The University of the State of New York

The State Education Department
State Review Officer
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No. 16-048

Application of a STUDENT WITH A DISABILITY, by her 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:
Law Office of Erika L. Hartley, attorneys for petitioner, Erika L. Hartley, Esq., of counsel

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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 those parts of a decision of an impartial hearing officer (IHO) which found that the student was not eligible for special education during the 2013-14 and 2014-15 school years, and denied in part the parent's request for relief. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

At the time of the hearing, the student was enrolled in the second grade in a charter school (Tr. pp. 231, 320, 518, 549). The parent testified that she received daily complaints from the student's teacher about the student's distractibility and out-of-seat behavior beginning in the 2013-14 school year, when the student was in kindergarten at the charter school (Tr. pp. 518-522). According to the parent, she began contacting the charter school in December 2013, to request that her daughter be referred to the CSE as a result of teacher reports that the parent had received regarding the student's behavior (Tr. pp. 520-24; see Parent Ex. GG). According to the district, the CSE first received a referral on February 22, 2014, which the district responded to by letter dated March 7, 2014 (Parent Exs. M; P; see Tr. pp. 102-04, 148-49).

The hearing record reflects that the district did not evaluate the student until June 18, 2014, due to scheduling conflicts and miscommunication between the parties (Tr. pp. 148-50, 154-55, 411-12, 524-29; Dist. Exs. 4 at p. 1; 5; Parent Exs. N at p. 1; U; Y at pp. 5-7; HH at p. 1; KK; LL).[1] On June 18, 2014, the parent and the student appeared for the evaluation, at which time the district completed a social history and conducted a psychoeducational evaluation of the student (Dist. Exs. 4-5; Parent Exs. KK; LL). A document dated July 23, 2014 and entitled "Classroom Observation" noted "[s]chool not in session; no opportunity to observe" (Dist. Ex. 3).[2]

The hearing record indicates that a CSE convened on July 25, 2014, and determined that the student was not eligible for special education services (Parent Exs. J; K). In response to the CSE's determination, the parent notified the CSE, by letter dated July 25, 2014, that she disagreed with its findings and requested that the CSE reconvene (Parent Ex. N at p. 3). By prior written notice dated July 28, 2014, the CSE informed the parent of its reasons for finding the student ineligible (Parent Ex. S at p. 1).[3]

Copies of correspondence in the hearing record dated September 2014 reveal that the parent requested that the CSE reconvene, but did not respond to scheduling requests from district staff (Parent Ex. SS). By letter dated September 30, 2014, the charter school's special education coordinator requested that the parent contact her if she still desired the CSE to reconvene (Parent Ex. QQ). By letter dated October 13, 2014, the parent replied to the charter school special education coordinator by repeating her disagreement with the CSE's determination that the student was not eligible for special education services and her request for independent evaluations at district expense (Parent Ex. O).

On November 6, 2014, a CSE reconvened to discuss the student's eligibility (Dist. Exs. 1-2). The November 2014 CSE continued to find that the student was not eligible for special education services (Dist. Exs. 1-2; Parent Ex. XX at p. 3). By prior written notice dated November 6, 2014, the parent was notified that the CSE determined the student was not eligible (Parent Ex. T).[4] According to the prior written notice, the CSE considered obtaining additional evaluations, but determined that they were unnecessary because the student was "functioning at or above grade level academically" and did not demonstrate deficits in any of the areas in which the parent requested evaluations (id.). The CSE determined not to provide the student with "[f]ormal

[1] The hearing record contains multiple duplicative exhibits (compare Parent Ex. B, with Dist. Ex. 7, Parent Ex. J, with Parent Ex. JJ, Parent Ex. U, with Parent Ex. HH at p. 2, and Parent Ex. K, with Parent Ex. MM). For purposes of this decision, only one parent exhibit was cited in instances where multiple identical copies of an exhibit were entered into evidence. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[2] The district is reminded that State regulation requires that an initial evaluation include an observation of the student in the student's learning environment (8 NYCRR 200.4[b][1][i], [iv]). It appears that this requirement was not met by the district in this case (see Tr. pp. 186, 544; Dist. Ex. 3).

[3] The prior written notice incorrectly indicated that the CSE meeting was held on June 21, 2014 (Parent Ex. S). A letter from the district to the parent also indicating that the student was not eligible for special education services correctly indicated that the CSE meeting was held on July 2, 2014, but was incorrectly dated June 21, 2014 (see Parent Ex. J).

[4] The November 2014 prior written notice did not document that the CSE reconvened and continued to incorrectly indicate that the CSE met in June 2014 (Parent Ex. T).

counseling" because her behaviors were described as "typical for her age"; however, the student's charter school agreed to provide her with "informal school counseling" (id.).

The hearing record reflects that between October 2014 and April 2015, the parent privately obtained a comprehensive eye examination, a neuropsychological evaluation, a sensorimotor eye examination, and a speech, language, voice, communication and/or auditory and processing evaluation (speech-language evaluation) (Parent Exs. A; B; E; F).

The hearing record also includes a document entitled "Behavior Log," which documents the student's behavior as well as school communication with the parent from January 2015 through April 2015 (Parent Ex. DD). According to this log, the December 2014 neuropsychological evaluation was provided to the charter school in March 2015, and the charter school subsequently shared the evaluation with the CSE (id.). The log also documents a charter school team meeting attended by both the student's parent and grandparent on April 30, 2015 (id.). The entry indicates that the charter school staff reiterated the CSEs' determinations that the student was not eligible for special education services and advised the parent and grandparent that any reconsideration needed to be addressed through the CSE (id.). The charter school staff informed the parent and grandparent that they were providing supports and services to the student "as if she was classified" including the student being in an integrated co-teaching (ICT)[5] classroom and receiving counseling support (id.).

A. Due Process Complaint Notice

By amended due process complaint notice dated August 28, 2015, the parent alleged that the district failed to offer the student a FAPE for the 2013-14, 2014-15, and 2015-16 school years (IHO Ex. II).[6] The parent asserted that the district failed to evaluate the student and wrongfully determined that the student was not eligible for special education and related services (id. at pp. 1-3). As relief, the parent sought determinations that the district violated its child find obligation and denied the student a FAPE (id. at p. 3). The parent also requested compensatory speech-language services, tutoring, a number of educational evaluations, and for the student to be placed in a nonpublic school (id.).

B. Partial Resolution

According to the evidence in the hearing record, the parent and the district entered into a resolution agreement on August 26, 2015 (IHO Ex. IV). Pursuant to the resolution agreement, the district agreed to fund several educational evaluations including a speech-language evaluation, an occupational therapy (OT) evaluation, an audiological evaluation, a central auditory processing evaluation, and a visual perceptual processing evaluation (id. at p. 1). The agreement also indicated that it constituted a "partial resolution of claims" included in the parent's due process complaint notice (id. at p. 2).

[5] ICT services means the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students (8 NYCRR 200.6[g][1]-[3]). An ICT classroom must minimally include a special education teacher and a general education teacher (8 NYCRR 200.6[g][2]).

[6] The parent initially filed a due process complaint notice dated July 3, 2015 (IHO Ex. I).

C. Impartial Hearing Officer Decision

After a prehearing conference held on October 14, 2015, the parties proceeded to an impartial hearing on December 3, 2015, which concluded on May 2, 2016, after seven days of proceedings (see Tr. pp. 1-621). In a decision dated June 7, 2016, the IHO determined that while the district committed several procedural errors in both the 2013-14 and 2014-15 school years, the errors did not rise to the level of a denial of a FAPE as the record did not indicate that the student required special education services in either year (IHO Decision at pp. 14-16).[7] The IHO found that the student performed well academically and that the charter school appropriately addressed the student's needs with general education supports (id.). The IHO then determined that the student should have been found eligible for special education services as a student with an other health-impairment before the beginning of the 2015-16 school year (id. at p. 16). The IHO found that the district failed to offer the student a FAPE for the 2015-16 school year and awarded the student 36 hours of speech-language therapy as compensatory education services (id. at pp. 16-18). The IHO further ordered the district to conduct a classroom observation by the end of the 2015-16 school year; reconvene the CSE upon receipt of an updated neuropsychological evaluation, or if the evaluation is not complete to conduct "such additional tests as it may require" and reconvene by August 15, 2016; and to have the CSE classify the student as other health-impaired and develop an IEP that includes speech-language therapy as well as OT and counseling as related services (id. at p. 18). The IHO further ordered the district to consider whether or not the student required a behavioral intervention plan (id.). In addition, the IHO directed the district to consider whether the student required a full time special education program including a possible referral for a nonpublic school placement, but found that the hearing record did not indicate the student required such a placement (id. at pp. 17-18).

IV. Appeal for State-Level Review

The parent appeals alleging that the IHO erred by failing to find that the district denied the student a FAPE for the 2013-14, 2014-15, and 2015-16 school years.[8] In particular, the parent alleges that the district failed to conduct sufficiently comprehensive evaluations to identify all of the student's special education needs. Further, the parent contends that her privately-obtained evaluations indicated that the student had deficits in a number of areas, such that the district's failure to timely conduct evaluations denied the student a FAPE. The parent also alleges that the IHO made several factual errors and requests that certain erroneous findings of fact be annulled and amended to correctly reflect the hearing record. The parent further challenges the IHO's finding that an updated neuropsychological evaluation was required before the CSE convened to develop a program for the student. The parent also contends that the IHO erred by failing to award OT despite determining that the student required OT to address her deficits. As relief, the parent requests a determination that the student was denied a FAPE for the 2013-14, 2014-15, and 2015-

[7] The decision, in an apparent typographical error, references the 2012-13 school year (IHO Decision at p. 14).

[8] Although the IHO did not explicitly hold that the district denied the student a FAPE for the 2015-16 school years, she found that the student should have been found eligible for special education services prior to the beginning of the school year, referenced Second Circuit precedent that an IHO may award compensatory education as a remedy for a denial of a FAPE, and awarded compensatory speech-language therapy services (IHO Decision at pp. 16-18). In context, the IHO appears to have found that the district failed to offer the student a FAPE for the 2015-16 school year.

16 school years, annulment of the IHO's finding that the student's neuropsychological testing needed to be updated, amendment of the IHO's findings of facts and an award of OT as a related service.

In an answer, the district responds to the parent's allegations with admissions and denials and argues that the IHO's decision should be upheld. The district contends that the parent's request for compensatory OT services is raised for the first time on appeal and should be denied.[9] Attached to the answer is a copy of an IEP dated August 15, 2016.[10]

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

[9] In its answer, the district proposes alternative types of relief that it contends would appropriately remedy any denial of a FAPE.

[10] The district does not request that I consider the IEP as additional evidence, and the parent specifically objects to its consideration by letter addressed to the Office of State Review. Counsel for the parent is reminded that the appropriate vehicle to respond to additional documentary evidence served with the answer is a reply, served and filed in accordance with State regulations, rather than through a letter addressed to the Office of State Review after the time to reply has expired (8 NYCRR 279.6). In any event, as the IEP is not relevant to any of the matters at issue in this appeal it has not been accepted as additional evidence and has not been considered in rendering this decision.

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]).

Except for in circumstances not applicable here, the burden of proof is on the school district during an impartial hearing (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Matters—Scope of Review

In view of the relief requested by the parent and the parties' partial resolution agreement, only a certain subset of issues raised in the parent's amended due process complaint notice remain to be addressed in this appeal. In her amended due process complaint notice, the parent alleged that the district failed to offer the student a FAPE for the 2013-14, 2014-15, and 2015-16 school years, requested several educational evaluations, and declaratory relief. On appeal, the parent alleges that the district violated its child find obligations, failed to timely evaluate the student, and wrongly determined that the student was not eligible for special education and related services, challenges specific factual findings made by the IHO, and alleges that the IHO erred by failing to award OT as a related service.

1. Resolution Agreement

As noted above, the parent and the district entered into a partial resolution agreement (IHO Ex. IV at p. 2). Pursuant to the agreement, the district agreed to fund five educational evaluations (id. at p. 1). According to the IDEA, the "purpose of the [resolution] meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the [district] has the opportunity to resolve the dispute that is the basis for the due process complaint" (20 U.S.C. § 1415[f][1][B][i][IV]; 34 CFR 300.510[a][2]; 8 NYCRR 200.5[j][2][i]). Applying this to the present case, I agree with the IHO that the parent's requests for the student to be evaluated must be deemed resolved. Furthermore, the parent's additional claims that derive from the district's original failure to timely evaluate the student, as well as the district's actions and inactions relative to the parent's request for additional evaluations and IEEs must also be deemed resolved.

The hearing record reflects that the parent's failure to evaluate claims are based on a dispute about timely initial evaluation, sufficiency of the initial evaluation, and the parent's requests for additional evaluations. The parent does not allege that the district failed to conduct an initial evaluation of the student. To the contrary, the district completed a psychoeducational evaluation and social history (Dist. Exs. 4-5; see 8 NYCRR 200.4[b][1][i]-[v]). Rather, the parent alleges that the district did not timely evaluate the student or obtain sufficient information about the student in all areas of suspected disability or sufficiently determine why the student was experiencing difficulty in school. Thus, the parent alleges that the district's failure to timely evaluate the student or conduct the additional assessments she requested as part of the student's initial evaluation amounted to a denial of a FAPE.

Accordingly, given that the parent's claims relating to her dissatisfaction with the results of the initial evaluation process followed in this case were resolved by the partial resolution agreement, there was no reason to resolve them further through the impartial hearing process (see R.E., 694 F.3d at 188). Thus, any inadequacies of the district's original evaluation of the student

and/or its failure to respond to the parent's request for IEEs were also resolved and the parent's claims related to untimely and inadequate initial evaluation of the student are dismissed.

2. Compensatory OT Services

For the first time on appeal, the parent requests an award of compensatory OT services.[11] A complaining party may not raise issues at the impartial hearing or for the first time on appeal that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]). The parent's amended due process complaint notice cannot reasonably be read to include this request and it in fact limited her request for compensatory relief to tutoring and speech-language therapy services (see IHO Ex. II). Further, a review of the hearing record shows that the district did not agree to an expansion of the scope of the impartial hearing to include these issues, nor did the parent attempt to further amend her due process complaint notice to include this request for relief and this request is therefore outside the scope of review.

The parent contends on appeal that the IHO should have awarded compensatory OT services because OT services were recommended in an OT evaluation report completed during the hearing in March 2016. The parent's amended due process complaint notice did include a request for an OT evaluation and the evaluation was completed during the course of the hearing (IHO Ex. II at p. 3; see Parent Ex. BB). However, after completion of the evaluation, the parent neither requested an amendment of the due process complaint notice to include a request for compensatory OT services nor requested compensatory OT services as relief in her post-hearing brief (IHO Ex. XV at pp. 27-29). Under these circumstances—where there was no request made for compensatory OT services—there is no reason to disturb the IHO's decision not to award this particular relief.

3. Other Relief Requested

The parent's remaining requests do not present any cognizable claims for relief, and it is therefore unnecessary to address them on the merits. Despite the parent's assertion to the contrary, the IHO found that the district denied the student a FAPE for the 2015-16 school year (see IHO Decision at pp. 16-18). Additionally, with regard to the parent's claims of factual errors and that the IHO erred in determining that an additional neuropsychological evaluation should be conducted, the parent's claims misstate both the hearing record and the IHO's findings of fact and decision on the matter.

