The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 13-177

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Cuddy Law Firm, PC, attorneys for petitioner, Jason H. Sterne, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, 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 a decision of an impartial hearing officer (IHO) which denied the parent's request for compensatory educational services. Respondent (the district) cross-appeals from that portion of the IHO's decision which ordered the district to conduct a psychiatric evaluation of the student. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

On October 28, 2011, the CSE convened to conduct the student's annual review and to develop an IEP to be implemented between October 31, 2011 and October 25, 2012 (see Dist. Ex. 3 at pp. 1, 17).[1] Finding that the student remained eligible for special education and related services as a student with an emotional disturbance, the October 2011 CSE recommended a 12:1+1 special class placement in a community school for social studies, science, art, music, health, computer, and library (id. at pp. 13, 16). The October 2011 CSE also recommended one 30-minute

[1] In September and October 2011, the student received special education programs and related services pursuant to a March 2011 IEP (see Dist. Ex. 4 at pp. 1, 12).

session per week of counseling in a small group (id. at p. 13). Because the student required strategies, including positive behavioral interventions, to address behaviors that impeded his learning or that of others, the October 2011 IEP indicated that the student would benefit from a behavioral intervention plan (BIP) (id. at p. 2). In recommending a 12:1+1 special class placement, the October 2011 CSE considered and rejected, among other things, a 12:1+1 special class as a full-time placement because the student's cognitive and academic abilities "suggest[ed] he should be able to be successful in a general education environment; however, emotional concerns continue[d] to be apparent and limit[ed] his ability to fully participate in general education" (id. at p. 18). Similarly, the October 2011 CSE considered and rejected a recommendation for speech-language therapy as a related service because the student did not require the service (id.). In addition, the October 2011 CSE also noted in the student's IEP that he "should be mainstreamed for both [English language arts] and math" (id.).

On October 22, 2012 the CSE convened to conduct the student's annual review and to develop an IEP to be implemented between October 22, 2012 and October 20, 2013 (see Dist. Ex. 2A at pp. 1, 11). As a student with an emotional disturbance, the October 2012 CSE recommended a 12:1+1 special class placement for social studies and science, as well as one 30-minute session per week of counseling in a small group (id. at pp. 7-8). Because the student required strategies, including positive behavioral interventions, to address behaviors that impeded his learning or that of others, the October 2012 IEP indicated that the student needed a BIP (id. at p. 2).[2] In recommending a 12:1+1 special class placement, the October 2012 CSE considered and rejected, among other things, a 12:1+1 special class as a full-time placement because the student's academic abilities "suggest[ed] he should be able to be successful in a general education environment," and further, that the student "should be mainstreamed for both ELA and [m]ath" (id. at p. 13).

A. Due Process Complaint Notice

In a due process complaint notice dated May 28, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12, 2012-13, and 2013-14 school years (see Parent Ex. A at pp. 1, 4-6).[3] Generally, the parent asserted that the district failed to adequately evaluate the student, which resulted in an IEP that did not accurately reflect the student's present levels of educational performance and deprived the parent of the opportunity to meaningfully participate in the development of the student's IEP (id. at pp. 4-5). The parent also asserted that the district failed to consider two privately obtained evaluations of the student, namely a 2011 speech-language evaluation and a 2010 updated psychological evaluation, which reflected that the student suffered "bullying-related trauma" that the district had failed to address (id. at p. 5). The parent also asserted that the student's eligibility classification of emotional disturbance was not appropriate, citing to the student's deficits in sensory integration and communication (id.).

[2] The hearing record includes a functional behavioral assessment (FBA) and a BIP, both dated October 23, 2012 (see Dist. Exs. 2D at pp. 1-2; 2E).

[3] During the relevant school years, the student continuously attended the same district public school (see Dist. Exs. 8 at pp. 1-5; 10 at pp. 1-3; 11 at pp. 1-10; 12 at pp. 1-9).

