The University of the State of New York

The State Education Department
State Review Officer
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No. 12-221

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Gail Eckstein, Esq., of counsel

Friedman & Moses, attorneys for respondent, Alicia Abelli, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter for the 2008-09 and 2010-11 school years and ordered it provide the student with compensatory additional services. The parent cross-appeals from the IHO's determination as to the amount of compensatory additional services ordered and to the extent that the IHO did not reach or dismissed certain issues raised in the due process complaint notice. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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 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]).[1]

III. Facts and Procedural History

I was appointed to conduct this review on October 29, 2014. The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. Briefly, the Committee on Special Education (CSE) convened on May 13, 2008, May 26, 2009, May 24, 2010, and June 4, 2010 to formulate the student's individualized education programs (IEPs) for the 2008-09, 2009-10, and 2010-11 school years, respectively (see generally Parent Exs. C; D; E; F). The student attended the recommended educational programs at a district public school for the 2008-09 and 2009-10 school years and attended the Cooke Center Academy (Cooke) for the 2010-11 school year (see Tr. pp. 355-56; Parent Ex. DD at p. 1).[2] In a due process complaint notice, dated January 24, 2011, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2008-09 and 2009-10 school years and requested compensatory additional services relative to the district's violations during those school years, as well as the summer of 2010, in addition to the costs of independent evaluations of the student (see Parent Ex. A at pp. 1-9).

An impartial hearing convened on March 3, 2011 and concluded on December 29, 2011, after 10 days of proceedings (Tr. pp. 1-911). In an interim decision dated April 22, 2011, the IHO ordered the district to pay for the costs of independent neuropsychological, speech-language, OT, and assistive technology evaluations of the student (Interim IHO Decision at p. 4).[3] In a final decision dated October 18, 2012, the IHO determined that the district failed to offer the student a FAPE for the 2008-09 and 2009-10 school years (IHO Decision at pp. 11-22). As relief, the IHO ordered the district to provide the student with compensatory additional services (id. at pp. 22-27).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's petition for review and the parents' answer and cross-appeal is also presumed and will not be

[1] The administrative procedures applicable to the review of disputes between parents and school districts regarding any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student are well established and described in broader detail in previous decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., 12-228; Application of the Dep't of Educ., Appeal No. 12-087; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 09-092).

[2] According to the parent's closing brief at the impartial hearing, the costs of the student's attendance at Cooke for the 2010-11 school year was the subject of another administrative hearing that settled and is not at issue in this proceeding (see Answer Ex. A at p. 3; see also Tr. pp. 669-70).

[3] The hearing record includes the independent neuropsychological, speech-language, and assistive technology evaluations completed pursuant to the IHO's interim order (see generally Parent Exs. DD-FF).

recited here. The parties' positions relative to the particular issues on appear are elaborated upon below.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought

desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

VI. Discussion

A. Preliminary Matters

1. Scope of Review

An initial clarification is necessary regarding the scope of review. As the student attended Cooke for the 2010-11 school year, for which the parent does not seek tuition reimbursement in

this proceeding (see Answer Ex. A at p. 3), review of the June 2010 IEP and the 2010-11 school year would be relevant only to the extent that parent sought compensatory additional services for July and August 2010 (see Parent Ex. A at p. 2). The parent did assert allegations regarding the procedural and substantive adequacy of the June 2010 IEP n the due process complaint notice (see Parent Ex. A at pp. 6-7) and, further a large portion of the district's direct case at the impartial hearing pertained to the June 2010 IEP (see, e.g., Tr. pp. 92-226, 474-597; Dist. Exs. 16-28). Yet, in the closing statement submitted to the IHO at the end of the impartial hearing, the parent indicated that the 2010-11 school year was not at issue (see Ans. Ex. A at pp. 1, 3). Although the IHO examined the May 2008 and June 2010 IEPs (see IHO Decision at pp. 20-22), he specified that the parent's claims related to the 2008-09 and 2009-10 school years (id. at pp. 4, 5, 14) and stated his finding that the district failed to offer the student a FAPE for the 2008-09 and 2009-10 school years (id. at pp. 21, 24). On appeal, the clarity regarding the relevance of the June 2010 IEP to the relief sought has not improved. The district asserts that the June 2010 IEP was at issue to the extent that it was intended to go into effect as of June 14, 2010, thus covering the latter part of the 2009-10 school year (approximately two weeks) (Pet. at ¶5 n.2). However, the parent does not directly raise any issues in the answer and cross-appeal specific to the June 2010, other than denials to allegations in the district's petition. Based on the foregoing, I decline to review the adequacy of the June 2010 IEP.

2. Section 504 Claims

The parent appeals the IHO's failure to hear his claims pursuant to section 504, as well as his "systemic claims."[4] An impartial hearing may be held on issues "relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child" (34 CFR 300.507[a][1]; see 20 U.S.C. § 1415[b][6]). While claims that are systemic in nature are not necessarily excluded from resolution in the due process forum, particular questions regarding how to address an individual student's needs are within the scope of an IHO's jurisdiction (Levine v. Greece Cent. School Dist., 2009 WL 261470, at *9 [W.D.N.Y. 2009]). Compensatory damages are not available in the administrative forum under the IDEA (see Taylor v. Vt. Dep't. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Board of Educ. of Newburgh Enlarged City School Dist., 288 F.3d 478, 483 [2d Cir. 2002]; see R.B. v. Bd. of Educ., 99 F.Supp.2d 411, 418 [S.D.N.Y. 2000]). Furthermore, claims alleging general violations of State or Federal laws or regulations by a district are properly subject to the State complaint procedures set forth in regulation (8 NYCRR 200.5[*l*]; see 34 CFR 300.151-300.153), rather than the due process impartial hearing system (see Application of a Student with a Disability, Appeal No. 10-031; Application of a Student with a Disability, Appeal No. 09-044). Thus, given the limited scope of an impartial hearing under the IDEA, the parents' claims will be reviewed to the extent that they assert violations of the IDEA and State regulations.

Regarding the parent's section 504 claims, New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and an SRO does not review section 504 claims (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012]; see also Educ. Law § 4404[2] [providing that SROs

[4] The parent acknowledges in a footnote in his petition that an SRO may not assume jurisdiction over a section 504 claim but requests that the SRO "find that the actions complained of were illegal[] and that the parent did not abandon her Section 504 claims" (Pet. ¶ 67 n. 22).

review determinations of IHOs "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, I have no jurisdiction to review any portion of the parent's claims regarding section 504.