The IHO found that the district failed to offer the student a FAPE for the 2015-16 school year and awarded the student 36 hours of speech-language therapy as compensatory education services (IHO Decision at pp. 16-18). Given that the IHO determined that the student should have

[11] The parent does not use the term "compensatory OT services" in her petition and simply asserts "[t]he IHO should have rendered an award of OT" (Pet. ¶65). However, the IHO did award OT services, as the IHO directed the CSE to reconvene and recommend OT services on a going-forward basis "in an amount to be determined by the CSE" (IHO Decision at p. 18). Therefore, the parent's request for an award of OT services on appeal is read as a request for compensatory OT services.

been classified as a student with an other health-impairment no later than the beginning of the 2015-16 school year, and the district has not cross-appealed that determination, it is final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).[12]

To the extent that the parent challenges the IHO's findings relative to the 2015-16 school year, the IHO found a denial of FAPE for that period of time and the parent is not seeking relief for that period of time in addition to what has already been awarded by the IHO, accordingly the parent has not been "aggrieved" by the IHO's decision relative to the 2015-16 school year (J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9-*10 [S.D.N.Y. Nov. 27, 2012] [concluding that there was no adverse finding, and therefore under the circumstances of that case, the parents were not aggrieved by the IHO's failure to decide an issue]; see also D.N. v. New York City Dep't of Educ., 905 F.Supp.2d 582, 588 [S.D.N.Y. 2012] [holding that the parent obtained all the relief she sought and therefore was not aggrieved]). Additionally, the parent's claims regarding the alleged factual inaccuracies in the IHO's decision or whether the student's 2014 neuropsychological evaluation should be updated did not result in any adverse findings. In particular, as noted above the IHO found that the CSE should consider any update to the privately-obtained neuropsychological evaluation or, if not provided to the district, the CSE should conduct "such additional tests as it may require" (IHO Decision at pp. 17-18). The IHO did not specifically direct that the district obtain a new neuropsychological evaluation, and as such, there is no basis to disturb the IHO's decision as requested by the parent. Therefore, those claims are also dismissed. Finally, although the parent is not seeking relief within the scope of the hearing based on her claims that the student should have been classified during the 2013-14 and 2014-15 school years, the parent's claims relative to those years are discussed below.

B. Eligibility for Special Education Services

For the 2013-14 and 2014-15 school years, the IHO determined that the district did not deny the student a FAPE. Initially, as discussed above, the parent requests no relief related to the purported denials of a FAPE for the 2013-14 and 2014-15 school years. Accordingly, while my reasoning may differ from the IHO's in some respects, there is no reason appearing in the hearing record to depart from the IHO's ultimate determination that the student was not denied a FAPE during the 2013-14 and 2014-15 school years.

By letter dated December 10, 2013, the parent notified the principal of the student's charter school that the student was undergoing a neuropsychological evaluation following complaints from the student's kindergarten teacher that the student was easily distracted, unable to focus, and very fidgety during class (see Tr. pp. 519-24; Parent Ex. GG). The parent requested that the

[12] Additionally, neither party appeals from the IHO's determination that the district failed to offer the student a FAPE for the 2015-16 school year or her orders awarding the student 36 hours of speech-language therapy, directing the district to conduct a classroom observation by the end of the 2015-16 school year; directing the CSE to reconvene before August 15, 2016; directing the CSE to develop an IEP that includes speech-language therapy as well as OT and counseling as related services; directing the district to consider whether or not the student required a behavioral intervention plan; and directing the district to consider whether the student required a full time special education program including a possible referral for a nonpublic school placement. Accordingly, these issues are final and binding on the parties and will not be reviewed on appeal (8 NYCRR 200.5[k], 279.4[a]; see also 34 CFR 300.514[b]).

principal "refer this letter to the school assessment in order to assist with other needed evaluations" (Parent Ex. GG).

According to the parent, she was told by personnel from the charter school that she needed to request an initial evaluation directly from the district (Tr. pp. 523-24). The hearing record includes a letter dated January 2, 2014, wherein the parent thanked a charter school staff member for replying to her initial request for evaluation (Parent Ex. M).[13] The parent stated that it was the charter school's obligation to forward her request to the CSE; however, she agreed to forward a copy of her December 2013 correspondence to the CSE herself (id.). The parent further requested that all communication regarding the student be shared with her advocate (id.).[14] Lastly, the parent requested that the privately-obtained neuropsychological evaluation be at public expense (id.).

By letter dated March 7, 2014, the district responded to the parent's initial request for evaluation and scheduled a meeting for the parent and a district school social worker to review the parent's due process rights and the evaluation process, and to complete a social history (Parent Ex. P). The parent requested that the meeting be rescheduled, and an April 2, 2014 letter from the district rescheduled the meeting for June 9, 2014 (Tr. pp. 524-26; Parent Ex. HH at p. 1). According to the parent, when she arrived for the June 9, 2014 meeting, she was informed that the student needed to be present, which was not indicated in the letter scheduling the meeting (Tr. pp. 526-27; see Parent Ex. HH at p. 1). The parent testified that she provided written consent for the district to evaluate the student, but that the district school psychologist "ripped up" the signed consent, indicating that the parent could sign a new consent form at the next scheduled appointment (Tr. pp. 527-29). By letter dated June 10, 2014, the parent wrote to the CSE and recounted her experience appearing for the social history on June 9, 2014, and requested that independent evaluations be conducted at district expense (Parent Ex. N at pp. 1-2). A letter dated June 11, 2014, rescheduled the appointment for June 18, 2014, and included a handwritten note requesting that the parent bring the student for an evaluation (Parent Ex. U).

On June 18, 2014, the parent and the student attended the scheduled appointment with the CSE, whereupon the parent signed a request for release of records and a consent to evaluate the student, and the district obtained a social history from the parent and conducted a psychoeducational evaluation of the student (Dist. Exs. 4-5; Parent Exs. KK; LL). According to the June 2014 psychoeducational evaluation report, the student's overall cognitive functioning was in the superior range of intelligence (Dist. Ex. 5 at p. 4). Academic testing revealed that the student was functioning at or above grade level and had "amassed all readiness skills necessary for first grade" (id.). The evaluator described the student as pleasant, easily engaged, sociable, and agreeable in nature (id.). The June 18, 2014 social history included information about the student's medical, developmental, health, family, and educational history, as well as information specific to the student's behavior at home and personal interests (Dist. Ex. 4). In addition, the social history indicated that recent audiological testing revealed the student had fluid in "the ear related to congestion" (id. at p. 2).

[13] Parent Ex. M includes handwritten notations that the letter was "[r]eceived Feb 22/2014" and was "not addressed to CSE" (Parent Ex. M). The district social worker testified that she received notice of the parent's initial request for evaluation on February 22, 2014 (Tr. p. 148).

[14] The hearing record reflects that the student's advocate was also the student's grandparent (Tr. pp. 401-02).

The CSE did not convene to review the evaluative information obtained in June 2014 prior to the conclusion of the 2013-14 school year. Considering the facts related to the 2013-14 school year in the light most favorable to the parent, the process by which the student was referred for initial evaluation was not seamless. The charter school principal incorrectly advised the parent that it was her responsibility to request an initial evaluation from the district's CSE. State regulation expressly provides that a referral for an initial evaluation of a student suspected of having a disability may be made by the student's parent in writing to the building administrator of the school which the student attends (8 NYCRR 200.4[a]; see 34 CFR 300.301[b]). The referral is required to "immediately" be forwarded to the CSE chairperson (8 NYCRR 200.4[a][4]). Upon receipt of a referral, defined as the earlier of the date that the referral is received by the building administrator or the CSE chairperson (8 NYCRR 200.4[a][3]), the district is required to "make reasonable efforts" to obtain the parent's informed consent (34 CFR 300.300[a][1][iii]). The parent contends that she sent an initial referral to the student's charter school on December 10, 2013, and sent it to the CSE on January 2, 2014 (Tr. pp. 414, 523-24; Parent Exs. M; GG). The hearing record reflects that the CSE received the parent's request in February 2014 (Parent Ex. M; see Tr. pp. 102-03, 148-49).[15] The parent has not challenged the district's purported date of receipt. However, assuming that the district's response dated March 7, 2014 was not timely the district met its obligation to evaluate the student when the district conducted an evaluation of the student in June 2014 (see J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 661 [S.D.N.Y. 2011], quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]).[16]

Concerning the 2014-15 school year, the IHO found that the CSE failed to conduct a classroom observation of the student, the student had received a diagnosis of attention deficit hyperactivity disorder (ADHD) and exhibited a mild receptive language delay, and that the CSE should have reconvened after April 30, 2015 (IHO Decision at pp. 15-16). However, the IHO determined that the hearing record did not support a finding that the student was eligible for classification during the 2014-15 school year and the charter school appropriately addressed the student's needs with general education supports (id. at p. 16).

The prior written notice documents sent to the parent do not indicate if specific classifications were discussed by the CSE but reflect that the CSE determined that the student did not have a disability. The parent argues that the student should have been classified as a student with an other health-impairment during the 2014-15 school year.

The IDEA defines a "child with a disability" as a child with specific physical, mental, or emotional conditions, including a learning disability, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1]). Under State and federal regulation, other health-impairment is defined as "having limited strength, vitality, or

[15] The parent's letter dated January 2, 2014 has a handwritten notation that it was received on February 22, 2014; however, February 22, 2014 was a Saturday.

[16] An initial evaluation must be conducted within 60 days from the date the district obtains parental consent unless extended by mutual agreement of the parents and the CSE (34 CFR 300.301[c][1][i]; 8 NYCRR 200.4[b][1]). As the district conducted its evaluation of the student in June 2014, even if parental consent should have been obtained earlier, the district was within or close to being within the applicable timelines.

alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that . . . [i]s due to chronic or acute health problems such as . . . attention deficit hyperactivity disorder [ADHD]" (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]). The other health-impairment category also requires an examination of whether the student's condition or deficits adversely affected her educational performance (see 34 CFR 300.8[c][9][ii]; 8 NYCRR 200.1[zz][10]). Whether a student's condition adversely affects his or her educational performance such that the student needs special education within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlet Sch Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 944 [9th Cir. 2007]; Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; see Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 297-98 [S.D.N.Y. 2010] [emphasizing that educational performance is focused on academic performance rather than social development or integration]; see also C.B. v. Dep't of Educ., 322 Fed. App'x 20, 21-22 [2d Cir. April 7, 2009]; Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; W.G. v. New York City Dep't of Educ., 801 F. Supp. 2d 142, 170-75 [S.D.N.Y. 2011] [finding insufficient evidence that the student's "academic problems—which manifested chiefly as truancy, defiance and refusal to learn—were the product of depression or any similar emotional condition"]; A.J. v. Bd. of Educ., 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. 2010] [noting the difficulty of interpretation of the phrase "educational performance" and that it must be "assessed by reference to academic performance which appears to be the principal, if not only, guiding factor"]; Eschenasy v. New York City Dep't of Educ., 604 F. Supp. 2d 639, 649-50 [S.D.N.Y. 2009]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], aff'd, 300 Fed. App'x 11 [2d Cir. Nov. 12, 2008]; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 399).

