings; and school-related information that is distributed to parents of students with limited English proficiency, "when necessary" (20 U.S.C. § 1415[b][4], [d][2]; 34 CFR 300.503[c][1][ii]; 300.504[d]; 300.9[a]; 300.322[e]; 8 NYCRR 154.3[b]; 200.1[*l*][1]; 200.4[b][6][xii]; 200.5[a][4], [d][5], [f][2]). Neither federal nor State regulations require that a district provide parents with a copy of the IEP in their native language (Letter to Boswell, 49 IDELR 196 [OSEP 2007] [noting that "[t]here is no requirement in IDEA or in its accompanying regulations that all IEP documents must be translated" and that schools are required to provide parents, in their native language, of all information relevant to activities for which consent is sought]; see 34 CFR 300.320; 8 NYCRR 200.4[d][2]).

Having found that the parent's claims relating to the 2012-13 school year should not be dismissed as time-barred, I now turn to the parent's assertion that the IHO erred in finding that the parent did not allege facts to support her claim that the district failed to offer the student a FAPE for the 2012-13 school year. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original 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 original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . ., is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]]).

On review, the parent's due process complaint notice does not contain any claim that the district failed to offer the student a FAPE for the first three months of the 2012-13 school year (Dist. Ex. 7 at pp. 2-6). However, as previously mentioned, the parent asserted in her due process complaint notice that an annual review was projected to occur on December 14, 2012, that no such annual review was scheduled or took place, and that the district failed to provide the student a FAPE during the 2012-13 school year (id. at pp. 3-4). These assertions sufficiently constitute claims regarding the district's failure to offer the student a FAPE from December 14, 2012 through the end of the 2012-13 school year. For purposes of determining whether the district offered the student a FAPE for the 2012-13 school year, this decision focuses on the district's actions from December 14, 2012 through the end of the 2012-13 school year.

B. The District's Obligation to Develop IEPs

The parent asserts that the district did not offer the student a FAPE for the remainder of the 2012-13 school year after the expiration of the September 2012 IEP, that the IHO erred as a matter of law in finding that the district was not required to develop an IEP for the student for the 2013-14 and 2014-15 school years, and that the IHO erred in finding that the district did not deny a FAPE to the student for the 2015-16 school year because the parent did not provide timely consent to evaluate the student to the district. The parent contends that the IHO also erred in finding that the district's failure to develop an IEP before the beginning of the 2015-16 school year did not result in a denial of a FAPE to the student.

Initially, contrary to the IHO's finding, the hearing record does not support the conclusion that the parent expressed the intent to keep the student enrolled in private school. The hearing record does not indicate that the parent had any conversations with district personnel or indicated in any documents provided to the district that she intended to keep the student enrolled in the private school and did not want the student to attend a district school (see Tr. pp. 113, 126-27, 373, 381-82, 395). Additionally, as the parent argues, the district's duty to offer the student a FAPE is triggered by the student's residency in the district, not the student's enrollment status or the parent's intent (see E.T. v. Bd. of Educ. , 2012 WL 5936537, at *14-*15 [S.D.N.Y. Nov. 26, 2012] [noting that "residency, rather than enrollment, triggers a district's FAPE obligations" and "the issue of parental intent vis-à[-]vis the child's enrollment is not dispositive of whether a school district has a FAPE obligation to a disabled child"] [internal quotations omitted]). Under the IDEA and State

law, a district must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). The IDEA also requires districts to have an IEP in effect at the beginning of each school year for every student with a disability in the district's jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]). The district of residence has an obligation to provide a FAPE to a resident student with a disability that does not end with the enrollment of the student in a nonpublic school outside the district or when the student is not enrolled in a district school (see Doe v. East Lyme Bd. of Educ.,790 F.3d 440, 450-51 [2nd Cir. 2015]; District of Columbia v. Vineyard, 901 F. Supp. 2d 77, 87-88 [D.D.C. 2012] [noting that a district's obligation to provide a FAPE is triggered by a student's residency in the district, not the student's enrollment in a public school in the district]; E.T., 2012 WL 5936537, at *14-*15 [noting that "[n]othing in the language of the IDEA divests a district of residence of its FAPE obligations simply by virtue of a parental placement at an out-of-district, but in-state, private school" and "a district of residence's FAPE obligation does not disappear when parents unilaterally place their children elsewhere"] [internal quotations and punctuation omitted]; see also N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1209 [9th Cir. 2008] ["A school district cannot abdicate its affirmative duties under the IDEA"]). While the district of location may have its own obligations, most notably the obligation to conduct child find; the duty to offer a FAPE remains with the district where the student resides (Doe, 790 F.3d at 450-51). A district of residence's obligation to offer a resident student with a disability a FAPE includes developing an IEP (Doe, 790 F.3d at 450 [finding that "a FAPE cannot be offered unless an IEP is issued"]). Accordingly, "[w]hen a child requires special education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP" (Forest Grove, 557 U.S. at 238-39; Doe, 790 F.3d at 450).

In this case, the district coordinator of special education and the district middle school psychologist testified it was their understanding that the student has resided in the district since kindergarten and neither the student nor the parent have moved out of the district (see Tr. pp. 108, 118, 130, 365; Dist. Exs. 4; 17 at p. 1; 18 at p. 1; see also Parent Exs. E-14 at p. 1; E-15 at p. 1). Thus, the district had a duty to develop an IEP for the student for the 2012-13, 2013-14, 2014-15, and 2015-16 school years (Doe, 790 F.3d at 450).

The district coordinator of special education testified that the September 2012 CSE meeting was the last time the CSE met regarding the student (Tr. p. 115; see also Tr. pp. 85, 152, 167).[14] The September 2012 IEP remained in effect until December 21, 2012 (see Tr. pp. 332-33; Dist. Ex. 24 at p. 1).[15] The hearing record indicates that there was no IEP in place for the student from December 21, 2012 through the end of the 2012-2013 school year. The district coordinator of special education and the district middle school psychologist testified that the September 2012 IEP was the last IEP that the district developed for the student, and testimony indicated that the CSE did not convene for the student's annual review after the September 2012 IEP expired (Tr. pp. 137, 139, 147, 368). Therefore, the district failed to offer the student a FAPE for the period of

[14] The hearing record reflects that the projected date of the student's annual review was December 14, 2012 (see Tr. p. 368; Dist. Exs. 21 at p. 1; 24 at p. 1).

[15] As mentioned above, the parent did not assert any claim in her due process complaint notice that the district failed to offer the student a FAPE for the first three months of the 2012-13 school year (Dist. Ex. 7 at pp. 2-6).

December 21, 2012 through the end of the 2012-13 school year due to its failure to develop an IEP for the student upon the expiration of the September 2012 IEP.