B. Translation of Documents

As it is relevant to the preliminary question regarding the statute of limitations, as well as to the procedural adequacy of the various CSE meetings at issue in this case, I first turn to the district's obligations relative to the translation of documents in the parents' native language. The parent asserts that the district failed to provide him with translated copies of the student's IEPs, a procedural safeguards notice, and prior written notices.

Both federal and State regulations require that a district provide parents with certain educational documents in their native language, ensure that consent and procedural notices are provided in the parents' native language, and provide a translator at all times during the impartial hearing process (see, e.g., 34 CFR 300.9[a]; 300.503[c], 300.504[d]; 8 NYCRR 200.1[*l*][1], 200.4[a][9][ii], [b][6][xii], [g][2][ii], 200.5[a][4], [f][2], [j][3][vi]). Here, the hearing record shows that, although capable of conversational English, the parent's native language was not English (see, e.g., Tr. pp. 830-34).

The hearing record shows that the district did not provide the parent with a copy of a procedural safeguards notice in his native language until, at the earliest, May 2010 (Tr. pp. 97, 174-75; Dist. Exs. 13 at p. 1; 25; 27; see 34 CFR 300.504[d], citing 300.503[c]; 8 NYCRR 200.5[f][2]).[5] Furthermore, although required, there is no evidence in the hearing record that the district provided a copy of a prior written notice or the results of any assessment of the student to the parents in their native language (see Tr. pp. 136-37; see also 34 CFR 300.503[c]; 8 NYCRR 200.4[b][6][xii], 200.5[a][4]). However, 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 still required to provide parents with full information, in the native language, of all information relevant to activities for which consent is sought]; see 34 CFR 300.320; 8 NYCRR 200.4[d][2]).[6]

The parent also asserts on appeal that the IHO should have found the district's failure to provide the parent with prior written notice a further basis for a finding of a denial of a FAPE, to

[5] The hearing record includes a document dated May 13, 2008, the same date as the May 2008 CSE meeting, that references an attachment and a booklet for a description of rights and procedural safeguards; however, the attachment is not included with the exhibit and it is unclear from the hearing record whether or not the parent ever received the referenced information (Parent Ex. V). Review of the hearing record also shows that the parent requested from the district and subpoenaed certain documents, including a translated copy of the procedural safeguards notice, which the district did not produce during the impartial hearing (see, e.g., Tr. pp. 48-49, 56, 174-75, 457, 461-63).

[6] Although not required to provide parents with a copy of an IEP in their native language, doing so would be in keeping with the spirit of the IDEA and is one way to demonstrate that the parent has been "fully informed of the student's educational program" (Letter to Boswell, 49 IDELR 196 [OSEP 2007]).

which the district answers that it cannot properly respond because the parent's claim in this regard lacks specificity, noting that the district sent "notices and other documentation to the [p]arent on a regular basis, so the lack of detail makes it difficult to respond to this claim." The district's response is disingenuous as a prior written notice is specifically required by federal and State regulations (see 20 U.S.C. § 1415[b][3]; 34 CFR 300.503; 8 NYCRR 200.5[a]; Letter to Chandler, 112 LRP 27623 [OSEP 2012]).

Under these circumstances, the hearing record supports a finding that the district's failure to provide the parent with copies of the procedural safeguards notice and prior written notice constituted a procedural violation of the IDEA (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). The effect of this violation as to the applicability of the IDEA's statute of limitations is discussed below.

C. Statute of Limitations

Turning next to the applicability of the IDEA's statute of limitations, the parties both disagree with aspects of the IHO's disposition of this issue. The IHO determined that the parent knew or should have known about the basis of his claim on or around December 31, 2008 and that the statute of limitations barred the parent's claims to the extent that they arose earlier than two years prior to the parent's January 24, 2011 due process complaint notice (IHO Decision at pp. 14, 19). The district asserts that, notwithstanding this finding, the IHO erred by considering the May 2008 IEP and ordering relief relative to the 2008-09 school year on a pro-rated basis. The parent argues that the IHO improperly determined that the parent knew or should have known about the claims in December 2008 and, in any event, that an exception to the statute of limitations applied as a consequence of the district's failure to provide the parent with certain notices in his native language.

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013]; R.B. v. Dept. of Educ., 2011 W.L. 4375694, at *2, *4 [Sept. 16, 2011 S.D.N.Y.]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]).[7] An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B., 2011 W.L. 4375694, at *6).

[7] New York State has not explicitly established a different limitations period.

The parent contends that the "withholding of information" exception applies in this instance.[8] Case law interpreting the "withholding of information" exception to the statute of limitations has found that the exception applies only to the requirement that parents be provided with certain procedural safeguards required under the IDEA (see D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 [3d Cir. 2012]; Avila v. Spokane Sch. Dist. 81, 2014 WL 5585349, at *8 [E.D. Wash. Nov. 3, 2014]; R.B., 2011 W.L. 4375694, at * 6; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F.Supp.2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943, 945 [W.D. Tex. 2008]; Evan H. v Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *7 [E.D. Pa. Nov. 4, 2008]). Such safeguards include the prior written notice and the procedural safeguards notice, the latter which, among other things, contains information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3], [d]; 34 CFR 300.503, 300.504; 8 NYCRR 200.5[a], [f]). However, if a parent is aware of his or her rights in developing a student's educational program, it has been held that the failure to provide the procedural safeguards does not under all circumstances prevent the parent from requesting an impartial hearing (see R.B., 2011 WL 4375694, at *7; El Paso Indep. Sch. Dist., 567 F. Supp. 2d at 945).

Based upon the district's failure to provide the parent with copies of a procedural safeguard notice or prior written notices in the parent's native language, as discussed above, this exception applies to the specific facts and circumstances of this case (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]). Moreover, there is nothing in the hearing record to indicate that the parent was nonetheless aware of his rights prior to his commencement of the present proceeding. The IHO's reasoning surrounding the parent's January 2008 correspondence to the district is not persuasive in this regard (IHO Decision at p. 14; see Parent Ex. X).[9] While the parent's letter requesting that the district conduct an evaluation of the student could arguably demonstrate knowledge of the district's responsibility under the IDEA and State law to evaluate the student, it does not reflect the parent's knowledge or awareness of his due process rights (see Parent Ex. X). Accordingly, to the extent the IHO limited the parent's relief based on his finding that a portion of the parent's claims were barred by the statute of limitations, that finding is reversed.

D. 2008-09 School Year

1. May 2008 CSE

a. CSE Composition—Additional Parent Member

The district argues that the IHO erred by finding that an additional parent member was required at the May 2008 CSE because the CSE did not consider the student's initial placement in

[8] The parent does not argue that the "specific misrepresentation" exception applies in this case.