As indicated above, the district did not complete a classroom observation of the student. The CSE convened on July 25, 2014 to consider the student's eligibility for special education and related services. The parent participated by telephone without copies of any available reports (Tr. pp. 532, 535; Parent Ex. K). The hearing record indicates that information considered by the CSE included the June 18, 2014 psychoeducational evaluation report, a social history, medical information, and behavioral reports the parent had received from the student's teacher (Parent Exs. K at pp. 1-2; NN). The CSE also reviewed documents that described the student as unfocused and talkative within the classroom, and that the student's academic areas were "on target" (Parent Ex. K at pp. 1-2). The CSE determined that the student did not require additional environmental, human, or material resources at that time and her academic needs could be met in the general education environment (id. at p. 2). The parent testified that she was told over the telephone that the student was not eligible for special education services because her scores did not fall in the range of a student with special needs (Tr. pp. 532-33).

Following the July 25, 2014 CSE meeting, in a letter dated the same day, the parent advised the CSE that she did not agree with the CSE's determination that the student was not eligible for

special education services and requested that the CSE reconvene because of the student's reported difficulty in school (Parent Ex. N at p. 3). The letter included a request for a neuropsychological evaluation at district expense and an evaluation by a behavioral specialist at district expense (id.).

By prior written notice dated July 28, 2014, the parent was formally notified of the result of the July 25, 2014 CSE meeting (Parent Ex. S at p. 1). The notice indicated that after review of the June 2014 social history and psychoeducational evaluation, and classroom evaluation reports, the CSE determined that the student was not eligible for special education services (id.). By letter dated October 13, 2014, the parent advised the charter school special education coordinator that she disagreed with the CSE's determination as the student continued to struggle socially and emotionally during the 2014-15 school year (Parent Ex. O at p. 1). The parent further noted that her request for independent evaluations at district expense remained unanswered (id. at p. 2).

According to the hearing record, the student was enrolled in a first grade classroom providing ICT services at the charter school for the 2014-15 school year (Tr. pp. 231, 234-35, 431-32). In September 2014, the parent began communicating with one of the student's classroom teachers via a behavior notebook (Parent Ex. CC). Entries in the behavior notebook describe the student as having good and bad days and as the school year progressed into November 2014, the student was frequently described as having difficulty focusing and following directions, acting "silly" and "defiant," and having difficulty accepting the consequences of her behavior (Parent Exs. CC at pp. 1-16; XX at pp. 1-3).

A comprehensive eye examination was completed on October 14, 2014, and indicated that the student complained of skipping words when reading and experiencing difficulty tracking (Parent Ex. F at p. 1). The report notes that the student rubbed her eyes when reading and sometimes sat too close to the television (id.). The evaluator recommended that the student undergo a "perceptual evaluation after a skills eval(uation)" (id. at pp. 1, 3).

On November 6, 2014, a district CSE reconvened to discuss the student's eligibility (Tr. pp. 544-46; Parent Ex. XX at p. 3). The hearing record reflects that a classroom observation was not completed and no new evaluations were obtained by or shared with the CSE (id.). One of the student's classroom teachers participated in the meeting and stated that the student did well in class, and did not exhibit behavior that she considered "glaring" or problematic (id.). The student's teacher agreed with the committee that the student did not need special education services (id.). The parent testified that she presented the behavior notebook to the committee, detailing the student's classroom difficulties, which she felt were not being addressed (Tr. pp. 546-47; Parent Ex. CC at pp. 1-4). The November 2014 CSE continued the July 2014 CSE's ineligibility determination, but agreed to consider the student "at-risk" and offered counseling (Tr. pp. 546-47; Parent Exs. X at p. 1; XX at p. 3).

By prior written notice dated November 6, 2014, the parent was notified that the "June 2014" CSE determined the student was ineligible for special education services (Parent Ex. T; see Parent Ex. S). According to the prior written notice, the CSE considered options for related services only, as well as additional evaluations, but rejected all options as unnecessary (Parent Ex. T at p. 1). The "June 2014" CSE also considered and rejected all of the evaluations requested by the parent because the student was functioning at or above grade level and did not demonstrate

deficits in any of the areas requested (Parent Ex. T). The student's charter school agreed to provide her with informal school counseling (id. at p. 2).

According to the December 30, 2014 neuropsychological evaluation report, the student presented as "sweet," "happy," and "well-related"; she displayed no signs of stranger anxiety and approached all tasks willingly and with enthusiasm (Parent Ex. B at p. 6). The evaluation indicates that it was obtained by parental request due to the student's school reporting attention difficulties, trouble with transitions, and behavioral difficulties in the form of refusing teacher directives more often than they would expect of a child the student's age (id. at p. 1). In obtaining the evaluation, the parent sought diagnostic clarification and recommendations for the student (id. at pp. 1, 6).