With respect to the 2011-12, 2012-13, and 2013-14 school years, the parent alleged that the district failed to develop appropriate annual goals and short-term objectives for the student and failed to recommend parent counseling and training (Parent Ex. A at p. 5). For the 2011-12 and 2012-13 school years, the parent asserted that the district failed to provide her with progress reports regarding the student's progress or lack of progress toward his annual goals (id.). Finally, for the 2012-13 school year, the parent asserted that the October 2012 CSE was not properly composed because an additional parent member, a counselor, and a school psychologist did not attend, which deprived the parent of the opportunity to meaningfully participate in the development of the student's IEP (id.).

As a proposed remedy, the parent requested that an IHO: (1) order "all necessary evaluations" to be completed within 15 days, including evaluations "mandated by Section 200.4" of the regulations, an updated psychoeducational evaluation, an FBA, a speech-language evaluation, a central auditory processing evaluation, an occupational therapy (OT) evaluation with a sensory component, and an assistive technology evaluation; (2) order the CSE to reconvene within 10 days of receiving the completed evaluations in order to recommend an appropriate program, reconsider the student's eligibility classification, and consider a nonpublic school placement through the Central Based Support Team (CBST); (3) order the CSE to develop an appropriate IEP with current and accurate present levels of educational performance; appropriate and measureable annual goals and short-term objectives; and to address the student's needs, including identifying appropriate methodologies; (4) order the CSE to provide all of the student's progress reports to the parent for the current school year; (5) order the district to provide additional services to make up for those services the student was denied during the "current school year" and during the 2011-12 school year; and (6) order the district to provide additional make up services in the form of parent counseling and training for the failure to provide this service during the 2011-12 and 2012-13 school years (id. at p. 6).

B. Impartial Hearing and IHO Decision

On July 16, 2013, the parties conducted an impartial hearing in this matter (see Tr. pp. 1-390). During the impartial hearing, the district agreed, with the parent's consent, to conduct the following evaluations of the student: a psychoeducational evaluation, an OT evaluation, and a speech-language evaluation (see Tr. pp. 164-83, 276-78, 308-10, 376). At the time of the impartial hearing, two additional evaluations had already been completed: a central auditory processing evaluation and an assistive technology evaluation (see Tr. pp. 177-80, 377; Dist. Ex. 5 at pp. at pp. 1-8). In addition, the district indicated that an FBA had been completed on October 23, 2012 (see Tr. pp. 180-81, 377-79; Dist. Ex. 2D at pp. 1-2). Over the district's objections at the impartial hearing, the IHO also ordered the district to conduct a psychiatric evaluation of the student, and the IHO further noted that upon the completion of this evaluation, if necessary, an additional FBA would be completed (see Tr. pp. 377-83).

In a decision dated August 9, 2013, the IHO determined that based upon the evidence the district failed to support the student's eligibility classification of emotional disturbance, and similarly, no evidence supported the parent's assertions that the student eligibility classification should be either other health-impairment or speech or language impairment (IHO Decision at p. 9). Without evidence to support the student's "current classification," the IHO concluded that she could not "determine if the IEP dated October 22, 2012 IEP" was appropriate or if the student

required "special education services" (id. at pp. 9-10). The IHO also noted that because the parent and the district "agreed to have the student evaluated with the necessary documents signed and appointments set on the record," the parent's request for evaluations was settled (see IHO Decision at pp. 2-3, 10). Finally, the IHO also found that the evidence did not support the parent's assertion that the student had been bullied (id. at pp. 10-11).

Turning to the parent's request for compensatory educational services, the IHO found that the student performed academically within the average to above average range, and he received his related services, with the exception of occasional provider absence (IHO Decision at p. 11). As a result, the IHO determined that no basis existed upon which to award compensatory or additional educational services to make up for the failure to provide special education or related services in this case (id.).