[9] It appears that the handwritten letter is dated January 31, 2008; however, the IHO read the date as December 31, 2008 (see IHO Decision at p. 14; Parent Ex. X). While this would ordinarily be determinative as to whether the parent's claims were barred by the statute of limitations, it is not necessary to determine the correct date in this instance as an exception to the statute of limitations applies.

a special class or a specialized or out-of-district school and, thus, was not required to convene a full CSE. In the alternative the district asserts that, even if the absence of an additional parent member was a procedural violation, it did not rise to the level of a denial of a FAPE.

Attendees at the May 2008 CSE meeting included a district school psychologist, a district school counselor, a district speech-language therapist, the student's district special education teacher, and the parent (Parent Ex. F at p. 2; see Tr. p. 251). The district does not dispute that an additional parent member did not attend the May 2008 CSE meeting.

At the time of the May 2008 CSE meeting, relevant State law and regulations in effect required the presence of an additional parent member at a CSE meeting convened to develop a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 647 [S.D.N.Y. 2011] [noting that the absence of an additional parent member does not constitute a violation of the IDEA]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 293-94 [S.D.N.Y. 2009], aff'd, 366 Fed.App'x 239, 2010 WL 565659 [2d Cir. Feb. 18, 2010]; Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11, 2005]).[10] Under applicable State law and regulations, a CSE subcommittee has the authority to perform the same functions as a CSE, with the exception of instances in which a student is considered for initial placement in a special class, or a student is considered for initial placement in a special class outside of the student's school of attendance, or whenever a student is considered for placement in a school primarily serving students with disabilities or a school outside of the student's district (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4]). State law further provides that when a district is permitted to convene a CSE subcommittee, the subcommittee need not include an additional parent member (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][2]-[5]).

The evidence in the hearing record describes the May 2008 CSE meeting as a "triennial review," not an initial meeting (Parent Ex. F at pp. 1-2). The hearing record also establishes that the student was not being considered for initial placement in a special class, a school primarily serving students with disabilities, or a school outside of the student's district (see id.). The hearing record is not clear as to whether the district intended to convene a CSE meeting or, as was permissible, a CSE subcommittee meeting to conduct the student's annual review. Accordingly, it is not clear whether the lack of an additional parent member at the May 2008 CSE meeting was a violation of State regulations (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4][i]-[iii]).

Even assuming for purposes of argument that the absence of an additional parent member was a violation of State regulations, it does not appear that it contributed to a denial of a FAPE in this instance, as nothing in the hearing record indicates that the absence of an additional parent member impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or

[10] Effective August 1, 2012, amendments to State law and regulations provide that an additional parent member is no longer a required member of a CSE unless specifically requested in writing by the parents, by the student, or by a member of the CSE at least 72 hours prior to the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]).

that the lack of a parent member caused a deprivation of educational benefits (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *13-*14 [E.D.N.Y. Aug. 19, 2013]).

b. Interpreter

The district next asserts that the IHO erred by finding that the parent required an interpreter at the May 2008 CSE meeting. . In support of this contention, the district cites examples in the hearing record that allegedly demonstrate that the parent's ability to comprehend spoken English did not necessitate interpretation services.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). In addition, the district "must take whatever action is necessary to ensure that the parent understands the proceedings of the [CSE] meeting, including arranging for an interpreter for parents [who are hearing impaired] or whose native language is other than English" (34 CFR 300.322[e]; 8 NYCRR 200.5[d][5]; see also Application of the Dep't of Educ., Appeal No. 12-215; Application of a Child with a Disability, Appeal No. 05-119).

In this case, as noted above, the hearing record shows that the parent's native language is other than English (see, e.g., Tr. pp. 830-34). The hearing record further shows that an interpreter did not attend the May 2008 CSE meeting (see Tr. pp. 251, 275, 837, 895; Parent Ex. F at p. 2). The district special education teacher who attended the May 2008 CSE meeting testified to some recollection that the parent was verbally advised to his right to an interpreter, which she "guess[ed]" would have been at a CSE meeting or in "the notice of appointment of the meeting"(Tr. pp. 275-76). She additionally testified that the parent did not request an interpreter (Tr. p. 251). In contrast, the parent testified that he requested an interpreter but that he was informed that there was not time to find one (Tr. p. 895). The parent further testified that members of the CSE inquired as to his understanding of English and whether the meeting could proceed without an interpreter (Tr. p. 896). Upon his response that he could "understand English, a little bit," he testified that the other members of the CSE "said okay" and "that's why [the meeting] continued" (id.). While there is testimony in the hearing record regarding the level at which the parent understood English (see, e.g., Tr. pp. 252, 270-73, 382-83, 898-901), it remains undisputed that English is not his native language.[11] Moreover, the evidence in the hearing record does not show that the May 2008 CSE made any effort to ascertain whether the parent ultimately understood what transpired during the meeting. Under these circumstances, the hearing record supports the IHO's finding that the district's failure to ensure the presence of an interpreter at the May 2008 CSE meeting constituted a procedural violation.

[11] The district cites to the parent's willingness to proceed with the impartial hearing on certain occasions when the interpreter was not available as evidence of his ability to understand English (see Tr. pp. 310-11, 417). This is not a persuasive ground upon which to conclude that the parent was fluent in English or understood the proceedings, particularly given that the parent also consented to continuation of the proceedings in his absence when he had to leave for work (see Tr. p. 354, 547-48).

c. Predetermination

The district asserts that the IHO erroneously found that the May 2008 CSE's 12:1 special class recommendation, as opposed to a 12:1+1 special class, was based on the district's view that "emotionally disturbed students" attended 12:1+1 special classes. The district further argues that the district based its recommendation on the student's progress in a 12:1+1 special class, as well as the CSE's impression that a 12:1+1 special class would be inappropriate for the student in this case because 12:1+1 placements contained students with "more 'emotional difficulties'."

Turning to the parties dispute in this regard, which may properly be viewed as a claim that the district predetermined the student's placement, the consideration of possible recommendations for a student, prior to a CSE meeting, is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar 26, 2009]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6 - *7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R., 615 F. Supp. 2d at 294). In addition, districts are permitted to develop draft IEPs prior to a CSE meeting "'[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process'" (Dirocco v. Board of Educ. of Beacon City School Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013], quoting M.M., 583 F. Supp. 2d at 506). Districts may also "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (Dirocco, 2013 WL 25959, at *18).

