The University of the State of New York

The State Education Department
State Review Officer
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No. 16-056

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:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, 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 that part of the decision of an impartial hearing officer (IHO) which denied his request for additional compensatory services for the 2013-14, 2014-15, and 2015-16 school years. 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 all times relevant to the challenged school years, the student has been eligible for special education programs and services and has attended district public schools (Dist. Exs. 10; 17; 23; Parent Ex. K).[1] The student is described in the hearing record as an auditory learner who exhibits weaknesses in reading, writing, and mathematics skills, as well as working memory, processing

[1] The student's eligibility for special education programs and related services as a student with a learning disability during all relevant school years is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

speed, and attention (Dist. Exs. 3 at pp. 1-2; 4 at pp. 2, 4, 6; 10 at pp. 1-3). Additionally, according to the parent the student received diagnoses of an attention deficit hyperactivity disorder (ADHD) and a learning disability from a "pediatric specialty doctor," who also recommended that the student be evaluated for dyslexia (Parent Ex. X at p. 2).

On March 5, 2013, a CSE convened for the student's annual review and recommended that the student receive seven periods per week of integrated co-teaching (ICT) services in a general education English language arts (ELA) class, five periods per week of ICT services in a general education mathematics class, five periods per week of ICT services in a general education social studies class, and five periods per week of ICT services in a general education science class (Parent Ex. K at pp. 1, 6, 8).[2] The March 2013 CSE also recommended that the student receive three periods per week of individual special education teacher support services (SETSS) for ELA (id. at p. 8).

Although not among the services listed on the student's IEP, the student also received two sessions per week of 1:1 home-based SETSS from September 2013 to December 2013 funded by the district (Tr. pp. 532-38; see Parent Ex. K at p. 8).[3] A CSE convened on November 22, 2013, to develop an IEP for the student, and recommended that the student receive five periods per week of ICT services for ELA, mathematics, and social studies, and six periods per week of ICT services for science; all provided in general education classrooms (Dist. Ex. 23 at p. 11). The November 2013 CSE also recommended that the student receive three periods per week of group SETSS for "academic support," and three periods per week of individual SETSS for ELA (id.). At some point in December 2013, the district discontinued the student's twice weekly sessions of 1:1 home-based SETSS (Tr. p. 535). By letter dated January 17, 2014, the district sent the parents a document entitled "Waiver of IEP Meeting to Amend IEP," requesting that the parents agree to amend the student's IEP from three periods per week of group SETSS for academic support and three periods per week of individual SETSS for ELA, to six periods per week of group SETSS for academic support (Dist. Ex. 21).[4] On January 21, 2014, the district began providing the student with six periods per week of group SETSS for academic support as proposed on the CSE meeting waiver request (compare Dist. Ex. 21, with Parent Ex. HH at pp. 5-10). By meeting notice dated April, 4, 2014, the district informed the parents that a subcommittee of the CSE (CSE subcommittee) meeting was scheduled for April 11, 2014, to amend the student's IEP to reflect the changes

[2] For non-core classes, it appears that the CSE envisioned that the student would remain in the general education setting without ICT services (Parent Ex. K at p. 6).

[3] The services referred to in this decision as home-based SETSS are referred to in the hearing record in a variety of ways, including as outside or afterschool special education services or tutoring (Tr. pp. 51, 75, 81, 181-82, 262, 387, 598).

[4] The due process complaint notice was executed and filed by the student's father; however, both the student's mother and father attended the CSE meetings and the impartial hearing dates (Tr. pp. 1, 216, 364, 480; Dist. Ex. 1). For purposes of clarification, unless otherwise indicated, references in this decision to the singular "parent" refer to the student's father.

outlined in the waiver request (Dist. Ex. 22 at p. 2). The hearing record does not reflect that an April 2014 CSE subcommittee meeting was held (see Tr. pp. 543-44).

A CSE convened on November 19, 2014 to develop the student's IEP for the remainder of the 2014-15 school year (Dist. Ex. 17 at pp. 1, 7, 10, 13). The November 2014 CSE recommended that the student receive five periods per week of ICT services for mathematics and ELA, and six periods per week of ICT services for science in general education classrooms (id. at p. 7). The CSE also recommended that the student receive five periods per week of group SETSS for academic support (id.). On November 21, 2014, staff from the district authorized the student to begin receiving five hours per week of 1:1 home-based SETSS from a private provider; however, these services were not listed on the November 2014 IEP (Tr. pp. 439-42; compare Dist. Ex. 17, with Dist. Ex. 37).

The CSE convened on March 16, 2015, in response to the parent's request and recommended that the student receive five periods per week of ICT services for mathematics and ELA, six periods per week of ICT services for science, and five periods of group SETSS for academic support (Dist. Exs. 10 at pp. 3, 8, 11-12; 11). The student continued to receive five hours per week of 1:1 home-based SETSS from a private provider; however, these services were not listed on the March 2015 IEP (Tr. pp. 464-65; compare Dist. Ex. 10, with Dist. Ex. 37, and Dist. Ex. 38).

A. Due Process Complaint Notice

In a "corrected" due process complaint notice, dated February 25, 2016, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14, 2014-15, and 2015-16 school years (Dist. Ex. 1).[5] With respect to the 2013-14 school year, the parent alleged that the district wrongfully discontinued the student's 1:1 home-based SETSS (id. at p. 3). Turning to the 2014-15 school year, the parent argued that the district wrongfully attempted to move the student to another school (id. at pp. 3-4). The parent also argued that after the district reinstated the student's 1:1 SETSS, the amount of services provided were "enough only for English," requiring the parent to obtain additional 1:1 tutoring for math and chemistry (id. at p. 4). Next, the parent argued that the district failed to identify all the student's needs and did not provide the student with appropriate accommodations (id.). The parent further argued that the district ignored the parent's request that the district exempt the student from a language other than English requirement until ordered to do so (id. at p. 5).[6] With respect to the 2015-16 school year, the parent argued that the district failed to identify the student's disability (id.). The parent also argued that the student failed physics and pre-calculus during the first marking period and the student's home-based SETSS provider recommended additional time to provide adequate support

[5] The parent's "corrected" due process complaint notice rectified a typographical error and was otherwise identical to the initial due process complaint notice filed on the same date.

[6] No issues remain in dispute for this claim. The parent requested a CSE meeting to address this issue and the March 2015 CSE determined that the student was exempt from the language other than English requirement (Dist. Exs. 10 at p. 11; 11).