IV. Appeal for State-Level Review

The parent appeals, and asserts that the IHO erred in failing to find that the district failed to offer the student a FAPE and by not granting any relief in a written decision. Specifically, the parent argues that the IHO erred in failing to determine whether the district's failure to evaluate the student resulted in a failure to offer the student a FAPE. The parent also asserts that the IHO erred in failing to render determinations with respect to the following: whether the annual goals in the 2011-12, 2012-13, and 2013-14 IEPs were appropriate and measureable; whether the district's failure to provide the parent with progress reports during the 2011-12 and 2012-13 school years resulted in a failure to offer the student a FAPE and deprived the parent of an opportunity to meaningfully participate in the IEP process; whether the district's failure to recommend parent counseling and training resulted in a failure to offer the student a FAPE and deprived the parent of an opportunity to meaningfully participate in the IEP process; and whether the district's failure to have a properly composed October 2012 CSE resulted in a failure to offer the student a FAPE and deprived the parent of an opportunity to meaningfully participate in the IEP process. The parent also asserts that the IHO erred by impermissibly shifting the burden of proof onto the parent to establish whether the October 2012 IEP was appropriate, and by otherwise not concluding that the district failed to offer the student a FAPE because the district failed to sustain its burden of proof on this issue.

In addition, the parent further asserts that since the district did not establish that it offered the student a FAPE, the IHO erred by not awarding additional or corrective services for the lack of appropriate services for the 2011-12 and 2012-13 school years, and by otherwise not remanding the matter for a determination of the appropriate additional or corrective services as relief. Next, the parent asserts that the IHO erred in failing to issue a written order directing the district to conduct a psychiatric evaluation of the student, as well as the "agreed-upon psychoeducational, [OT], and speech/language evaluations," and that the failure to issue a written order deprived the parent of an enforceable order to ensure compliance with the verbal directives at the impartial hearing. As a result, the parent argues that the IHO should be admonished for her failure to comply with regulations. Finally, the parent asserts that the IHO improperly limited the number of pages allowed for closing briefs, which denied the parent her due process rights. As relief, the parent seeks an order sustaining her appeal and awarding the relief requested in the due process complaint notice.

In an answer, the district asserts that the IHO properly found that the district offered the student a FAPE, and properly denied the parent's request for relief. The district contends that because all of the evaluations agreed upon at the impartial hearing have been completed—namely, the psychoeducational, the OT, and the speech-language therapy evaluations—the parent lacks a basis upon which to now appeal this issue. The district also argues that the page number limitation set by the IHO for the parties' closing briefs did not deprive the parent of her due process rights, as it applied to both parties. The district also contends that the IHO did not shift the burden of proof to the parent to establish that the district failed to offer the student a FAPE, and moreover, the October 2011 and October 2012 IEPs offered the student a FAPE contrary to the parent's allegations.[4] In addition, the district asserts that the October 2012 CSE was properly composed, and the district's failure to recommend parent counseling and training did not result in a failure to offer the student a FAPE. Finally, the district argues that the IHO properly declined to award compensatory or additional educational services as relief.

In its cross-appeal, the district asserts that the IHO erred in directing the district to conduct a psychiatric evaluation of the student, as the parent did not request this evaluation in the due process complaint notice, and therefore, it was not properly before the IHO. In an answer to the district's cross-appeal, the parent asserts that the due process complaint notice included a request for a psychiatric evaluation of the student through her request for an "order that all necessary evaluations be undertaken and completed with 15 days."

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 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

[4] With respect to the 2013-14 school year, the district argues that since the October 2012 IEP remained in effect until approximately October 22, 2013, any claims related to an IEP not yet developed for the 2013-14 school year are not yet ripe for review and must not be considered.

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., 2010 WL 3242234, at *2 [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, 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, 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, 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. Sufficiency of Evaluative Information Available to the CSE

With respect to the parent's assertions that the district did not have sufficient updated evaluative information to develop the student's October 2011 and October 2012 IEPs, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]; Application of a Student with a Disability, Appeal No. 09-126 [noting 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"]; Application of the Dep't of Educ., Appeal No. 07-018). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an initial evaluation or a reevaluation (34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]) and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]).