The May 2008 IEP indicates that, in addition to its ultimate 12:1 special class placement recommendation, the CSE also considered a general education class placement without special education services but rejected this option because the student required the support of a small structured classroom (Parent Ex. F at p. 14). The IEP also stated that the CSE considered a special class with a smaller teacher-to-student ratio but determined that it was too "restrictive" for the student (id.; see Tr. p. 266).

The district special education teacher testified that, in the middle school, district students deemed eligible for special education as students with learning disabilities attended 12:1 special classes, whereas students with emotional disturbances attended 12:1+1 special classes (Tr. pp. 258, 267, see also Tr. pp. 334-38, 393-94). Both the special education teacher and the district school counselor further testified that the May 2008 CSE recommended a 12:1 special class placement for the student because she exhibited "learning issues" rather than "any emotional disturbance"

(Tr. pp. 258, 267, 393). Ultimately, the special education teacher went further to indicate that the student needed a 12:1+1 special class but that the district did not offer the placement the student required at a middle school level (Tr. p. 343). Similarly, the district school counselor testified that, but for her impression as to the grouping in the 12:1+1 special class, such a ratio would have been a more appropriate recommendation for the student (Tr. pp. 394-95).

While it appears that the CSE improperly factored certain considerations into its ultimate placement determination, the hearing record does not support the conclusion that the district failed to maintain an open mind as to the appropriateness of alternative placement recommendations. However, the district is reminded that placement decisions must be based on a student's unique needs as reflected in the IEP, rather than based on the existing availability of services in the district (34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 163 [2d Cir. 2014] [finding that the IDEA's LRE requirement is not limited, in the extended school year context, by what programs the school district already offers, but rather must be based on the student's needs]; Adams v. State, 195 F.3d 1141, 1151 [9th Cir. 1999]; Reusch v. Fountain, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] ["Although the Act does not require that each school building in [a district] be able to provide all the special education and related services for all types and severities of disabilities[, i]n all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007] [stating that service delivery determinations must be made by the CSE "based on a child's individual and unique needs, and cannot be made as a matter of general policy by administrators, teachers or others apart from the IEP Team process"]).

Thus, while the IHO correctly recognized that the district's justification for the 12:1 placement recommendation was not based on the student's needs, in this instance, the CSE did not refuse to consider other options or present at the meeting with a closed mind. Therefore, the misconceptions articulated by certain district employees regarding the placement process does not contribute to a finding that the district failed to offer the student a FAPE in this instance. On the other hand, whether or not the 12:1 special class was actually aligned with the student's needs, notwithstanding the district's purported reasoning for the recommendation, is further discussed below.

2. May 2008 IEP

a. Evaluative Information and Present Levels of Performance

Next, although not addressed by the IHO, the parent argues that the district failed to offer evidence that the evaluations conducted by the district were consistent with the IDEA and State law. The district asserts that the student's IEPs were based on information based on the student's progress at the district public school as well information provided by CSE members.

An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other

things, the content of the student's IEP (20 U.S.C. §1414[b][2][A]; 34 CFR 300.304[b][1]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. §1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. §1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district agree otherwise (34 CFR 300.303[b][1]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).

Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). On the basis of its review, a CSE must "identify what additional data, if any, are needed to determine," among other things, "the present levels of academic achievement" of a student (20 U.S.C. § 1414[c][1][B]). Any additional assessments need only be conducted if found necessary to fill in gaps in the initial review of existing evaluation data (20 U.S.C. § 1414[c][2]; see also D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *9 [S.D.N.Y. Aug. 19, 2013]).

As an initial matter, to the extent that the parent relies on information from evaluations of the student, which postdate the May 2008 CSE meeting and, thus, were not available at the time of the meeting, such subsequently completed evaluations do not offer support to the parent's claim that the evaluative information before the May 2008 CSE was insufficient (see R.E., 694 F.3d at 187; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [holding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Thus, for example, absent some indication in the hearing record that an assistive technology assessment of the student was warranted based on the information before the CSE or pursuant to the parent's request therefor, the October 2011 assistive technology assessment does not support a finding that the May 2008 CSE should have pursued such information (see Parent Ex. FF; see also Tr. p. 350).

Review of the evidence in the hearing record indicates that the May 2008 CSE had available to it a March 2008 bilingual psychoeducational evaluation report, a May 2008 counseling progress report, and a May 2008 speech-language therapy progress report (see Parent Ex. B at pp. 2-3; see generally Parent Exs. K; L; BB). The district special education teacher and the district school counselor testified that they had no recollection that the March 2008 bilingual psychoeducational evaluation was discussed at the May 2008 CSE meeting (Tr. pp. 314-15, 385-86). However, the May 2008 IEP reflects information taken directly from the March 2008 bilingual psychoeducational evaluation report (compare Parent Ex. F at pp. 3-5, with Parent Ex. L at pp. 1-7). Specifically, the May 2008 IEP reported the student's instructional levels based on an administration of the Woodcock Johnson III Tests of Achievement (WJ-III ACH) (Parent Ex. F at p. 3, with Parent Ex. L at pp. 4-6). Consistent with the psychoeducational evaluation, the May 2008 IEP indicated that the student achieved the following grade equivalents: end of second grade in letter-word identification and spelling; beginning of second grade in passage comprehension; beginning of fifth grade in simple calculation; and beginning of third grade in applied problems (compare Parent Ex. F at p. 3, with Parent Ex. L at pp. 4-5).

In addition, as reported in the psychoeducational evaluation report, the May 2008 IEP indicated that the student was "learning the basic phonetic skills of short vowels and consonant sounds to pronounce 2-syllable words" (compare Parent Ex. F at p. 3, with Parent Ex. L at p. 4). Relative to the student's mathematical skills, the psychoeducational evaluation report and the May 2008 IEP reflected that the student "was able to solve 3-digists addition with carrying-on, 2-digit multiplied by 1-digit, and 2-digits subtraction with borrowing," was learning the addition of fractions without simplification, was struggling with division, could solve one-step word problems, and could recognize American coins (compare Parent Ex. F at p. 3, with Parent Ex. L at p. 5).

Further consistent with the psychoeducational evaluation report, the May 2008 IEP reported that administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded scores reflecting that the student exhibited functioning in the high deficient range in verbal comprehension and perceptual reasoning and the borderline range in working memory and processing speed (compare Parent Ex. F at p. 4, with Parent Ex. L at p. 2). As the psychologist who completed the evaluation observed, the May 2008 IEP indicated that the student had limitations in the verbal domain, particularly with English vocabulary, but "showed some potential in simple reasoning and using mnemonic skills to recall information (compare Parent Ex. F at p. 4, with Parent Ex. L at p. 3). The May 2008 IEP also reported that the student's work speed was slow and that she showed some delay in visual-motor functioning (compare Parent Ex. F at p. 4, with Parent Ex. L at p. 4). As noted in the psychoeducational evaluation report, the May 2008 IEP reported that the student was "dominant in English, as the translation of test items did not improve[] her scores" but that "she had limited English expressive skills" (compare Parent Ex. F at p. 4, with Parent Ex. L at p. 2).

With regard to the student's social/emotional performance, the May 2008 IEP also relied upon the March 2008 psychoeducational evaluation, noting the student's shyness (compare Parent Ex. F at p. 5, with Parent Ex. L at p. 5). Likewise, the May 2008 IEP reported information from the parent that the student was compliant but shy in the home (id.). Based on information provided in the psychoeducational evaluation report, the May 2008 IEP also indicated that the student responded to prompting and cooperated to complete the evaluation (id.). The May 2008 IEP also

reported that the student had limited expressive skills with which to communicate with others (Parent Ex. F at p. 5).

The hearing record also indicates that the May 2008 CSE had before it a May 2008 counseling progress report prepared by the student's then-current school counselor, who also attended the May 2008 CSE meeting (see Tr. p. 369; see generally Parent Ex. K). The counseling progress report indicated that the student's relationships with peers were "workable," as long as "another child d[id] not influence her" (Parent Ex. K). It further stated that the student could be "very insecure" and would only speak if she felt safe (id.). The counseling progress report also indicated that the student was "not performing academically in the classroom" (id.). The report detailed that, in counseling, the student was working on appropriate play, relating to peers and adults, self-esteem, as well as speaking up and expressing her feelings (id.). The school counselor recommended that the student's counseling mandate be modified to two weekly 30-minute sessions in a group of three (id.). While the particular information included in the May 2008 counseling progress report was not directly included in the student's present levels of performance in the May 2008 IEP, a review of the annual goals and related services recommendations, indicates that the CSE's recommendations were consistent with the report (see Parent Ex. F at pp. 7, 15).

Although it is unclear from the hearing record whether or not the CSE reviewed it, the hearing record also includes a May 2008 speech-language progress report, prepared by the student's then-current speech-language therapist who also attended the May 2008 CSE meeting (see Parent Ex. F at p. 2; see generally Parent Ex. BB). The speech-language progress report indicated that the student presented with moderate expressive and receptive language delays (Parent Ex. BB). The report stated that the student struggled following directions with increased complexity, had an immature vocabulary, difficultly expressing herself, and had a tendency to "shut down if many demands [were] placed on her" (id.). The report indicated that the student benefited from repetition, simplified directions, and close adult supervision (id.). The speech-language therapist recommended that the student's speech-language mandate be modified to one weekly 30-minute session in a group of three (id.). As with the counseling progress report, a review of the May 2008 IEP similarly reveals that the CSE's recommendations were consistent with the information and recommendations of the speech-language progress report (see Parent Ex. F at pp. 11, 15).

Based on the foregoing, the hearing record shows that the May 2008 CSE had before it current evaluative information relative to the student which was sufficient to enable it to develop the student's May 2008 IEP (see generally Parent Exs. F; K; L). Consistent with this evaluative information, and primarily the March 2008 bilingual psychoeducational evaluation, the May 2008 IEP reflected the student's needs in the areas of academics, social/emotional, and expressive/receptive language (Parent Ex. F at pp. 3-6). To be sure, the district could have performed other evaluations of the student in preparation for the May 2008 CSE meeting, such as a classroom observation or, in particular, a speech-language evaluation given the recommendation for the same in the March 2008 psychoeducational evaluation (see Parent Ex. L at p. 7). However, overall, the hearing record demonstrates that the combination of input from the student's teacher and providers, the district psychoeducational evaluation, and the related services progress reports

provided the CSE with adequate information with which to formulate an appropriate IEP (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).[12]

b. Classification

The parent next argues that the district improperly found the student eligible for special education as a student with a speech or language impairment until June 2010, thus resulting in a denial of FAPE to the student for the preceding years, including the 2008-09 school year. Although the parent argues that the student's classification of a student with an intellectual disability would be more appropriate, he does not argue that the classification of speech or language impairment is inappropriate. In other words, the parties do not appear to dispute that the student is eligible for special education and related services as a student with a speech or language impairment. This determination, as described in more detail below, is supported by the evidence in the hearing record as the student exhibited expressive and receptive language that adversely affected her educational performance (34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The IDEA provides that a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification (20 U.S.C. § 1412[a][3] ["Nothing in this chapter requires that children be classified by their disability so long as each child . . . is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111; M.R. v. South Orangetown Central Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y., Dec. 16, 2011] [finding that once a student's eligibility is established "it is not the classification *per se* that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" [emphasis in the original]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]).

The special education teacher who served on the May 2008 CSE testified that a speech or language impairment classification was appropriate for the student because she had difficulties processing information, noting that the student had difficulty following conversations if someone spoke too quickly or if multiple people spoke at once (Tr. p. 255). In addition, the information available to the May 2008 CSE indicated that the student exhibited expressive and receptive language delays (see Parent Exs. F at pp. 4, 5; L at p. 2; BB). Thus, the student's classification as a student with a speech or language impairment, absent some evidence that the classification rather than the student's needs inappropriately drove the resulting recommended program, does not contribute to a finding that the district failed to offer the student a FAPE (see M.R., 2011 WL 6307563, at *9).[13]

[12] The parent does not appear to directly dispute the lack of identified management needs in the May 2008 IEP; however, to the extent a discussion of the same is relevant to the issue of the appropriateness of the recommended 12:1 special class placement, it is addressed below.

[13] While not determinative, as it postdates the relevant CSE meeting, the October 2011 assistive technology assessment report, completed in compliance with the IHO's order in this proceeding, notes that classifications of both speech-language therapy and intellectual disability appeared consistent with the student's deficits and needs (Parent Ex. FF at p. 1).

c. Annual Goals

In his answer, the parent asserts generally that the district did not establish that the annual goals included in all of the disputed IEPs were appropriate or measurable. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

In the instant case, the parent does not articulate a specific objection to the annual goals included in the May 2008 IEP. A review of the IEP reveals that it included 11 annual goals with approximately 33 corresponding short-term objectives in the areas of counseling, reading comprehension, vocabulary, writing, mathematics, expressive and receptive language, and object control (Parent Ex. F at pp. 7-12). The student's then-current school counselor testified at the impartial hearing that she developed the student's counseling goals which provided that the student would continue to work on her self-image (by identifying positive characteristic about herself and by identifying and implementing changes which would enhance her perception about herself) and identifying and verbalizing her feelings (by building up her confidence and working on identifying and verbalizing her feelings through the use of books, pictures, and puppets) (Tr. pp. 362-65; Parent Ex. F at p. 7). A review of the remaining annual goals, even if their exact provenance is unclear, reveals that they are sufficiently aligned with the student's needs as set forth in the present levels of performance (see Parent Ex. F at pp. 3-12).

A further review of the annual goals further reveals that most of the short-term objectives included the required evaluative criteria (i.e., 70, 80, 85, or 90 percent accuracy; 3 or 4 out of 5 trials), evaluation procedures (i.e., teacher observation or measurement), and schedules to be used to measure progress (Parent Ex. F at pp. 7-12). Thus, a review of the May 2008 IEP demonstrates that the annual goals, combined with their corresponding short-term objectives, contained "sufficiently detailed information regarding the conditions under which each objective was to be performed and the frequency, duration, and percentage of accuracy required for measurement of progress" (Tarlowe, 2008 WL 2736027, at *9 [internal quotations omitted]; see also, e.g., P.K. v. New York City Dep't of Educ., 819 F.Supp.2d 90, 109 [E.D.N.Y. 2011], aff'd 526 Fed. App'x 135 [2d Cir. May 21, 2013] [noting reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress]).

d. 12:1 Special Class and Related Services

The district next asserts that the IHO erroneously found that the May 2008 IEP's recommended 12:1 special class placement was improper. The parent argues that the evidence in the hearing record supports the IHO's determination. In particular, and with specific reference to the May 2008 IEP, the parent asserts that the district recommended a significantly different

educational program for the student relative to the preceding school year, including a reduction amount of recommended speech-language therapy and counseling sessions, without a proper basis.

By way of background, the hearing record indicates that the student attended a 12:1+1 special class in a district public school for elementary school (see Tr. 355-356; Parent Exs. H at p. 2; W). It is the shift from a 12:1+1 special class to a 12:1 special class placement that forms the basis of the parties primary dispute. State regulations provide that a special class placement with a maximum class size not to exceed 12 students is designed for "students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]). A 12:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs shall be determined by factors which relate to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (8 NYCRR 200.1[ww][3][i][d]).

The district's contention that a 12:1 classroom was appropriate to meet the student's needs is inextricably intertwined with the view of certain CSE members, as discussed above, that a 12:1+1 classroom ratio was only appropriate for students with an emotional disturbance (Tr. pp. 343, 394-95). Reflecting this understanding, the scant evidence offered by the district at the impartial hearing in support of the CSE's decision to recommend a special class with a 12:1 ratio instead of a 12:1+1 ratio does not support a finding that the May 2008 CSE's recommendation was made based on the student's needs (Tr. pp. 258, 266-7, 334-38, 343, 393-95). Indeed, both the district special education teacher and district school counselor testified that, but for their impressions regarding the grouping of the 12:1+1 special classes at the district middle school, such a ratio would have been more appropriate for the student (Tr. pp. 343, 394-95).[14]

Furthermore, the May 2008 IEP failed to identify any of the student's management needs in the sections of the IEP designated for that purpose (see Parent Ex. F at pp. 3-5). To be sure, the IEP's present levels of performance indicated that the student benefited from certain environmental modifications and human or material resources, including use of mnemonic devices and prompting (see id.). Overall, however, a review of the May 2008 IEP shows that the CSE omitted management needs that were essential for the student to benefit from instruction, thus resulting in a denial of FAPE to the student. For example, the March 2008 psychoeducational evaluation recommended that the student would benefit from training in study skills and intensive tutoring in English, neither of which was recommended by the May 2008 CSE (Parent Ex. L at pp. 3, 7). The May 2008 speech-language progress report indicated that the student benefited from repetition,

[14] Additionally, the district may not seek refuge in the testimony of the district special education teacher indicating that, when the May 2008 IEP was implemented, the assigned public school classroom might have included additional adult support (Tr. pp. 351-52). This is the sort of retrospective testimony offered in an attempt to rehabilitate an IEP that is explicitly prohibited by R.E. (694 F.3d at 186; see P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 140-41, 2013 WL 2158587 [2d Cir. May 21, 2013]). Therefore, this is not persuasive support for the district's position that the 12:1 special class was appropriate for the student.

simplified directions, and close adult supervision (Parent Ex. BB). Furthermore, the district special education teacher who attended the May 2008 CSE meeting testified that the student would be capable of achieving the annual goals included in the IEP because she would receive "repetition, one-on-one support when needed, [and the] use of manipulatives" (Tr. p. 331). The special education teacher also indicated that the student would be "participating in the extended day program," which, according to the special education teacher, offered tutoring and was required for all students receiving special education services (Tr. p. 331). It appears that the information before the May 2008 CSE indicated that the student exhibited management needs that would have interfered with the instructional process such that placement in a 12:1 special class without additional support or identified management needs on her IEP was insufficient.

In addition to a 12:1 special class placement, the May 2008 IEP also recommended the following weekly related services: two 30-minute sessions of speech-language therapy in a small group (3:1) and one 30-minute session of counseling in a small group (3:1) (Parent Ex. F at p. 15). Relative to the student's IEP for the 2007-08 school year, the May 2008 IEP terminated the student's individual speech-language therapy and changed the student's counseling mandate from an individual sessions to a small group session (see id. at pp. 2, 15). The district special education teacher testified that the May 2008 CSE decided to terminate the student's individual speech-language therapy session because the student "didn't function in that one-to-one setting" and the speech-language therapist "felt that the individual session was not beneficial to her at all" (Tr. pp. 261-62). As to counseling, the district school counselor testified that the small group sessions were more beneficial for the student than the one-to-one because it offered "more of the social aspect" (Tr. pp. 378-79). She also indicated that the student might benefit from counseling in a therapeutic setting with her family outside of school (Tr. pp. 377-79). The counselor further opined that the student would receive greater benefit from receiving only one kind of counseling service (i.e. individual or group) as opposed to both because removing the student from class for both sessions would improperly detract from the student's classroom instruction time (Tr. p. 379). Furthermore, the modification in the student's related services mandates was consistent with the counseling and speech-language therapy progress reports completed by the student's then-current providers who also attended the May 2008 CSE meeting (see Parent Exs. K; BB; see also Parent Ex. F at p. 2).

Therefore, upon review of the evidence in the hearing record, it appears that the related services recommendations for the student were appropriate to address the student's speech-language and social/emotional needs. However, the fact that the district did not offer any persuasive evidence in support of the May 2008 CSE's placement recommendation coupled with the CSE's failure to indicate the student's managements needs on the May 2008 IEP support a finding that the district failed to offer the student a FAPE for the 2008-09 school year. Accordingly, the IHO did not err in reaching a similar conclusion.

3. Implementation

The parent further argues that the district failed to introduce any evidence as to whether or not the May 2008 IEP was implemented and, as a consequence, the IHO should have identified this as an additional ground for finding that the district denied the student a FAPE for the 2008-09 school year. Relatedly, the parent argues that the district failed to offer any evidence of the student's progress during the 2008-09 school year. Other than an alleged lack of progress, the

parent has not at any point throughout this proceeding what aspects of the the May 2008 IEP were not implemented.[15]

The parents implementation claim, to the extent it is based upon the student's alleged lack of progress during the 2008-09 school year, is misguided in that, progress, although an important factor in determining whether the student is receiving educational benefit, is not dispositive of all claims brought under the IDEA (see M.S. v. Bd. of Educ. of the City Sch. Dist. of the City of Yonkers, 231 F.3d 96, 103-04 [2d Cir. 2000], abrogated in part on other grounds, Schaffer v. Weast, 546 U.S. 49 [2005]). The goal of the IDEA is to provide opportunities for students with disabilities to access special education and related services that are designed to meet their needs and enable them to access the general education curriculum to the maximum extent possible (20 U.S.C. §§ 1400[c][5][A], [d]; 1414[d][1][A]). The IDEA provides no guarantee of any specific amount of progress, so long as the district offers a program that is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192). However, an implementation claim is a narrow inquiry into the actual delivery of the program and services recommended in the student's IEP, rather than the appropriateness of the recommended program and services or the student's progress thereunder. Indeed, an implementation claim is a narrow one and it has been held that such a claim must be closely examined to ensure that it involves nothing more than implementation of services already spelled out in an IEP (Polera, 288 F.3d at 489 [reviewing the relevant claim and noting that the district's alleged failure to provide services was "inextricably tied to the content of the IEPs and therefore . . . much more than a failure of implementation"]; Donus v. Garden City Union Free Sch. Dist., 987 F. Supp. 2d 218, 231 [E.D.N.Y. 2013]; see also Piazza, 777 F. Supp. 2d at 682).

A review of the parent's claim reveals that it does not allege an implementation claim but rather seeks a finding that the student's progress or lack thereof during the 2008-09 school year provides further evidence that the May 2008 IEP was inappropriately designed. As such, the parent's claim is without merit.

E. 2009-10 School Year

As for the 2009-10 school year, the parent argues that the IHO failed to squarely rule that the district failed to offer the student a FAPE for the 2009-10 school year as a result of the district's failure to present any testimonial or documentary evidence to show the procedural and substantive adequacy of the May 2009 IEP. In the alternative, the parent argues that the May 2009 IEP is invalid on its face for reasons similar to those identified by the IHO with respect to the May 2008 and June 2010 IEPs and, additionally, because it was not based on appropriate evaluations, was created pursuant to blanket policies, and offered the same program that proved unsuccessful during

[15] While the student's progress during the 2008-09 school year would be a relevant inquiry for the purpose of evaluating the appropriateness of the educational program recommended in the May 2009 IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66, 2013 WL 3155869 [2d Cir. June 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [December 2010]), for the reasons set forth below, it is not necessary to reach this question.

the preceding school year. The parent also argues that the district failed to show that the student made progress during the 2009-10 school year.

The parent correctly asserts that the district failed to present evidence at the impartial hearing in support of its contention that the May 2009 IEP offered the student a FAPE. However, the May 2008 and May 2009 CSE meetings were not identical, and the parent may not impute the shortcomings of the May 2008 CSE to the May 2009 CSE. For example, unlike the May 2008 CSE meeting, an interpreter attended the May 2009 CSE meeting (Tr. p. 838; see Parent Ex. E at p. 1). In addition, as to parental participation, the parent testified that he attended the May 2009 CSE meeting by telephone and contributed to the discussion (see Tr. pp. 838-40). Other claims made by the parent with respect to the May 2009 CSE are legally indistinguishable from those rejected above with respect to the May 2008 CSE and, thus, must be rejected. For example, the lack of attendance of an additional parent member at the May 2009 CSE did not result in a denial of a FAPE (see Parent Ex. E at p. 2). In addition, the parent's claim that the May 2009 IEP was invalid based on the district's failure to implement it (which, in turn, is grounded on an alleged lack of progress) must fail for the same reasons set forth above.

Nevertheless, overall the district failed to offer evidence that the May 2009 CSE considered sufficient evaluative information, accurately described the student's present levels of performance, developed appropriate annual goals, and offered a placement and related services aligned with the student's needs. Although the parent offered the May 2009 IEP into evidence (see generally Parent Ex. E), absent other information regarding the CSE meeting such as testimony from an attendee, meeting minutes, a prior written notice, or some evidence as to what the May 2009 CSE considered in developing the IEP, it is impossible to assess whether or not the district offered the student a FAPE for the 2009-10 school year.[16]

F. Compensatory Additional Services

As a remedy for the district's failure to offer the student a FAPE, the IHO ordered additional services in an amount adjusted for a 10-month school year for the 2008-09 and 2009-10 school years and on a pro-rated basis for the 2008-09 school year based on the IHO's determination with respect to the application of the statute of limitations (IHO Decision at pp. 26-27). In total the IHO awarded 274.34 hours of individual speech-language therapy, 948.75 hours of tutoring, and 25 hours of assistive technology consultant services for one year (id.). The IHO further directed the district to lend or purchase for the student a "System 7" computer with printer, scanner, and router, as well as certain specified software (id. at p. 27). Both the district and the parent argue that the IHO challenge specific aspects of this award.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Within the Second Circuit, compensatory relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy,

[16] The May 2009 IEP introduced into evidence at the impartial hearing appears to be incomplete in that it lacks pages specifying, among other things, the placement and related service recommendations and the other programs/services considered and the reasons for rejection (see generally Parent Ex. E).

and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd. of Educ., 2008 WL 9731053, at *12-*13 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "(a)ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't of Educ., Appeal No. 11-075; Application of a Student with a Disability, Appeal No. 10-052). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30. 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "(c)ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-

hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]; Application of a Student with a Disability, Appeal No. 13-168; Application of the Dep't of Educ., Appeal No. 12-135; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

As an initial matter, the district argues that the parent's request for compensatory additional services in his due process complaint notice was impermissibly vague in that it did not set forth the frequency or nature of the requested services. Although the parent did not indicate how many hours of compensatory additional services he sought in his due process complaint notice, he explicitly requested an award of compensatory education, thus properly preserving this issue for consideration (see M.R., 2011 WL 6307563, at *12-*13 [party barred from seeking compensatory education when mentioned for the first time in a brief submitted at the close of the impartial hearing]).