With regard to the 2013-14, 2014-15, and 2015-16 school years, the hearing record does not indicate that the district developed an IEP for the student for any of these three school years. The district middle school psychologist testified that the CSE did not hold annual reviews during the years that the student would have attended the district middle school, nor does the hearing record contain IEPs developed during this time frame (see Tr. pp. 394-95). The district high school psychologist testified that the CSE process for district high school students with disabilities was not initiated for the student for the 2015-16 school year and that the CSE did not meet regarding the student prior to the start of the 2015-16 school year (see Tr. pp. 474-76). Therefore, the district failed to offer the student a FAPE for the 2013-14, 2014-15, and 2015-16 school years due to its failure to develop an IEP for the student for those years (see Eschenasy v. New York City Dep't of Educ., 604 F. Supp. 2d 639, 650 [S.D.N.Y. 2009] [finding that the district did not offer an appropriate placement because the district did not develop an IEP for the student]).

While not dispositive to the district's failure to offer the student a FAPE for the 2013-14 and 2014-15 school years, the hearing record also indicates that the district failed to reevaluate the student when required to do so. The evidence in the hearing record reveals that the district most recently evaluated the student in December 2010; thus, consistent with federal and State regulation requiring districts to reevaluate students at least once every three years, it appears that the district was required to reevaluate the student in December 2013 (see Tr. p. 152; Dist. Exs. 19 at pp. 1-3; 21 at p. 1; 24 at p. 1; 8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][2]). The hearing record indicates that the district did not attempt to reevaluate the student until after the parent filed her due process complaint notice in September 2015 (see Tr. pp. 101, 149-50, 155, 176-77, 201, 374, 380-81; Dist. Exs. 13-14; see also Parent Ex. A-11).[16]

C. Unilateral Placements

The parent asserts that the IHO erred in finding that Elmwood, Gow, and Buffalo Academy were not appropriate placements for the student. However, a review of the hearing record supports the IHO's findings that the parent failed to prove that the educational services at Elmwood, Gow, and Buffalo Academy were specially designed to meet the student's needs.

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 offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate"

[16] Because I find a denial of a FAPE for the 2015-16 school year based on the district's failure to have an IEP in place for the beginning of the school year, it is unnecessary for purposes of this decision to address the IHO's determination that the parent's later actions precluded the district from timely evaluating the student and developing an IEP later in the school year.

(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, citing 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]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; 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).

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

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

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

1. The Student's Needs

In this instance, although the student's needs are not directly in dispute, a discussion thereof provides context for the discussion of the disputed issue to be resolved—namely, whether the student's unilateral placements at Elmwood, Gow, and Buffalo Academy were appropriate to meet his needs.

With respect to cognitive functioning, the student exhibited weaknesses in verbal comprehension, complex language processing, perceptual reasoning, and working memory; and his full scale IQ consistently fell at the first percentile (Parent Ex. E-14 at pp. 2-3, 6; see Dist. Exs. 18 at pp. 3-4; 19 at p. 2). Review of cognitive test results from 2005, 2007, and 2013 show that the student demonstrated relatively consistent cognitive scores without significant variation, with relative strengths noted on subtests measuring visual search and visual memory skills (Dist. Exs. 18 at pp. 1, 3; 19 at p. 2; Parent Ex. E-14 at pp. 1, 2-3, 6). The student demonstrated a significant delay with respect to complex language processing and comprehension, tasks involving any kind of spatial skills, and verbal memory skills (Dist. Ex. 19 at p. 2; Parent Ex. E-14 at pp. 3-4).

With respect to academics, the student demonstrated significant delays in reading and passage comprehension, and math reasoning, as well as in his ability to understand directions (Dist. Ex. 19 at p. 2; Parent Ex. E-14 at pp. 4-5). Specifically, with respect to reading comprehension, the student demonstrated weaknesses in inferencing, interpretation, reflection, application, and synthesis skills (Dist. Ex. 21 at p. 3). The student answered both written and oral questions with unrelated responses and demonstrated inconsistent oral reading skills (Dist. Exs. 19 at p. 2; 21 at p. 3). Additionally, the student exhibited difficulty making connections between current and past reading passages, as well as making connections to his own or everyday experiences (Dist. Ex. 21 at p. 3). Further, the student needed to work on identifying important events in a story and using character names when retelling a story (id.). With respect to writing, the student demonstrated difficulty writing sentences with appropriate capitalization and punctuation as well as combining two sentences into one, and required prompts and support to expand sentences and edit his written work (Dist. Exs. 18 at p. 3; 21 at p. 3). The student's mathematics performance was delayed, and he struggled with both basic and multistep problems involving all operations, as well as math vocabulary and concepts including place value (Dist. Exs. 5 at p. 1; 6 at p. 2; 18 at p. 3; 19 at p. 2; 21 at p. 3; Parent Exs. F-3; F-4; F-9; F-11 at pp. 1, 4-5).[17]

With respect to speech-language skills, the student demonstrated significant difficulty with expressive language, and "pronounced impairment" when attempting to consolidate "little bits of discrete information" into meaningful information (Parent Exs. E-14 at p. 6; E-15 at pp. 1-2). The student struggled to respond to "wh" questions, as well as inferential questions, including predicting outcomes and determining causes and effects (Dist. Exs. 19 at p. 2; 21 at p. 3; Parent Ex. E-14 at p. 2). Although the student was able to take turns during structured conversations for two to three exchanges, the student demonstrated difficulty with topic maintenance, and used some perseverative language during less structured conversations (Dist. Ex. 21 at p. 3). As language became increasingly complex, the student demonstrated increasing difficulty processing and comprehending language input, and it was noted that language should be kept very simple for the student (Parent Ex. E-14 at pp. 3-7). The student demonstrated impaired performance on measures of auditory processing, as well as a functional language delay, which was a reflection of the student's distinct and severe language impairments (Parent Ex. E-14 at pp. 4-7; E-15 at p. 3). Specifically, with respect to speech production, the student demonstrated numerous

[17] Inconsistent with other information found in the hearing record regarding the student's performance in mathematics is the September 2013 psychological evaluation report that included selected subtest scores from the Woodcock-Johnson III-Tests of Achievement (WJ-III), including math fluency at the 51st percentile, math calculation at the 21st percentile, and Math Calculation Skills at the 29th percentile (Parent Ex. E-14 at pp. 4-5).

misarticulations, and his rapid rate of speech further compromised his intelligibility (Parent Ex. E-15 at p. 4).