With respect to the October 2011 IEP, the hearing record demonstrates that in September 2011 the district sought the parent's consent to evaluate the student (see Parent Ex. J; see also Dist. Ex. 13 at p. 3). However, the parent refused to provide consent, and hearing record indicates that in a telephone conversation with a district school psychologist, the parent specifically advised that she did not "want any evaluations to take place since [the student] was evaluated in the spring" (Dist. Ex. 13 at p. 3; see Parent Ex. J; compare Dist. Ex. 13 at p. 3, with Tr. pp. 197-98). The parent provided the district with copies of "the reports" in September 2011 via facsimile (Dist. Ex. 13 at p. 3).

In September 2012, the hearing record indicates that the district's school psychologist spoke with the parent, who requested the inclusion of "speech" on the student's IEP (Dist. Ex. 13 at p. 1). At that time, the district psychologist offered the parent the opportunity to request a reevaluation, but the parent "did not want to have [the student] receive another evaluation" (id.). In addition, the hearing record reveals that with the exception of a request for an assistive technology evaluation during the 2012-13 school year, the parent did not allow the district to evaluate the student, but preferred to exercise her right to obtain "her own outside evaluation[s]" (see Tr. pp. 115-17, 218-19, 229-30, 280-87, 289-90, 295-97). Here, the parent's failure to consent to the district's request to evaluate the student in September 2011, and the parent's failure to avail herself of an opportunity to have the district reevaluate the student in September 2012 effectively thwarted the district's ability to obtain updated evaluative information concerning the student, which the parent cannot now use as a basis upon which to conclude that the district failed to offer the student a FAPE for either not evaluating the student or as a basis upon which to conclude that the October 2011 and October 2012 IEPs were not appropriate because the district lacked sufficient updated evaluative information concerning the student. Additionally, the hearing record shows that the parent provided consent for the OT, speech-language and psychoeducational evaluations—which she specifically requested in the due process complaint notice—during the course of the impartial hearing and that these evaluations have been completed at this time (see Tr. pp. 173-80; Answer & Cr. Appeal ¶ 9). Consequently, the issues raised with respect to district's alleged the failure to conduct updated evaluations of the student as a basis to conclude that the district failed to offer the student a FAPE are no longer justiciable.

Assuming for the sake of argument, however, that these issues remained viable, the hearing record shows that the October 2011 CSE and the October 2012 CSE had both the 2010 psychological evaluation and the 2011 speech-language evaluation of the student prior to the development of the October 2011 and October 2012 IEPs (see Tr. pp. 354-55; Parent Exs. V; W; see also Dist. Ex. 13 at p. 3; Pet. ¶¶ 4-5). The 2010 psychological evaluation, conducted in November and December 2010 by a licensed psychologist, included an assessment of the student's cognitive functioning, academic achievement, visual motor integration, and attending and behavior (Parent Ex. W at p. 1). An administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) by the evaluating psychologist yielded the following indices scores: verbal comprehension 98 (45th percentile), perceptual reasoning 82 (12th percentile), working memory 83 (13th percentile) and processing speed 100 (50th percentile) (id. at p. 2). Although the psychologist reported that the student's full scale IQ of 88 (21st percentile) placed him in the "[l]ow [a]verage" range of cognitive abilities, she noted a 16-point discrepancy between the student's verbal comprehension and perceptual reasoning scores (id.). The psychologist concluded that the student's language-based reasoning and eye-hand coordination were better developed than his perceptual reasoning and active memory skills (id.). With respect to academic achievement,