The December 2014 neuropsychological evaluation report indicates that formal cognitive testing revealed the student's cognitive level was in the very superior range with marked strength in conceptualizing and problem solving visual information and with learning and remembering new information (Parent Ex. B at p. 6). Despite the student's struggles with attention as described below, the report notes the student had a highly developed ability to reason and make associations with new information (id.). The student's verbal knowledge (i.e., vocabulary and articulation of learned information), general factual knowledge, visual processing speed for routine pattern matching, and fine motor control were all above average compared to her chronological peers (id.). Academically, reading skills for decoding, comprehension, and spelling were described as superior (id.). Quantitative knowledge was described as average (id.). The evaluator described the student's attention as "generally good" during 1:1 highly structured tasks (id.). However, the student's attention wandered and excessive motor activity prevented the student from demonstrating her optimal level of performance on tasks where it was not possible to provide a more intensive level of cuing and structuring (id.). The report indicates that consistent with the student's wandering attention, she performed poorly in relation to her overall ability on tasks that involved listening to information and then acting on what she heard or answering questions related to what she heard (id.). The amount of information the student was able to hold at one time was weak, compared to that which would be predicted based on her level of intellect (id.). The evaluation report notes that the evaluator's observations of the student's weak attention, particularly to information she hears, in addition to difficulties with attention and regulating motor activity were consistent with information provided to the evaluator by the parent at the time of the evaluation, and that the student's difficulties described in school were also present in other environments, to some degree (id.).

Overall, the December 2014 neuropsychological evaluation report indicates that given the observation that the student was demonstrating attention problems across multiple environments and that she was experiencing negative consequences due to her attention problems, the evaluator offered a diagnosis of ADHD combined type (Parent Ex. B at p. 6). The report further notes that it was clear that the student liked to move around and was easily bored, while at the same time she excelled cognitively in many areas (id.). The evaluator indicated the student needed an educational setting more appropriate to her cognitive needs (id.). The evaluator recommended the student would benefit from a more interactive teaching environment, with a low student to teacher ratio of no more than 12 students and extra teacher support, in a nonpublic school with similarly gifted students (id. at p. 7). Additional recommendations were for increased time on examinations to address the student's slower processing speed, movement breaks, repetition of directions with the student repeating them back to ensure attention and comprehension, visual instruction prompts,

and early prompts prior to transitions (id.). Additional recommendations were for the student to highlight key words or arithmetic signs to reduce careless errors and insure direction following, use of a checklist that fed into a reward system to teach the student to bring essential supplies home from school, and use of an agenda to track assignments and materials needed in school (id.). Due to the student's increased negative feedback from teachers and because the student was demonstrating more anxiety in school, the evaluator recommended private and in-school counseling (id.). The evaluator also recommended a re-evaluation in 12 to 18 months to monitor the student's academic progress in response to recommendations (id.).

The student did not receive a diagnosis of ADHD until December 30, 2014 (Dist. Ex. 6). The evaluative information available to and considered by the CSE in July 2014 and November 2014 did not indicate that the student's behaviors and difficulty attending interfered with her ability to learn (Parent Exs. J; K; XX). Most notably, the evaluator who ultimately diagnosed the student with ADHD indicated that the student's behaviors that in turn subjected her to negative consequences were caused by her inattention (Parent Ex. B at p. 6). There is nothing in the record to indicate that the student's behaviors impacted her ability to learn. The hearing record also reveals that the parent's primary concern was not the student's ability to learn; rather, the parent objected to the charter school's use of consequences and negative reinforcement when the student behaved inappropriately (Parent Ex. EE at pp. 1-4). The parent expressed concern for the student's self-esteem and emotional well-being, describing the student as feeling sad and not understanding why she was always in trouble (Parent Exs. EE at p. 3-4; TT at pp. 1, 6-7). In January 2015, the student's teachers implemented a sticker incentive chart and communication log to regulate her behavior in a more positive way, with improvement noted (Parent Ex. II). With regard to counseling, it was noted that the student appeared to be responsive to it, and returned to class "excited and happy to learn" (Parent Ex, II at p. 1). At the time of the July 2014 and November 2014 CSEs, the student did not exhibit limited alertness with respect to the educational environment due to chronic or acute ADHD and there was no evidence that the student's academic performance had been adversely affected. With regard to the student's social behavior in the classroom, while of great concern to the parent, I agree with the IHO that the hearing record does not demonstrate that the student's behaviors adversely affected her educational performance.

In addition to meeting criteria for a specific disability category, in order to be deemed eligible for special education, a student must by reason of such disability, "need special education and related services" (34 CFR 300.8[a][1]; 8 NYCRR 200.1[zz]). State regulation defines "special education" as "specially designed individualized or group instruction or special services or programs" (8 NYCRR 200.1[ww]; see 20 U.S.C. § 1401[29]; Educ. Law § 4401[2]; 34 CFR 300.39[a][1]). "Specially-designed instruction," in turn, means "adapting, as appropriate, to the needs of an eligible student . . ., the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]). In New York, the Education Law describes special education as including "special services or programs," which, in turn, includes, among other things, "[s]pecial classes, transitional support services, resource rooms, direct and indirect consultant teacher services, transition services . . ., assistive technology devices . . . as defined under federal law, travel training, home instruction, and special [education] itinerant teachers [services] . . . ." (Educ. Law § 4401[2][a]). In New York the definition of "special services or programs" (and therefore special

education) also encompasses related services, such as counseling services, OT, physical therapy, and speech-language therapy (Educ. Law § 4401[2][k]).

The issue of whether a student requires special education is not always clear, because some services described by special education teachers and providers appear at times to be similar to services that are provided to regular education students. For example, State law and regulation in New York also specifically contemplate the provision of academic intervention services, RTI support, or "additional general education support services" to students in the general education setting (see Educ. Law §4401-a[3]; 8 NYCRR 100.1[g]; 100.2[ee], [ii]; 200.4[a][9]). Upon receiving a referral to the CSE for a determination of a student's special education eligibility, within 10 school days a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, academic intervention services, and any other services designed to address the learning needs of the student (Educ. Law §4401-a[3]; 8 NYCRR 200.4[a][9]).[17] State regulations define "academic intervention services" as "additional instruction which supplements the instruction provided in the general curriculum and assists students in meeting the State learning standards . . . and/or student support services which may include guidance, counseling, attendance, and study skills which are needed to support improved academic performance" but does not include special education services and programs (8 NYCRR 100.1[g]).