With respect to fine and gross motor skills, the student exhibited significant delays in visual perceptual skills, gross and fine motor skills, motor planning, and functional performance skills (Dist. Ex. 19 at pp. 2-3; Parent Exs. E-14 at p. 5; E-16 at p. 3). The student exhibited weakness in core postural muscles which affected his strength, endurance, balance and the quality and execution of fine motor skills, such as writing (Parent Ex. E-16 at pp. 2-3). With respect to activities of daily living skills, the hearing record showed that the student demonstrated significant difficulty during activities involving dressing and undressing, and that he required assistance with life skills (Tr. p. 521; Parent Ex. E-16 at pp. 3-4). The student consistently required assistance to organize materials, complete work, prepare for tests, and attend to and participate in classroom routines, tasks, and activities (Dist. Exs. 19 at pp. 2-3; 21 at pp. 3-5, 7; Parent Ex. E-16 at pp. 3-4). With respect to attention skills, the student displayed varying degrees of difficulty, but typically required adult support to stay on task or come back to task once distracted, and required adult monitoring to sustain his participation in the classroom (Dist. Exs. 18 at pp. 1-2; 19 at pp. 1-2; 21 at pp. 3-5; Parent Ex. E-14 at pp. 5-6).

With respect to social/emotional functioning, the student demonstrated anxiety, motoric hyperactivity, and reduced adaptability to changes (Parent Ex. E-14 at p. 6). Even so, throughout the hearing record, the student is described by school personnel as cooperative, pleasant, sweet, a pleasure, positive, polite, friendly, enthusiastic, innocent, respectful, and delightful (Tr. p. 518; Dist. Exs. 5 at pp. 1-3; 19 at p. 1; 21 at p. 4; Parent Exs. E-14 at p. 2; E-15 at p. 1; F-1-F-5; F-8; F-10; F-11 at pp. 1, 11, 12). With respect to peer interactions, although the student demonstrated kindness and consideration toward others, and was well respected by teachers and classmates alike, he also required adult support to initiate and maintain conversation, and his social skills were considered to be less developed than his peers (Tr. pp. 497, 519-20; Dist. Exs. 5 at pp. 1-3; 21 at p. 4).

With respect to physical development, the student has a history of food allergies including all nuts (Dist. Exs. 19 at p. 1; 21 at p. 4). Additionally, the student had a seizure in school in the 2011-12 school year, and the hearing record includes an April 2012 physician note indicating that the seizure disorder and medications the student required may have cognitive side effects leading to learning difficulties (Tr. pp. 318-19; Parent Ex. E-17 at p. 2).

2. Specially Designed Instruction

The parents argue that, contrary to the IHO's findings, the hearing record contains sufficient evidence describing how the educational programs at Elmwood, Gow, and Buffalo Academy addressed the student's needs. Specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

a. Elmwood

The parent argues that the Elmwood reports include reference to the student's one to one educational aide, indicate that English assignments were modified, and when written assignments were given, that the student received one to one assistance in a separate location and instruction from his educational aide. However, a review of the hearing record supports the IHO's finding that the parent failed to establish that Elmwood provided the student with educational instruction specially designed to meet the student's unique needs.

Elmwood is a nonpublic, general education school located outside the district that provides instruction to students in preschool through eighth grade (Tr. pp. 83-84, 498, 563-64). The student began attending Elmwood for the 2012-13 school year, where he repeated sixth grade, then continued to attend for seventh grade (2013-14 school year) and eighth grade (2014-15 school year) (Dist. Exs. 5 at pp. 1-3; 6 at p. 2; Parent Exs. F-3; F-4). During sixth and seventh grade, Elmwood provided instruction to the student in English, Mathematics, History, Science, Art, Chorus, and "Sports" (Parent Exs. F-3; F-4). Aside from science being discontinued, the student took the same courses during eighth grade (compare Dist. Ex. 5 at pp. 1-3, with Parent Ex. F-3, and Parent Ex. F-4). According to the Buffalo Academy director, during the 2012-13 school year class sizes at Elmwood ranged from 15 to 25 students (Tr. pp. 498, 502, 529).[18]

The student also attended a course entitled "Learning Lab" for all semesters he attended Elmwood, and according to the Buffalo Academy director, the learning lab provided support for students who struggled, homework help, and remedial support (Tr. pp. 504-06, 538; Dist. Ex. 5 at p. 2; Parent Exs. F-3; F-4). She further testified that the learning lab was like a "resource room in a public school" and was staffed by a "full-time teacher who had a special education background" (Tr. pp. 504-05, 538-39; see Dist. Ex. 5 at p. 2; Parent Exs. F-3; F-4). Additionally, during the 2012-13 school year, she indicated that there were a range of 5 to 15 students who attended the learning lab, depending upon the time of day, and that the teacher would support but not provide direct instruction to the students (Tr. pp. 505-06, 538-39).

According to the Buffalo Academy director, Elmwood accommodated the student's need for additional supports by including the services of an aide and "modified" or "altered" curriculum, and the hearing record contains documentation that the parent provided private funding for the student's aide during the 2013-14 and 2014-15 school years (Tr. pp. 503-04, 530; see Tr. pp. 628-29; Dist. Ex. 6 at p. 2; Parent Ex. F-4; IHO Ex. 3 at pp. 8-9, 11, 20-21, 23-24).[19] With respect to related services, the parent funded private speech-language services during the 2014-15 school year (Tr. pp. 628-29; see Parent Exs. B-2; B-4).[20]

[18] For consistency in this decision, the former head of school at Elmwood, who at the time of the hearing was the current executive director of Buffalo Academy, will be referred to as the Buffalo Academy director. According to the testimony of the Buffalo Academy director, the student attended Elmwood while she was employed there during the 2012-13 school year (Tr. pp. 497-98, 502, 529).

[19] The hearing record does not specify the frequency or duration of the services the student received from the aide.

[20] The hearing record does not specify the frequency or duration of the services the student received from the speech-language therapist. Testimony from the parent suggests that the student also received privately-obtained

Despite noting the presence of a private aide and the inclusion of the learning lab in the student's program, the hearing record contains insufficient evidence regarding the manner in which Elmwood addressed the student's special education needs. According to the district coordinator of special education, a general education program such as Elmwood was "absolutely not" appropriate for the student, the parent did not request or access any special education services for the student from the district while the student attended Elmwood, nor to her knowledge did the district of location provide any services to the student (Tr. pp. 83, 86-87). The Buffalo Academy director testified that the needs of the student were much greater than the average student attending Elmwood, there were concerns regarding the student's ability to be successful at Elmwood, and that academically, Elmwood was not an appropriate placement for the student (Tr. pp. 503, 532).