the psychologist reported that, as measured by the Wechsler Individual Achievement Test-Second Edition (WIAT-II), the student's academic skills fell within the "[a]verage to [s]uperior range of functioning" (id.). According to the psychologist, the student's academic functioning appeared to be more evenly and better developed than his cognitive functioning (id. at pp. 2-3). She cited reading foundation skills (standard score 121) and spelling (standard score 110) as areas of strength for the student and reading comprehension (standard score 93) an area of relative weakness (id.). The psychologist noted that in contrast, the student scored higher on math reasoning (standard score 112) than he did on a measure of written math skills (standard score 105) (id. at p. 2). Based on her administration of the Beery Test of Visual Motor Integration, the psychologist concluded that the student's perceptual development was in the average range (id. at p. 3). The psychologist reported that on the Conners' Parent Rating Scale, maternal ratings of the student resulted in clinically significant elevations on the oppositional, cognitive/inattention and hyperactivity scales (id.). She noted that the parent viewed the student as inattentive, able to attend only if interested, quick to anger, argumentative, fidgety, short tempered and easily distracted (id.). The psychologist stated that the obtained ratings were consistent with a diagnosis of an attention deficit hyperactivity disorder (ADHD) (id.). Based on the evaluation results, the psychologist recommended, among other things, that the student continue to receive therapy to address emotional issues secondary to bullying and trauma, continue to be provided with educational accommodations, and undergo a speech-language evaluation (id.).

In February 2011 the student underwent a speech-language evaluation (see Parent Ex. V at p. 1). The evaluator reported that the parent requested the evaluation due to concerns regarding the student's academic and behavior difficulties in school and that his then-current services may not be appropriate (id.). The speech-language pathologist described the student as a friendly, verbal boy who had no difficulty engaging in conversation; however, the student did exhibit difficulty adjusting to the formal testing environment (id. at p. 3). She noted that although the student was initially attentive for the first 15 minutes, he became inattentive, distractible, and fatigued over the remainder of the 90-minute session (id.). The speech-language pathologist noted that it was necessary to constantly refocus the student's attention and provide him with cues for task completion (id. at p. 1).

Based on informal observation, the speech-language pathologist reported that the student's oral structures were intact and functionally adequate (Parent Ex. V at p. 1). She indicated that the student's hearing was within normal limits; his vocal pitch, resonance, quality, intensity, and rate were age and gender appropriate; his fluency was unremarkable; and his overall intelligibility was good (id. at pp. 1-2). Based on an administration of the Clinical Evaluation of Language Fundamental-Fourth Edition (CELF-4), the speech-language pathologist reported that the student experienced difficulty comprehending and executing simple, concrete oral directions (id. at p. 2). Among other things, she noted that the student verbally rehearsed directions before attempting to follow them, but forgot the details before finishing attempts to repeat them; he was unfamiliar with basic test descriptions, such as the word "underline;" he failed to respond to longer or more complex commands and required visual cues and prompts before responding; and he exhibited confusion with basic geometric shapes, spatial relationships, and directional concepts (id.). The speech-language pathologist reported that many of the student's responses to age level questions were delayed (id.). As reported by the student, she noted that he frequently forgot information "said" to him and required numerous repetitions to understand directions (id.). According to the speech-language pathologist, the student demonstrated poor auditory memory for sentences and

number "repletion" tasks, and had difficulty on the word classes subtest because he forgot the series of words in which he had to find a relationship (id.). The speech-language pathologist commented that the student's recognition of common objects and action verbs in pictures was below age expectation and his overall thinking and reasoning skills were significantly below age expectation (id.). The speech-language therapist opined that the student's overall poor auditory memory, auditory misperceptions and limited comprehension of age level concepts suggested the presence of an auditory processing disorder (id.).

With respect to the student's conversational skills, the speech-language pathologist reported that the student freely initiated conversation, but failed to signal topic change or engage in give and take (Parent Ex. V at p. 2). The speech-language pathologist noted that the student's pragmatic language skills were often inappropriate (id.). She described the student's verbal output as consisting of single words, phrases, and short sentences, and indicated that his informal expressive vocabulary was delayed (id.). According to the speech-language pathologist, the student demonstrated frequent word retrieval episodes, multiple mispronunciations, and circumlocutions during descriptive tasks and in conversation (id.). The speech-language pathologist indicated that syntactical disorganization was evident when the student attempted to construct more complex sentence forms (id.). Based on the evaluation results, the speech-language pathologist concluded that the student presented with severely impaired language function across all areas with a specific deficit in auditory functioning (id.). She recommended that the student receive individual speech-language therapy twice weekly to address his reduced auditory memory and poor listening and attention, and to improve the student's basic concept development, enhance core vocabulary, and to improve reasoning and thinking skills (id. at p. 3).