Next, the district asserts that the IHO impermissibly relied solely upon the testimony of the parent's witnesses with regard to the amount of services and failed to provide an explanation as to how the amount of services would put the student in the position she would have been had she been provided with a FAPE. In his cross-appeal, the parent asserts that the IHO erred in calculating the awarded services on a pro-rated basis because it was premised upon an erroneous application of the IDEA's statute of limitations. The parent also argues that the IHO erred in failing to award counseling services and additional assistive technology services.

Contrary to the district's position, the IHO did not err in relying on the parent's witnesses as the district offered nothing to rebut the parent's evidence on the issue of relief. As to the prorated calculations, for the reasons set forth above relative to the application of the statute of limitations and the exceptions thereto, the hearing record indicates that the IHO erred in limiting the parent's relief to a portion of the 2008-09 school year. An independent review of the evidence in the hearing record supports the nexus between the district's inappropriate 12:1 special class placement recommendation and the tutoring services. For example, the psychologist who completed the June 2011 neuropsychological evaluation report noted the student's functioning and the improvement she had exhibited as a result of implementation teaching strategies such as scaffolding which could have been more readily used in a more supportive class placement and which could be utilized in tutoring (Parent Ex. E at p. 20). The psychologist recommended additional services for the student in reading and mathematics (id. at p. 20). While the nature and the measure of this award may not necessarily be the most precise, it efforts to place the student where she should have been absent the denial of a FAPE.

On the other hand, the related services recommended in the May 2008 IEP and the lack of assistive technology did not contribute to a finding that the district failed to offer the student FAPE for the 2008-09 school year, no award of speech-language therapy, counseling, or assistive technology should relate to the 2008-09 school year. Therefore, it would be inappropriate to order compensatory additional services in these areas as the May 2008 CSE's recommendations

regarding speech-language therapy, counseling, and assistive technology are supported by the evidence in the hearing record. However, the district offered no evidence regarding the information considered or the reasoning adopted by the May 2009 CSE in continuing the student's related services mandates in the 2009-10 school year (such as a report of progress to describe the effectiveness of the reduction in services during the 2008-09 school year) and there is no information in the hearing record as to whether or not assistive technology should have been recommended in the May 2009 IEP. Thus, the IHO's award should be modified accordingly.

Based on the foregoing, the IHO's award for tutoring is modified to account for the subtracted portion of the 2008-09 school year based on the above findings related to the statute of limitations. The foundation of the IHO's calculations is otherwise supported by the hearing record (see IHO Decision at pp. 22-23, 26-27; Tr. pp. 736, 773-76; Parent Exs. EE at p. 20; GG). Thus, the district is ordered to provide compensatory additional educational services to the student in the form of 1,150 hours of 1:1 tutoring services provided—at the option of the parent—by either a district provider or a non-district/private provider (including, but not limited to, EBL Coaching) and at a rate not to exceed $110.00 per hour.

For the reasons set forth above, the IHO's award for speech-language therapy is modified to relate only to the 2009-10 school year. That is, utilizing the recommendations of the private speech-language pathologist as a foundation for the calculation of an award, as did the IHO, the district is ordered to provide compensatory additional educational services to the student in the form of 167 hours of 1:1 speech-language therapy (see IHO Decision at pp. 23, 26; Tr. pp. 628-29, 639-40; Parent Ex. DD at p. 5; see also Tr. pp. 717-18, 724-25).

In terms of counseling services relative to the 2009-10 school year, the hearing record lacks a precise recommendation from a witness or an evaluation such as is available for the tutoring and speech-language therapy relief. The June 2011 neuropsychological evaluation report indicates that "[m]ake [u]p services to address" the student's "adaptive and social skills" were "urgent" (Parent Ex. EE at p. 20; see also Tr. pp. 723-24, 735-36). In the closing brief, the parent requested 480 hours of counseling services, asserting that such number represented five hours per week to address two years of alleged FAPE violations (Ans. Ex. A at p. 30). Absent some other support in the hearing record, for the counseling award, I will adopt a quantitative approach as suggested by the parent (see, e.g., Application of a Student with a Disability, Appeal No. 13-054; Application of the Bd. of Educ., Appeal No. 14-013). However, as the hearing record does not indicate that the student required five hours of individual counseling per week in addition to the group counseling received by the student during the 2009-10 school year, the calculation shall be based on one hour per week of individual counseling sessions for one 10-month school year, totaling 36 hours.

While I find that the parent is entitled to assistive technology and assistive technology services for the 2009-10 but not the 2008-09 school year, I nonetheless find no reason in the hearing record to modify the IHO's award as it is consistent with the recommendations in the June 2011 assistive technology assessment (see IHO Decision at pp. 23, 27; Tr. pp. 802-07, 809; Parent Ex. FF).

VII. Conclusion

In summary, the evidence in the hearing record supports the IHO's ultimate conclusion that the district failed to offer the student a FAPE for the 2008-09 and 2009-10 school years, albeit on different grounds. However, as explained above, the IHO's award of compensatory additional services should be modified. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the district shall provide additional services to the student in the form of 1,150 hours of 1:1 tutoring services provided—at the option of the parent—by either a district provider or a non-district/private provider (including, but not limited to, EBL Coaching) and at a rate not to exceed $110.00 per hour, which shall be used by the student within two years of the date of this decision, unless the parties otherwise agree;

IT IS FURTHER ORDERED that the district shall provide additional services to the student in the form of 167 hours of 1:1 speech-language therapy services at a time and location to be determined by the parties, which shall be used by the student within two years of the date of this decision, unless the parties otherwise agree, provided that if the district is unwilling or unable to provide these services, it shall provide the parent with authorization to obtain these services at district expense;

IT IS FURTHER ORDERED that the district shall provide additional services to the student in the form of 36 hours of 1:1 counseling services at a time and location to be determined by the parties, which shall be used by the student within two years of the date of this decision, unless the parties otherwise agree, provided that if the district is unwilling or unable to provide these services, it shall provide the parent with authorization to obtain these services at district expense; and

IT IS FURTHER ORDERED that the IHO's order for assistive technology and 25 hours of assistive technology consultant services is upheld.

Dated: **Albany, New York**
November 28, 2014

SARAH L. HARRINGTON
STATE REVIEW OFFICER