(id.). For relief, the parent requested an award of compensatory education services "for lost sessions" and three additional hours of 1:1 home-based SETSS (id. at pp. 2, 5-6). The parent also requested that the CSE reconvene to consider the results of any evaluations conducted by the district (id. at p. 6). Finally, the parent requested that the district provide the student with certain program modifications and accommodations (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on March 30, 2016, and concluded on June 2, 2016, after four days of proceedings (Tr. pp. 1-621). In an interim decision on pendency dated April 22, 2016, the IHO determined that the student's current educational placement consisted of ICT services for history, math, science and ELA, together with five hours of home-based SETSS (Interim IHO Decision at p. 5).[7] By decision dated July 18, 2016, the IHO determined that the student did not receive all of the services recommended in his IEPs during the 2013-14, 2014-15, and 2015-16 school years (IHO Decision at p. 7). Nonetheless, the IHO noted that the student received outside services funded by the district and made educational progress "commensurate with his ability" (id.). Next, the IHO found that the district's failure to provide the student with services in the manner mandated in the IEPs did not rise to the level of a "gross violation" of the student's right to a FAPE so as to justify an award of compensatory education (id. at p. 11). The IHO found that the student met grade level expectations as a result of his receipt of home-based services during the 2014-15 and 2015-16 school years, such that the student was not entitled to compensatory education services or an increase in home-based services (id.). With respect to the parent's request for direct SETSS for the 2016-17 school year, the IHO found that the hearing record established that the student required these services to receive educational benefit (id.). Accordingly, the IHO ordered the district to authorize for the student to receive direct SETSS for one hour per week in each core subject (math, science, social studies, and ELA) that the student enrolled in for the 2016-17 school year (id. at pp. 11-12). Lastly, the IHO denied the parent's request for classroom modifications and accommodations, finding that the hearing record established that the student was provided a number of the requested accommodations in light of his disabilities (id. at p. 12).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in finding that the district's failure to provide the student with the services recommended in the student's IEPs during the 2013-14, 2014-15, and 2015-16 school years did not rise to the level of a "gross violation."[8] The parent also

[7] The April 2016 interim decision is not at issue in this appeal. However, on the first hearing date, the IHO noted—and the district agreed—that the student's pendency placement included the five periods per week of in-school SETSS (Tr. pp. 51-52, 212-13); this portion of the student's pendency placement was not reflected in the interim decision and the hearing record is unclear whether the district has been fully implementing this portion of the student's stay-put services during the pendency of this proceeding (see Tr. pp. 62, 135-36, 167-68, 249, 262-63, 337-38, 352-53; Dist. Ex. 25 at p. 1).

[8] To the extent the parent does not raise arguments regarding claims alleged in the due process complaint notice which were not reached by the IHO, the parent has effectively waived his right to have these issues considered

objects to the IHO's determination that the home-based services funded by the district constitute adequate compensatory services for the district's failure to implement the student's IEPs. The parent generally alleges that the district failed to implement the student's IEPs for each of the years at issue. With respect to the 2013-14 school year, the parent argues that the district discontinued the student's 1:1 home-based SETSS in December 2013 without the parent's consent to amend the student's program. The parent further argues that the district modified the manner in which the student's SETSS were provided in January 2014 but did not schedule a CSE meeting to discuss the changes until April 2014. Next, the parent argues that ICT services did not provide the student with sufficient support to address his needs. Turning to the 2014-15 school year, the parent argues that the student was without ICT services in his social studies class from September 2014 through November 2014. The parent also argues that the student did not receive the in-school group SETSS mandated by the April 2014, November 2014, or March 2015 IEPs. With regards to the 2015-16 school year, the parent argues that the student did not receive the mandated ICT services in science lab or the required in-school group SETSS. The parent also argues that the student did not receive indirect SETSS in physics or individual direct SETSS in math.[9] The parent further contends that the home-based SETSS was intended to be a portion of the student's educational program, and that the IHO erred in finding that the home-based SETSS made up for the district's failure to implement the in-school group SETSS required by the student's IEPS. For relief, the parent requests 1530 hours of compensatory services for the district's failure to implement the student's IEPs for the 2013-14, 2014-15, and 2015-16 school years, as well as three additional hours per week of home-based SETSS because of the student's decline in performance during the 2015-16 school year. The parent also requests individual weekly psychological services as relief for the social/emotional deficits caused by the district's failure to implement the student's IEPs and modify the curriculum to meet his needs.

Because SETSS was a primary area of dispute between the parties and among the forms of relief requested by the parent, the undersigned SRO requested, by letter dated September 13, 2016, a more detailed documentary description from the district regarding SETSS than what had been

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on review by not identifying them with specificity in the petition (see N.B. v. New York City Dep't of Educ., 2016 WL 5816925, at *4 [S.D.N.Y. Sept. 29, 2016]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *14 [S.D.N.Y. Feb. 20, 2013]). These include the parent's allegations that: (1) the district wrongfully moved the student to another school; (2) the district failed to identify the student's disability; and (3) the student did not receive appropriate testing accommodations (see Dist. 1 at pp. 3-5).

[9] This claim relates to services recommended in an IEP dated March 11, 2016, which post-dates the filing of the parent's due process complaint notice on February 26, 2016 (Dist. Exs. 1; 3). While this claim may be raised by the parent in another proceeding, it is not relevant to this proceeding. This concern arose during the impartial hearing, and the IHO explained that the parent had the option to file another due process complaint notice and that if he did it would be consolidated with the current case (Tr. pp. 379-97). It does not appear that the parent did so, and the proceeding cannot be expanded to involve disputes over the March 2016 IEP at this juncture. In any event, regardless of whether there is a dispute over the March 2016 IEP, the IDEA dictates that the student should receive services pursuant to the IHO's undisputed interim pendency decision during this proceeding, and pendency attached as of the filing of the due process complaint notice on February 25, 2016 (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 455-56 [2d Cir. 2015]).

developed in the record of the impartial hearing, and the parent was offered the opportunity to object and otherwise respond to the documentary information submitted by the district.

In an answer, the district denies the parent's allegations and argues to uphold the IHO's decision in its entirety. Initially, the district asserts that any claims that accrued prior to February 25, 2014 are barred by the IDEA's two-year state of limitations. The district concedes that it did not implement the services on the student's IEPs for the 2013-14, 2014-15, and 2015-16 school years "strictly as written," but that the failure to implement the IEPs did not rise to the level of a denial of a FAPE because the student's program was supplemented by home-based services that provided the student with educational benefits and permitted him to make progress. In the alternative, the district contends that if it denied the student a FAPE for the school years at issue, it is not necessary to provide relief beyond that awarded by the IHO because the student was meeting grade level expectations. Additionally, the district submits the requested additional documentary evidence regarding SETSS and asserts that the SETSS program was established as a permanent innovative program waiver pursuant to State regulations.

In a reply, the parent reiterates many of the claims from his petition. The parent argues that the district waived its statute of limitations defense because it was not raised in the district's response to the parent's due process complaint notice. The parent also objects to the admission and consideration of portions of the additional evidence regarding SETSS submitted by the district, and provides his understanding of SETSS. Nonetheless, the parent appears to continue to press that the student is entitled to 1530 hours compensatory services, and I interpret that request as including home-based SETSS to some undefined extent, as discontinuation of home-based SETSS was a significant area of the parent's concerns. It further appears the parent may be interpreting SETSS as instruction at certain times in his argument and as a related service at other times.

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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. of Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress

in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

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

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

VI. Discussion

A. Preliminary Matters

1. Additional Evidence

As indicated above, the district submitted additional documentary evidence for consideration on appeal with its answer in response to an inquiry from the undersigned (see Supp. Ex. 1). The parent objects to the admission and consideration of this documentary evidence. As noted herein, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

Upon preliminary review of the evidence in the hearing record, I questioned whether it was necessary to seek further additional evidence from the district pursuant to 8 NYCRR 279.10(b) because the term "SETSS" is not defined by State regulation, cannot currently be found in any published federal or State policy documentation, and was not adequately defined in the hearing record. An administrative hearing officer cannot take judicial notice of facts attendant to a highly specialized term like SETSS which, for reasons further described below, is not commonly known among special education practitioners throughout the special education field or authoritatively attested by a government body (which government body is not a party to or being challenged in

the proceeding). Consequently, I directed that the additional documents regarding SETSS be proffered by the district in order to ascertain more information regarding the definition of SETSS and how it was being utilized in the case (see Supp. Ex. 1).

While I have considered the parent's reasons for objecting to my consideration of this additional information, and I am cognizant that the additional information provided by the district was available at the time of the impartial hearing, the need to formulate an appropriate remedy and render a decision regarding SETSS does not preclude admission of the additional documentary evidence solely for the limited purpose of what SETSS constitutes. Accordingly, the district's additional evidence will be considered for this limited purpose.

2. Statute of Limitations

The district argues that the parent's claims which accrued prior to February 25, 2014 are barred by the IDEA's statute of limitations. The parent argues that the district waived its ability to raise a statute of limitations defense by failing to raise it in a response to the due process complaint notice.

The IDEA requires that a party must request a due process hearing within two years of the date the party "knew or should have known about the alleged action that forms the basis of the complaint" (20 U.S.C. § 1415[b][6][B], [f][3][C]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]). The evidence in the hearing record reveals that the district did not raise a statute of limitations defense on the record at any point during the impartial hearing or in its post-hearing memorandum (see Tr. pp. 1-621; Dist. Ex. 40), despite that the parent explicitly raised these claims in his amended due process complaint notice (Dist. Ex. 1). Accordingly, the district has waived its right to assert this defense (M.G. v. New York City Bd. of Educ., 15 F. Supp. 3d 296, 306 [S.D.N.Y. 2014] [holding that "[b]ecause the [district] did not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see R.B. v. Dep't of Educ., 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [holding that a statute of limitations defense need not be raised in the district's response to the due process complaint notice but noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level"]; Vultaggio v. Bd. of Educ., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]).

B. Procedural Compliance: CSE Process and Parental Participation

Tuning to the events that led to the due process complaint, as noted above, the first stage of the appropriate inquiry of whether a FAPE is offered to a student is to determine if the board of education has complied with the procedural requirements set forth in the IDEA (Rowley, 458 U.S. at 206-07). The parent argues that the district amended the frequency of the student's in-school SETSS without scheduling a CSE meeting to discuss the changes. Upon review, the evidence in the hearing record supports the parent's allegations.

The IDEA contains detailed provisions that set forth the required content and procedure for developing an IEP, including provisions that specify the procedure for making changes to an

IEP (20 U.S.C. § 1414[d][3]-[D], [F]). Both the IDEA and State and federal regulations provide that an IEP can be modified by the development of a new IEP by the CSE, or pursuant to an amendment by agreement (20 U.S.C. § 1414[d][3][D], [F]; 34 CFR 300.324[a][4], [6]; 8 NYCRR 200.4[f], [g]). To change an IEP by agreement, the parents and district may agree not to convene a CSE meeting and instead develop a written document to amend or modify the student's current IEP (20 U.S.C. § 1415[d][3][D]; 34 CFR 300.324[a][4][i]; 8 NYCRR 200.4[g][2]). State regulations expressly provide that if a district wishes to amend a student's IEP by agreement, the district must provide the parent with a written proposal to amend the IEP and the parent must agree in writing to the proposed amendments (8 NYCRR 200.4[g][2]).

In the instant case, the CSE convened on November 22, 2013, with both parents in attendance, to develop the student's IEP (Dist. Ex. 23). The November 2013 CSE recommended that the student receive ICT services in a general education classroom, and three periods per week of group SETSS for academic support and three periods per week of individual SETSS for ELA (id. at p. 11). In addition, the student received two sessions per week of 1:1 home-based SETSS funded by the district from September to December 2013 (Tr. pp. 532-35). Thereafter, on January 17, 2014, the district sent the parent a form entitled "Waiver of IEP Meeting to Amend IEP," requesting that the parents agree to amend the delivery of the student's SETSS, from three periods per week of group SETSS for academic support and three periods per week of individual SETSS for ELA, to six periods per week of group SETSS for academic support (Dist. Ex. 21).[10] The parent testified that he did not agree to amend the student's IEP without a CSE meeting and did not sign the document (Tr. pp. 535-36; see Dist. Ex. 21). Notwithstanding the parent not agreeing in writing to the proposed amendment of the November 2013 IEP, on January 21, 2014, the district began providing six periods per week of SETSS to the student as indicated in the waiver document (Tr. pp. 534-36; Parent Ex. HH at pp. 5-10). In addition, although the district informed the parents by meeting notice dated April, 4, 2014 that a CSE meeting was scheduled for April 11, 2014 to amend the student's IEP to reflect the changes outlined in the waiver document, the parent testified that the April 2014 CSE meeting did not take place and that he did not receive an amended IEP (Tr. pp. 543-44; Dist. Ex. 22 at p. 2).

Here, the hearing record shows that the district did not hold a CSE meeting to amend the student's IEP, which would have allowed the parents to participate and provide input in amending the student's IEP. It is well established that "[t]he core of the [IDEA] is the cooperative process that it establishes between parents and schools" (Schaffer v. Weast, 546 U.S. 49, 53 [2005]). In addition, the IDEA sets forth procedural safeguards that include providing parents the opportunity to participate in the decision-making process regarding their child's educational placement (20 U.S.C. §§ 1414[e]; 1415[b][1]; 34 CFR 300.116; 300.327; 300.501[c]; see Burlington, 471 U.S. at 368 ["the Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness"]; Rowley, 458 U.S. at 186 n.6; [in enacting the IDEA, Congress sought "to maximize parental involvement in the education of each handicapped child"]). Accordingly, the district violated the IDEA by failing to convene a CSE meeting to amend the

[10] The parent testified that in December 2013, the district discontinued the student's home-based SETSS without notice to the parents (Tr. p. 535).

student's IEP. To the extent the district argues that the student's IEP was changed via an amendment by agreement, the hearing record is devoid of any evidence that the parent agreed in writing to any of the amendments to the November 2013 IEP proposed by the district. Although the district apparently sought to convene a CSE meeting in April 2014 to discuss the amendments to the November 2013 IEP, the district had already modified the manner of delivery of the student's SETSS for four months without any input from the parent. Furthermore, the April 2014 CSE meeting did not take place. Thus, the district's failure to properly change the student's IEP by way of a CSE meeting or an amendment by agreement significantly impeded the parents' ability to participate in the decision-making process regarding the development of the student's IEP and thereby denied the student a FAPE (20 U.S.C. § 1415[f][3][E][ii][II]; 34 CFR 300.513[a][2][ii]; 8 NYCRR 200.5[j][4][ii]).

C. Clarification of SETSS

After procedural compliance with the IDEA is assessed, the next area of inquiry is whether the IEP developed by a CSE through the IDEA's procedures was reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07). Additionally, in some cases, such as the instant case, the extent to which special education services were provided in conformity with the IEP must be also be reviewed to determine if material deviations occurred that resulted in a denial of a FAPE to the student. Because of the flaws in the CSE process (i.e., lack of parental participation in modifying the IEPs), and the fact that home-based SETSS services were provided to the student without listing them on the IEPs, the parent did not center his claims on the substantive adequacy of the resultant IEPs, but he made several claims with regard to the failure to provide services, most but not all of which focus on the provision of SETSS. As noted previously, the term SETSS required further clarification because it featured in this case as (1) a primary area of parental concern; (2) a significant aspect of the special education services called for in the student's IEPs; and (3) a disputed area for which relief was sought.

Because the hearing record lacked a reasonably complete definition of the term SETSS, the undersigned directed the district to further explain the term with additional documentary evidence (Supp. Ex. 1). While an SRO may reference State-level interpretive policy guidance which has been promulgated by a governing State body in order to implement the IDEA and attendant State law, I explained to the parties that I could not, for evidentiary purposes, take judicial notice of the details of local district-level special education programs that are outside the hearing record and for which details do not appear in either State or federal law and are not referenced in any State-level policy guidance.[11] Accordingly, a rather lengthy exercise to clearly define terms is necessary in order to address the remainder of the issues in this case.

[11] An SRO also has the ability to search second-tier due process records and may, as necessary, reference matters appearing in a different second-tier due process appeal between the same parties and involving the same student in order to avoid unnecessarily confusing or conflicting factual determinations by the same administrative tribunal, or at the very least explain why a later factual determination differs from an earlier one.

The district submitted additional documentary evidence consisting of several documents. First is a document that purports to be a definition of SETSS that is on district letterhead and which indicates that the district is "seeking a waiver to continue the service known as Special Education Teacher Support Services (SETSS), a flexible hybrid service combining Consultant Teacher and Resource Room Services" (Supp. Ex. 1 at p. 2). The document further explains that:

> In order to foster flexibility, the NYC Department of Education [had previously] requested an innovative waiver from the State Education Department to combine Consultant Teacher services and Resource Room into a single hybrid service known as Special Education Teacher Support Services (SETSS). This flexible model provides specially designed and/or supplemental instruction to support the participation of a student with a disability in the general education classroom. It also provides consultation to a student's general education teacher.

(Supp. Ex. 1 at p. 2).

Additionally, the definition indicates that:

> These services are designed to maintain students in the general education environment and utilize the combined expertise of the general and special education teacher. The service may be all direct or a combination of direct and indirect service to the student. The student's IEP must indicate the amount of time, the distribution of time between direct service and indirect service (consultation) and the location of the service (i.e. general education classroom or a separate location). Group size may not exceed eight students.
>
> For a student at the intermediate/junior high school or high school level who is recommended to receive SETSS in the general education classroom the specific subject area(s) during which the SETSS will be provided must be indicated.

(Supp. Ex. 1 at pp. 2-3).

A second document among the additional evidence appears to be a "Statement of Consultation" between the district and a collective bargaining organization signed by a representative of the organization (Supp. Ex. 1 at p. 6). A third document, a letter from the New York State Education Department's Office of Special Education, dated May 6, 2011, indicates that the district was scheduled to submit an annual report regarding a waiver of subdivisions (d) and (f) of 8 NYCRR 200.6 by August 1, 2011, prior to consideration of a permanent waiver (id. at p. 7). The district also submitted an annual report related to the 2010-11 school year systemically describing the performance of students who received SETSS services (id. at pp. 9-11).[12]

[12] The documentation indicates that as of February 2008, approximately 27 percent of students in the district eligible for special education (about 41,600 students) received SETSS (see Supp. Ex. 1 at p. 3). The term SETSS

The documentation is useful insofar as it identifies with specificity several contextual terms used in State and federal law, the authority under which SETSS operates, the way it was designed, the purposes to be achieved through its use, and the requirements for documenting the use of SETSS in a student's IEP.

For instance, State regulations provide that special education be provided with certain threshold service level requirements (i.e., staffing qualifications, maximum student-to-staff ratios, etc.). The Commissioner of Education has the authority to grant a waiver from any requirement in sections 200.1 and 200.6 of 8 NYCRR Part 200 "upon a finding that such waiver will enable a local school district, board of cooperative educational services, approved private school, State-operated school, State-supported school or State department or agency to implement an innovative special education program that is consistent with State law, applicable Federal requirements and all other sections of this Part, and will enhance student achievement and/or opportunities for placement in regular classes and programs" (8 NYCRR 200.6[*l*]). Thus, as defined in this case, SETSS appears to be the product of the district's application under the State's innovative program waiver process.[13]

As for the details of the service, SETSS is identified as a hybrid of consultant teacher services and resource room services as those terms are defined in New York State's continuum of

has appeared sporadically in SRO decisions for approximately 13 years, but the nuances and contours defining the service in each case have been scant (see, e.g., Application of a Child with a Disability, Appeal No. 03-078). Because the jurisdiction of an SRO extends only to special education matters involving the particular student who is the subject of the due process proceeding at hand, this information is provided for background context only and, consequently, I express no opinion in this decision on matters of a systemic nature.

[13] The most recently published application and review procedures for innovative program waivers is found at http://www.p12.nysed.gov/specialed/applications/innovative-waiver-application-april-2015.html.

special education services.[14, 15] While the term "consultant teacher services" is not specifically referenced under the federal continuum of special education services, resource room is mentioned

[14] Consultant teacher services are:

> for the purpose of providing direct and/or indirect services to students with disabilities who attend regular education classes, including career and technical education classes, and/or to such students' regular education teachers. Such services shall be recommended by the committee on special education to meet specific needs of such students and the student's individualized education program (IEP) shall indicate the regular education classes in which the student will receive consultant teacher services. Consultant teacher services shall be provided in accordance with the following provisions:
>
> > (1) The total number of students with disabilities assigned to a consultant teacher shall not exceed 20.
> >
> > (2) Each student with a disability requiring consultant teacher services shall receive direct and/or indirect services consistent with the student's IEP for a minimum of two hours each week, except that the committee on special education may recommend that a student with a disability who also needs resource room services in addition to consultant teacher services, may receive a combination of such services consistent with the student's IEP for not less than three hours each week.
> >
> > (3) Upon application and documented educational justification to the commissioner, approval may be granted for a variance for the number of students with disabilities assigned to a consultant teacher as specified in paragraph (1) of this subdivision.

(8 NYCRR 200.6[d]).

[15] Resource room programs are also set forth with special provisions for New York City as follows:

> Resource room programs shall be for the purpose of supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs.
>
> > (1) Each student with a disability requiring a resource room program shall receive not less than three hours of instruction per week in such program except that the committee on special education may recommend that for [sic] a student with a disability who also needs consultant teacher services in addition to resource room services may receive a combination of such services consistent with the student's IEP for not less than three hours per week.
> >
> > (2) Students shall not spend more than 50 percent of their time during the day in the resource room program.
> >
> > (3) An instructional group which includes students with disabilities in a resource room program shall not exceed five students per teacher except that, in the city school district of the city of New York, the commissioner shall allow a variance of up to 50 percent rounded up to the nearest whole number from the maximum of five students per teacher.
> >
> > (4) The composition of instructional groups in a resource room program shall be based on

as an example of a supplementary service under the attendant regulations (see 34 CFR 300.115[b]). Consultant teacher services are linked by State regulation to the classroom instruction received by a student with a disability, and provide either specially designed instruction directly to the student to enable the student to benefit from regular classroom instruction, or consultation to the student's regular education teachers in order to assist them in modifying the environment or their instruction to the particular student (see 8 NYCRR 200.1[m]). A resource room program provides specialized supplementary instruction in an individual or small group setting for a portion of the school day, with the instructional group not to exceed 5 students (8 in New York City upon seeking a variance from the Commissioner) (8 NYCRR 200.1[rr], 200.6[f]). While consultant teacher services must be provided by licensed or certified special education teachers, the required qualifications of the resource room provider appears to be more nuanced (see 8 NYCRR 200.1[m], [rr]).[16]

> the similarity of the individual needs of the students according to:
>
> (i) levels of academic or educational achievement and learning characteristics;
>
> (ii) levels of social development;
>
> (iii) levels of physical development; and
>
> (iv) the management needs of the students in the classroom.
>
> (5) The total number of students with a disability assigned to a resource room teacher shall not exceed 20 students or, for the city school district of the city of New York, the commissioner shall allow a variance of up to 50 percent rounded up to the nearest whole number from the maximum of 20 students per teacher; except that the total number of students with a disability assigned to a resource room teacher who serves students enrolled in grades seven through twelve or a multi-level middle school program operating on a period basis shall not exceed 25 students or, for the city school district of the city of New York, the commissioner shall allow a variance of up to 50 percent rounded up to the nearest whole number from the maximum of 25 students per teacher.
>
> (6) Upon application and documented educational justification to the commissioner, approval may be granted for a variance from the size of an instructional group and the total number of students assigned to a resource room teacher as specified in paragraphs (3) and (5) of this subdivision.

(8 NYCRR 200.6[f]).

[16] Although the qualifications of a teacher who is able to provide resource room services is not inherent in the regulatory definition, a resource room program "means a special education program for a student with a disability" (8 NYCRR 200.1[rr]). Guidance issued by the New York State Education Department states that "[e]ach student with an IEP that indicates resource room services must receive such services from the special education resource room teacher" ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 10 VESID Mem. [Nov. 2013] [emphasis added], available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf). The guidance further indicates that "[w]hile a teaching assistant, under the general supervision of the special education teacher, can assist in the delivery of the special education services, he or she cannot be the provider of such services in place of the special education teacher" (id.). Additionally, the guidance contemplates that "one special education

SETSS blends the two services by allowing either specially designed and/or supplemental instruction by a certified special education teacher, as well as providing consultation to the student's regular education teacher (Supp. Ex. 1 at p. 2). Thus SETSS, which provides instruction and consultation on instruction by a special education teacher, is clearly not designed as a related service.[17] The documentary evidence indicates, similar to consultant teacher services, SETSS may be a direct service to provide the student with compensatory skill development or remediation activities (id.).

> These services address areas of deficit that have been identified for that student and strengthen the student's cognitive skills in order to aid the student to benefit from the student's general education classes. Direct services are provided to address educational needs directly related to the student's disability and not to provide additional academic instruction. This means that instruction is not provided in place of the student's regular academic instruction.[18]

(Supp. Ex. 1 p. 2)

Indirect SETSS appear to focus on consultation, but also appears to allow the delivery of the instructional strategies to the student by either the regular education or special education teacher, a distinction not envisioned with consultant teacher services (Supp. Ex. 1 at p. 2).

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teacher [will be] assigned" to a resource room for each instructional group of five students in the resource room (id.).

[17] The term related services, while included in the definition of special education in New York, means "developmental, corrective, and other supportive services as are required to assist a student with a disability," and does not include instruction of the student or teacher consultation by a special education teacher (8 NYCRR 200.1[qq]; see Educ. Law § 4401[2][a]).

[18] When describing the student's direct group SETSS, the student's SETSS teacher for ELA testified that she provided study strategies and worked on homework assignments and projects with the student (Tr. pp. 263-64). She further testified that she used the direct SETSS as a "management period" to make sure that the student was "managing the requirements," working on essays and whatever else he was expected to do inside or outside of the classroom (Tr. p. 264). Additionally, the SETSS teacher testified that during the direct SETSS period, she explained to the student what he needed to do to improve essays and wrote "explicit annotations" on his essays to guide the student during the rewriting process (Tr. p. 267).

> Indirect Services provide collaborative consultation between the certified special education (SETSS) teacher and the general education teacher which focuses on adjusting· the learning environment and modifying and adapting instructional techniques and methods to meet the individual needs of the students in the general education classroom. Agreed upon strategies are delivered by the special education and/or general education teacher in the general education classroom.[19]

(Supp. Ex. 1 at p. 2).

Like consultant teacher services, the evidence shows that a student's IEP must indicate each of the particular academic content areas in which SETSS will be provided to the student (Supp. Ex. 1 at pp. 2-3). The IEP must also indicate the amount of time that SETSS will be provided, the distribution of that time between direct and indirect services, and the location of the service (the general education classroom versus a separate location) (id. at p. 2). With regard to location, the terms of indirect SETSS dictate that the location for delivery of instruction to the student as a result of the consultation would always be a general education setting (id.). According to the evidence, if SETSS is recommended on an IEP for a student, the student must receive not less than three hours per week of the service (Supp. Ex. 1 at p. 3), in alignment with State regulations regarding resource room and/or consultant teacher services (8 NYCRR 200.6[2][2], [f][1]). If the student receives group SETSS, the group size cannot exceed 8 students (Supp. Ex. 1 at p. 2; see 8 NYCRR 200.6[f][3]).

As for any remaining similarities with resource room programs, the documentary evidence does not present a clear picture regarding how SETSS operates similarly or dissimilarly to that mode of specialized supplementary instruction. Resource room programs can support a student's participation in settings other than the general education setting; however, under State regulations, a CSE cannot design an IEP which designates that the student will spend more than 50 percent of the day in a resource room (8 NYCRR 200.6[f][2]), and the evidentiary description of group SETSS in a separate location has the same 50 percent maximum (Supp. Ex. 1 at p. 1). On the other hand, the description of SETSS in the evidence also makes multiple references to LRE, mainstreaming, and participation in the general education classroom, placing very heavy emphasis on using SETSS as a method to support increasing the student's participation in and ability to benefit from education with non-disabled peers (id. at pp. 1-3). As compared to a resource room program, whether group SETSS instruction in a separate location can provide specialized supplementary instruction in academic content areas for up to 50 percent of the school day is unknown.[20]

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[19] Testimonial evidence from the SETSS teacher for science indicates that he met with a co-teacher on a weekly basis and developed materials, strategies, and resources to support the student, certain portions of which corroborate the description of indirect SETSS from the documentary evidence (see Tr. pp. 62-64, 151; Supp. Ex. 1 at p. 2).

[20] As described above, direct SETSS in the general education classroom is not intended to offer additional

With this understanding of the definition of SETSS, how it must be described on a student's IEP, and some of the specific objectives to be achieved with the service,[21] I now turn to the parent's claims that district wrongfully failed to provide special education services to the student, including, but not limited to, SETSS services.

D. Implementation of IEPs

Turning to the merits of the parent's implementation claims, once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). However, a district's failure to implement these services will constitute a denial of FAPE only if the district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ., 535 F.3d 1243, 1252 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]; T.M. v Dist. of Columbia, 75 F. Supp. 3d 233, 242 [D.D.C. 2014]; V.M. v N. Colonie Cent. School Dist., 954 F Supp. 2d 102, 118-19 [N.D.N.Y. 2013]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, the student nevertheless received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

1. November 2013 IEP: September 2014 through November 2014

As discussed above, the district amended the November 2013 IEP without the parents' participation or consent, and the amended IEP was implemented in violation of the procedures called for by the IDEA (compare Dist. Ex. 20 at p. 11, Dist. Ex. 21 at p. 1, and Dist. Ex. 22, with Dist. Ex. 23 at p. 11). The original November 2013 IEP, which the parents participated in the development of and agreed to, provided the student with ICT services in general education classrooms, and three periods per week of direct group SETSS for academic support and three periods per week of direct individual SETSS for ELA in a separate location (Dist. Ex. 23 at pp. 3,

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academic instruction.

[21] The district, and IHO's for that matter, should be prepared to develop the evidentiary hearing record regarding the definition of SETSS in all cases in which it bears on disputed issues in the case.

11, 16).[22] A review of the hearing record reveals that the frequency and delivery of the SETSS that was recommended in the November 2013 IEP was not provided consistently to the student from September 2014 through November 2014. Service records documenting the dates the student received SETSS reflect that the student received only one to two periods per week of SETSS, and do not indicate whether the focus of the direct SETSS was for individual SETSS in ELA in a separate location or group SETSS for the generic "academic support" in a separate location (Dist. Ex. 25 at pp. 7-8; Parent Ex. II at pp. 1-3). Based on the foregoing, the hearing record shows that from September 2014 through November 2014, the district failed to fully implement the in-school SETSS as mandated on the student's November 2013 IEP. Furthermore, although the November 2013 IEP recommended that the student receive ICT services in social studies, the hearing record reflects that that student did not receive these services at the beginning of the 2014-15 school year (Tr. pp. 332-35, 570).

2. November 2014 IEP and March 2015 IEP

Turning to the November 2014 IEP, the CSE convened on November 19, 2014 to develop the student's IEP (Dist. Ex. 17). The November 2014 CSE recommended that the student receive ICT services in general education classrooms and five periods per week of direct group SETSS for academic support in a separate location (id. at p. 7).[23] The hearing record reveals that the frequency of the SETSS recommended in the November 2014 IEP was not provided consistently to the student from November 2014 through March 2015. A review of service records indicates that the student received only one to two periods per week of SETSS at school (Dist. Ex. 25 at pp. 5-7; Parent Ex. II at pp. 3-7). Accordingly, the hearing record shows that from November 2014 to March 2015, the district failed to fully implement the in-school SETSS as mandated in the student's November 2014 IEP.

Turning to the March 2015 IEP, the CSE convened on March 16, 2015 to develop the student's IEP (Dist. Ex. 10 at pp. 8, 11).[24] The March 2015 CSE recommended that the student receive ICT services in general education classrooms and five periods per week of direct SETSS in a group for academic support in a separate location with a notation of "provider's room" (id. at p. 8).[25] However, the district's service logs indicate that the student received only one period per week of SETSS, and only the parent's documentary evidence indicates that SETSS was likely provided in school (Dist. Ex. 25 at pp. 5-6; Parent Ex. II at pp. 7-10). Based on the foregoing, the

[22] The direct group SETSS did not appear to identify on the IEP those academic content areas in which the student needed support (Dist. Ex 23 at p. 11).

[23] The direct group SETSS did not appear to identify on the IEP those academic content areas in which the student needed support (Dist. Ex 17 at p. 7).

[24] The hearing record refers to a March 2015 psychoeducational evaluation that is neither in the hearing record nor reflected in the March 2015 IEP (Dist. Exs. 10; 14 at p. 1). However, a February 2013 psychoeducational evaluation report was entered into evidence (Dist. Ex. 4).

[25] The March IEP suffers from the same notation flaws regarding specific academic content areas that were found in the November 2014 IEP discussed above (see Dist. Ex. 10 at p. 8).

hearing record shows that from March 2015 to June 2015, the district failed to fully implement the student's in-school SETSS as mandated by the March 2015 IEP.

The student's March 2015 IEP remained in effect at the commencement of the 2015-16 school year, and as noted above, the student was recommended to receive ICT services in general education classrooms with five periods per week of direct SETSS in a group for academic support (Dist. Ex. 10 at pp. 8, 11). However, the service logs indicate that the student generally received only one to two periods per week of group SETSS in school (Tr. pp. 168, 182, 294-95; Dist. Ex. 25 at pp. 1-4; Parent Ex. GG at pp. 1-7). In addition, the March 2015 IEP provided the student with six periods per week of ICT services for science, and the principal testified that the student's physics class consisted of four ICT "classes" and a double period for physics lab (Tr. pp. 298, 344-45; Dist. Ex. 10 at p. 8). However, the principal explained that the special education teacher who provided the ICT services was "at his maximum teaching capacity" and alternated which period he attended the physics lab, thereby being present for only one of the two lab periods (Tr. pp. 345-46). Thus, the hearing record shows that from September 2015 through March 2016, the district failed to fully implement the student's recommended ICT services in science and in-school SETSS as mandated in the March 2015 IEP.[26]

The district acknowledges that the SETSS services were not provided "in perfect conformity with the IEPs' mandates during the three years at issue," but takes the position that "tutoring" though a private agency was authorized by a special education administrator and that the student received "afterschool SETSS" though a "'P-3 Authorization for Special Education Support Services'" (Answer ¶ 7).[27] These events are addressed further below.

A review of the hearing record supports the conclusion that the district consistently recommended SETSS as a "material" provision of the student's IEPs (Dist. Exs. 10 at p. 8; 17 at p. 7; 20 at p. 11; 23 at p. 11; Parent Ex. K at p. 8). As discussed above, the district's failure to implement the required number of SETSS sessions constituted a material deviation from the provisions of the November 2013, November 2014, and March 2015 IEPs. If the district had failed to provide the student with the mandated SETSS for a short period of time, it may not have risen

[26] Where, as here, the special education teacher missed a portion of a two-period lab class designated as an ICT service, I express no opinion whether that, standing alone, would constitute a material deviation from the IEP and deny this student a FAPE. However, when combined with the large number of missing SETSS sessions it is more than sufficient to find a material deviation from the IEP.

[27] A June 2, 2010, "Q and A document" issued by the State Education Department to district superintendents clarifies that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control ("Questions and Answers Related to Contracts for Instruction," Question 5, P-12 Education Mem. [Jun. 2, 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html). Such services must be provided consistent with the student's IEP. While a shortage of district personnel appears to have occurred in this case, district does not explain whether SETSS are considered part of the core instructional services that must be provided in conformity with State law as outlined in the Q and A document or how staffing shortages are address in the area of SETSS. Nevertheless, even a contracted SETSS provider must provide the services in conformity with the IEP (i.e. resource room style group SETSS services envisioned to be provided in school).

to the level of constituting a significant or substantial deviation from the student's IEPs. However, in the instant case, the extraordinary amount of time the district failed to fully implement the student's IEPs (from September 2014 through March 2016; approximately 17 months of school) resulted in a significant reduction in the provision of the student's in-school SETSS which, in this instance, constituted a material deviation from the student's IEPs and therefore deprived the student of a FAPE (A.P., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822).

E. Remediation Efforts and Relief

Having found that the district (1) denied the student a FAPE by significantly impeding the parent's opportunity to participate in the decision-making process by amending the November 2013 IEP without the parent's participation or consent; and (2) deprived the student of a FAPE from December 2013 through March 2016 by failing to fully implement the SETSS as mandated in the IEPs, the next inquiry is what relief, if any is appropriate to remedy these violations. The parent requests compensatory services consisting of 1530 hours of services for the district's failure to implement the IEPs during the 2013-14, 2014-15 and 2015-16 school years. The IHO largely denied the parent's request for compensatory education services, finding that the district's failure to provide the student with services as mandated in the IEPs did not deny the student of a FAPE, because the student met grade level expectations as a result of the home-based SETSS he received during the 2014-15 and 2015-16 school years.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]). 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]).

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 Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; 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"]). 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"]).

As noted above, the parent requests compensatory services consisting of 1530 hours of services for the district's failure to fully implement the IEPs during the 2013-14, 2014-15, and 2015-16 school years. The parent sets forth this calculation in his post-hearing brief as follows: (1) for the 2013-14 school year, the student was entitled to receive 555 hours of SETSS and ICT services; (2) for the 2014-15 school year, the student was entitled to receive 508 hours of SETSS and ICT services; and (3) for the 2015-16 school year, the student was entitled to receive 522 hours of SETSS and ICT services, for a total of 1530 hours (Parent Ex. PP at pp. 35-37). While the parent is correct that the student missed services during each of these school years, the foundation for his calculation, and the request for compensatory services deriving therefrom, is not supported by the hearing record. For example, the parent based his calculation on a 12-month school year consisting of 42 weeks (id.). However, the student was recommended to attend a 10-month school year program, consisting of 36 weeks, for each of the relevant school years (Dist. Exs. 10 at p. 9; 17 at p. 8; 23 at p. 11). Next, the parent claims that the student was entitled to 8 hours per week of individual SETSS; however, this calculation was based on a January 2016 recommendation from the student's home-based service provider (Parent Ex. T). The parent also claims that the student did not receive ICT services for certain periods of time; however, the parent's calculation appears to assume that the student did not receive any ICT instruction for the entire year (Parent Ex. PP at pp. 35-37). The parent also calculates missed hours for services that were recommended in the March 2016 IEP that post-dated the due process complaint notice; however, during this period of time the student should have received services in accordance with the IHO's interim pendency decision (Interim IHO Decision at p. 5), as the pendency provisions of the IDEA dictate the services to be provided while there is a pending proceeding and there is no indication in the

hearing record that the parties agreed to proceed with a revised IEP as the student's pendency placement after the due process proceeding was commenced.

In addition to the IHO's award, the hearing record generally shows that the student received five hours per week of 1:1 home-based SETSS from November 2014 through March 2016 (see Tr. pp. 411, 464-65, 596, 598-601; Dist. Exs. 37-39; Parent Ex. T at p. 1). The district administrator of special education testified that the student needed to receive additional SETSS based on her professional judgment and observation of the student (Tr. pp. 430-31, 457).[28] She further testified that she attended the November 2014 CSE meeting, recommended that the student receive individual SETSS, and by authorization dated November 21, 2014, provided the parents with district authorization for the student to receive five hours per week of 1:1 SETSS from a private provider (Tr. pp. 435-36, 439-42, 464; Dist. Ex. 37). The assistant director also testified that she recommended the services to "continue to support the student so that he could be successful in that school" (Tr. p. 457). However, instead of directing the district to implement the services in school as recommended in the student's IEP, the district administrator of special education testified that she intended that the student receive the 1:1 home-based SETSS "independently of the IEP" and that whether the CSE "wanted and agreed to put the [1:1 home-based SETSS] on the IEP, that was on the team" (Tr. pp. 455, 458).[29] Taking into consideration the additional documentary evidence as discussed above regarding the definition of SETSS, direct SETSS is defined as: "a flexible hybrid service [that is designed to] strengthen the student's cognitive skills in order to aid the student to benefit from the student's general education classes. [SETSS is] provided to address educational needs related to the student's disability and not to provide additional academic instruction" (Supp. Ex. 1 at p. 1). Based on this definition, it is important that the student receive SETSS in the manner for which it was recommended in the IEPs, namely in school (cf. Matter of Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289, 293-94 [2010] [noting that when interpreting a statute providing equal access to services to students with disabilities, the purposes of the statute can only be effectuated by a fact-specific analysis into what the student requires to receive educational benefits]). For example, the student's school-based SETSS teacher for mathematics indicated the student needed to learn how to work with others in a group because it was a real-world skill that would help him in his final two years of high school and when "hopefully going on to college" (Tr. p. 178). The SETSS teacher also indicated that she felt the small group setting was helpful for the student (Tr. p. 179). The home-based SETSS

[28] However, when placed in context, the administrator's statements can be interpreted multiple ways. As discussed above, at the time the administrator observed the student in his classroom, the district was not implementing the SETSS recommendation as contained in the November 2013 IEP (Tr. pp. 434-36; Dist. Ex. 25 at pp. 7-8; Parent Ex. II at pp. 1-3). By indicating that her determination was independent of the CSE (Tr. pp. 455, 458), it is unclear whether the administrator directed the provision of services because she believed the student needed services in addition to those on his IEP or in lieu of the services on his IEP.

[29] The notion of directing the provision of special education services unilaterally, apart from the CSE and a student's IEP, was probably well-intentioned on the part of the administrator; nevertheless, it raises enormous concerns, as it undermines the very notion of the collaborative planning process that is at the core of the IDEA, provides little sense of the extent to which the administrator was actually aware of the student's evaluative information and educational needs, and risks poor coordination among service providers.

provider's report indicated the student needed problem-solving graphic organizers and "one on one tutoring support in a quiet, calm learning environment to finish many lengthier assignments" (Parent Ex. T at p. 5). For school, the home-based provider report recommended that the student sit in the front of the room, receive differentiated notes to help with organization and focus, and that directions be read aloud, written on the board, and repeated (id.). Further, the home-based provider indicated that when the student was in a group setting, he "should be given a clear role in the group" (id.). Another area of concern with providing home-based SETSS services (either in addition to or in lieu of services listed on the IEP) is that although the hearing record indicates that several of the student's school-based SETSS providers were aware that he received home-based services as well, it is devoid of any evidence that there was any coordination between the school program and the home-based program (see, e.g., Tr. pp. 73-74, 81-84, 174-75, 261-62, 265, 427-28). Furthermore, the director of home-based services testified that to her knowledge, the student's home-based provider did not have contact with his current teachers (Tr. pp. 420-21).[30]

While the student received some SETSS in school, the majority of SETSS was received at home, which prevented the student from "strengthen[ing] [his] cognitive skills" within the school environment. Nevertheless, a review of the hearing record reveals that the student received enough educational benefit to meet grade level expectations and pass all his Regents courses and exams, as noted in his transcript and report card (Dist. Exs. 26; 27). More specifically, the student achieved passing grades in the core subject areas of mathematics, science, history, and English (id.). Specifically, his grades in mathematics included an 88 for geometry, 82 for algebra 2/trigonometry, and passing grades in pre-calculus after the first half of the 2015-16 school year (id.). In science, the student obtained an 85 in biology, 86 in chemistry, and passing grades in physics after the first half of the 2015-16 school year (id.). In history, the student received an 83 in global studies 9, an 82 in global studies 10, and passing grades in U.S. history after the first half of the 2015-16 school year (id.). In English, the student's grades were 78 in global literature 9, 80 in global literature 10, and passing grades in American literature after the first half of the 2015-16 school year (id.).

Additionally, the student's transcript indicates that during the 2013-14 and 2014-15 school years, the student attempted 24 credits toward graduation and completed all 24 credits, with a cumulative average of 83.86% (Dist. Ex. 27). Regarding the student's Regents exams, the

[30] Certain additional instructional or supportive services may be available to special education students and non-disabled students alike (e.g., academic intervention services (AIS) or "building level services"); however, according to the State Education Department, such services should not be listed on a student's IEP (see "Academic Intervention Services: Questions and Answers," at pp. 5, 20, Office of P-12 Mem. [Jan. 2000], available at http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf). On the other hand, services that clearly fall into the realm of special education services are required to be listed on an IEP, at least according to United States Department of Education guidance, which states that "[t]he IEP Team is responsible for determining what special education and related services are needed to address the unique needs of the individual child with a disability. The fact that some of those services may also be considered 'best teaching practices' or 'part of the district's regular education program' does not preclude those services from meeting the definition of 'special education' or 'related services' and being included in the child's IEP" (Letter to Chambers, 59 IDELR 170 [OSEP 2012]). In this case, I find no evidence that home-based SETSS is a service provided to non-disabled students, and as such, it must be listed on the student's IEP.

transcript indicates that in 2013, the student received a 90 on both the geometry and living environments exams (id.). During 2014, the student received a 74 on the chemistry Regents exam, 65 on the trigonometry Regents exam, and 81 on the global history Regents exam (id.). In 2015, the student received a 70 on the ELA Regents exam (id.). Further, at the time of the impartial hearing the student was expected to graduate with a Regents diploma after the 2016-17 school year (Tr. pp. 280, 306; Dist. Exs. 5 at p. 1; 26; 27).

As discussed above, the student did not receive a significant amount of school-based SETSS as mandated on his IEPs during the 2013-14, 2014-15, and 2015-16 school years. However, he received a significant amount of home-based SETSS not specified on his IEPs. In addition, the IHO already awarded relief sufficient to remedy the deprivation of a FAPE for the 2013-14, 2014-15, and 2015-16 school years, such that no further relief is necessary on appeal. More specifically, the IHO ordered that the student receive one hour per week of SETSS for each core subject (mathematics, science, social studies, and ELA) that the student enrolled in for the 2016-17 school year (IHO Decision at pp. 11-12). The principal testified that the student would take English and social studies for the 2016-17 school year because those subjects were four-year mandated courses and that the student would have already received all the credits in mathematics and science necessary to receive a Regents diploma by the completion of the 2015-16 school year (Tr. pp. 355-56). Thus, the IHO's award provided that the student would receive a minimum of two hours per week of SETSS for the duration of the 2016-17 school year, approximately 72 hours. Should the student elect to enroll in additional course work in mathematics and science, he would receive an additional two hours per week of SETSS, totaling a maximum of 144 hours of SETSS awarded as compensatory services. Therefore, the IHO's order is specifically designed to provide between 72 and 144 hours of SETSS in the form of compensatory services reasonably conditioned upon the type of coursework the student elects.

The hearing record further indicates that the student made significant progress, particularly in English and history (Tr. p. 78). The student's SETSS provider and co-teacher for history and English indicated that the student demonstrated improvement in his ability to organize and structure essays without blocking, made progress aligning essay responses to the assigned task, and showed improvement in his ability to analyze and explain answers (Tr. pp. 250-251, 257-58). Additionally, this teacher indicated that the student demonstrated growth in maturity, organizational skills, and homework production (Tr. pp. 251, 280). Further, the student's teacher testified that the student was progressing toward college readiness and should have "no trouble" meeting the required standards to graduate from high school (Tr. pp. 270, 280).

Thus, although the district denied the student a FAPE for the 2013-14, 2014-15, and 2015-16 school years, taking into account the student's progress and the amount of home-based SETSS

received by the student, the IHO awarded appropriate relief to remedy the denial of a FAPE.[31] Under these circumstances, it is not necessary to award additional relief.[32]

VII. Conclusion

In summary, the evidence in the hearing record establishes that the district failed to offer the student a FAPE for the 2013-14, 2014-15 and 2015-16 school years but that the student is not entitled to additional compensatory relief beyond that already awarded by the IHO in the form of further hours of compensatory services.

I have considered the parties' remaining contentions and find them without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 2, 2016

JUSTYN P. BATES
STATE REVIEW OFFICER

[31] To the extent that the IHO did not make an explicit finding that the district denied the student a FAPE for the 2013-14, 2014-15, and 2015-16 school years, the hearing record establishes, as discussed above, that the student was denied a FAPE for these school years.

[32] The adequacy of the March 2016 IEP was not at issue in this proceeding, and the parent remains free to bring any claims he may have with respect to that IEP in a separate proceeding.