The courts have grappled with this final criterion of eligibility in light of various state definitions of special education in cases, where a student with attention deficits needs support in the classroom, but such support might appropriately be deemed part of general education (Alvin Indep. Sch. Dist. v. A.D., 503 F.3d 378, 384 [5th Cir. 2007] [finding that, although a district developed an academic and behavior contract to assist the student and identified him at risk, the student demonstrated academic progress and social success and, therefore, did not need special education]; M.P. v. Aransas Pass Ind. Sch. Dist., 2016 WL 632032, at *5 [S.D. Tex. Feb. 17, 2016] [finding that district employees managed [the student's] behaviors using interventions available to all students, and therefore, the student did not need services under the IDEA]; L.J. v Pittsburg Unified Sch. Dist., 2014 WL 1947115, at *15 [N.D. Cal. May 14, 2014] [finding that a student made academic and behavioral progress after receiving general education interventions and, therefore was not a "child with a disability" under the IDEA]; Ashli C. v State of Hawaii, 2007 WL 247761 at *10-*11 [D. Haw. Jan. 23, 2007] [distinguishing the differentiated instruction the student received in a general education setting, which was available to all students, from accommodations or specially designed instruction]).

[17] A district may provide a response to intervention program in lieu of academic intervention services (8 NYCRR 100.2[ee][7]). Response to intervention is a multi-level educational approach to targeted academic and behavioral intervention—adjusted and modified as the student's needs require—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]). Response to intervention 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-oct10.pdf).

During the second half of the 2014-15 school year, the student underwent additional evaluations beginning with a sensorimotor eye examination completed on March 19, 2015 (Parent Ex. E). The evaluation report indicated that testing was the result of reports of accommodative insufficiency and to rule out an oculomotor dysfunction due to reports of tracking and motility deficits (id. at pp. 1, 3). Examination findings demonstrated significant binocular dysfunction manifested in motilities, tracking, and accommodative tasks that were likely to contribute to the student's difficulty with schoolwork and near activities (id. at p. 3). The report notes that the student might benefit from vision therapy (id.). Until the parent would be available to bring the student to vision therapy sessions, the student was instructed to use bifocals to aid in schoolwork (id.). The report indicated an additional recommendation for the student to return for re-evaluation in three months, and for possible enrollment in a vision therapy program (id.).

An April 16, 2015 independent speech-language evaluation report indicated the student was evaluated due to parental concerns about the student's receptive and expressive language abilities (Parent Ex. A).[18] According to the evaluation report, in addition to a previous diagnosis of ADHD, the parent noted the student had "problems with following directions, and often says "huh" or "what" when she hears long sentences" (id. at p. 1). In addition, the report indicated that the student complained of not understanding information spoken to her at times, especially in noisy situations (id.). According to the parent, at the time of the evaluation, the student's hearing ability "appeare[d] to be compromised secondary to frequent ear infections" (id.).

According to the April 2015 independent speech-language evaluation report, objective testing revealed compromised hearing ability in the student's right ear (Parent Ex. A at p. 2). Clinical observation and formal language testing revealed moderately to severely delayed receptive and expressive language skills characterized by difficulty with auditory processing, auditory memory/recall, syntax and semantics (id.). The speech-language evaluator recommended speech-language therapy to facilitate improved language and communication skills (id.). Recommended goals addressed the student's auditory processing skills as they related to improved communication abilities and the student's expressive language skills for functional communication (id. at p. 3).

A team meeting took place at the charter school on April 30, 2015, which was attended by both the student's parent and grandparent (Parent Ex. DD). At that time, the charter school staff informed the parent and grandparent that the school was providing supports and services to the student "as if she was classified" including the support of being in an ICT classroom and counseling (id.). However, even assuming that the district should have determined the student to be eligible for special education after receipt of the March 2015 and April 2015 evaluations, the parent requests no specific relief related to any resulting denial of a FAPE other than compensatory OT, which as noted above was not raised in her due process complaint notice. Accordingly, the hearing record provides no basis to disturb the IHO's determination not to award relief relating to the 2014-15 school year.

[18] The IHO found that the April 2015 speech-language evaluation report was not provided to the CSE (IHO Decision at p. 16). However, the parent testified that she provided the speech-language evaluation report to the dean of students at the student's charter school (Tr. pp. 569-70).

VII. Conclusion

In summary, because the parent requests no relief related to the purported denials of a FAPE for the 2013-14 and 2014-15 school years, a review of the hearing record provides no basis for setting aside the IHO's decision. I have considered the parties' remaining contentions,[19] and find them unnecessary to address in light of the determinations made herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 23, 2016

STEVEN KROLAK
STATE REVIEW OFFICER

[19] As an affirmative defense in its answer, the district suggested that the parent was "entitled to withhold consent for additional testing" as an alternative to the parent's requested relief. Although moot given the disposition of the parent's appeal, rather than continuing an adversarial approach, the parties are encouraged to determine in a cooperative process, as permitted pursuant to State regulation, to mutually agree whether the additional evaluation is necessary (see 8 NYCRR 200.4[b][4]).