



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 15-010

**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:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, 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 her requests to order respondent (the district) to place her son at a nonpublic school at the district's expense, pay the cost of privately obtained evaluations, and provide for compensatory additional services. The district cross-appeals from the IHO's determination that it failed to demonstrate that it satisfied its child find obligations for the 2012-13 school year or that it offered to provide the student an appropriate educational program for the 2013-14 school year. The appeal must be sustained in part. The cross-appeal must be sustained in part.

### **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**

During the 2012-13 school year, the student attended a charter school as a regular education student in a kindergarten class with other students who received integrated co-teaching (ICT) services (Parent Ex. Q at p. 3; see Tr. pp. 30, 33, 54, 562). The evidence in the hearing record

reflects that, based on the student's reading needs, he received Tier I response to intervention (RtI) services (see Tr. pp. 31-33, 68-69, 301-02; Dist. Ex. 30 at p. 16).<sup>1</sup>

By letter dated February 6, 2013, the charter school informed the parent that, due to a continued lack of progress in reading, the school would begin Tier II RtI on February 11, 2013, which would include 30 minutes of additional targeted instruction at least four times per week (for a minimum of seven weeks) in a small group of no more than five students and which would focus on remediating key reading skills, such as comprehension, decoding, and fluency (Parent Ex. K).

In a notice dated February 12, 2013, the charter school informed the parent that the student continued to read below grade level and was at risk of being retained in kindergarten (Parent Ex. J at p. 1). By letter, dated March 5, 2013, the parent informed the charter school that she was in disagreement with the student being retained in kindergarten and requested counseling for the student based on her concerns regarding his social/emotional functioning (see Dist. Ex. 3; Parent Ex. G at pp. 1-2; see also Tr. pp. 579-80). In response to the parent's request for counseling, by letter dated March 6, 2013, the charter school requested that the parent complete a student and family history form (Dist. Ex. 4 at pp. 1-5).

By letter to the charter school, sent on March 12, 2013, intended as an "amendment" to the February 12, 2013 letter, the parent requested several evaluations of the student at "[d]istrict [e]xpense with an outside neutral assessor," including in the areas of occupational therapy (OT), assistive technology, speech-language, central auditory processing, visual-perceptual, and physical therapy (PT) (Parent Ex. H at p. 2; see also Tr. p. 580). The parent also requested that the district provide the student with tutoring services with a reading specialist, as well as counseling and classroom and testing accommodations (Parent Ex. H at p. 2). The charter school forwarded the parent's February and March 2013 letters to the district CSE (see Dist. Ex. 2 at p. 10; Parent Ex. H at p. 1).

On April 6, 2013, the parent executed consent for the district to evaluate the student but included a handwritten notation indicating that the parent had pursued certain private evaluations of the student and did not want the district to conduct duplicative assessments (Dist. Ex. 8 at pp. 1-2). The parent privately obtained two evaluations of the student, including an April 2013 speech-language evaluation and a May 2013 neuropsychological evaluation (see generally Parent Exs. C; F). Between April and May 2013 the district conducted a social history, a psychoeducational evaluation, two classroom observations, and an OT evaluation (see Dist. Ex. 9 at pp. 1-2; see

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<sup>1</sup> Response to intervention (RtI) is a multi-level educational approach to targeted academic and behavioral intervention—adjusted and modified as the student's needs require—used to provide early, systematic, and appropriately intensive assistance to students who are at risk or who are not making academic progress at expected rates (see 8 NYCRR 100.2[ii][1]). According to State-issued guidance, RtI seeks to prevent academic and behavioral failure through early intervention, frequent progress monitoring, and increasingly intensive research-based instructional interventions for students who continue to have difficulty in the general education setting (see Response to Intervention, Guidance for New York State School Districts, Office of Special Educ., at p. 1 [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance/cover.htm>). While Tier I RtI consists of the "core instructional program provided to all students by the general education teacher in the general education classroom" and includes "differentiated instruction based on the abilities and needs of the students in the core program," the more-intensive Tier II RtI is typically small group (3-5) supplemental instruction" provided in addition to the core instruction provided in Tier I (id. at pp. 12-13).

generally Dist. Exs. 16-18; Parent Exs. L; Q). On May 29, 2013, the parent informed the district by email that she did not agree with the OT evaluation report completed by the district and requested a private OT evaluation at district expense (see Dist. Exs. 2 at p. 1; 23 at pp. 7, 12).

On June 14, 2013, the CSE convened to conduct the student's initial review and to develop an IEP for the 2013-14 school year (see Dist. Ex. 30 at pp. 1, 14). Finding the student eligible for special education as a student with an other health-impairment, the June 2013 CSE recommended a general education class placement with ICT services in a charter school (id. at pp. 1, 12, 14).<sup>2</sup> To address the student's needs, the June 2013 IEP also included several supports and accommodations and four annual goals (see id. at pp. 9-11). The hearing record indicates that, at the June 2013 CSE meeting, the district provided the parent with an authorization to obtain a private OT evaluation at district expense (see Tr. p. 204; Dist. Ex. 2 at pp. 1-2; 32 at p. 3; see generally Dist. Ex. 34).

By prior written notice, dated July 17, 2013, the district: summarized the evaluations considered by the CSE and the ICT services recommended in the June 2013 IEP; informed the parent of the CSE's reasons for not recommending related services, including speech-language therapy, OT, and counseling; and explained its reasons for rejecting other placement options, including special education teacher support services (SETSS), a special class in a community school, and a nonpublic school (see Parent Ex. R at pp. 1-2).<sup>3</sup>

In August 2013, the parent privately obtained PT and OT evaluations of the student (see generally Parent Exs. E; D).

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

In an amended due process complaint notice, dated September 3, 2013, the parent alleged that the district failed to offer the student a free and appropriate public education (FAPE) for the 2012-13 and 2013-14 school years (Parent Ex. A at p. 1).<sup>4</sup> In particular, the parent alleged that the district failed to satisfy its child find obligations and timely refer the student to the CSE for an initial evaluation when the district became aware, during the course of the 2012-13 school year,

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<sup>2</sup> The student's eligibility for special education programs as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

<sup>3</sup> The prior written notice in this case included the information required by State and federal regulations (see Parent Ex. R at pp. 1-3). Specifically, a district must provide prior written notice of determinations made, the reasons for the determinations, and the parent's right to request additional assessments (8 NYCRR 200.5[a][3]; see 34 CFR 300.305[c], [d]; see also 34 CFR 300.503[b]). Prior written notice must also provide parents with a description of the actions proposed or refused by the district, an explanation of why the district proposed or refused to take the actions, a description of other options that the CSE considered and the reasons why those options were rejected, a description of other factors that were relevant to the CSE's proposal or refusal, a statement that the parent has protection under the procedural safeguards and the means by which the parent can obtain a copy of the procedural safeguards, and sources for the parent to contact to obtain assistance in understanding these (8 NYCRR 200.5[a][3]; see 34 CFR 300.503[b]; 8 NYCRR 200.1[oo]).

<sup>4</sup> The evidence in the hearing record indicates that the parent's original due process complaint notice was filed on June 28, 2013 (Parent Ex. B at p. 1). The original due process complaint notice was not entered into evidence at the impartial hearing.

that the student exhibited poor academic performance and behavioral challenges (id.). The parent also alleged that the student failed to make educational gains and did not benefit from the Tier I RtI services (id. at p. 3). The parent alleges that, after the parent's referral of the student's for an initial evaluation, the district completed required evaluations in an untimely manner (id. at p. 2).

With regard to the 2013-14 school year, the parent alleged that the composition of the June 2013 CSE was improper because a speech-language pathologist did not attend the CSE meeting to interpret the results of a speech-language evaluation and make an appropriate recommendation (Parent Ex. A at p. 2). The parent also alleged that the district failed to afford the parent an opportunity to participate in the development of the IEP and that the June 2013 CSE failed to discuss the student's assistive technology needs (id.). With regard to the initial evaluation of the student, the parent alleged that the district failed to conduct an OT evaluation of the student and failed to assess the student's needs in all suspected areas of disability (id.). The parent also asserted that the CSE failed to consider the available evaluative data at the time of the June 2013 CSE meeting (id.).

With regard to the content of the June 2013 IEP, the parent alleged: that the annual goals were immeasurable and inappropriate for the student; that the CSE failed to conduct a functional behavioral assessment (FBA) and to develop a behavioral intervention plan (BIP); and that the recommended ICT services were inappropriate for the student (Parent Ex. A at pp. 3-4). The parent also alleged that the district failed to address the student's related service needs and, in particular, inappropriately failed to recommend speech-language therapy for the student (id. at pp. 2, 3).

As relief, the parent requested that the IHO order the district to provide the student an appropriate placement in a nonpublic school at district expense (Parent Ex. A at p. 3). The parent also requested that the district reimburse her for the privately obtained August 2013 OT and PT evaluations, as well as for "all monies expended for testing and/or evaluations requested" by the parent in her March 12, 2013 letter (id. at pp. 3, 4). The parent also requested an order requiring the district to fund "at the enhanced rate" further assessments of the student, including an assistive technology evaluation (along with the provision of a laptop with software for dyslexia), a central auditory processing evaluation, a visual perceptual evaluation, and a vision skills evaluation, as well as an FBA and a BIP (id.). The parent also requested tutoring services for the student with a reading specialist using either the Orton-Gillingham or Lindamood-Bell methodologies (id. at p. 4). The parent further sought an order requiring the district to fund cognitive behavioral therapy and counseling for the student (id.). Finally, the parent requested that the IHO order the CSE to reconvene to develop an appropriate educational program for the student (id.).

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

After a prehearing conference on August 9, 2013, an impartial hearing convened in this matter on November 15, 2013, and concluded on July 11, 2014, after six days of proceedings (see Tr. pp. 1-839). By decision, dated December 1, 2014, the IHO determined that the district denied the student a FAPE for the 2012-13 and 2013-14 school years (see IHO Decision at pp. 9-16). First, the IHO found that the district violated its child find obligations during the 2012-13 school year because, although the charter school had procedures in place to determine if the student needed special education, the district failed to provide adequate academic interventions to address

the student's difficulties while the district determined whether special education services were warranted (*id.* at pp. 11-12). Specifically, the IHO found that there was insufficient evidence in the hearing record demonstrating how the district attempted to assist the student in the area of mathematics (*id.*). With regard to the timeliness of the student's initial evaluation by the district to determine his eligibility for special education, the IHO found that the district conducted evaluations and convened the CSE to develop an IEP "well before the 2013-14 school year when the IEP would [have] be[en] implemented" (*id.* at p. 15). Thus, the IHO found that, although the June 2013 IEP may have been developed in an untimely manner, this did not rise to the level of a denial of a FAPE (*id.*).

With regard to the 2013-14 school year, the IHO found that the hearing record did not support a finding that the district engaged in any violations of the IDEA relative to the CSE process (see IHO Decision at p. 14-16). Specifically, the IHO found that, while the district and the parent had the discretion to invite a related service provider to the CSE meeting, the district was not obligated to do so and, therefore, the June 2013 CSE was properly composed (*id.* at pp. 14-15). The IHO also found that the parent and her advocate were provided with a meaningful opportunity to participate during CSE meeting (*id.* at p. 15). As to the sufficiency of the evaluative information before the CSE, the IHO found that the June 2013 CSE had nothing before it to support the need for an assistive technology evaluation, a central auditory processing evaluation, or a vision evaluation (*id.* at p. 16). Next, the IHO found that the district's failure to conduct an FBA and to develop a BIP for the student did not amount to a denial of a FAPE because the CSE was aware of the student's behavioral and social/emotional needs and the IEP included appropriate supports for the student's management needs, including, among others, preferential seating, silent signals, extrinsic reinforcements, and verbal/non-verbal reminders (*id.* at p. 15).

Turning to the June 2013 IEP, the IHO found that the annual goals were consistent with the student's identified needs in all areas, including academics and attending skills, and that the criteria used to measure progress was also appropriate (IHO Decision at p. 14). However, with regard to related services, the IHO found that the CSE should have recommended speech-language therapy for student because there was sufficient evaluative information before the CSE to indicate that the student had language deficits and needed speech-language therapy (*id.* at p. 13). The IHO also found, however, that the CSE appropriately declined to recommend OT and PT because strategies to support the student's management needs in the IEP would assist the student with any deficits that would otherwise be addressed with such services (*id.* at pp. 13-14). Additionally, the IHO found that the student did not display any problematic behavior within the classroom other than distraction that would warrant counseling (*id.*). The IHO determined that any behavior exhibited by the student related to anxiety did not present in the classroom and did not interfere with instruction (*id.* at p. 14). Finally, the IHO found that the recommendation in the June 2013 IEP for placement of the student in a general education classroom with ICT services was inappropriate because the student struggled the previous year as a regular education student in a similar setting while receiving academic interventions (*id.* at p. 13).

The IHO denied much of the relief requested by the parent (IHO Decision at pp. 16-17). The IHO found that the parent's requests for placement of the student in a nonpublic school at district expense and for tutoring for the 2013-14 school year were moot as the school year had ended during the course of the hearing (*id.* at p. 16). The IHO noted that the parent did not request that the CSE reconvene and recommend deferment for the purpose of locating an appropriate

nonpublic school placement for the student (id. at p. 16 n.2). In addition, the IHO found relief in the form of placement at a nonpublic school inappropriate absent evidence regarding a specific nonpublic school (id. at p. 16). The IHO also noted that the parent did not specifically request compensatory additional services in the form of tutoring and that there was insufficient evidence demonstrating the nature of or the student's need for tutoring services (id. at p. 16 & n.3). Similarly, the IHO found that there was no evidence presented as to the nature of cognitive behavioral therapy and how it would benefit the student or address his needs (id. at p. 17). Consistent with the IHO's findings set forth above, the IHO also concluded that an award of counseling services was not warranted (id.).

As for evaluations, the IHO granted the parent's request for reimbursement for the cost of the OT evaluation obtained by the parent but only to the extent that the parent personally paid for it (IHO Decision at p. 17). The IHO declined to award the parent reimbursement for the privately obtained PT evaluation, finding insufficient evidence in the hearing record supporting the student's need therefor (id.). Finally, as noted above, the IHO also found insufficient evidence supporting the student's need for the remaining evaluations requested by the parent (id.).

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

The parent appeals, challenging the IHO's failure to award any relief despite finding that the district denied the student a FAPE for the 2012-13 and 2013-14 school years.

Relative to the 2013-14 school year, the parent asserts that the June 2013 CSE should have included a "specialist" to interpret the results of the OT evaluation of the student. In addition, the parent argues that the IHO erred in finding that the district obtained and considered adequate evaluative information about the student prior to the June 2013 CSE meeting. Turning to the June 2013 IEP, the parent argues that IHO erred in finding that the student's OT and PT deficits were mild and that the June 2013 CSE appropriately declined to recommend OT and PT services for the student. Further, the parent argues that, while the IHO correctly determined that the CSE erred in not recommending speech-language therapy for the student, given the student's significant speech-language deficits, the IHO erred in declining to award any relief related to such a defect. The parent further argues that the IHO erred in finding that the student did not require counseling services, in light of the student's anxiety and behavioral challenges.

The parent also argues that the IHO erred in failing to address evidence in the hearing record that the CSE failed to reconvene to consider the August 2013 private OT and PT.

The parent argues that the IHO erred in failing to award the relief requested. The parent asserts that the IHO erred in finding that the parent's requests for a nonpublic school placement and for tutoring services were moot because, although the 2013-14 school year had passed, the

student continued to be without an appropriate IEP and services and was not making progress.<sup>5</sup> The parent also argues that the IHO should not have conditioned the parent's request for an appropriate nonpublic school placement upon the parent's identification of a specific school. In addition, the parent argues that the student lost educational benefit as a result of the inappropriate June 2013 IEP and that the tutoring assessment included in the hearing record offered sufficient evidence of the nature of this requested relief. The parent seeks a nonpublic school placement for the student, as well as an unspecified amount of tutoring and counseling. The parent also continues to request the following evaluations of the student: assistive technology, central auditory processing, visual perceptual, and vision skills.

In an answer and cross-appeal, the district responds to the parent's petition by variously admitting and denying the allegations raised and asserting that the IHO correctly declined to award the parent the requested relief. As an initial matter, the district set forth assertions directed at the scope of review. Specifically, relative to the privately obtained August 2013 PT and OT evaluations, the district argues that any claim in the parent's petition that the CSE failed to reconvene to consider the results of those evaluations was not raised in the parent's amended due process complaint notice and, therefore, may not be considered on appeal. In addition, the district argues that the parent fails to challenge in her petition the IHO's findings that the parent was afforded an opportunity to participate in the development of the June 2013 IEP and that the annual goals in the IEP were appropriate.

In its cross-appeal, the district asserts that the IHO erred in finding that the district violated its child find obligations for the 2012-13 school year. In addition, as to the IHO's finding that the district offered insufficient academic interventions for the student in the area of mathematics, the district asserts that the parent failed to raise such a claim in her due process complaint notice and that, in any event, the district provided the student with appropriate services during the 2012-13 school year. In addition, the district argues that it evaluated the student, convened the CSE, and developed the IEP in an appropriate and timely manner.

Next, the district cross-appeals the IHO's determination that it failed to offer the student a FAPE for the 2013-14 school year. The district argues that the IHO erred in finding that the CSE should have recommended speech-language therapy for the student and asserts that the student did not display any significant speech-language deficits during testing and demonstrated above-average language skills, above-average expressive and receptive language skills, and normal articulation skills. The district also asserts that the IHO erred in finding the placement recommendation inappropriate for the student. Specifically, the district argues that, given the

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<sup>5</sup> In support of the assertion that the student has made no academic progress, the parent submitted additional documentary evidence for consideration on appeal (see generally Pet. Ex. A). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this case, the parent's supplemental exhibit includes a 2014-15 school year report card, dated November 12, 2014 (Pet. Ex. A at pp. 1-2). While this document could not have been offered at the time of the impartial hearing, it is not necessary to render a decision in this matter and, therefore, the parent's request is denied.



student's overall high or average functioning and mild attentional deficits, a placement in a general education classroom with ICT services, along with the supports for the student's management needs enumerated in the June 2013 IEP, was appropriate.

In an answer to the district's cross-appeal, the parent argues that the IHO correctly determined that the district denied the student a FAPE for the 2012-13 and 2013-14 school years.

## **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. Scope of Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. As argued by the district, since the parent asserts for the first time on appeal that the CSE failed to reconvene to consider the results of the privately obtained August 2013 PT and OT evaluations, this allegation is outside the permissible scope of review and will not be considered (20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.508[d][3][i], [ii], 300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]; see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at \*6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*9 [S.D.N.Y. Mar. 28, 2013]).<sup>6</sup> In addition, in her answer to the district's cross-appeal, the parent sets forth allegations tending to articulate an implementation claim relative to the 2013-14 school year. This too is inappropriately asserted for the first time in a responsive pleading on appeal and, as such, will not be considered.

Next, as the parent does not assert in her petition any challenge to the IHO's findings that the parent was afforded an opportunity to participate in the development of the student's June 2013 IEP and that the annual goals were appropriate for the student, these determinations have become final and binding on the parties and will not be further addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).<sup>7</sup> In addition, in her petition, the parent does not continue to advance her request that the district conduct an FBA or BIP or reimburse her for the privately obtained August 2013 PT evaluation, which the parent alleges was paid for by her insurance (Pet. ¶ 13).<sup>8</sup> Accordingly, the IHO's denial of the parent's requests for such relief are also final and binding and will not be further addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

### B. Child Find and Parental Referral

With regard to the IHO's finding that the district violated its child find obligations, the purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ., 2012 WL 5936537, at \*11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202, 2010 WL 1049297

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<sup>6</sup> Indeed, the parent indicated that she provided the private evaluations to the student's school after the commencement of the 2013-14 school year, which postdated the parent's September 2013 amended due process complaint notice (see Tr. pp. 619, 683, 743; Parent Ex. A at p. 1).

<sup>7</sup> Although the parent includes arguments directed to such claims in her answer to the district's cross-appeal, she does not point to that portion of her petition that identified her appeal of these particular findings, conclusions, and orders of the IHO (see 8 NYCRR 279.4[a]). An answer to a cross-appeal may not be treated as a second opportunity to set forth additional findings of the IHO with which the petitioner takes issue (see 8 NYCRR 279.5).

<sup>8</sup> In any event, for substantially the same reasons identified by the IHO, the June 2013 IEP identified the student's attentional needs and included appropriate management needs to address the student's attentional and behavioral deficits (see IHO Decision at p. 15; Dist. Ex. 30 at pp. 5-9).

[2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][7]).

A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To determine that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate the student (A.P., 572 F.Supp.2d at 225, citing Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F.Supp.2d 815, 819 [C.D.Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, the school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's RtI program (8 NYCRR 200.4[a]; see also 8 NYCRR 100.2[ii]).

In addition, a referral may be made by a student's parent or person in parental relationship (34 CFR 300.301[b]; 8 NYCRR 200.4[a][1][i]). State regulations do not prescribe the form that a referral by a parent must take, but do require that it be in writing (8 NYCRR 200.4[a]; Application of a Child Suspected of Having a Disability, Appeal No. 05-069; Application of a Child Suspected of Having a Disability, Appeal No. 99-69).<sup>9</sup> Once a building administrator or employee of a district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 school days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (8 NYCRR 200.4[a][2][ii], [iv][a]; see also 34 CFR 300.300[a]). State regulations also provide that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate), to determine whether the student would benefit from

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<sup>9</sup> State regulations require a written request for a referral, submitted by persons other than the student or a judicial officer, to include: the reasons for the referral, including any test results, records or reports upon which the referral is based; a description of the intervention services, programs or instructional methodologies used to remediate the student's performance prior to referral, including any supplementary aids or support services provided to the student (or an explanation as to why no support services were provided); and a description of the extent of parental contact or involvement prior to the referral (8 NYCRR 200.4[a][2][iii]).

additional general education support services as an alternative to special education, including speech-language services, AIS, and any other services designed to address the learning needs of the student (8 NYCRR 200.4[a][9]). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (8 NYCRR 200.4[a][9][iii][a]-[b]). Upon receiving the parent's consent to conduct an initial evaluation of the student, the district must complete that evaluation within 60 days (see 20 U.S.C. § 1414[a][1][C][i][I]; 34 CFR 300.301[c][1][i]-[ii]; 8 NYCRR 200.4[b][1]).

Initially, with regard to the appropriateness of the academic interventions provided to the student during the 2012-13 school year, the IDEA provides for impartial hearings and State-level reviews in matters relating to the identification, evaluation or educational placement of students, or the provision of a FAPE (20 U.S.C. § 1415[b][6][A]; 34 CFR 300.507[a][1]; 8 NYCRR 200.5[i][1], [j][1]). In this case, while the district's use of RtI or other academic intervention is relevant to an examination of whether the district improperly failed to identify the student as a student with a disability under the IDEA, the district's compliance with 8 NYCRR 100.2(ii) and the skill with which the particular pre-referral academic interventions in the RtI program were delivered is not a matter subject to the jurisdiction of an IHO or SRO.

In this instance, the evidence in the hearing record demonstrates that the district attempted certain academic interventions prior to considering the student's eligibility for special education, which attempts did not contravene the district's obligations under the IDEA. As noted above, during the 2012-13 school year, the student attended a charter school for kindergarten as a regular education student in a classroom with students receiving ICT services (Tr. pp. 30, 33, 562; Parent Ex. Q at p. 3). The student's report card indicated he was "proficient" in the fall term and "substantially deficient" in the winter and spring terms in the area of reading (Parent Ex. I at p. 1). The 2012-13 report card also indicated that the student was "substantially deficient" during the fall, winter, and spring terms in the area of mathematics (id.).

The evidence in the hearing record reflects that, during the 2012-13 school year, the charter school provided the student with Tier I and then Tier II RtI services in reading (Tr. pp. 31-32, 69, 244, 575-78; Parent Ex. K). Specifically, the dean of special services testified that, in the winter term of the 2012-13 school year, the student qualified for and began to receive additional reading supports (Tr. p. 31). According to the dean, she provided the student with five sessions of Level Literacy Intervention per week in a small group (5:1), which was a program that addressed reading comprehension, work-solving skills, and writing about reading (Tr. pp. 32, 69). A second teacher provided the student with four sessions of reading intervention per week in a small group (Tr. pp. 32, 69). The dean of special services testified that, despite the reading intervention, the student remained below grade level in reading (Tr. pp. 69-70). By letter, dated February 6, 2013, the district informed the parent that the student presented with difficulties in reading and would receive Tier II RtI in reading beginning February 11, 2013 (Parent Ex. K; see Tr. pp. 31-32, 69, 244, 575-78). The letter further indicated that the additional reading instruction would consist of approximately four 30-minute sessions per week for a minimum of seven weeks (Parent Ex. K). The parent also testified the student received Tier II interventions consisting of 1:1 support in class and small group instruction (5:1) to address the student's needs related to reading (Tr. pp. 577-78).

With respect to the mathematics services provided to the student during the 2012-13 school year, the evidence in the hearing record indicates that the charter school did not offer tiered

intervention as a part of RtI (Tr. pp. 56, 350-51). The hearing record is unclear as to whether or not the student received mathematics instruction using a program called "Whatever it Takes Interventions," which the school provided to students based upon teacher-collected data regarding student achievement and mastery and which consisted of modified and small group instruction (Tr. pp. 56-57, 350-52).<sup>10</sup> However, the student's teacher reported to the June 2012 CSE that the student's performance in mathematics was "inconsistent" on the same tasks on different days, which the teacher attributed to the student's attentional deficits (Parent Ex. AA at pp. 42-43; see Dist. Ex. 30 at p. 4). He further indicated that, in such instances, the student responded to small group instruction, redirection, directions repeated, and prompts (id. at p. 43).

Given the student's age, the implementation of these interventions, and the district's overall response to the student's academic struggles, it was not unreasonable for the district to observe the student's response to such interventions prior to initiating its own referral of the student for consideration for special education by the CSE. Even if the student was failing to make "adequate progress" when receiving RtI reading services or the less formal interventions in mathematics, after an "appropriate period of time," the evaluation process following referral of the student to the CSE commenced (see 8 NYCRR 200.4[a]).<sup>11</sup> That is—as relevant to the related matter of the timeliness of the district's evaluations—not long after the student transitioned to Tier II RtI, the district treated the parent's March 5 and March 12, 2013 letters as a referral of the student for special education and, after April 6, 2013, when the district received the parent's consent to evaluate the student, it timely conducted its evaluations of the student during April and May 2013, within 60 days of receipt of consent (Dist. Exs. 2 at pp. 9-10; 3; 8 at pp. 1-2; 9 at p. 1; Parent Ex. H at pp. 1-2; see 8 NYCRR 200.4[b][1], [7]).<sup>12</sup> Furthermore, the district arranged and developed the student's special education program at the June 2013 CSE, also "[w]ithin 60 school days of the receipt of consent to evaluate" the student (see 8 NYCRR 200.4[e][1]; Dist. Ex. 30). Based on the foregoing, the IHO's determinations that the district violated its child find obligations for the 2012-13 school year, offered insufficient academic interventions for the student in the area of mathematics in its RtI program, and "may have" developed the June 2013 IEP in an untimely manner must be reversed (see IHO Decision at pp. 11-12, 15).

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<sup>10</sup> The dean testified that Whatever it Takes Interventions did not include additional pull-out small-group instruction in mathematics (Tr. pp. 57, 350-51).

<sup>11</sup> A student must not be determined to be a student with a disability if the determinant factor for that determination is lack of appropriate instruction in reading; lack of appropriate instruction in math; or limited English proficiency, which is based on the provision of appropriate instruction, data collection, and formal assessment conducted over an appropriate period of time (34 CFR 300.306 [b], 300.309[b]).

<sup>12</sup> While it appears that the district obtained the parent's consent to initiate the evaluations beyond the 10 school days required by State regulations (compare Dist. Ex. 3 and Parent Ex. H at p. 2, with Dist. Ex. 8 at p. 1; see 8 NYCRR 200.4[a][2][iv][a]), the evidence in the hearing record reveals that the district made reasonable efforts to schedule the social history interview, at which it provided the parent with the consent form, within the regulatory time frame (see Dist. Exs. 2 at pp. 9-10; 5; see also 8 NYCRR 200.4[a][8], 200.5[b][1]).

## C. The June 2013 IEP

### 1. Sufficiency of Evaluative Information

On appeal, the parent argues that the CSE did not have sufficient evaluative information available to it at the time of the June 2013 CSE meeting to identify the student's needs. Specifically, the parent contends, given the parent's March 2013 written request and the district's alleged awareness of the student's deficits, that the district should have evaluated the student in the areas of PT, assistive technology, vision skills, and visual perceptual skills.

When a student suspected of having a disability is referred to a CSE, the CSE, upon receipt of consent, must ensure that an evaluation of the referred student is performed (20 U.S.C. § 1414[a][1][A]; see 34 CFR 300.301[a]), which must include at least a physical examination, an individual psychological evaluation (unless a school psychologist assesses the student and determines that such an evaluation is unnecessary), a social history, an observation of the student in the current educational placement, and other appropriate assessments or evaluations as necessary to ascertain the physical, mental, behavioral, and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[b][1][i]-[v], [j][1]). The student must be assessed in all areas of suspected disability (20 U.S.C. § 1414[b][3][B]), including, "if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities" (34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified" (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Moreover, as part of an initial evaluation, the CSE must, as appropriate, "review existing evaluation data on the child" including "evaluations and information provided by the parents of the child" (20 U.S.C. § 1414[c][1][A][i]; 34 CFR 300.305[a][1][i]; 8 NYCRR 200.4[b][5][i]). 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]). 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., 966 F. Supp. 2d 315, 329-30 [S.D.N.Y. 2013]).

The hearing record indicates that the June 2013 CSE considered several sources of evaluative information, as well as verbal input provided by meeting participants, which included the parent and the student's teachers (see Tr. pp. 219, 229-30, 244, 261, 275; Parent Ex. R at p. 1; see generally Dist. Exs. 16-18; Parent Exs. C; F; L; Q). Specifically, the hearing record reflects that the June 2013 CSE considered an April 2013 social history report, an April 2013 OT teacher report, a May 2013 OT evaluation report, a May 2013 psychoeducational evaluation report, April 2013 and May 2013 classroom observation reports, as well as an April 2013 private speech-language evaluation report and a May 2013 private neuropsychological evaluation report (see Parent Ex. R at p. 1; see generally Dist. Exs. 16-18; Parent Ex. C; F; L; Q). The foregoing evaluative reports included information about the student's needs in the areas of cognition, academics, speech-language skills, fine motor skills, social/emotional/behavioral and attention, and visual-spatial/perceptual skills (see Tr. p. 261; Parent Ex. R at p. 1; see generally Dist. Exs. 16-18; Parent Exs. C; F; L; Q).

The May 2013 private neuropsychological evaluation report reflected that the student's full scale IQ of 90, verbal comprehension index of 96, and fluid reasoning index of 94 all fell within the average range compared to same age peers (Parent Ex. C at pp. 4, 13). According to the psychologist who conducted the May 2013 private neuropsychological evaluation, the student's "academic skills [we]re on target and age appropriate overall" (*id.* at p. 5). Specifically, according to the evaluation report, the student demonstrated average skills in the areas of early reading skills, mathematics problem solving skills, and numerical operations compared to same age peers (*id.* at pp. 5, 14). Additionally, a May 2013 psychoeducational evaluation report reflected, with respect to standardized assessments, the student demonstrated average cognitive abilities and average to high average reading, writing, and mathematics skills (Dist. Ex. 17 at pp. 3-4).

Review of the evaluative data reveals that there was sufficient information before the June 2013 CSE about the student's visual-perceptual/spatial skills. The May 2013 private neuropsychological evaluation reflected the student achieved a visual spatial index score of 73 (4th percentile) which fell in the well below average range compared to same age peers (Parent Ex. C at p. 4). As described in the May 2013 neuropsychological evaluation report, according to the results of the Beery-Buktenica Development Test of Visual-Motor Integration (Beery VMI), the student demonstrated low average skills in the areas of visuoconstructional ability and visuomotor integration, skills which related to the student's needs in visual-spatial and visual-perceptual skills (*id.* at p. 6). Regarding tasks that required visual reasoning and visual-perceptual recognition, the evaluation noted that the student scored in the average range (*id.* at pp. 4-5). Further, the report indicated that the student "demonstrated no impairment" with respect to tasks requiring perceptual speed, visuomotor coordination, visual discrimination, and visual working memory skills, all skills which related to visual-spatial and visual-perceptual skills (*id.* at p. 5). In addition, the May 2013 psychoeducational evaluation report indicated, with respect to the results of the Beery VMI and the Bender Visual-Motor Gestalt Test-Second Edition (Bender Gestalt-II)—assessments that measure fine motor skills and visual-motor skills—that the student performed in the average range (Dist. Ex. 17 at p. 5).

In addition, as summarized below, with the exception of PT, the evaluative information before the June 2012 CSE reflected the student's related services needs in the areas of social/emotional and behavioral, language, and fine and gross motor skills (*see, e.g.*, Dist. Exs. 17 at p. 8; 18 at pp. 4-5; Parent Exs. C at pp. 7, 11; F at pp. 5, 8-9). Based on the information before the June 2013 CSE, as a whole, including the private evaluations obtained by the parent, the hearing record shows that the CSE had information before it sufficient to develop the student's IEP. With respect to the absence of information about the student's PT or assistive technology needs, while the CSE must obtain sufficient information about the student to determine the student's educational needs, the "absence of one single measure should not itself render an IEP invalid, so long as the CSE team otherwise has sufficient information about the student to determine the student's needs" (*P.L. v. New York City Dep't of Educ.*, 56 F. Supp. 3d 147, 160-61 [E.D.N.Y. 2014], quoting *R.B. v. New York City Dep't of Educ.*, 15 F. Supp. 3d 421, 431 [S.D.N.Y. 2014], *aff'd*, 2015 WL 1244298 [2d Cir. Mar. 19, 2015]).

The parent's argument underlying her claim that the June 2013 CSE had before insufficient evaluative information about the student is premised upon the district's failure to conduct all of the assessments specified by the parent in her March 12, 2013 letter to the district (*see* Parent Ex. H at p. 2). The parent's March 2013 letter requested evaluations "at [d]istrict [e]xpense with an



outside neutral assessor" in the areas of speech-language, OT, PT, assistive technology, central auditory processing, and visual-perceptual (Parent Ex. H at p. 2; see also Tr. pp. 580-81). In response to the parent's request, the district failed to either assess the student in each of the requested areas sought by the parent to determine the student's educational needs (20 U.S.C. § 1414[c][4][A], [B]; 8 NYCRR 200.4[b][5][iv]) or provide the parent with prior written notice detailing its reasons for concluding that additional evaluative data of the student was unnecessary (8 NYCRR 200.5[a]; see 34 CFR 300.305 [d], 300.503).<sup>13</sup> However, given the sufficiency of the evaluation information before the June 2013 CSE, as a whole, this procedural violation does not in and of itself constitute a denial of a FAPE in this instance.<sup>14</sup>

## **2. Related Services**

On appeal, the parties dispute whether or not the June 2013 CSE appropriately declined to recommend related services for the student's 2013-14 school year consisting of speech-language therapy, counseling, PT, and OT. Each contention is addressed below seriatim.

### **a. Speech-Language Therapy Services**

The evidence in the hearing record supports the IHO's finding that the June 2013 IEP should have included provision for speech-language therapy in light of the student's deficits in language processing (see IHO Decision at p. 13). The evaluative information before the June 2013 CSE indicated the student demonstrated average skills in certain areas of language processing (see Dist. Ex. 17 at pp. 2, 5; Parent Ex. F at pp. 3, 7). The May 2013 psychoeducational evaluation indicated that the student's speech-language skills were appropriately developed and that he performed in the high average range in standardized testing in the areas of expressive and receptive language skills (Dist. Ex. 17 at pp. 2, 5). The April 2013 speech-language evaluation report indicated that the student demonstrated above average articulation and performed well in the areas of memory, retrieval and automaticity (Parent Ex. F at pp. 3, 7).

Notwithstanding this information about the student's strengths, the April 2013 speech-language evaluation report indicated that the student presented with certain language deficits (see generally Parent Ex. F). In particular, the report indicated that, while the student performed at age appropriate levels on two out of three sections, he performed below age level on the phonological awareness and flexibility section of the Emerging Literacy and Language Assessment (ELLA) (id. at pp. 2, 8). In addition, the speech-language pathologist reported that administration of the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) yielded a range of scores, including low scores on the word structure (9th percentile), recalling sentences (5th percentile), and sentence structure (16th percentile) subtests and, in particular, the concept and

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<sup>13</sup> While there is evidence in the hearing record reflecting that the district explained to the parent at the June 2013 CSE meeting that the student did not need a PT evaluation because the student was "able to navigate the school environment in an age appropriate and safe manner, fully aware of environment and boundaries," the district was still obligated to inform the parent by prior written notice of its reasons and conclusions for not evaluating the student in all of the areas requested by the parent in her March 12, 2013, letter (Dist. Ex. 32 at pp. 3-4).

<sup>14</sup> This is particularly so given the parent's communications to the district subsequent to her March 12, 2013 letter requesting that the district refrain from duplicative or excessive testing of the student (see Dist. Exs. 2 at pp. 7-8; 8 at p. 2; 23 at pp. 7, 14).

following directions subtest (2nd percentile) (id. at pp. 5, 8). She opined that this revealed a "disconcerting pattern for [the student], which [would] ultimately affect[] his daily functioning in the classroom environment" (id. at pp. 5, 6, 8). The speech-language pathologist recommended the student receive three 45-minute sessions of individual speech-language therapy and two weekly speech-language therapy sessions within the classroom setting (id. at p. 9).

In addition, the May 2013 neuropsychological evaluation report reflected, based on information provided by the parent, that the student also demonstrated significant impairments in pragmatic communication (Parent Ex. C at p. 7). Additionally, the May 2013 neuropsychological evaluation reflected a "rule out" diagnosis of a social communication disorder (id. at p. 11). The evaluating psychologist recommended speech-language therapy for the student to address his difficulties with phonological awareness/flexibility, following multi-step directions, application of word structure rules to language, and pragmatic language (id. at p. 11).

Thus, although the information before the CSE reported that the student demonstrated some areas of strength in the area of speech-language, the more comprehensive speech-language evaluation report, as well as the private neuropsychological evaluation report, reported that the student exhibited notable weaknesses in the area of language processing (see Parent Ex. F at pp. 5, 8-9; Parent Ex. C at pp. 7, 11). Thus, in view of the evidence I find insufficient reason to depart from the IHO's conclusion that the June 2013 CSE should have recommended speech-language therapy services for the student.

#### **b. Counseling Services**

Next, the evidence in the hearing record supports the IHO's finding that the student did not require counseling services and that the management needs in the student's June 2013 IEP appropriately addressed any social/emotional or behavioral needs, including attending concerns (see Dist. Ex. 30 at p. 9).

The school psychologist testified that the June 2013 CSE considered the evaluative data before the June 2013 CSE regarding the student's social/emotional needs, which indicated that the student demonstrated age-appropriate social/emotional skills and supported the CSE's conclusion that counseling was not warranted (Tr. pp. 292-99; see generally Dist. Exs. 17; Parent Exs. C; L). The May 2013 psychoeducational evaluation report described the student's behavior as happy, friendly, and cooperative and noted that the student engaged in the tasks, maintained eye contact, responded appropriately to conversational and assessment queries, provided social smiles and laughs when appropriate, and demonstrated age appropriate affect, demeanor, and temperament (Dist. Ex. 17 at p. 1). The May 2013 psychoeducational evaluation report also indicated the student did not present with any significant social/emotional/behavioral weaknesses (id. at p. 8).

The May 2013 neuropsychological evaluation report reflected that the student demonstrated a full range of affect and adequate frustration tolerance during the assessment (Parent Ex. C at p. 8). Behaviorally, the psychologist noted that the student presented as friendly and cooperative, eye contact was generally appropriate, and the student exhibited difficulty remaining on task during non-preferred tasks but responded to redirection including verbal praise (id. at p. 4). According to the results of the Behavior Assessment Scale for Children-Second Edition, Teacher Report Form (BASC-2), the student exhibited moderate elevations regarding the anxiety

and atypicality scales (id. at p. 8). The BASC-2 results indicated that, overall, the student did not exhibit externalizing behaviors in school, and the only internalizing behavior noted by the teacher was in the area of anxiety (see id.). With respect to the BASC-2, Parent Report Form, the student's T-scores fell within the at-risk range in the area of hyperactivity, moderately elevated in the areas of anxiety and depression, and within the clinically significant range in the area of somatic complaints (id.). According to the May 2013 neuropsychological evaluation, the parent reported that the student demonstrated sensitivity to noises, difficulty with changes in environment, did not like to brush his teeth or eat many foods, exhibited a low frustration tolerance, and was verbally impulsive (id. at p. 3). The evaluating psychologist recommended counseling/play therapy for the student to address behaviors including disrupting other children, difficulty turn taking, interrupting, and inappropriate expression of feelings (id. at p. 12). The evaluating psychologist also recommended counseling/play therapy for the student to address home-related stressors, anxiety, emotional regulation, and problem solving (id.).

Although the student demonstrated moderate elevation on the anxiety scale, the May 2013 classroom observation reports—which were conducted on two different occasions—did not note any concerns with anxiety (see Parent Ex. L at pp. 1-3; see also Parent Ex. C at p. 8). For example, the April 2013 classroom observation report reflected that the student engaged in the teacher's lesson and interacted well with others (see Parent Ex. L at p. 1). The April 2013 classroom observation report also indicated the student worked well independently, followed teacher instructions, maintained attention, organized belongings, transitioned well, and interacted appropriately within a group setting (id.). The May 2013 classroom observation only noted one aspect of the student's social/emotional/behavioral functioning, which was the student's difficulties with attention (see id. at pp. 2-3); however, the management needs in the June 2013 CSE addressed the student's attention related needs (see Dist. Ex. 30 at p. 9). Further, the school psychologist testified that, while the student exhibited needs related to attention and distractibility, the ICT services and supports for the student's management needs included in the June 2013 IEP addressed the student's needs in these areas (Tr. p. 300). Thus, based on the evidence in the hearing record, the IHO correctly found that the June 2013 CSE did not deprive the student of a FAPE as a consequence of its determination not to recommend counseling services for the student for the 2013-14 school year.

### **c. Physical Therapy Services**

The parent also argues that that the June 2013 CSE should have recommended PT for the student. The district school psychologist testified that, based upon his observations, the district could address the student's gross motor needs within the classroom with accommodations and without PT services (Tr. pp. 287-89). However, in an April 2013 social history conducted as part of the student's initial evaluation, the parent reported that the student was "very clumsy for his age" and reiterated her request for the district to conduct a PT evaluation of the student (Parent Ex Q at p. 4). The May 2013 OT evaluation report indicated the student demonstrated difficulties with navigating the school and maintaining stability for classroom tasks and exhibited decreased strength for school functions (Dist. Ex. 18 at pp. 4-5). An April 2013 OT teacher report assessing the student's school functioning and participation indicated that the student's gross motor skills were not grade appropriate and included delayed running and jumping skills (Dist. Ex. 16 at p. 1).

Thus, observations from the parent and the occupational therapist indicated some concerns about the student's gross motor skills (see Dist. Exs. 17 at p. 7; 18 at pp. 2, 4; Parent Exs. C at p. 6; L at p. 1; Q at p. 4). In addition, unlike speech-language therapy, counseling, and OT services, the June 2013 IEP and the subsequent prior written notice do not reflect that the CSE considered and rejected PT services for the student (see Dist. Ex. 30 at p. 15; Parent Ex. R at p. 2). At this juncture, given the limited scope of the evaluative information available to the CSE in this area, it is appropriate to order the CSE to, when it next convenes, consider whether or not, based on evaluative information about the student's PT needs, including but not limited to the August 2013 private PT evaluation report provided by the parent, the student requires PT services (see generally Parent Ex. E).

#### **d. Occupational Therapy Services**

The parent next argues the June 2013 CSE inappropriately declined to recommend OT services for the student's 2013-14 school year. In a May 2013 OT evaluation, the occupational therapist indicated that, although the student exhibited slight weaknesses in visual perceptual and motor integration skills, the student's needs would be addressed in the primary education program and, therefore, did not recommend OT for the student (see Dist. Ex. 18 at pp. 7-8). However, the occupational therapist made these conclusions despite the student's performance on the Beery VMI Developmental Test of Visual Perception (8th percentile) and Developmental Test of Motor Coordination (6th percentile), both of which indicated that the student's performance was below average compared to same age peers (id. at p. 6). In the May 2013 neuropsychological evaluation, the psychologist reported the results of the Beery VMI, which indicated that the student demonstrated low average skills in the areas of visuo-constructional ability and visuo-motor integration, which included that the student demonstrated adequate pencil grip but an impulsive approach to his drawings (Parent Ex. C at p. 6). The psychologist recommended further evaluation to rule out the diagnosis of a developmental coordination disorder (id. at p. 11). In addition, the May 2013 OT evaluation indicated the student exhibited difficulties with coordination, dressing, manipulating small items, cutting with scissors, pencil grasp, and organizing personal items all of which significantly impeded classroom function (Dist. Ex. 18 at pp. 3-4). According to the report, the student also demonstrated difficulties with navigating the school, using classroom tools efficiently, and stability for classroom tasks (id. at pp. 4-5). In view of the foregoing evidence in the hearing record, OT services were warranted for the student based on his fine motor and visual-perceptual needs at the time of the June 2013 CSE meeting.

Based on the foregoing, given the June 2013 CSE's failure to recommend both speech-language therapy and OT services for the student, the hearing record supports a finding that the district denied the student a FAPE for the 2013-14 school year.

#### **3. Integrated Co-Teaching Services**

Finally, a review of the evidence in the hearing record establishes, that the IHO erred in determining that the June 2013 CSE's recommendation for ICT services in a general education classroom placement was not appropriate. State regulations define ICT services as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR

200.6[g][1]). In addition, State regulations require that school personnel assigned to a classroom providing ICT services shall "minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]).

As an initial matter, in finding the ICT services inappropriate, the IHO reasoned that the student struggled during the 2012-13 school year when he was a regular education student in an ICT setting, receiving academic interventions including small group instruction (see IHO Decision at p. 13; Tr. pp. 575-78). The IHO, however, mistakenly equated the student's experience in an ICT setting as a regular education student with the recommendation that he be the recipient of the ICT services (see IHO Decision at p. 13). The CSE's recommendation afforded the student a service for which he would have been "intentionally grouped together [with other students] based on similarity of need for the purpose of receiving specially designed instruction in a general education class . . . [where the] general education teacher and a special education teacher share[d] responsibility for the delivery of primary instruction, planning[,] and evaluation" to the student (see "Continuum of Special Education Services for School-Age Students with Disabilities," Office of Special Education, at pp. 14-15 [rev. Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>). Thus, the June 2013 CSE's recommendation of ICT services afforded the student a "supplementary aid and service" that was not available to the student during the 2012-13 school year (see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 145 [2d Cir. 2013]).

The hearing record reflects that the student demonstrated difficulties with language processing, attention, and fine and gross motor skills (see generally Dist. Exs. 16-18; Parent Exs. C; D; F; L; Q). Diagnostic impressions of the student included an attention deficit hyperactivity disorder (ADHD), combined type, and an anxiety disorder, not otherwise specified, as well as to rule out a social communication disorder, an autism spectrum disorder, and a developmental coordination disorder (Parent Ex. C at p. 11). The evidence in the hearing record demonstrates that ICT services provided though the student's individually designe IEP would appropriately address the student's strengths and deficits (see Dist. Ex. 30 at pp. 1-9). For example, consistent with the evaluative information before the CSE, the June 2013 IEP present levels of performance reflected, among other things, that the student demonstrated overall average to high average academic and cognitive skills (id. at pp. 1-3). Indeed, despite the student's struggles with reading during the 2012-13 school year, the June 2013 IEP reported results of standardized testing showing that the student achieved high average scores in the area of reading (id. at pp. 1-3; see Dist. Ex. 17 at pp. 3-4; see also Parent Ex. C at p. 5). The June 2013 IEP also indicated that the student exhibited delays with attention, distractibility and impulsivity, and visual spatial skills, but that he benefitted from instructional strategies, such as sentence starters, prompting, and redirection (Dist. Ex. 30 at pp. 3-9). In addition, the classroom observations conducted by the district reflected that the student was able to work attentively during the 2012-13 school year in a general education classroom either independently or with teacher reminders or prompts (see Parent Ex. L at pp. 1-2).

The June 2013 IEP also included the following strategies and accommodations to address the student's delays and management needs: preferential seating, frequent positive reinforcement, extrinsic reinforcement as a motivator, repeated review of academic content, frequent verbal and nonverbal redirection to ensure attention to task, extra time to complete writing assignments, reminders to slow down and check work, a structured class, personal conversations for behavioral

reminders, sentence starters for oral and written responses, tasks broken down into steps to help with task completion, reward systems and consistent consequence systems, frequent verbal and nonverbal reminders of expectations, opportunities to work in small differentiated groups within the classroom, silent signals to remove opportunities for talking and getting out of seat, graphic organizers to help with organization of writing and reading responses, kinesthetic movements and visual aids to support all auditory material, opportunities to work on fine motor skills during choice time, lines broadened with a thick black marker to be cut, and beginning writing lessons with warm-up stretches (Dist. Ex. 30 at p. 9).

According to the June 2013 IEP, the CSE considered and rejected a general education class placement with related services only or with special education teacher support services (SETSS), as well as a 12:1+1 special class in a community school (Dist. Ex. 30 at pp. 15-16). The IEP indicates that related services only were rejected as the CSE determined that the student did not require speech-language therapy or OT, as discussed below (*id.* at p. 15). The June 2012 CSE declined to recommend SETSS because the student "present[ed] with attentional weaknesses within the classroom," such that the support of a special education teacher throughout the school day was warranted (*id.* at p. 16). Next, the CSE determined that a special class was too restrictive for the student, as the student should have access to nondisabled peers, exhibited "mild-moderate" attentional needs, and "d[id] not present with any severe deficits in the classroom" (*id.*). Finally, the IEP indicated that the CSE declined the request of the parent advocate for a deferral to the central based support team (CBST) for a nonpublic school placement on similar grounds (*id.*).

Given the student's cognitive and academic strengths, and the supports included in the June 2013 IEP to address his deficits, the hearing record supports a finding that the June 2013 CSE's recommendation for ICT services was reasonably calculated to enable the student to receive educational benefit (Dist. Ex. 30 at p. 9). However, given the determination that the district failed to offer the student a FAPE for the 2013-14 school year based on its failure to recommend speech-language therapy and OT services for the student, I will proceed to consider whether any of the relief now sought by the parent is appropriate to redress those deficiencies.

## **D. Relief**

### **1. Prospective Placement**

Turning to the question of whether the parent is entitled to the relief sought in this case, the parent first argues that the IHO erred in finding that her request for a nonpublic school placement for the 2013-14 school year was moot because the 2013-14 school year had passed (see IHO Decision at p. 16). It is well settled that the dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin, 583 F. Supp. 2d at 428; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at \*3-\*4 [W.D.N.Y. Sept. 30, 2008]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of

the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; M.S. v. New York City Dep't of Educ., 734 F.Supp.2d 271, 280-81 [E.D.N.Y. 2010]). Here, due to the expiration of the 2013-14 school year, the IHO correctly found that, to the extent that the parent's request for placement of the student within a State-approved nonpublic school related to the 2013-14 school year was no longer a real and live controversy.

In addition, to the extent that the parent requested that the district fund the costs of a future placement of the student in a nonpublic school, this form of relief could only be properly characterized as an unrealized prospective unilateral placement. Such relief in the form of an order directing a district to pay for a student's placement at a private school, is available only "where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for a placement in a public school was inappropriate" (see Burlington, 471 U.S. at 369-70), which, as the IHO observed, could not be established where the parent did not identify any particular nonpublic school (see IHO Decision at p. 16).

Furthermore, when determining an appropriate placement on the educational continuum, a CSE should first determine the extent to which the student can be educated with nondisabled peers in a public school setting before considering a considerably more restrictive nonpublic school option (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*15 [E.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"). Thus, a directive to prospectively require placement of a student in a nonpublic school unnecessarily runs roughshod over the important statutory purpose of attempting, whenever possible, to have disabled students meaningfully access the public school system each year by first attempting placement in a public school with their nondisabled peers (see Cooke Center for Learning and Dev. v. Mills, 19 A.D.3d 834, 836 [3rd Dep't 2005] [finding that "federal law prefers a 'public' education, where a 'child is educated in the school that he or she would attend if nondisabled,' if possible"]; Matter of Pelose, 66 A.D.3d 1342, 1344 [4th Dep't 2009] [noting that the "central purpose of the IDEA . . . and article 89 of the Education Law is to afford a 'public' education for children with disabilities"]). Moreover, the discussion of the student's needs, as previously indicated, do not suggest that removal from the public school was warranted at the time of the June 2012 CSE meeting in order to offer the student a FAPE (see Application of the Dep't of Educ., Appeal No. 13-082; Application of the Dep't of Educ., Appeal No. 12-157). As such, prospective placement relief would not be appropriate under the circumstances of this case.

## **2. Additional Services**

Next, the parent challenges the IHO's denial of her request for a reading specialist to provide tutoring services to the student. As an initial matter, to the extent the IHO also found the

parent's request for additional service to be moot (see IHO Decision at p. 16), it is generally accepted that a claim for compensatory education or additional services presents a live controversy (Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*15 [E.D.N.Y. Oct. 30, 2008]; see Lesesne v. Dist. of Columbia, 447 F.3d 828, 833 [D.C. Cir. 2006]; Lillbask, 397 F.3d at 89-90; Sch. Admin. Dist. No. 35 v. Mr. & Mrs. R., 321 F.3d 9, 17-18 [1st Cir. 2003]; Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769, 774 [8th Cir. 2001]; Fullmore v. Dist of Columbia, 40 F. Supp. 3d 174, 178-79 [D.D.C. 2014]).

The IHO also noted that the parent did not specifically request compensatory additional services in the form of tutoring (see IHO Decision at p. 16 n.3). In her amended due process complaint notice, the parent did request tutoring in reading, counseling, and cognitive behavioral therapy services for the student at district expense (Parent Ex. A at pp. 4).<sup>15</sup> I find that this was sufficient to put the district on notice that the parent sought compensatory additional services as a form of relief in this matter.

Thus, turning to the merits of this particular form of relief, 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, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X, 2008 WL 4890440, at \*23 [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. Mar. 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

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<sup>15</sup> At the prehearing conference, in response to the IHO's inquiry about the relief sought by the parent, the parent's attorney did not specify a request for compensatory additional services (see Tr. pp. 5-6; see also Prehearing Conference Summary). However, the parent's amended due process complaint notice postdated the prehearing conference and, as the original due process complaint notice was not entered into evidence at the impartial hearing, it is unclear whether or not relief in the form of tutoring, counseling, or cognitive behavioral therapy was added to the requested relief (see Tr. p. 1; Parent Ex. A at pp. 1, 4). Subsequently, in response to the IHO's inquiry during the parent's closing statement, the parent's attorney indicated that the parent was requesting an award of tutoring with a reading specialist, whether such service be provided by the Huntington Learning Center or by a reading specialist using Orton-Gillingham or Lindamood-Bell methodologies, as specified in the amended due process complaint notice (Tr. pp. 781-83; Parent Ex. A at p. 4).



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 compensatory educational services or 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).

In this instance, as described above, the district's denial of a FAPE for the student's 2013-14 school year related to the June 2013 CSE's determination not to recommend speech-language therapy or OT in the student's IEP. However, the relief sought by the parent does not relate to the district's violation of the IDEA (see 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"]). Thus, the

recommendation offered by the Huntington Learning Center that the student receive 10 hours of tutoring per week for 16 weeks does not offer the speech-language and OT services that the June 2012 CSE should have recommended for the student (see Parent Ex. X at p. 3). Similarly, the requested counseling and cognitive behavioral therapy do not relate to the district's violations of the IDEA. The parent does not advance an argument seeking additional services in the form of speech-language services or OT services, choosing instead to focus relief efforts on nonpublic schooling and academic tutoring, and I am hard pressed to begin constructing such an argument on the parent's behalf at this late stage of the administrative proceedings. Constructing an argument would also be a problematic approach insofar as the district would lack any meaningful opportunity to respond. However, I will direct the CSE to reconvene to consider any lack of speech-language therapy and OT services on the student's IEP and revise the student's current IEP accordingly. Accordingly, I can find little basis to modify the IHO's ultimate determination declining to award the parent relief in the form of compensatory additional services, albeit on different grounds.

## **VII. Conclusion**

In sum, while the hearing record does not support a finding that the district violated its child find obligations during the 2012-13 school year, the district failed to sustain its burden to establish that it offered the student a FAPE for the 2013-14 school year. However, the hearing record did not support an award of relief to the parent in the form of prospective placement of the student in a nonpublic school or additional services in the areas of reading, counseling, or cognitive behavioral therapy. Instead, appropriate relief in this instance is to direct the district to reconvene and address the procedural deficiencies. In view of the foregoing, the parties' remaining contentions need not be addressed.

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

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

**IT IS ORDERED** that the IHO's decision, dated December 1, 2014, is modified, by reversing those portions that found that the district violated its child find obligations and denied the student a FAPE for the 2012-13 school year.

**IT IS FURTHER ORDERED** that the district shall consider whether or not it would be appropriate to conduct any evaluations requested by the parent to assess the student's special education needs and, after due consideration, provide the parent with prior written notice describing, if applicable, its reasons for concluding that additional evaluative data of the student was unnecessary.

**IT IS FURTHER ORDERED** that, unless the parties otherwise agree, the CSE shall reconvene within 20 days of the date of this decision to consider all evaluative information about the student, including the August 2013 private PT and OT evaluations, to develop an appropriate educational program for the student which includes appropriate related service recommendations consistent with this decision.

**Dated:**            **Albany, New York**  
                         **May 29, 2015**

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