In this instance, although the Elmwood progress reports from the 2013-14 and 2014-15 school years reference a "modified" or "altered" curriculum, and reference the student's aides, the evidence does not establish how or to what extent Elmwood adapted the content, methodology, or delivery of instruction to meet the student's unique special education needs (see Dist. Exs. 5; 6; Parent Exs. F-3-F-6). While the 2014-15 Elmwood progress report indicated that as written work increased in English, the student worked in a separate location with a one to one aide, "completing tasks that were designed to reinforce and practice sentence construction and organization," there were no specific strategies described regarding what, if any, specially designed instruction was provided to the student (Dist. Ex. 5 at p. 1). With respect to the learning lab at Elmwood, the 2014-15 progress report does not indicate what "specific designated tasks" the aide planned for the student, or how the instruction was differentiated to meet his specific needs (id. at p. 2). While generally describing the classes the student attended at Elmwood, the hearing record does not include evidence to further describe how the staff adapted activities or the delivery of instruction during educational tasks to meet the student's unique needs (see Tr. pp. 503-06; Dist. Exs. 5 at pp. 1-3; 6 at p. 2; Parent Exs. F-3-F-6).

Lastly, with respect to the student's related services needs, the parent testified that the student received private speech-language therapy and OT while attending Elmwood; and according to documentary evidence contained in the hearing record, the parent paid for those related services for the 2013-14 and 2014-15 school years (Tr. pp. 628-29; Parent Ex. B-2; B-3; B-4; IHO Ex. 3 at p. 11). Aside from information about the parent's payment for speech-language therapy and OT services, the hearing record is devoid of evidence showing how the related services the parent obtained addressed the student's needs. The hearing record does not specify the frequency and duration of the privately-obtained OT and speech-language therapy services, provide any information about the focus of the sessions, what specific needs of the student were addressed, or what progress, if any, was made with these services. Without sufficient evidence, a determination cannot be made regarding whether the related services the student received while attending Elmwood addressed the student's needs (see L.Q. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that services met the student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the provider's] qualifications, the focus of her therapy, or the type of services provided" and where "[the provider] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at

OT services during the student's years at Elmwood (Tr. p. 629).

*5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met the student's needs where the parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd, 471 Fed. App'x 77 [2d Cir. June 18, 2012]).

Upon consideration of the foregoing, although the Buffalo Academy director's testimony generally described the school, and the classes the student attended were included in the progress reports, the hearing record as a whole lacks sufficient information regarding how Elmwood provided educational instruction that was specially designed to meet the unique needs of the student. Specifically, the supports described in this hearing record—including the use of an aide and the learning lab—are generally the type of supports from which any student would receive benefit, and the parent failed to show how these supports were special instruction tailored to this student's unique needs. Accordingly, the evidence in the hearing record cannot support a finding that Elmwood was an appropriate unilateral placement for the student for the 2012-13, 2013-14, and 2014-15 school years (Gagliardo, 489 F.3d at 115 [noting that reimbursement for a unilateral placement should be denied if "the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not"]; see Doe, 790 F3d at 451-52 [affirming the determination that small class size and modified grading, alone, did not constitute special education where the record did not indicate how curriculum was modified to meet the student's needs]; Hardison v. Bd. of Educ., 773 F.3d 372, 387-88 [2d Cir. 2014] [upholding an SRO's finding that the parents unilateral placement of the student was not appropriate because the hearing record lacked "more specific information as to the types of services provided to [the student] and how those services tied into [the student's] educational progress"]).

b. Summer 2015

The parent argues that the 2015 Gow summer report indicates that the student was placed in a small class, received small class instruction, and made progress in that he passed the summer program. For the reasons detailed below, the hearing record supports the IHO's finding that there is insufficient evidence showing that the student's placement at Gow was appropriate to meet his needs.

The hearing record contains little information regarding how Gow provided specially designed instruction to meet the student's individual needs (see generally Parent Exs. B-7; F-7-F-10). Testimony from the Buffalo Academy director and the parent indicated that Gow is a private residential and day school for students with language based learning disabilities (Tr. pp. 508, 630). The student attended Gow in summer 2015, and the hearing record contains a "student schedule form" from Gow dated July 16, 2015 (Parent Ex. F-7; see also Parent Exs. F-8-F-10). The student's name appears on the student schedule form, along with the names/times of the three 55-minute courses (Math Lab 3, Study Skills 2, and Writing 1) he completed (Parent Ex. F-7). The student's specific dates of attendance at Gow are not provided (see generally Parent Exs. F-7-F-10).

The hearing record contains three Gow mid-summer academic reports, which provide some narrative information, but do not show that Gow provided specially designed instruction to meet the student's specific needs (see Parent Exs. F-8-F-10). For example, according to the Writing I mid-summer academic report, the student met requirements for "accomplishments/course

content," and the teacher commented that although the student enjoyed writing and often wrote "a lot" in his journals, the quality of the student's work "could be better" (Parent Ex. F-8). The teacher opined that the student's writing skills could be strengthened by "learning basic sentence patterns;" however, the report did not include the instructional strategies Gow staff used to improve the quality and strength of the student's writing (id.). With respect to Math Lab III, the student's performance in both "accomplishments/course content" and "effort and participation" was described as meeting requirements or "marginal" (Parent Ex. F-9). The math teacher reported that the student used a variety of tactics to avoid the work expected of him, that the student got caught up in the other students' stories instead of focusing on math, and that the student should request help as often as possible as there were only six students in the class (id.). Even here, where the teacher identified specific needs in math class, there is no evidence in the hearing record that the math teacher provided support or strategies to the student to address those needs (id.).

While generally describing the topics covered in the classes the student attended at Gow, the hearing record does not include sufficient evidence to further describe how or to what extent staff adapted the content or delivery of instruction to meet the student's unique needs (see Parent Exs. F-8-F-10). Upon consideration of the foregoing, although the hearing record included Gow progress reports from summer 2015, the hearing record as a whole lacks sufficient information regarding how Gow provided educational instruction that was specially designed to meet the unique needs of the student, and thus there is insufficient reason to overturn the IHO's ruling (see Gagliardo, 489 F.3d at 115; Doe, 790 F3d at 451-52; Hardison, 773 F.3d at 387-88).

Lastly, with respect to the student's related services needs, there is evidence in the hearing record that a speech-language therapist billed the parent for what appears to be speech-language therapy sessions during June and July 2015 (Parent Ex. B-4). The hearing record does not indicate the frequency and duration of the speech-language therapy sessions, nor does it describe the speech-language needs addressed, how the therapy met those needs, and what specially designed instructional methods were used in the process. Without sufficient evidence, a determination cannot be made regarding whether the related services the student received during summer 2015 addressed the student's needs (see L.Q., 932 F. Supp. 2d at 490; R.S., 2011 WL 1198458, at *5).

c. Buffalo Academy

At the outset, a review of the petition shows that while the parent specifically appealed the IHO's adverse findings regarding the appropriateness of Elmwood and Gow, she did not appeal the IHO's determination that she "failed to meet[] her burden of proving that Buffalo Academy was appropriate" to meet the student's needs (IHO Decision at p. 25). However, because the parent requests tuition reimbursement for Buffalo Academy as relief, and out of an abundance of caution, I have reviewed the hearing record on this issue and as discussed below, find that the hearing record supports the IHO's decision. Although the Buffalo Academy director testified that the student needed specially designed instruction in "core content areas," the evidence in the hearing record was insufficient to show that Buffalo Academy provided that instruction to the student (Tr. p. 520).

The student attended Buffalo Academy for the 2015-16 school year (Parent Exs. F-11). According to the director, Buffalo Academy is an independent, ungraded private school located outside the district, that at the time of the impartial hearing, employed 12 adults and provided

instruction to 18 students ages 9 to 17 years old (Tr. pp. 498-99, 510, 520).[21] She testified that the school served both nondisabled students and students identified with disabilities who exhibited "very unique profiles," as no one student was taught at the same grade level in all areas, and students were considered to be either exceptionally accelerated or in need of remediation (Tr. pp. 510-11). The instructional model at Buffalo Academy included one to one instruction in all core academic areas, with larger (5 to 11 students) groups for classes such as art, physical education, learning strategies, argumentative writing, and an applied learning class, where students complete "in-school homework" (Tr. pp. 510-11, 517). The director noted that students generally achieve 18 months to 3 years of progress in a 10-month school year (Tr. p. 511).

Regarding the admission process, the director testified that after reviewing the student's reports he was not initially accepted, because the director did not think "socially or academically [Buffalo Academy] could accommodate [the student's] needs given that most of [Buffalo Academy's] teachers are secondary certified in content areas" (Tr. pp. 515-16). At that time, she did not believe that the student could be accommodated given the Buffalo Academy staffing model and the expectation that students be "very independent" (Tr. pp. 515-16; see also Tr. pp. 531, 535-36). The director testified that she hired a teacher with elementary and special education certification specifically to provide the student's instruction, the cost of which the parent paid for in addition to Buffalo Academy's standard tuition, that allowed the student to attend Buffalo Academy (Tr. pp. 516, 536-38). According to the director, the special education teacher provided one to one instruction to the student in all core subjects (Tr. p. 517).

The hearing record reflects that for the first trimester of the 2015-16 school year, the student received instruction in English language arts (ELA) using second grade level curriculum, and although the student's overall grade was "85% B," the student scored "1" (not meeting standards) or "2" (working toward standards), or received an "N/A" designation in all "[s]tandards [a]ssessed" (Parent Ex. F-11 at pp. 1, 8-10).[22] The teacher noted that the student's reading comprehension had improved since the beginning of the year; however, the student rushed through reading when working independently (Parent Ex. F-11 at p. 10). Additionally, the teacher indicated that the student would benefit from slowing down, being asked comprehension questions throughout reading rather than just at the end, and that the student needed to work on including punctuation in his writing (id.). Although the student was instructed one to one at the second grade level, and the teacher identified a strategy to ask the student questions throughout a passage rather than at the end, the hearing record did not otherwise describe instructional methods or strategies to address the student's reading and writing needs, including his need to slow down when reading or include punctuation in his writing (see generally Parent Ex. F-11).

With respect to mathematics, the student was instructed using second to third grade level curricula, and although the student's overall grade was "81% C" the student scored "1" (not meeting standards) or "2" (working toward standards) in all "[s]tandards [a]ssessed" (Parent Ex. F-11 at pp. 1, 4-5). The director testified that the student "was able to understand and perform at that level

[21] The hearing record does not indicate whether the special education teacher hired specifically to work with the student was included as one of the 12 adults at the school.

[22] The director testified that "N/A" on the November 2015 report card meant that Buffalo Academy did not measure the student's "academic performance by the standard way in which we measure" (Tr. p. 523, 529, 548).

which is equivalent to a C," and opined that the teacher's concern was with the inconsistency of the student's performance (Tr. pp. 545-46). The teacher noted in the November 2015 report card that the student knew basic math facts in addition, subtraction, multiplication and division, but inconsistently demonstrated his math knowledge, and rushed when working independently (Parent Ex. F-11 at p. 5). The hearing record provided no other information about the student's math instruction at Buffalo Academy. Although the student was instructed one to one at the second to third grade level, there is no evidence of what specially designed instruction was used to meet the student's individual special education needs.

The director testified that although the student received one on one "exposure" to the science and social studies curriculum at a third grade level, he was not able to understand it and therefore, "was not held accountable" for understanding or being tested on the curriculum; receiving designations of "pass," but not grades, in those classes (Tr. pp. 523, 530, 547; Parent Ex. F-11 at pp. 2-4, 6-7). The teacher commented on the report card that the student's social studies and science content was integrated into the ELA and math curriculum, and that in social studies she was focusing on building the student's reading skills and comprehension (Parent Ex. F-11 at pp. 4, 7).

According to the November 2015 Buffalo Academy report card, the learning strategies class met weekly for one hour and was designed to work on student skills such as improving planning and organization and understanding long and short-term goals, as well as for "addressing areas teachers feel keep students from maximizing their full potential" (Parent Ex. F-11 at pp. 10-11). The Buffalo Academy director—who was the teacher of this class—indicated that the student engaged well with peers and seemed happy in the class, and was "challenged when responding to multi-step directions and understanding abstract comments" (Tr. p. 510; Parent Ex. F-11 at p. 10). With respect to the argumentative writing class, the report card indicated that the student was an eager learner and worked well in the group setting, but needed "extra support when finding evidence in a text," as well as in "developing an opinion and supporting it with relevant evidence" (Parent Ex. F-11 at p. 11). The director testified that even though the student received mostly "N/A"s, two "1"s and one "3" on "standards assessed," the student received an overall grade of 95%, which was "related to effort more than it [was] achievement" (Tr. pp. 548-49; Parent Ex. F-11 at p. 11). She further testified that the student was not successful academically in the argumentative writing class (Tr. p. 549). As with the academic classes, the hearing record did not show how Buffalo Academy provided specially designed instruction in either the learning strategies or the argumentative writing classes to meet the student's identified needs.

Similarly, the Buffalo Academy director testified about the student's underdeveloped social skills, yet the hearing record is devoid of information about how Buffalo Academy addressed the student's social/emotional needs (see Tr. pp. 518-22, 535-36, 550-53; Parent Ex. F-11). She further testified that the student needed "a battery of supports" regarding life skills; noting that she would be "very concerned about [the student's] ability to navigate independent of adult support until he is directly taught those skills"; yet as explained in detail below, there is no information in the hearing record suggesting that Buffalo Academy provided the student with specially designed instruction to meet these needs (Tr. p. 521).

Accordingly, as described above, the hearing record contains insufficient evidence regarding the manner in which Buffalo Academy addressed the student's special education needs.