In addition to the 2010 psychological evaluation and the 2011 speech-language evaluation obtained by the parent, the hearing record demonstrates that the October 2011 CSE considered the student's performance on State tests, as well as the results of an assessment administered by the student's special education teacher in developing the student's October 2011 IEP (Tr. pp. 187-93; Dist. Ex. 3 at p. 1). According to the special education teacher, his assessment of the student was consistent with the description of the student on the October 2011 IEP in that the student functioned at a high average level in both reading and writing as measured by the Writing, Reading and Assessment Profile (WRAP) (Tr. pp. 190, 192-93). He testified that the student functioned at grade level in reading; however, the special education teacher noted that the student struggled with reading comprehension (Tr. pp. 190-91, 193). With respect to the State test results listed on the October 2011 IEP, the special education explained that based on the test dates the student scored at a "Level 2" for the ELA exam (Tr. p. 192; see Dist. Ex. 3 at p. 1). He explained that with respect to reading, the student did not meet grade level, but that according to State assessments, the student's grade was passable (Tr. p. 192). He also explained that on the math assessment, the student scored at a "Level 3," which reflected a grade level performance (Tr. pp. 192-93; see Dist. Ex. 3 at p. 1).

To the extent that the district argues it relied on the 2010 psychological evaluation and 2011 speech-language evaluation to develop the student's October 2011 IEP, the hearing record demonstrates that the results of the 2010 psychological evaluation are reflected in the October 2011 IEP (compare Parent Ex. W, with Dist. Ex. 3 at p. 1). However, with respect to the 2011 speech-language evaluation, the student's special education teacher who participated in the October 2011 CSE meeting denied ever having seen the 2011 speech-language evaluation (Tr. pp.

186-87, 270).[5] The special education teacher testified, however, that the parent provided the district speech therapist with a copy of the 2011 speech-language evaluation, but the results of the evaluation conflicted with the therapist's own opinion that the student did not require speech-language therapy (see Tr. pp. 201-02).[6]

With respect to the October 2012 IEP, the hearing record provides little evidence regarding the information considered by the October 2012 CSE when developing the student's October 2012 IEP. However, the hearing record—as noted above—indicated that the parent did not request evaluations of the student during the 2012-13 school year, except for an assistive technology evaluation, and the parent did not accept the district's invitation to reevaluate the student in September 2012 (Tr. pp. 153, 229-30; Dist. Ex. 13 at p. 1). Thus, even accepting the district's argument that the 2010 psychological evaluation and the 2011 speech-language evaluation remained timely and valid at the time of the October 2012 CSE meeting, the October 2012 IEP did not reflect information obtained from either evaluation (compare Parent Exs. V at pp. 1-3 and W at pp. 1-3, with Dist. Exs. 2A at pp. 1-3 and 3 at pp. 1-3). The October 2012 IEP did, however, reflect the student's performance his most recent State-wide assessments, which his special education teacher reported provided "plenty of information" upon which to make a recommendation (see Tr. p. 275; Dist. Ex. 2A at p. 1).

Based upon the foregoing, the hearing record shows that the district developed the student's October 2011 IEP and October 2012 IEP based upon information available to the respective CSEs and that the parent's failure to consent to the district's request to conduct updated evaluations of the student in September 2011 and failure to avail herself of the district's invitation to reevaluate the student in September 2012 directly affected the district's ability to rely upon more updated evaluative information in the development of the student's October 2011 IEP and October 2012 IEP. As such, the parent's withholding of consent to evaluate the student cannot be used as a basis upon which to allege that the October 2011 and October 2012 IEPs were not appropriate for the student.

B. Eligibility for Special Education Programs and Related Services

With respect to the parent's assertion that the student's eligibility classification of emotional disturbance was not proper, citing among other things, the student's diagnosis of autism, federal and State regulations do not require the district to offer the student a "diagnosis;" instead, they require the district to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA and information that will enable the student be "involved in and progress in the general education curriculum" (34 CFR § 300.304[b][1]; see 8 NYCRR 200.4[b][1]). Courts have given considerably less weight on identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed though

[5] The special education teacher also denied having seen the 2010 psychological evaluation (Tr. p. 270). In addition, the student's school counselor—at the time of the impartial hearing—could not recall having seen the 2010 psychological evaluation or the 2011 speech-language evaluation (see Tr. p. 142).

[6] A district speech therapist attended the October 2011 CSE meeting (Tr. pp. 185-87; Dist. Ex. 3 at p. 22).

special education and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting 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"]).

Therefore, while in this case the IHO found that the hearing record lacked evidence to support the student's current eligibility classification of emotional disturbance or the parent's suggested eligibility classifications of other health-impairment or speech-language impairment, as noted above, the special education programs and related services recommended to address a student's individual needs is often of more import than the student's actual eligibility classification or failure to include a diagnosis in the IEP (see Fort Osage, 641 F.3d at 1004; Draper, 480 F. Supp. 2d at 1342).

C. Parent Counseling and Training

With respect to the parties' assertions concerning the district's failure to recommend parent counseling and training in the student's October 2011 and October 2012 IEPs, the failure to include parent counseling and training in an IEP constitutes a procedural violation, (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *10 [S.D.N.Y. Sept. 27, 2013]), and in the ordinary case, barring an aggregation with other procedural violations, fails to result in a denial of a FAPE (F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at * 10 [S.D.N.Y. Oct. 16, 2012]). Furthermore, the Second Circuit recently noted that the absence of parent counseling and training in a student's IEP did not necessarily have a direct effect on the substantive adequacy of the recommended program, and because districts are required by regulation to provide parent counseling and training, districts remain accountable for the failure to provide the services regardless of the contents of the IEP (R.E., 649 F.3d at 191; see K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 811 [8th Cir. 2011]).

In this case, it is undisputed that neither the October 2011 IEP nor the October 2012 IEP included a recommendation for parent counseling and training (see Dist. Exs. 2A; 3). However, the hearing record does not contain evidence that this procedural violation, standing alone, rose to the level of a denial of a FAPE such that an award of additional services was warranted as relief.

D. Annual Goals

With respect to the parties' contentions regarding the annual goals in the October 2011 IEP and the October 2012 IEP, the parent's assertions that the annual goals were not appropriate based upon a lack of sufficient and updated evaluative information must fail, as the parent did not consent to the district's request to conduct updated evaluations of the student.

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]).

However, even assuming that the parent's assertions remained viable, the hearing record shows that the October 2011 IEP included approximately 11 annual goals related to the student's ability to cope with frustration; increase acceptance of responsibility for actions and deserved consequences; retell a story; write a narrative; develop mathematical problem solving skills; understand ideas, values, beliefs and traditions from history; understand and apply scientific concepts, principles and theories; perform basic motor and manipulative skills and attain competency in a variety of physical activities; access, generate, process and transfer information using appropriate technologies as indicated by computer-based programs; work with a variety of art materials to create visual art works; and use instruments and non-traditional sounds to create and perform music (Dist. Ex. 3 at pp. 3-12). While three of the annual goals in the October 2011 directly relate to the student's needs as identified in the present levels of academic performance, it is not clear how the remaining annual goals in the IEP relate to the student's unique needs. Specifically, the annual goals targeting the student's ability to cope with frustration and to accept responsibility directly relate to the student's tendency to cry and yell when he feels he has been wronged by a peer or wrongly accused by an adult (Dist. Ex. 3 at pp. 1, 3-4). Similarly the annual goal targeting the student ability to retell a story can be logically traced back to the student's weaknesses in reading comprehension (id. at pp. 1, 5). However, the October 2011 IEP indicates that the student performed at grade level in math and demonstrated a "clear strength" in math reasoning, yet the October 2011 IEP includes an annual goal to improve his ability in mathematical concepts and reasoning in order to successfully solve word problems (id. at pp. 1, 7). In addition, the October 2011 IEP reflected that the student had average to high average abilities in reading and writing, yet included an annual goal related to improving writing skills (id. at pp. 1, 6). The remaining annual goals in the October 2011 IEP appear to be curriculum goals, rather than annual goals targeting the student's specific needs (see id. at pp. 8-12).