In this instance, although Buffalo Academy provided a special education teacher to instruct the student in core academics while following the school's one to one model; and while the student was instructed using second to third grade curricula, there is no evidence in the hearing record as to how, if at all, the curriculum was modified. The evidence does not sufficiently establish how or to what extent Buffalo Academy adapted the content, methodology, or delivery of instruction to meet the student's unique special education needs (see Parent Ex. F-11).

Lastly, with respect to the student's related services needs, there is no evidence in the hearing record that the student received related services while attending Buffalo Academy (see L.Q., 932 F. Supp. 2d at 490; R.S., 2011 WL 1198458, at *5).[23]

Upon consideration of the foregoing, the hearing record as a whole lacks sufficient information regarding how Buffalo Academy provided educational instruction that was specially designed to meet the unique needs of the student. Accordingly, the evidence in the hearing record does not support a finding that Buffalo Academy was an appropriate unilateral placement for the student for the 2015-16 school year (see Gagliardo, 489 F.3d at 115; Doe, 790 F3d at 451-52; Hardison, 773 F.3d at 387-88).

3. Progress

There is no testimonial evidence in the hearing record supporting the parent's contention that the student made progress at Gow; nor did the mid-summer reports from Gow provide support that the student made progress (Tr. p. 638; see Parent Exs. F-8-F-10). Upon further examination, very little, if any progress is indicated in the progress reports from Buffalo Academy or in the final reports from Elmwood (see Dist. Exs. 5 at pp. 1-3; 6 at p. 2; Parent Exs. F-3-F-4; F-11 at pp. 1-12).[24] Progress reports from Elmwood largely indicate that the student received designations of "N/A" for achievement in academic subjects, to which the Buffalo Academy director testified meant Elmwood did not grade the student using the "same expectations" as the other students (Tr. pp. 502-03; see Dist. Exs. 5 at pp. 1-2; 6 at p. 2; Parent Exs. F-3-F-6). The Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a private placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115). Accordingly, the hearing record does not support a finding that the unilateral placements were appropriate on the basis of any progress the student may have made in them (see Hardison, 773 F.3d at 387-88 [noting the difficulty of assessing a student's progress "when the record does not contain specific evidence of what services were actually provided to the student to address the disability that the private placement is intended to ameliorate"]; Frank G., 459 F.3d at 364 [holding that, although a

[23] The November 2015 Buffalo Academy report card indicated that the student's fine motor skills were "underdeveloped" (Parent Ex. F-11 at p. 12). The hearing record does not indicate how this need was addressed during the 2015-16 school year.

[24] To the extent that the Buffalo Academy director testified that the student made progress during the 2015-16 school year, she also acknowledged that his year had not been successful academically and that his progress was marked by inconsistencies (Tr. pp. 549-51, 567-68). This equivocal testimony falls far short of establishing that the student made progress at Buffalo Academy sufficient to overcome the lack of evidence, described above, regarding how it addressed his needs (see Hardison, 773 F.3d at 387-88; C.L., 744 F.3d at 836; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. Dec. 26, 2012]; Frank G., 459 F.3d at 364-67).

student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . 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"]).

D. Relief

1. Transportation Expenses Reimbursement

The parent asserts that the IHO erred in not awarding reimbursement for the costs of transportation for the 2012-13, 2013-14, and 2014-15 school years, arguing that both federal and State regulations, along with the district's transportation policy, entitle her to reimbursement for the costs of transporting her son to and from his private placement for the 2012-13, 2013-14, and 2014-15 school years. In its cross-appeal, the district asserts that the IHO erred in finding that the parent was entitled to reimbursement for transportation for the 2015-16 school year, arguing that the parent's request for transportation to Buffalo Academy was untimely.

The IDEA includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Specialized transportation must be included on a student's IEP if required to assist the student to benefit from special education (Application of a Child with a Disability, Appeal No. 03-053). If a CSE determines that a student with a disability requires transportation as a related service in order to receive a FAPE, the district must ensure that the student receives the necessary transportation at public expense (Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; see 8 NYCRR 200.1[ww]).

The State Education Department has indicated that a CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and that an IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate" ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1375 [11th Cir. 1997]; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]).

In this matter, the hearing record does not support the parent's argument that she is entitled to reimbursement for transportation costs under the IDEA, as there is no indication in the hearing record that special transportation services were necessary for the student to receive a FAPE during the 2012-13, 2013-14, and 2014-15 school years. To the extent the parent relies on the district's transportation policy as requiring the district to provide the student with special transportation, the policy appears to be coextensive with State law, which requires districts to provide transportation

of a student to an "appropriate special service or program" recommended for the student by the district or when the student attends a nonpublic school "for the purpose of receiving services or programs similar" to those recommended for the student by the district (Educ. Law §§ 4401[4]; 4402[4][a], [d]; see IHO Ex. 1 at Ex. 7). In this case, the student did not attend a district-recommended program or any of the parental placements for the purpose of receiving services similar to those recommended by the CSE.[25] Because the hearing record does not indicate that the student required special transportation to receive a FAPE, under the circumstances of this case equitable considerations do not weigh in favor of reimbursing the parent for the costs she incurred transporting the student to his nonpublic school placements for the 2012-13 through 2014-15 school years. This decision does not constitute a determination regarding the student's entitlement to transportation as available to regular education students, and the parent is free to pursue other remedies to acquire reimbursement for the expenses she incurred in transporting the student to his private placements during the 2012-13, 2013-14, and 2014-15 school years, to the extent any are applicable (see Educ. Law §§ 3635; 4402[4][[d]).

However, the district has failed to establish that the IHO erred in awarding reimbursement for the costs of transporting the student to Buffalo Academy during the 2015-16 school year. The district contends that the parent failed to submit a timely request under Education Law § 3602-c, also known as the dual-enrollment statute; however, the dual-enrollment statute provides that a request for services for a student with a disability must be made to the school district in which the student's nonpublic school is located (Educ. Law § 3602-c[2][a]). By its own terms, this provision does not apply to the parent's request to the district, and I decline to reverse the IHO's award of reimbursement for the costs incurred by the parent in transporting the student to Buffalo Academy during the 2015-16 school year.[26]

2. Independent Educational Evaluations

The parent asserts that the IHO erred in finding that she was not entitled to reimbursement of privately-obtained evaluations because she did not request an IEE prior to filing her due process complaint notice and failed to indicate with which district evaluations she disagreed. Upon review of the hearing record, the parent is equitably entitled to reimbursement for the costs of the privately-obtained June 2015 OT evaluation.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency

[25] Because the district failed to recommend that the student receive any services for the periods at issue, I have considered the services recommended by the CSE in the last IEP it developed for the student.

[26] State law provides that districts must generally provide transportation for children residing in the district "to and from the school they legally attend" (Educ. Law § 3635[1][a]). A request for transportation must be made by April 1 of the preceding school year, except that a district may not deny a late request "where a reasonable explanation is provided for the delay" (Educ. Law § 3635[2]). As no argument is made that the parent's request was untimely pursuant to § 3635, it has not been considered in resolving this claim. In any event, the district did not respond to the parent's request for transportation to determine if she had a reasonable explanation for the delay in making the request for transportation (see Tr. pp. 145-47, 172-75).

responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

Although the IHO is correct that the parent did not meet the regulatory prerequisites for reimbursement of an IEE by objecting to a district evaluation, the hearing record indicates that the district last evaluated the student in December 2010, did not reevaluate the student as required under the IDEA and State regulations by December 2013, and did not attempt to reevaluate the student until after the parent filed her due process complaint notice in September 2015 (see Tr. pp. 149-50, 152, 155, 177, 374, 380-81; Dist. Exs. 13-14; 19; 8 NYCRR 200.4[b][4]). Further, although the district coordinator of special education indicated at the impartial hearing that the private evaluations were not provided to the district prior to the impartial hearing, the hearing record reflects that the district used the June 2015 private OT evaluation report in the development of the student's IEP for the 2016-17 school year and did not conduct its own OT evaluation (Tr. pp. 103-05; June 2016 IEP).[27] The hearing record reflects that the parent did not provide consent to the district to conduct an OT evaluation of the student (Parent Ex. A-11). However, because "[a] parent seeking special education services for their child under the IDEA must allow the school to evaluate the student and cannot force the school to rely solely on an independent evaluation," the district was not required to accept the parent's evaluation when developing the student's IEP (V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 118 [N.D.N.Y. 2013]). Accordingly, the hearing record indicates the district used the privately-obtained evaluation to meet its statutory obligations. The district may not shift the costs of determining the student's needs to the parent, and she is therefore entitled to reimbursement of the costs of the June 2015 OT evaluation relied upon by the June 2016 CSE (see Letter to Anonymous, 55 IDELR 106 [OSEP 2010] [stating that it would be consistent with federal regulation to allow reimbursement for an IEE when the district

[27] As part of the review process, I directed the district to provide the Office of State Review with any copies of any IEPs developed for the student subsequent to submission of the due process complaint notice at issue in this proceeding, as well as copies of any evaluations relied on by the CSE in the development of such IEPs. In response, the district submitted the following: a June 2016 speech-language evaluation diagnostic summary report; a June 2016 vocational assessment outcomes report; a June 2016 vision services evaluation report; a June 2016 assistive technology consideration/screening form; a June 2015 OT evaluation report; a June 2016 pyschoeducational evaluation report; and a June 2016 IEP.

failed to provide an evaluation in compliance with the IDEA]; see also A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 206-09 [S.D.N.Y. 2010] [noting that the IDEA places the responsibility for evaluation procedures on the district in the first instance). However, the privately obtained psychological and speech-language evaluations the parent seeks reimbursement for were obtained in September 2013 and October 2013, respectively; prior to the time the district was obligated to reevaluate the student (Parent Exs. B-2; E-14). Therefore, the parent's request for reimbursement of the costs of the privately-obtained September 2013 psychological evaluation and October 2013 speech-language evaluations is denied.

3. Compensatory Education Services

As noted above, in her petition the parent requests "additional special education instruction and related services for the period of time the [s]tudent was denied [a] FAPE (4 years) now . . . and beyond the age of 21." In her due process complaint notice, the parent requested "day for day corrective action services" and "3 years of compensatory education beyond the age of 21" (Dist. Ex. 7 at p. 6). In her post-hearing brief, the parent requested that the district provide "day for day corrective action/and or additional services" and "4 years of compensatory education beyond the age of 21 so that [the s]tudent may obtain a Local or Regents diploma" (Parent Post-Hr'g Br. at p. 55). Despite the parent clearly raising compensatory services at multiple points during the course of the impartial hearing process, the district did not address the request either in its post-hearing brief or in its answer and cross-appeal, and the IHO did not address the request in his decision. The district is required under the due process procedures set forth in New York State law to address its burdens by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Doe, 790 F.3d at 457; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] ["the ultimate award [of compensatory education] 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"]). Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district, it is not a State Review Officer's responsibility to craft the district's position regarding the appropriate compensatory education remedy. The district did not alternatively assert any arguments, or provide evidentiary support. on the issue of what, if any, compensatory education remedy would be appropriate if it were found to have denied the student a FAPE, despite having a full and fair opportunity to be heard at the impartial hearing.

Nonetheless, at no point during the impartial hearing or in her papers did the parent quantify her request by reference to specific services she considers necessary to remediate the district's failure to offer the student a FAPE, or present evidence with regard to what she considers to be an appropriate compensatory remedy. As a result, the hearing record is generally deficient with regard to evidence tending to show what might constitute an appropriate remedy under the circumstances of this case. Accordingly, I directed the district to submit additional evidence consisting of the evaluative material considered by the CSE that convened to develop the student's IEP for the 2016-17 school year, as well as that IEP. On review of the additional materials submitted by the district, a June 21, 2016 CSE recommended a program for the student for the 2016-17 school year consisting of an 8:1+1 special class placement, as well as related services, supplementary aids and services/program modifications/accommodations, assistive technology,

testing accommodations, and a coordinated set of transition activities (June 2016 IEP at pp. 10-14).

A number of courts have held that when a parent fails to establish the appropriateness of a unilateral placement, compensatory education is not available as an alternative remedy (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]; but see I.T. v. Dep't of Educ., 2013 WL 6665459 at *7-*8 [D. Haw. Dec. 17, 2013] [finding that the student was entitled to compensatory education for services the student received at the nonpublic school]; Reg'l Sch. Unit 51 v. Doe, 920 F. Supp. 2d 168, 209-10, 212-15 [D. Me. 2013] [finding that the nonpublic school was an appropriate placement and upholding the IHO's award of reimbursement of tuition as compensatory education for the denial of a FAPE in earlier school years]). However, absent direct authority within the Second Circuit, even assuming that the rule stated by the Third Circuit would be adopted,[28] this case is distinguishable because the district developed no IEPs during the school years at issue, the district did not provide the parent with the procedural safeguards notice in her native language, and the parent testified that she was unaware that she could request special education programs and related services from the district or seek reimbursement for the costs of the student's tuition from the district (see Tr. pp. 611, 621, 624, 627). Accordingly, in this rare circumstance, the unique and specific factors underlying the district's denial of a FAPE to the student effectively render a traditional tuition reimbursement analysis inadequate to effectuate the purposes of the IDEA. Accordingly, I find that compensatory education services are available as an appropriate equitable remedy for the FAPE denial at issue in this case.

The Second Circuit has held that compensatory education "is an available option under the Act to make up for denial of a free and appropriate public education" (Newington, 546 F.3d at 123) and that "[w]hatever its precise form, the remedy must be 'appropriate in light of the purpose of the Act'" (Doe, 790 F.3d at 457, quoting Burlington, 471 U.S. at 369). One of the purposes of the IDEA is to ensure that students with disabilities are provided with special education and related services designed to prepare them for "further education, employment and independent living" (20 U.S.C. § 1400[d][1][A]). However, because the parent has acknowledged that the student received some educational services during his time in unilateral placements, the hearing record does not support an award of, as sought by the parent, essentially "year for year" make-up educational services for the time period during which the student was denied a FAPE (see, e.g., Mr. I. v. Maine Sch. Admin. Dist., 480 F.3d 1, 26 [1st Cir. 2007] [upholding a denial of compensatory education based on the theory that when the district developed an IEP, it would necessarily take into account

[28] The Court in D.F. recited the rule without specifying its basis, apparently assuming it as a truism (585 F.3d at 739). In P.P., the Court held "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education" (585 F.3d at 739). As discussed elsewhere in this decision, the Second Circuit has adopted an apparently broader reading of the purpose of compensatory education, which treats it as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred (see Doe, 790 F.3d at 456-57; Newington, 546 F.3d at 123).

the effect of its prior failure to offer special education services]; N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014] [noting that compensatory education "should be denied when the deficiencies suffered have already been mitigated"], report and recommendation adopted, 2015 WL 1137558 [D.R.I. Mar. 12, 2015]). Indeed, the Second Circuit has indicated that it may be appropriate when designing an award of compensatory education to take into account "the possibility that the [s]tudent's educational needs have changed since the commencement of proceedings" and include in the award "analogous educational services appropriate to the [s]tudent's current needs" (Doe, 790 F.3d at 457).

Under the circumstances of this case, a review of the hearing record reveals that the most appropriate equitable compensatory remedy consistent with the student's current needs is one for transition services. Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to State regulations, an IEP for a student who is at least 15 years of age, or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (8 NYCRR 200.4[d][2][ix]; see 20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]). An IEP must also include the transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]).

State regulations provide that transition services are defined as a coordinated set of activities that focus on improving the student's academic and functional achievement, "to facilitate the student's movement from school to post-school activities including, but not limited to, post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living or community participation" (8 NYCRR 200.1[fff]). "The coordinated set of activities must be based on the student's strengths, preferences and interests, and shall include needed activities in the following areas: (1) instruction; (2) related services; (3) community experiences; (4) the development of employment and other post-school adult living objectives; and (5) when appropriate, acquisition of daily living skills and provision of a functional vocational evaluation" (id.).

The student became eligible for transition services in the 2013-14 school year, the year in which he turned 15 years of age (8 NYCRR 200.4[d][2][ix]). As noted above, the district did not develop IEPs for the 2013-14, 2014-15, or 2015-16 school years, and, therefore, the district did not recommend transition services for the student for the 2013-14, 2014-15, or 2015-16 school years. However, based upon the student's current needs described below; and the fact that the student received no transition services for the first three years he was eligible for such services, the district is ordered to provide the student with an additional 108 hours of transition services.

The evidence in the hearing record demonstrates that the district conducted a vocational assessment of the student in June 2016 (June 2016 Vocational Assessment). According to the June 2016 vocational assessment report, the student expressed interest in becoming a doctor, but was "not interested in any of the medical tasks presented in the questionnaire, such as 'taking care of sick people'" (id. at p. 6). With respect to food service, the student was found to be highly motivated to participate in all the simulated food service activities on the computer and demonstrated relative strengths in restaurant math and liquid measurements (id. at p. 7). According to the June 2016 vocational assessment report, the student's priority programming needs required remediation or accommodation of the following factors, listed in order of priority: sensory, emotional/behavioral, intellectual, motor, and coping/adaptive behavior (id. at p. 5). Due to these priority programming needs, the report indicated that the student may require additional time to complete work tasks involving discrimination of items by shape, size, and configuration; and further, that the student's fine motor and coordination challenges may increase frustration and lower productivity in work tasks (id. at p. 7). Additionally, according to the vocational report, the student's current level of vocational functioning was within the work activities/pre-vocational training range, which indicated that the student may require educational and job accommodations/modifications to work to his full potential and that the student would require additional training before entering entry level employment (id.).

Consistent with the identified needs in the June 2016 vocational assessment report, the Buffalo Academy director testified that she would recommend a functional class placement, rather than an academic class placement for the student (Tr. pp. 555-56). Further, the director testified that the student required development in life skills, including "a battery of supports from money management, from how to be less vulnerable in social situations in public," and that she "would be very concerned about his ability to navigate independent of adult support until he is directly taught those skills" (Tr. p. 521). However, the director acknowledged that the student did not receive instruction at Buffalo Academy in money management or navigating public transportation, or any vocational training (Tr. pp. 556-58; see Parent Ex. F-11). Similarly, a review of the hearing record does not indicate that the student received any type of vocational or transition planning or services during the time he was eligible for such services while he attended Elmwood or Gow (see Dist. Exs. 5-6; Parent Exs. F-4-F-10).

Based on the above, the hearing record supports an award of 108 additional hours of transition services over the period of the student's remaining eligibility for services under the IDEA and should include, but not necessarily be limited to, functional and life skill goals and activities (Ferren C v. Sch. Dist., 612 F. 3d 712, 720 [3rd Cir. 2010] [noting that "[i]f an individual was deprived of his or her right to an adequate FAPE, and by extension an IEP, prior to the age of [21], it follows that the student could only be fully compensated by an award of compensatory education that contains the elements of a FAPE that [he or] she was previously denied"]).[29]

[29] This determination is based upon 36 weeks of school in a 10-month school year, at one hour per week for the three school years during which the student was eligible to receive transition services under State regulation and did not.

VII. Conclusion

For the reasons set forth above, the hearing record supports a finding that the district failed to offer the student a FAPE for the period of December 21, 2012 through the end of the 2012-13 school year and for the 2013-14, 2014-15, and 2015-16 school years. In addition, the hearing record supports the IHO's findings that the parent did not meet her burden of establishing that the Elmwood, Gow, or Buffalo Academy educational programs provided the student with educational instruction specially designed to meet his unique needs. However, under the unique circumstances of this case, the hearing record warrants an award of 108 hours of compensatory transition services over the student's remaining years of eligibility under the IDEA to remediate the district's denials of a FAPE.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the district reimburse the parent for the costs of the June 2015 OT evaluation; and

IT IS FURTHER ORDERED that the district provide the student with 108 hours of compensatory transition services during the period of the student's remaining eligibility for services under the IDEA.

Dated: **Albany, New York**
September 28, 2016

CAROL H. HAUGE
STATE REVIEW OFFICER