A review of the annual goals on the October 2012 IEP reflected a reduction in annual goals based upon the progress the student demonstrated in the 2011-12 school year as indicated in the special education teacher's testimony at the impartial hearing (Tr. pp. 199-200). The student's October 2012 IEP included four annual goals (Dist. Ex. 2A at pp. 3-7). Two annual goals related to counseling goals—targeting the student's ability to cope with frustration and to increase his acceptance of responsibility for his actions and deserved consequences—were carried over from the previous year's IEP (compare Dist. Ex. 2A at pp. 3-4, with Dist. Ex. 3 at pp. 3-4). According to the school counselor, the counseling annual goals were repeated from the previous year because the student's behavior with respect to coping and taking responsibility was similar to the year before and he had yet to achieve these annual goals (Tr. pp. 98-99). She explained that the counseling annual goals were written based on teacher and counselor observation (Tr. p. 113). The remaining academic annual goals were also similar to those found in the student's previous IEP, and appeared to be curriculum goals rather than annual goals specific to the student's needs (compare Dist. Ex. 2A at pp. 5-6, with Dist. Ex. 3 at pp. 8-10).

Based upon the foregoing, the hearing record demonstrates that the October 2011 and October 2012 CSEs developed annual goals, respectively, in the October 2011 IEP and October 2012 IEP based upon the information available to the CSEs at that time, and moreover, that the CSEs created the annual goals within constraints directly arising from the parent's withholding of consent to evaluate the student.

E. IHO's Order

The parent asserts that the IHO erred when she did not order the evaluations agreed upon at the impartial hearing, or the order to conduct a psychiatric evaluation of the student, in writing. The district asserts that the IHO exceeded her jurisdiction by ordering a psychiatric evaluation of the student because the parent did not specifically request it in the due process complaint notice. In this instance, as the agreed-upon evaluations (psychoeducational, OT, and speech-language therapy) have already been completed, it appears unnecessary at this juncture to reduce the IHO's verbal orders at the impartial hearing into a written order.

With respect to the psychiatric evaluation, the hearing record shows that the parent did not assert that the district failed to perform a psychiatric evaluation of the student and did not specifically request this evaluation in the due process complaint notice. However, given the lack of updated evaluative information regarding the student and the dispute over the student's eligibility classification, there is no reason to disturb the IHO's order directing the district to conduct a psychiatric evaluation of the student in order to provide more information about the student's needs that may not be identified through the already completed evaluations.

F. Compensatory or Additional Educational Services

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]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];[7] 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988];

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

Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education 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, 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 LEXIS 113149, at *38-40 [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).

In this case, the parent asserts that the IHO erred in failing to direct the district to provide additional services because the district failed to offer the student a FAPE, which as noted above, rested squarely on the argument that the district did not rely on sufficient evaluative information to develop the student's October 2011 and October 2012 IEPs. However, similar to the parent's assertions regarding the sufficiency of the evaluative information, the adequacy of the annual goals, and whether the student's eligibility classification was proper, the parent's arguments regarding additional services must also fail. Here, even assuming for sake of argument that the district failed to provide the student with sufficient supports and services, it did so only due to the parent's withholding of consent to evaluate the student. As such, an equitable remedy such as compensatory or additional educational services is not available.

VII. Conclusion

Based on the above, the hearing record does not provide a sufficient upon which to disturb the IHO's decision in this matter, and therefore, the parent's assertions concerning the October 2011 IEP and the October 2012 IEP, as they relate to the sufficiency of the evaluative information, the student's eligibility classification, the adequacy of the annual goals, parent counseling and training, the IHO's failure to include the agreed-upon evaluations in a written order, and the parent's request for additional services must be dismissed.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 22, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER