



The University of the State of New York

The State Education Department

State Review Officer

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No. 16-079

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:

Aaronson Rappaport Feinstein & Deutsch, LLP, attorneys for petitioner, Allison Landwehr, Esq., of counsel

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2013-14 and 2014-15 school years were appropriate. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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

This appeal arises from a decision of an IHO that was issued after remand (see Application of a Student with a Disability, Appeal No. 15-123). Therefore, the parties' familiarity with the procedural history of the case, including the IHO's decision before remand and the issues presented for review on appeal before remand, is presumed and they will not be repeated in detail (see id.).

The student has demonstrated weaknesses in expressive and receptive language, particularly written expression, and has had difficulty with attending and organization (Tr. p. 32; Dist. Exs. 12 at p. 2; 13 at p. 1; 14 at p. 1; see Dist. Exs. 3 at pp. 1-2; 4 at pp. 1-3). In addition, he has demonstrated difficulty with visual motor integration, and motor coordination, which may have negatively affected the legibility and speed of his handwriting (see Dist. Ex. 9 at pp. 5, 6). With respect to the student's educational history, he was reportedly found eligible for special

education and related services in in 2007, as a student with a learning disability; however, his disability classification was later changed to speech or language impairment (Parent Ex. S at p. 8). For the 2012-13 school year (ninth grade), the student received integrated co-teaching (ICT) services in a general education classroom, as well as the related services of speech-language therapy and occupational therapy (OT) (Dist. Exs. 9 at p. 2; 10 at p. 1; 14 at p. 1; 15 at p. 1).

The CSE convened on December 4, 2013 for a review of the student's program and to develop an IEP to be implemented commencing on December 11, 2013 (Dist. Ex. 3 at pp. 1, 14).¹ Finding that the student remained eligible for special education as a student with a speech or language impairment, the CSE recommended that the student receive ICT services in math, English language arts (ELA), and science, as well as speech-language therapy two times per week for 45 minutes in a group of five students (id. at pp. 8, 13; see Dist. Exs. 9 at p. 2; 10 at p. 1).² The December 2013 IEP included eight annual goals to address the student's needs related to math, written expression, vocabulary, and expressive and receptive language skills, as well as two postsecondary goals related to the student's plan to attend a four year college as a full time student, and a set of transition activities (Dist. Ex. 3 at pp. 3-7, 10-11). The IEP also included testing accommodations and identified strategies and supports to address the student's management needs including small group instruction, extra time, tutoring in subject areas where necessary, tests read aloud during exams, and the use of a calculator (id. at pp. 2, 10).

The CSE convened on December 23, 2014 for an annual review of the student's program (Dist. Ex. 4 at pp. 3, 14; see Tr. p. 84).³ The CSE continued to find the student eligible for special education as a student with a speech or language impairment and recommended that he receive ICT services five times per week in math and science as well as speech-language therapy twice per week in a group of five students (Dist. Ex. 4 at pp. 10, 14-15). The December 2014 IEP contained testing accommodations, a transition plan, and seven annual goals that addressed the student's needs related to receptive and expressive language skills, written expression, vocabulary, chemistry, and geometry (id. at pp. 4-9, 11-12). Strategies and supports to address the student's management needs included teacher prompts, extra time for assessments and classwork, graphic organizers, small group instruction, teacher check-ins, preferential seating toward the front of the classroom, and teacher modeling (id. at p. 3).

Prior to and during the 2013-14 and 2014-15 school years, the parent filed several state complaints with the State Education Department (SED) alleging various violations of federal and State laws and regulations pertaining to the education of the student (Parent Exs. B-F).⁴ As a result

¹ Both IEPs at issue in this appeal have implementation dates beginning and ending in the month of December, covering a portion of two different school years (see Dist. Exs. 3 at p. 3; 4 at p. 1; see generally Educ. Law § 2[15]). Accordingly, for purposes of clarity, this decision generally refers to the date of the challenged IEPs rather than the school years in which they were implemented.

² The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

³ Testimony by the district special education coordinator indicated that, although the IEP indicates that the date of this meeting was December 19, 2014, the actual date of the meeting was December 23, 2014 (Tr. pp. 84-85; see Dist. Ex. 4 at p. 14).

⁴ The hearing record contains SED's responses to four different state complaints filed by the parent, two of which were filed in conjunction with the student's occupational therapist (Parent Exs. B-E).

of the State complaints, SED directed the district to: respond to the parent's request for mediation; comply with the parent's request for education records; respond to the parent's request to amend the student's education records; provide prior written notice to the parent a reasonable time before the district proposes or refuses to initiate or change the educational placement of the student; provide SED with a copy of the formalized directive and school policy issued by the principal to the CSE sub-committees indicating when to issue a procedural safeguards notice; ensure provision of annual goals progress reports to the parent; reconvene the CSE to develop a new IEP for the student; and provide the parent with information about where to obtain an independent educational evaluation (IEE) and the criteria for such an evaluation (Parent Exs. B-E).

On November 3, 2014, the district and parent negotiated an agreement which, among other things, required the district to provide the student with 160 hours of special education teacher support services (SETSS) as "compensatory education for Geometry and Chemistry classes in satisfaction of the 2013-2014 school year" (Dist. Ex. 5 at p. 1; see Tr. pp. 91, 255; Dist. Ex. 6). At the time of the impartial hearing, the student had received all the authorized hours of SETSS provided for in the mediation agreement (Tr. pp. 138, 151, 175).⁵

A. Due Process Complaint Notice

In the due process complaint notice dated April 17, 2015, the parent alleged that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years (see Parent Ex. A at pp. 1-5). The parent asserted that the December 2013 CSE failed to review sufficient evaluative data on the student and that the IEP failed to include an accurate description of the student's functional and instructional levels and lacked sufficient or appropriate annual goals required to address several identified academic and skills deficits (id. at pp. 2-3). Further, the parent alleged that the December 2013 CSE failed to recommend ICT services in each of the student's core subjects, and alternatively, failed to recommend a small structured classroom with increased levels of teacher support, as well as a 12-month program, SETSS, OT, counseling, appropriate speech-language therapy, sufficient supports for management needs, test accommodations, supplementary aids or supports, assistive technology, or a transition plan (id.). The parent also alleged that the district should have conducted a functional behavioral assessment (FBA) and developed a behavioral intervention plan (BIP) to address the student's "interfering behaviors and actions" (id.).

With respect to the December 2014 CSE and resultant IEP, the parent asserted that the CSE failed to review sufficient evaluative information to formulate the student's program and failed to recommend appropriate or adequate ICT services, SETSS, OT, counseling, speech-language therapy, testing accommodations, management needs, supplementary aids or supports, or assistive technology (Parent Ex. A at pp. 3-4). Further, the parent alleged that the December 2014 CSE failed to recommend a 12-month program, appropriate or sufficient annual goals, modified promotion criteria, or an appropriate transition plan (id. at pp. 4-5). The parent also alleged that the district should have conducted an FBA and developed a BIP (id. at p. 4).

⁵ The SETSS hours authorized by the special education mediation agreement were provided to the student by the Huntington Learning Center (HLC) (Tr. pp. 120, 123, 138; see Parent Ex. K). In addition, HLC provided an additional 17 hours of services including testing and registration as "essentially . . . a scholarship" (Tr. pp. 138, 175).

Asserting that the flaws in the December 2013 and December 2014 IEPs resulted in the student's lack of sufficient progress during the 2013-14 and 2014-15 school years, the parent requested 955 hours of 1:1 compensatory tutoring at Huntington Learning Center (HLC) to remedy the denial of a FAPE (Parent Ex. A at pp. 3, 5-7). In addition, the parent requested: that the district reimburse HLC for the cost of diagnostic testing and registration fees; a metro card for the student's transportation; "make-up" counseling and OT; independent OT, speech-language and neuropsychological evaluations; and a reconvene of the CSE after completion of the requested evaluations (*id.* at p. 7).

B. Impartial Hearing Officer Decisions

On July 30, 2015, the parties proceeded to an impartial hearing, which concluded on August 6, 2015, the second day of proceedings (*see* Tr. pp. 1-267). In a decision dated November 24, 2015 ("IHO Decision I"), the IHO concluded that the parent's claims concerning the December 2013 IEP were moot based upon the November 2014 mediation agreement, which authorized the student's receipt of 160 hours of SETSS as compensatory services with respect to the 2013-14 school year (IHO Decision I at pp. 10-11, 13). In addition, the IHO found that the December 2014 IEP offered the student a FAPE (*id.* at pp. 11-13). In a decision dated March 18, 2016, the undersigned sustained the parent's appeal of the IHO's November 24, 2015 decision and remanded the matter to the IHO for substantive determinations on the merits of the parent's claims raised in the April 2015 due process complaint notice that were not addressed in the IHO's November 24, 2015 decision with respect to the provision of a FAPE for the 2013-14 and 2014-15 school years (*see Application of a Student with a Disability, Appeal No. 15-123*).

Upon remand, the IHO held a post-remand telephone conference with the parties on May 4, 2016, during which the parties and the IHO discussed issues to be determined and agreed that the district would provide both the parent and the IHO with proof as to the student's graduation status (May 4, 2016 Tr. pp. 7, 15-16, 20).⁶ Upon inquiry by the IHO, neither party requested additional hearing days to present testimony or documentary evidence (May 4, 2016 Tr. pp. 16, 18-20). In a decision, dated October 12, 2016 ("IHO Decision II"), the IHO found that the December 2013 and December 2014 IEPs offered the student a FAPE (IHO Decision II at pp. 32-33).

With respect to the December 2013 CSE meeting and resulting IEP, the IHO found that the CSE had sufficient evaluative information before it with which to create the student's IEP and the student's present levels of performance accurately reflected the evaluative information (IHO Decision II at p. 13). The IHO also determined that the annual goals contained in the IEP were reasonably related to the student's deficits and included evaluative criteria, evaluation procedures, and schedules from which the student's progress could be measured (*id.* at p. 14). The IHO also noted that the lack of short-term objectives was not a flaw in the goals, as the student did not require participation in alternative assessments (*id.*). With specific respect to the parent's argument that the December 2013 IEP lacked academic goals for the student's deficits in phonics, reading comprehension, and distractibility, the IHO determined that those areas of need were addressed in other goals and accommodations included in the IEP (*id.*).

⁶ The May 4, 2016 post-remand telephone conference is paginated separately from the other hearing dates and is referenced herein by date (May 4, 2016 Tr. pp. 1-23).

Next, the IHO found that placement and services included in the December 2013 IEP offered the student a FAPE (IHO Decision II at pp. 15-16). Specifically, the IHO determined that the recommended ICT services, related services, and "program modifications" were appropriate for the student and that the student did not require additional academic support in the form of SETSS or more ICT services (id. at p. 15). In support of his determination, the IHO noted the student's enrollment in "Regents-level high school courses and early college classes," as well as his participation in tutoring after school and on the weekend, and further observed that the student "met the credit requirements for promotion to eleventh grade" (id.).⁷ The IHO noted that the December 2013 CSE discontinued OT for the student "[b]ased on the recommendation of the student's occupational therapist during the 2012-13 school year" (id.). As for supports for the student's management needs, the IHO noted that, in addition to those included in the December 2013 IEP, the district special education coordinator "credibly testified" that the student received additional modifications from his teachers, such as graphic organizers (id. at pp. 15-16). The IHO also found that the hearing record did not indicate that the student would have exhibited substantial regression without a 12-month program (id. at p. 17).

The IHO found that, with respect to special factors, the hearing record did not support a finding that the student's behavior impeded his learning or that of others and therefore the CSE was not required to conduct an FBA or develop a BIP (IHO Decision II at pp. 18-19). Next, the IHO determined that the CSE recommended appropriate testing accommodations and modifications in order to allow the student to participate in statewide assessments (id. at p. 19). Further, the IHO concluded that "evidence in the hearing record d[id] not support [the parent's] allegation" that "the student did not receive the recommended test accommodation of testing in a small group due to inattentiveness" (id. at p. 20). Finally, the IHO found that the post-secondary transition goals and transition services included in the December 2013 IEP were appropriate for the student and that the hearing record did not demonstrate that the student required modified promotional criteria (id. at pp. 21-22).

With respect to the December 2014 CSE meeting and resultant IEP, the IHO found that the CSE had sufficient evaluative information before it with which to create the student's IEP, including progress reports, transcripts, and "prior IEPs" and that it was reasonable for the CSE to include the student's grades on Regents examinations on the IEP (IHO Decision II at p. 23).⁸ As with the December 2013 IEP, the IHO found that the December 2014 IEP contained measurable annual goals reasonably related to the student's deficits and noted that, while the IEP did not include goals in the area of ELA, the student's deficits in encoding, decoding, reading comprehension, vocabulary, and written expression were addressed in other annual goals and that it was appropriate for the CSE to include goals focused on chemistry and geometry—credits that the student needed in order to graduate (id. at pp. 24-25). Similarly, the IHO found that the

⁷ The IHO also noted that the district special education coordinator "credibly testified" that a recommendation for additional ICT services "would have impeded the student's ability to take early college classes" (IHO Decision II at p. 15).

⁸ In his decision before remand, the IHO found that the district offered the student a FAPE, concluding that: the evaluative information available to the December 2014 CSE identified the student's needs in reading, writing, and organization; the annual goals, ICT services, modifications, and speech-language therapy recommended by the CSE appropriately addressed the student's needs; the student did not require OT in order to receive a FAPE; and the student made progress during the 2014-15 school year (IHO Decision I at pp. 12-13).

"program modifications" included in the IEP ameliorated the need for annual goals directed at the student's executive functioning and distractibility (id. at p. 25).

Turning to the placement and services included in the December 2014 IEP, the IHO found that the CSE recommended "sufficient support services to permit [the student to] benefit educationally from . . . instruction" (IHO Decision II at p. 25). As with the December 2013 IEP, the IHO evaluated the program and services by describing the recommendation, noting the student's attendance in Regents-level courses and early college classes, receipt of tutoring, and achievement of passing grades (id. at pp. 25-26). Additionally, the IHO indicated that it was reasonable for the December 2014 CSE to not recommend ICT services for the student in ELA since the student had passed the ELA Regents (id. at p. 26). Moreover, the IHO noted testimony that "the CSE offered to add SETSS to the student's program for assistance with math" but that the parent declined due to the student's schedule (id.). As for OT services, the IHO observed that in January 2013, October 2013, and July 2015, the district evaluated the student's OT needs and no OT services were recommended (id.). The IHO also concluded that the hearing record did not support a finding that the student required a 12-month program (id. at p. 27). As to the parent's other claims related to the December 2014 IEP, the IHO concluded that the CSE did not need to conduct an FBA or create a BIP because the hearing record did not support a finding that the student's behavior impeded his learning or that of others, the IEP included appropriate testing accommodations, and the IEP included appropriate long-term transitional goals and transitional services (id. at pp. 29-32).

With respect to the parent's request for compensatory services, the IHO found that, because the student graduated with a Regents diploma, he was no longer eligible for special education services and, therefore, compensatory services could only be awarded if there was a gross violation of the IDEA (IHO Decision II at p. 32). Having found that the district offered the student a FAPE for the 2013-14 and 2014-15 school years, the IHO declined to award any compensatory services (id. at pp. 32-33).

IV. Appeal for State-Level Review

In her petition, the parent asserts that the IHO erred in finding that the district offered the student a FAPE for the 2013-14 and 2014-15 school years. Initially, the parent alleges that the IHO was biased, used an improper legal standard, and rendered a decision in favor of the district even though, as the parent asserts, the district did not defend the December 2013 IEP.

With respect to the December 2013 CSE meeting and resultant IEP, the parent asserts that the IHO erred in finding that the district offered the student a FAPE. The parent asserts that the CSE failed to review the student's prior evaluations, the student's functional levels were listed incorrectly in the present levels of performance, the goals included on the IEP were lofty, vague, and overly broad and failed to address the student's academic and social/emotional deficits, the IEP described interfering behaviors that the student exhibited but did not recommend an FBA or a BIP, the CSE failed to recommend sufficient modifications or resources to address the student's management needs, adequate testing accommodations, or any supplementary aids and supports or assistive technology, the student should have been provided additional academic supports such as SETSS, and the CSE failed to recommend sufficient related services in that the CSE did not recommend OT or counseling and only recommended speech-language therapy in a group.

With respect to the December 2014 CSE meeting and resultant IEP, the parent asserts that the IHO erred in finding that the district offered the student a FAPE. The parent asserts that: the CSE convened without the parent's participation in violation of the IDEA; the CSE failed to review any evaluations or documents and the student had not been evaluated in speech-language in years; the IEP did not accurately identify the student's functional levels and the CSE failed to recognize the student's deficits in math; the goals included in the IEP were lofty, vague, and overly broad, and failed to address the student's academic and social/emotional deficits; the IEP lacked goals in encoding and decoding and objectives in ELA, spelling, vocabulary and writing; the CSE did not recommend an FBA or a BIP despite the student's interfering behaviors and his inability to focus and attend; the IEP did not include sufficient modifications or resources to address the student's management needs, supplementary aids and supports or assistive technology, or testing accommodations; the CSE failed to recommend ICT services in all of the student's core subjects; the CSE failed to recommend SETSS, OT, 1:1 speech-language therapy, or counseling; and the CSE failed to recommend appropriate transition activities and post-secondary goals. The parent requests that an SRO overturn the IHO's decisions, and provide the relief sought in the original due process complaint.

In its answer, the district generally responds to the parent's allegations with admissions, denials, or various combinations of the same and argues in favor of the IHO's determinations that it offered the student a FAPE for both the 2013-14 and 2014-15 school years. In response to the parent's claims of IHO bias, the district asserts that the IHO acted with impartiality. The district also notes that the due process complaint notice did not include an allegation that the parent was not provided an opportunity to participate in the December 2014 CSE meeting and asserts that the district did not deny the parent a chance to meaningfully participate in the meeting because the parent, after receiving several notices of each meeting, canceled the first two meetings and did not cancel or attend the meeting after she was notified of it. Notwithstanding the parent's nonattendance at the third scheduled meeting, the district asserts that it fulfilled its legal obligations.

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]).

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. Initial Matters

1. IHO Bias and the IHO's Decision

The parent asserts that the IHO exhibited bias in that he demonstrated "preconceptions" by "readdress[ing]" issues already ruled upon before remand (Pet. ¶ 89) and ignored or failed to consider evidence presented by the parent.

The parent's assertion that the IHO exhibited a lack of impartiality amounts to the parent's disagreement with the conclusions reached by the IHO or with the weight afforded to evidence presented at the impartial hearing. Such disagreement does not provide a basis for finding actual or apparent bias by an IHO (see Application of a Student with a Disability, Appeal No. 15-033; Application of a Student with a Disability, Appeal No. 13-083). Overall, an independent review of the entire hearing record shows that the impartial hearing was conducted in a manner consistent with the requirements of due process (see 34 CFR 300.514[b][2][i], [ii]), and that the IHO provided both parties with the opportunity to present their cases, allowed both sides to fully develop testimony through direct and cross-examination of witnesses and, further, on remand, allowed the parties the opportunity to produce additional documentary evidence or witnesses (see Tr. pp. 1-266; May 4, 2016 Tr. 1-23). Further, while the parent generally alleges that the IHO ignored "a great deal of evidence presented by the parent," the parent does not point to specific examples of evidence which the IHO overlooked (Pet. ¶¶ 86, 88). Rather the parent's more detailed arguments relate to the weight that the IHO gave specific pieces of evidence (see id. at ¶¶ 91-97). For example, the parent alleges that the IHO disregarded information contained within the December 2013 and December 2014 IEPs and overlooked deficiencies in the annual goals (see id. at ¶¶ 92-95). The parent does reference that the IHO ignored the May 2015 psychoeducational, May 2015 speech-language therapy, and June 2015 OT evaluations; however, the IHO's decision references each of these evaluations (IHO Decision II at pp. 7, 19, 26, 30). Contrary to the parent's assertion, review of the IHO's decision reveals that the IHO utilized the record as a whole in making his determinations, as shown by his citations to testimony and evidence introduced into the hearing record (8 NYCRR 200.5[j][5][v]; see generally IHO Decision II at pp. 13-22). The IHO weighed the evidence adduced at the impartial hearing and resolved the primary disputed issues in the district's favor (IHO Decision II at pp. 13-22). Although the parent disagrees with the conclusions reached by the IHO, such disagreement does not demonstrate that the IHO acted without impartiality.⁹

⁹ Likewise, to the extent that the parent raises an issue with the IHO's application of the burden of proof in light of the district's decision not to present testimonial evidence regarding the December 2013 IEP, such an argument also relates to the weight the IHO afforded the evidence. The parent does not assert that the IHO improperly shifted the burden of proof to the parent (see Educ. Law § 4404[1][c]). Moreover, the district did present some testimonial and documentary evidence concerning the December 2013 CSE and the resultant IEP (see Tr. pp. 31-

The parent's challenge to the IHO's revisiting of issues decided in his November 2015 decision, while framed as an allegation of bias, is more aptly characterized as an assertion relating to the doctrine of the law of the case. "The law of the case doctrine 'is implicated when a court reconsiders its own ruling on an issue in the absence of an intervening ruling on the issue by a higher court. It holds that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case, unless cogent and compelling reasons militate otherwise.'" (Pape v. Bd. of Educ. of Wappingers Cent. Sch. Dist., 2013 WL 3929630, at *8 [S.D.N.Y. July 30, 2013], appeal dismissed [Dec. 10, 2013], citing U.S. v. Quintieri, 306 F.3d 1217, 1226 [2d Cir. 2002]). The doctrine of law of the case is intended to avoid retrial of issues that have already been determined within the same proceeding (People v. Evans, 94 N.Y.2d 499, 502-04 [2000] [noting that law of the case has been described as "'a kind of intra-action res judicata'"]; see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005]; Cone v. Randolph Co. Schs. Bd. of Educ., 657 F. Supp. 2d 667, 674-75 [M.D.N.C. 2009]; see generally Application of a Child with a Disability, Appeal No. 98-73 [noting that a pendency determination by a State Review Officer would not be reopened during the proceeding once it was decided]).

Here, as I did not reach the merits of the IHO's determinations regarding the December 2014 IEP prior to remanding the matter for further administrative proceedings on other unaddressed issues (Application of a Student with a Disability, Appeal No. 15-123), the law of the case doctrine would generally have prohibited the IHO from reconsidering his determinations on the merits set forth in his November 2015 decision (IHO Decision I at pp. 12-13). However, in his decision after remand, the IHO did not reconsider his earlier determinations regarding the evaluative information available to the December 2014 CSE or the appropriateness of the annual goals, ICT services, modifications, or speech-language therapy included in the December 2014 IEP, or the omission of OT; rather, the IHO's October 2016 decision articulated consistent conclusions and, if anything, more closely targeted the nuanced aspects of the parent's claims regarding the December 2014 CSE and IEP that he did not address in the November 2015 decision (compare IHO Decision I at pp. 12-13, with IHO Decision II at pp. 23-32). Whether or not the IHO's determinations are supported by the evidence in the hearing record is a separate inquiry, discussed below.

2. Scope of Review

The parent asserts that the district deprived her of a meaningful opportunity to participate in the creation of the student's December 2014 IEP, when the CSE convened without her presence. The district objects to this argument as being outside the scope of the due process complaint notice. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR

61; Dist. Exs. 3; 9-11). With that said, I can certainly understand the parent's frustration with the outcome in light of the district's failure to take advantage of the opportunity to present evidence after remand, continued assertion of previously-rejected defenses to the parent's claims (May 4, 2016 Tr. pp. 7-8), and noncommittal representations about its position during the post-remand telephone conference—before the parent's attorney joined the conference—including references to not defending the IEP and "likely . . . conceding" the 2013-14 school year (May 4, 2016 Tr. pp. 8, 10-11). However, the question of whether the district's lackluster presentation of its case resulted in a failure to meet its burden of proof on any of the parent's claims is a question reserved for the merits.

300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original 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 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

Here, review of the due process complaint notice shows that the parent's participation in the December 2014 CSE meeting was not raised as an issue to be addressed at the impartial hearing (see generally Parent Ex. A). Although the April 2015 due process complaint notice included a request that the IHO make an "examination of [the parent's NYSED] complaints and proposed plan of action to tackle all outstanding issues" (Parent Ex. A at p. 6)—and the hearing record included evidence that SED sustained the parent's State complaint alleging that the district failed to ensure that the parent received notice of the December 2014 CSE meeting (Parent Ex. E at pp. 3-4)—the request is vague and did not sufficiently place the district on notice of the issue.¹⁰ The State complaints were not attached to the due process complaint notice and the parent neither described the subject matter of the State complaint pertaining to notice of the December 2014 CSE meeting nor summarized the facts underlying that complaint in her due process complaint notice.¹¹

Therefore, where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, I decline to review these issues for the first time on appeal. To hold otherwise inhibits the development of the hearing record for the IHO's consideration and renders the IDEA's statutory and regulatory provisions that limit the issues meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoelt v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).¹²

¹⁰ A due process complaint notice must include "a description of the nature of the problem of the student relating to such proposed or refused initiation or change, including facts relating to such problem" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]).

¹¹ SED sustained the parent's State complaint finding that: the parent did not receive the meeting notice at least five days prior to the December 2014 CSE meeting; there was no evidence of an agreement between the parent and the district to hold a meeting within five days; and there was no evidence that the district tried other methods to ensure the parent's participation (Parent Ex. E at p. 4).

¹² Nor can it be said that the district opened the door to such claims by raising this issue as a defense to a claim that was identified in the due process complaint notice (M.H., 685 F.3d at 250-51; see B.M. v. New York City

As a final note on this point, even if the parent's claim about her participation in the December 2014 CSE meeting was sufficiently articulated in the due process complaint notice, the parent did not raise the IHO's failure to address this issue in her appeal of the IHO's November 24, 2015 decision despite challenging the IHO's failure to reach several other specified issues (see Application of a Student with a Disability, Appeal No. 15-123). Moreover, after remand, the parent's attorney did not take advantage of the opportunity to clarify what issues she felt the IHO ought to reach despite being given the opportunity to do so (see May 4, 2016 Tr. pp. 15-16). Therefore, even if the parent's attendance at the December 2014 CSE meeting was an issue raised in the due process complaint notice, I would nevertheless find that the parent waived this claim.

Finally, with regard to the issues to be addressed, the parent has not appealed the IHO's determinations concerning short-term objectives, 12-month services, promotional criteria, the provision of accommodations by the student's related services providers and teachers at the student's school, and specifically for the December 2013 IEP, the IHO's determination concerning the transition plan. As such, those decisions are final and binding upon the parties and will not be further discussed (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]).

B. December 2013 CSE and IEP

1. Consideration of Evaluative Information and Present Levels of Performance

The parent asserts that the December 2013 CSE failed to review the student's prior evaluations and only considered the student's progress reports and grades and that the CSE did not discuss several of the student's deficits during the CSE meeting, including the student's writing. Additionally, the parent alleges that the student's functional levels included on the December 2013 IEP were incorrect.

In developing the recommendations for a student's IEP, the CSE must consider: the results of the most recent evaluation of the student; the student's strengths; the concerns of the parent for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). However, neither the IDEA nor State law requires a CSE to "consider all potentially relevant evaluations" of a student in the development of an IEP or to consider "every single item of data available" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 340 [S.D.N.Y. 2013], quoting F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581-82 [S.D.N.Y. 2013]; see L.O. v. New

Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014] [noting that foundational questions, as opposed to direct examination pursued "in support of an affirmative, substantive argument," would not open the door to issues outside of the due process complaint notice]; J.C.S. v. Blink Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]). During the impartial hearing, testimony regarding the parent's nonattendance at the December 2014 CSE meeting was first provided by the district's witness during redirect examination in response to questions targeting clarification of the date of the December 2014 CSE meeting (Tr. pp. 83-85) and further testimony on the parent's attendance at the meeting was then elicited by the IHO (Tr. pp. 96-100). This is insufficient to support a finding that the district opened the door to the issue of the parent's nonattendance at the December 2014 CSE meeting.

York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016]; M.Z., 2013 WL 1314992, at *8). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs, the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at *9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *7-*9 [S.D.N.Y. Oct. 12, 2011]).

Recently, the Second Circuit determined that the failure to memorialize which evaluative information the CSE reviewed constituted a "serious procedural violation" (L.O., 822 F.3d at 110-11). The Court in L.O. cautioned that, when a CSE fails to accurately document the evaluative data it relied on in developing an IEP, reviewing authorities or courts, often times months or years later, are left to speculate as to how the CSE formulated the student's IEP and it causes other errors or omissions in the IEP to be called into question (L.O., 822 F.3d at 110-11).

The hearing record contains a December 2012 occupational therapy progress report, a January 2013 OT evaluation, a March 2013 educational evaluation and an October 2013 OT evaluation (Dist. Exs. 9-11; Parent Ex. S at pp. 12, 17-18). While the IHO cited the 2013 evaluations to support his conclusion that the CSE had adequate evaluative information, the evidence in the hearing record does not support a finding that the December 2013 CSE considered these evaluations (IHO Decision II at p. 13; Dist. Exs. 9-11; see Tr. p. 35; Dist. Ex. 3 at p. 1).¹³ The IEP does not memorialize that the CSE considered the evaluations and no testimonial or

¹³ The December 2012 OT student progress report completed by an occupational therapist who began working with the student in November 2012 was not cited by the IHO (Parent Ex. S at pp. 12, 17-18). The December 2012 OT progress report is included in the hearing record as an attachment to a June 2015 OT evaluation completed by the same occupational therapist (id. at pp. 1, 12, 17-18). The June 2015 OT evaluation claims that the district deleted the December 2012 progress report, as well as an assistive technology referral, from the district's Special Education Student Information System (SESIS) program on May 13, 2013 (see id. at p. 13). There is nothing in the hearing record that sheds any further light on the circumstances surrounding the district's handling of the student's educational records other than documentation of findings based on a State complaint alleging that the CSE failed to respond to the parent's requests for amendments to the student's educational records (including a request to restore content improperly removed) that may or may not have pertained to the handling of the December 2012 OT progress report (Parent Ex. C at pp. 5-7). As the purported deletion of the progress report is not presented as an issue to be resolved in this forum, it is unnecessary to review the implications of such an action. However, as the district did not otherwise rebut the parent's evidence that the December 2012 OT progress report should have been available to the December 2013 CSE, its contents shall be summarized and examined in the same manner as the student's most recent evaluation information.

documentary evidence indicates otherwise.^{14, 15} Moreover, a comparison of the information about the student included in these evaluations does not align with the present levels of performance included in the December 2013 IEP (compare Dist. Ex. 3 with Dist. Exs. 9-11). These "most recent evaluations"—completed within one year of the December 2013 CSE meeting—should have been considered by the December 2013 CSE (L.O., 822 F.3d at 110-11).

The December 2012 OT student progress report, completed by the student's then-current occupational therapist, indicated that the student had significant problems with written communication; however, he was able to "legibly, with effort, copy and write a sentence" (Parent Ex. S at p. 17). The occupational therapist reported that, as volume and rate of production increased, the student's legibility decreased (id.). According to the occupational therapist, the "primary academic problem" in this area was that the student was not able to write as quickly as he thought or spoke and, therefore, he left out information when using written communication (id.). The occupational therapist also noted that, in math, the student had, at times, not received credit for work that was possibly correct due to problems with legibility (id.). In other areas the student was able to give more complete verbal as opposed to written responses (id.). The occupational therapist explained that the student could not produce the sequential alphabet from memory in either manuscript or cursive, and, at times, he used capitals and lowercase letters without regard to their placement in a sentence (id.). The occupational therapist indicated that the student had been introduced to a kinesthetic-based method for learning to write but opined that the student would "require a large amount of practice and drill, both to override neurologically imbedded incorrect practices and flawed letter and numeral production[,] as well as to effectively establish the correct ways to shape each numeral and letter" (id.). The occupational therapist reported that, following partial implementation of the kinesthetic-based method, the student was able to form numerals legibly if done in an "orderly and slow pace" but that he continued to revert to incorrect formation of the numerals five, eight, and nine, and that he was learning to self-monitor but required continued instruction to recognize correctly versus incorrectly formed numerals (id.). Among other things, the occupational therapist recommended that the student be provide with: in-class as well as pull-out, at-home, direct and consultative OT services to continue to focus on numeral and math written communication through January 2013; a move to language and

¹⁴ State and federal regulations contemplate other vehicles for documenting and/or sharing this information with the parent. Specifically, both State and federal regulations require a district to provide prior written notice any time a district proposes or refuses to "initiate or change the identification, evaluation, or educational placement of [a] child or the provision of FAPE to the child" (34 CFR 300.503[a]; 8 NYCRR 200.5[a]). Among other things, the prior written notice must include "a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action" (34 CFR 300.503[b][3]; 8 NYCRR 200.5[a][3][iv]). If a district did not send a prior written notice to the parent, the district must respond to the parent's due process complaint notice and include the same information regarding the evaluations, assessments, records, or reports the CSE relied upon (34 CFR 300.508[e]; 8 NYCRR 200.5[i][4][i]). In the instant case, the hearing record does not include a prior written notice, nor does the district's response to the parent's due process complaint notice identify the evaluations, assessments, records, or reports the December 2013 CSE relied on (Dist. Ex. 2 at p. 3).

¹⁵ Although the district special education coordinator explained the CSE's recommendations by referencing that "it was determined by the evaluator that [OT] was not needed at the time" and noted that, while the OT evaluation was not referenced in the IEP, "the parent [wa]s aware of the results as she was handed multiple copies of the [OT] reports" (Tr. pp. 37, 46-47), it remains unclear whether the committee considered the evaluations or if they were simply aware of the recommendations reached in the OT evaluations or whether the parent was provided the copies of the OT evaluations at the CSE meeting or at some other time.

handwriting with an emphasis on acquiring cursive handwriting using a neurokinesthetic approach around February 1, 2013; to explore/assess the needs of the student with respect to the use of a computer, laptop, assistive technology and instruction in keyboarding; and to continue OT twice per week for 60 minutes per session (id. at p. 18). The December 2012 OT student progress report included six new annual goals for the student to work on until March 2013, pending completion of formal OT and psychoeducational evaluations (id.).¹⁶

In January 2013, an OT evaluation of school function and participation (January 2013 OT evaluation) was conducted by the district as part of the student's triennial reevaluation (Dist. Ex. 9 at p. 2). As indicated in the report, the method of evaluation included clinical observation, parent report, teacher report, file/chart review, student interview and administration of the Wold Sentence Copying Test (WSCT), Berry Buktenica Developmental Test of Visual Motor Integration (VMI), and Child Occupational Self-Assessment (COSAS) (id.).¹⁷ The evaluation report outlined the following primary concerns with respect to the student's functioning: writing/written expression, coping with frustration, and focusing/completing work (id. at p. 3). According to the evaluation report, the parent's biggest concern regarding the student's performance in school was his writing and his tendency to miss words when copying (id. at p. 2). The January 2013 OT evaluation report described the student as cooperative, pleasant, and attentive, and noted that he worked independently on tasks and asked for clarification when needed (id. at p. 3). Additionally, the evaluator indicated that the student did not "seem to become easily distracted by the noise in the adjacent room or when multiple people walked into the room where the evaluation took place" (id.).

The January 2013 OT evaluation report included the student's then-current teachers' concerns regarding his handwriting, written expression, and math computation; specifically noting issues with coping with frustration, following directions, working independently, completing assignments, and keeping pace with class demands (Dist. Ex. 9 at p. 3). As recorded by the evaluator, the student reported that he engaged in school assemblies and shows, had made friends since entering the school, and transitioned easily between classes (id. at p. 4). In addition, he stated that loud sounds did not bother him (i.e. the fire drill), and he was not distressed by changes in his schedule or routine; however, the student reported that, at times, he became distracted by people talking to him in class (id.). Consistent with this, the evaluation report indicated that, with respect to social engagement, the student had difficulty screening out or tolerating distractions in all environments, but that this did not significantly impede the student's ability to function (id.). According to the evaluation report, no significant difficulties were noted with respect to the student's movement/accessibility, ability to complete activities of daily living (ADLs), or management of classroom tools or materials (id. at pp. 4-5).

Furthermore, the January 2013 OT evaluation report indicated that the student used a functional pencil grasp when writing, he did not report any hand pain or weakness, and he could

¹⁶ The December 2012 OT student progress report states that the goals are "for the upcoming three months, through March 2012"; however, based on the content of the report, this is presumed to be a typographical error (see Parent Ex. S at p. 18).

¹⁷ The June 2015 OT evaluation opined about the appropriateness of evaluating a student's eligibility for OT using the WSCT (Parent Ex. S at pp. 1, 4, 15). In addition, at the impartial hearing, the private neuropsychologist testified that the WSCT would not be a sufficient measure "on its own" (Tr. p. 208).

write approximately 101 letters per minute, which according to the WSCT was considered appropriate for an 8th grade student (Dist. Ex. 9 at p. 5). The evaluator reported that the student copied a 29-word sentence legibly with alignment to the left margin, used consistent spacing between words with only one error, and that he could copy from a distance with proper orientation to the line and directionality of letters (id.). The evaluator further noted that the student's legibility decreased with longer writing tasks "as he was writing at a faster speed and was not writing in a careful manner" (id.). The January 2013 OT evaluation report indicated that the student was comfortable typing on a keyboard and could type faster than he could write, and opined that a computer may be a good option for completing longer writing assignments (id.).

The January 2013 OT evaluation report included scores from an administration of the VMI, which indicated that the student's visual motor integration and motor coordination skills both fell within the below average range and his visual perception skills fell within the average range (Dist. Ex. 9 at p. 6). Based on the student's scores, the evaluator opined that some decreased motor coordination may be affecting the student's ability to copy complex forms accurately and form letters neatly (id. at p. 6).

The January 2013 OT evaluation report also included the results of the COSA, which noted the student's report that his mind often "work[ed] faster than his writing speed so it [wa]s difficult to get all of his ideas down on paper" and that he found it difficult to include all the information indicated in a writing rubric in an essay or term paper (Dist. Ex. 9 at p. 7). The evaluator described the student as a polite, cooperative, and articulate student who had difficulty organizing his thoughts on paper, writing legibly, and completing his work, which impacted his performance at school (id.). Finally, the evaluator indicated that the student had been receiving OT services for the past six years and that "his writing [wa]s legible when he wr[ote] in a slow manner" (id.). Although the evaluator did not recommend the student for school-based OT, she included a list of suggestions/accommodations/adaptations to promote school function, which included strategies to address the student's difficulties with writing/typing and attention/focus (id. at p. 8).

In addition to the January 2013 OT evaluation and as part of the student's triennial reevaluation, the district also conducted an educational evaluation of the student in March 2013 (Dist. Ex. 10). The resultant evaluation report included the results of an administration of the Stanford-Binet Intelligence Scales – Fifth Edition (SB-V), which indicated that the student attained an abbreviated IQ (ABIQ) of 100 placing him within the average range in terms of his overall ability to reason, solve problems, and adapt to the cognitive demands of his surroundings (id. at p. 2). The March 2013 educational evaluation report also included the scores from an administration of the Woodcock-Johnson Test of Achievement – Third Edition (W-J III), which indicated that the student's broad reading and academic application skills fell within the "[l]ow" range, while his broad math skills fell within the "[l]ow [a]verage" range (id. at pp. 1-2). Specifically, in reading the student received a grade equivalent score of 5.9 on letter-word identification, 5.1 on passage comprehension, and 2.8 on reading fluency (id. at p. 1). His standard score for broad reading was 75 (id. at p. 2). The March 2013 evaluation described the student's ability to decode words as better developed than his ability to reason, draw inferences, and read short passages quickly (id.). In mathematics, the student received a grade equivalent of 9.7 on math calculation, a 5.4 on applied problems, and a 4.0 on math fluency (id. at pp. 2-3). The student's standard score for broad math was 84 (id. at p. 2). The March 2013 educational evaluation report indicated that, while the student's math calculation skills were a relative strength, the student could not solve division problems or multiply numbers with decimals (id.). Additionally, the evaluation report indicated

that the student could apply various math concepts to solve one-step word problems read to him but that he also experienced difficulty solving two-step problems that involved money or purchases (id.). In writing, the student performed at a 3.0 grade equivalent on the writing sample subtest (id.). The March 2013 educational evaluation report concluded that the student demonstrated reading, writing, and mathematics delays and that he continued to need special education services to progress academically (id. at p. 3).

At the request of the parent, the district conducted a second OT evaluation of school function and participation in October 2013 (October 2013 OT evaluation) (Dist. Ex. 11). The parent requested the evaluation due to continued concerns regarding the student's motor and writing skills (id. at p. 2). As indicated in the evaluation report, the method of evaluation included clinical observation, parent report, teacher report, file/chart review, student interview, and use of the VMI and COSA (id.).¹⁸ It is noted that no formal assessments were reported in this evaluation (see id. at pp. 1-7). The evaluation report outlined the following primary concerns with respect to the student's functioning: motivation, handwriting, and communication-written (id. at p. 2). The evaluator described the student as cooperative and persistent for the duration of the evaluation and noted that he showed "good focus and attention on tasks despite potential distractions in the testing room" (id. at p. 3). The evaluator reported that, according to the student's teachers, the student, at times, rushed through assignments thereby sacrificing the quality of his work and not demonstrating his potential (id.). With regard to social engagement, the evaluator reported that the student demonstrated adequate attention to complete classroom activities despite potentially distracting stimuli, transitioned between routine activities and classes with ease, and fully participated in small and large group activities and appeared to get along well with peers (id.). Additionally, the evaluator reported that the student had functional postural control, range of motion, strength and endurance for participation in his educational environment (id. at p. 4).

According to the evaluator, the student demonstrated adequate fine motor skills to manage classroom tools and materials, was right-hand dominant, and had an array of prehension grasps and in-hand manipulation skills (Dist. Ex. 11 at p. 4). The evaluator further noted that the student held writing utensils using a functional grasp and demonstrated adequate endurance for writing and copying tasks (id.). With respect to keyboarding, the student was familiar with the "home row approach" but continued to visually regard the keys (id.). With regard to visual motor skills, the evaluator indicated that the student demonstrated appropriate visual perceptual skills to discriminate differences and similarities in letters, numbers, complex shapes, and orientation of objects (id. at p. 5). The evaluator reported that the student could copy from a near and far point model without errors or omissions and produce a sentence with adequate letter formation, spacing, sizing, and alignment as part of a near-point sentence copying task (id.). The evaluator commented that the student's writing pace appeared typical for his grade and noted that the student reported "no difficulties keeping up with the physical aspect of writing in class" (id.). Finally, the evaluator noted some inconsistencies in the legibility of the student's written work, specifically decreased legibility of the student's notes; however, the student reported that he ensured his writing was legible when his work was to be submitted (id.). In summary, the evaluator reported that the student presented with functional gross motor skills and adequate fine and visual motor coordination for independence with ADLs and management of classroom materials (id. at p. 6).

¹⁸ Although the front page of the evaluation indicates that the VMI and COSA were used to evaluate the student, they are not referred to in the body of the evaluation report (Dist. Ex. 11).

Furthermore, the evaluator reported that the student could independently implement strategies to improve his performance and participation in school, including using a computer to complete assignments and asking for clarification or assistance with tasks (*id.*). The evaluator concluded that the student did not demonstrate a need for the specialized support of school OT (*id.* at p. 6). With respect to "primary concerns," the evaluator recommended: that the student be referred to a school counselor to address motivation; that if concerns persisted regarding the student's handwriting legibility, access to a classroom computer for extended writing assignments should be considered; and that the student should be referred to a speech-language therapist and special education teacher for written communication strategies (*id.*).

Review of the evidence in the hearing record does not support a finding that the CSE considered the information summarized above concerning the student's present levels of performance. The district special education coordinator testified that the December 2013 CSE reviewed report cards and the student's transcript, "as well as teacher progress reports" (Tr. p. 35). Within the December 2013 IEP the CSE documented that it reviewed the student's scores on his U.S. History (85), Integrated Algebra (65), Living Environment (79), and Physical Setting (73) Regents exams (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 20 at pp. 1-2). Additionally, according to the December 2013 IEP, summaries of the student's then present levels of performance were based on "teacher reports"(Dist. Ex. 3 at pp. 1-2); however, no written teacher reports were memorialized as being reviewed at the meeting and none were included in the hearing record.¹⁹ Specifically, in ELA, the IEP described that the student was "usually on task during the lesson" and came to class prepared with notes but that his homework was usually incomplete and his binder and notes were disorganized (*id.* at p. 1). Furthermore, the IEP included information purportedly from the student's teacher that the student participated daily and could analyze text verbally but that he struggled with sentence structure and writing clear essays and, at times, seemed fatigued and would put his head down during class time (*id.*). According to the IEP, the student's math teacher also described that the student appeared fatigued and would put his head down and that he was off task at times during class (*id.*). The IEP also indicated that the student's math teacher would like the student to become more organized and take better notes (*id.*). The December 2013 IEP suggested that the student photocopy a peer's notes at the end of the day but noted that "it [wa]s [the student's] responsibility to do so daily" (*id.*). Furthermore, the December 2013 IEP indicated that the student would benefit academically from attending after-school tutoring one day a week and "Saturday Academy" (*id.*). The December 2013 IEP present levels of performance further indicated that the student was struggling in chemistry and attended after-school tutoring once per week with the science teacher (*id.*). The summary page of the IEP indicated that the student performed at a ninth grade instructional/functional level for reading and math (*id.* at p. 13).²⁰

Thus, according to the testimonial evidence in the hearing record and a review of the IEP itself, the present levels of performance included in the IEP were not based on the most recent

¹⁹ The December 2013 CSE meeting attendance page reflects that a regular education teacher attended the meeting (Dist. Ex. 3 at p. 15). According to the hearing record, that regular education teacher was the student's geometry teacher during the 2013-14 and 2014-15 school years (Dist. Exs. 12 at p. 2; 19 at p. 2; 20 at pp. 1, 3).

²⁰ According to the district special education coordinator, the ninth grade level was based on the fact that the student "had met ninth grade requirements" (Tr. pp. 60-61).

evaluative information and failed to describe the academic, developmental, and functional needs of the student (see 34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). For example, much of the present levels of performance focus on the student's fatigue and organization and do not describe with any specificity the student's academic skills or deficiencies in the areas of reading, writing, or math.²¹ In summary, the hearing record does not support a finding that the CSE considered the student's most recent evaluations or adequately identified the student's present levels of performance.

2. Annual Goals

The parent argues that the annual goals contained in the December 2013 IEP are lofty, vague, and overly broad and do not address the student's academic, social, and emotional deficits.²²

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The December 2013 IEP contained approximately eight annual goals which targeted skills related to writing, note-taking, reading and listening comprehension, vocabulary, and geometry (Dist. Ex. 3 at pp. 3-7). Even assuming that the December 2013 CSE considered the March 2013 educational evaluation, other than grade equivalent scores, the evaluation, detailed above, provides little information regarding the student's specific academic skills or needs (see Dist. Ex. 10). Similarly, the present levels of performance, developed as part of the December 2013 IEP, provide minimal insight into the student's needs with respect to specific reading, writing, and/or math skills (Dist. Ex. 3 at pp. 1-2). As the student's academic needs are not clearly identified, the hearing record offers little basis on which to assess whether or not the annual goals adequately addressed the student's academic needs.

The March 2013 educational evaluation indicated that the student attained a standard score of 75 with a corresponding percentile rank of 5 in Broad Reading on the W-J III ACH, and specified that the student was performing at a grade equivalent of 2.8 in reading fluency, 5.1 in

²¹ Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

²² The measurability of the goals contained in the December 2013 IEP are not at issue in this appeal; however, the findings from a State complaint issued on December 30, 2014 concluded that the December 2013 IEP contained annual goals that were not measurable in that the goals were lacking a combination of the accuracy percentage and the number of trials required to attain accuracy (Parent Ex. D at pp. 1, 8-9).

passage comprehension, and 5.0 in letter-word identification (Dist. Ex. 10 at pp. 1-2). The educational evaluation report further indicated that the student received a grade equivalent of 3.0 on a test measuring written expression (id. at p. 2). To the extent that the student exhibited unidentified deficits in written expression, the December 2013 IEP contained annual goals designed to improve the student's ability: to write and edit several drafts before producing a final product; to write simple sentences in a variety of forms; and to edit writing to correct punctuation, grammar, and most spelling (id. at pp. 4-5). While the speech-language annual goals also addressed writing skills under expressive language skills (i.e., improving the student's ability to write grammatically correct sentences, focusing on the correlation between his intended content and actual written content), the December 2013 IEP did not contain specific goals that correlated with the deficits alluded to in the March 2013 educational evaluation (i.e., reading fluency and word identification) (Dist. Exs. 3 at pp. 6-7; 10 at pp. 1-2).

With regards to the IHO's determination that the receptive language and vocabulary goals would address the student's deficits in reading comprehension and phonics, the annual goal targeting the student's ability to improve his receptive language (i.e., improving receptive language by accurately and succinctly paraphrasing a passage presented, written or verbal, in five or fewer sentences) could have addressed the areas of reading comprehension and vocabulary skills (i.e., improve his vocabulary skills by using 30 new age appropriate words in grammatically correct sentences) (Dist. Ex. 3 at p. 7). However, without further assessment or detail regarding the student's decoding and reading fluency it is not possible to know whether the speech-language goals sufficiently addressed the student's needs or whether additional annual goals were warranted.

Regarding mathematics, the December 2013 IEP contained annual goals to improve the student's ability to copy notes accurately during class and to find the four points of concurrency: orthocenter, centroid, incenter, and circumcenter (Dist. Ex. 3 at pp. 3, 7).²³ The March 2013 educational evaluation reported that the student's standard score in Broad Math on the W-J III-ACH was 84 with a corresponding percentile rank of 14 placing him within the low average range (Dist. Ex. 10 at p. 2). As discussed above, the educational evaluation indicated that the student was performing at a grade equivalent of 4.0 in math fluency, 5.4 in applied problems, and 9.7 in calculation (id.). The March 2013 educational evaluation detailed the student's struggle with solving two-step problems that involved money or purchases, the rate at which he solved basic mathematical operations, and solved division problems and problems using multiple numbers with decimals; however, the December 2013 IEP did not contain annual goals to address the student's deficits in these basic mathematic skills (id.).

With regard to the student's speech-language needs, the December 2013 IEP contained three annual goals designed to improve his expressive and receptive language skills, as described above; however, the hearing record does not contain information regarding the student's then-current speech-language strengths and deficits (Dist. Ex. 3 at pp. 6-7). Therefore, it is difficult to determine if the annual goals developed for the December 2013 IEP adequately addressed the student's needs.

²³ The annual goal in mathematics that targets finding the four points of concurrency is not discussed in the December 2013 IEP present levels of performance and is not further explained in the hearing record (see Dist. Ex. 3 at p. 7). Lacking such information, it is impossible to determine how this goal was determined or which, if any, of the student's deficits it was intended to address.

In summary, as noted above, absent evidence regarding the evaluative materials considered by the CSE or a description of the CSE's reasoning underlying the inclusion or omission of annual goals in the IEP in this instance, the state of the hearing record raises "serious questions about the CSE's review of [the student's] needs and the adequacy of its determinations in reaching the terms of the IEPs" program (L.O., 822 F.3d at 123). The extent to which these deficiencies in the hearing record regarding the annual goals contribute to a finding that the district failed to offer the student a FAPE shall be further examined below.

3. Behavioral, Attentional, and Social/Emotional Needs—Special Factors, Counseling, and Speech-Language Therapy

The parent asserts that the CSE should have conducted an FBA and created a BIP to address the student's interfering behaviors and should have recommended counseling as a related service to address the student's distractibility and feelings of being overwhelmed with work and worried about his grades. Additionally, the parent contends that the student required speech-language therapy to be delivered in a one-to-one setting due to his distractibility rather than in a group as mandated by the December 2013 IEP.

Under the IDEA (and paralleled under state policy), a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160-61 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address [among other things, a student's interfering behaviors,] in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, the "student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others goes somewhat further than federal requirements and may require that the CSE consider developing a BIP for the student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a], [b]).²⁴

²⁴ State regulation defines an FBA as "the process of determining why the student engages in behaviors that impede learning and how the student's behavior relates to the environment" and provides that the FBA "shall include, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). State regulation describes a BIP as "a plan that is based on the results of a[n] [FBA] and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1 [mmm]).

Here, a review of the hearing record shows no evidence that the student's behaviors interfered with his learning or that of other students. According to the district special education coordinator, the student was well-mannered and worked well in groups (Tr. p. 31). While the December 2013 IEP indicated that he student placed his head on his desk, displayed distractibility, appeared fatigued, or was at times "off task" in math (Dist. Ex. 3 at pp. 1-2), these descriptions of the student in the school setting do not necessarily reflect problematic behaviors that would warrant a BIP (see G.B. v New York City Dep't of Educ., 145 F. Supp. 3d 230, 252 [S.D.N.Y. 2015] [finding that a student's "tendency to withdraw" when overstimulated was not the "type[] of disruptive behavior that require[d] an FBA or BIP"]; J.S. v. New York City Dep't of Educ., 104 F. Supp. 3d 392, 406 [S.D.N.Y. 2015] [finding that reports of a student's anxiety, lethargy, motivation, and frustration described the student's "demeanor and emotional state," rather than behaviors]).

A review of the evaluative information summarized above does not reveal that, even if the CSE considered these evaluation reports, a different impression of the student's behaviors would have formed. The January and October 2013 OT evaluations and the March 2013 educational evaluation report indicated that, in the testing environment, the student presented as cooperative and attentive and both OT evaluation reports noted that he was not easily distracted during the testing (Dist. Exs. 9 at p. 3; 10 at p. 1; 11 at p. 3).²⁵ According to the January 2013 OT evaluation report, the parent indicated that the student experienced frustration, difficulty sleeping, and difficulty remaining seated to complete homework and the student reported becoming distracted "at times" when people talked to him in class (Dist. Ex. 9 at pp. 2, 4). The January 2013 OT evaluation report included the concerns of the student's teachers regarding the student's "work behaviors and student roles and responsibilities, including coping with frustration, following directions, working independently, completing assignments, and keeping pace with class demands" (id. at p. 3); however, the October 2013 OT evaluation report noted that teachers described the student as "pleasant and cooperative" and noted that he participated in class but benefited from prompts to "encourage persistence and motivation" (Dist. Ex. 11 at pp. 3, 6). In the areas of social engagement, the January 2013 OT evaluation report indicated that the student experienced difficulty with "screen[ing] out" or "tolerat[ing] distractions" but that this did not "significantly impede function" (Dist. Ex. 9 at p. 4); in contrast, the October 2013 evaluation indicated that his skill level was "consistent with classmates" (Dist. Ex. 11 at p. 3). Both OT evaluation reports indicated that the student's skill level in other areas of social engagement was "consistent with classmates" (id.).

The parent does not argue that the student exhibited behaviors other than those identified in the IEP and does not point to evidence that the identified behaviors interfered with the student's learning or that of others. Moreover, the December 2013 IEP set forth a program that would generally have supported needs in the areas of distractibility and fatigue, including the strategies to address the student's management needs (such as small group instruction and extra time), as well as testing accommodations, ICT services, and speech-language therapy (see Dist. Ex. 3 at pp. 2, 8, 10). Given the above, the evidence in the hearing record supports the determination that the CSE did not have information before it—or otherwise available to it—which indicated that the

²⁵ The December 2012 OT progress report contained within the June 2015 OT evaluation report neither includes information about the student's behavioral needs nor elaborates on the fatigue or attention difficulties noted in the IEP (Parent Ex. S at pp. 13, 17-18).

student exhibited behaviors that impeded his learning or that of others to the extent that the CSE was required to recommend a BIP be developed for the student.

Relatedly, the hearing record also does not support the parent's argument that the student required counseling as a related service. Specifically, while the student did, at times, exhibit difficulty staying on task and focused, he did not present with social/emotional needs such that he required counseling services in order to receive educational benefit (Tr. pp. 31, 33; Dist. Exs. 3 at p. 1; 9 at pp. 3-4). The district special education coordinator testified that counseling "was never really brought up" in any of the student's CSE meetings (Tr. p. 55), although she acknowledged that the parent communicated to the CSE that the student "was overwhelmed with his course load" (Tr. p. 56). Nonetheless, the district special education coordinator testified that the CSE did not recommend counseling because the student "never exhibited any kind of anxiety towards anything in his classroom that warranted the need for counseling services" (Tr. p. 37). While the private neuropsychologist did not evaluate the student until after the both the December 2013 and December 2014 CSE meetings, at the impartial hearing, he opined that the student "could [have] benefit[ed] from counseling services with the right counselor, if it fit into his schedule" (Tr. p. 211). He elaborated that, such counseling services would be appropriate if "focused on giving him support in meeting all of his academic needs" (*id.*). The adequacy of the support for the student's academic needs is discussed below with respect to the recommended ICT services; however, the hearing record does not indicate that the student required additional support for his social/emotional needs in order to receive a FAPE.

Finally, as the parent's objection to the speech-language therapy is related to the student's distractibility, it may also be examined in this context. The December 2013 IEP provided for the student's receipt of speech-language therapy twice per week for 45 minutes per session in a group of five students (Dist. Ex. 3 at p. 8). As noted above, the hearing record does not include any information generated as of the date of the December 2013 CSE regarding the student's speech-language needs. However, given the parent's narrow objection to the CSE's recommendation for speech-language therapy, the evidence in the hearing record is sufficient to support the conclusion that the student did not exhibit distractibility to the degree that he would not receive educational benefit in group speech-language therapy. With specific respect to his speech-language needs, the special education coordinator testified that the student struggled with expressive language (Tr. pp. 32, 36). The private neuropsychologist testified as to his opinion that it would have been very difficult for the student "to work on his writing . . . in a group setting" (Tr. p. 204); however, he also acknowledged that the group setting of the speech-language therapy would have been beneficial for improving the student's verbal expression (Tr. p. 223). The special education coordinator described, while the student liked to work independently, he could also work well in groups (Tr. pp. 31, 32). Further, a review of the hearing record as a whole reveals that, while the student could at times be distracted, he was also an engaged participant in his classes (*see* Dist. Exs. 3 at p. 1; 9 at pp. 3-4). The special education coordinator explained that the December 2013 CSE did not recommend individual speech-language therapy for the student because the student could "function within a small group" and, therefore, the small group service provided the least restrictive environment for the student (Tr. pp. 58-59). Moreover, the speech-language therapy sessions were recommended to be provided in the therapy room, which could provide a quieter and less distracting environment (Dist. Ex. 3 at p. 8). Finally, the student testified he preferred "[e]ither/or" when it came to group versus individual speech-language therapy (Tr. p. 249). Based on the foregoing, the hearing record does not support a finding that the student exhibited

distractibility to such a degree that he required speech-language therapy on an individual basis in order to receive a FAPE.

In summary, the hearing record supports the IHO's determinations that the student did not exhibit interfering behaviors warranting an FBA or a BIP, did not exhibit social/emotional needs warranting a recommendation of counseling, and did not exhibit distractibility to a degree that warranted a recommendation for individual rather than group speech-language therapy.

4. Writing Needs—Occupational Therapy and Assistive Technology

The parent asserts that the December 2013 CSE failed to recommend OT for the student, despite reports that the student's notes were frequently incomplete and that he needed to improve his organization. Additionally, although not addressed by the IHO, the parent continues to assert that the CSE failed to recommend assistive technology for the student.

Regarding OT services for the student, the IHO determined that the CSE discontinued the student's OT services consistent with the recommendation of the student's occupational therapist from the 2012-13 school year and cited to the January and October 2013 OT evaluations (IHO Decision at p. 15). However, the hearing record does not indicate that the occupational therapists who conducted the January and October 2013 OT evaluations were providers of OT to the student (see Tr. p. 47). Notwithstanding this inaccuracy, the evidence in the hearing record, as a whole, supports the IHO's conclusion that the student did not require OT services to receive a FAPE.

Although at the time of the December 2013 CSE meeting the student continued to have difficulty with binder organization and taking complete notes, a review of the hearing record does not support the parent's contention that OT should have been recommended as a related service for the student. The district special education coordinator testified that OT was not recommended because the evaluator determined it was not needed at that time (Tr. p. 37). The occupational therapist who completed the December 2012 progress update of the student recommended that he receive two 60-minute sessions of OT per week, pending the completion of psychoeducational and OT assessments (Parent Ex. S at p. 18). The district subsequently conducted two OT evaluations of the student: the first in January 2013 and the second in October 2013, neither of which recommended OT services for the student (Dist. Exs. 9; 11). While the January 2013 OT evaluation reflected the concerns of the student's then-current teachers regarding his handwriting, it also indicated that the student's writing was legible when he wrote in a slow manner (Dist. Ex. 9 at pp. 3, 7). In addition, the October 2013 OT evaluation, discussed in more detail above, indicated that the student had functional postural control, range of motion, strength and endurance for participation in his educational environment, and adequate fine motor skills to manage classroom tools and materials (Dist. Ex. 11 at pp. 4-5). Although the evaluator noted that the student demonstrated inconsistencies in the legibility of his written work and that his notes showed decreased writing legibility, she also noted that the student ensured that his writing was legible when he knew his work would be submitted to a teacher for review and that he frequently used a home computer to complete assignments (id.).

While neither the January 2013 nor October 2013 OT evaluations recommended the student for OT services, both evaluations noted the student's difficulty with maintaining legibility on longer writing assignments and recommended that the student have access to a computer or be allowed to type longer assignments (Dist. Exs. 9 at pp. 5, 8; 11 at p. 6). The parent asserts that the

December 2013 CSE and resultant IEP failed to provide the student with any assistive technologies, supplementary aids, or supports. Under the IDEA, one of the special factors that a CSE must consider is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]).

According to the district special education coordinator, the December 2013 CSE did not consider evaluating the student's need for assistive technology devices or services (Tr. p. 101). However, as discussed above, the December 2013 CSE should have considered the January 2013 OT evaluation, which indicated that the student was comfortable typing on a keyboard and could type faster than he could write (Dist. Ex. 9 at p. 5). Furthermore, the January 2013 OT evaluation indicated that using a computer might be a good option for the student for completing longer writing assignments, recommended that staff consider allowing the student to type writing assignments, and offered suggestions for a variety of typing tutorials and games to improve the student's typing skills (*id.* at p. 5, 8).²⁶ The December 2012 OT student progress report also recommended that the use of a computer, laptop, assistive technology, and instruction in keyboarding be explored (Parent Ex. S at p. 18). The district special education coordinator testified that she had a discussion with the parent regarding the provision of a laptop for the student, but the parent and student determined they did not want one (Tr. p. 101; see Parent Ex. S at p. 18). The parent confirmed that she did not want the student to use a laptop in class because the student did not like to type and the parent was concerned that the student would be viewed differently by classmates if he used a laptop (Tr. pp. 234-35). Overall, the district cannot rely on the parent's rejection of the specific device as a basis for not conducting an assistive technology evaluation or considering options other than a laptop (see Letter to Simon, 211 IDELR 436 [OSEP 1987] ["Where an open discussion does not lead to agreement on the contents of the IEP, the local educational agency has the ultimate responsibility for crafting the IEP."]). This is especially so where there is no indication that the district even inquired as to the parent's reason for not wanting the student to use a laptop (Tr. p. 101).

The district's failure to consider assistive technology may have arisen from the December 2013 CSE's failure to appropriately consider the above-referenced OT evaluations (or document that it did and why it decided not to provide assistive technology to the student). However, while the CSE failed to identify the student's need for assistive technology and either provide it or document reasons why it was not necessary, the extent to which this failure may have contributed to a denial of a FAPE is discussed below.

²⁶ The June 2015 OT evaluation and report contains a document from the district's SESIS program which indicated that an assistive technology evaluation referral was deleted from the system on May 13, 2013 (Parent Ex. S at p. 14). There is no indication in the hearing record that the district ever conducted an assistive technology evaluation of the student.

5. Management Needs, Testing Accommodations, and Supplementary Aids and Supports

The parent argues that the December 2013 IEP failed to provide the student with sufficient resources to address his management needs, specifically identifying a lack of 1:1 support, manipulatives, sentence starters, a multi-sensory learning environment, and graphic organizers. Additionally, the parent asserts in general terms that the IEP failed to include adequate supplementary aids or supports.²⁷

State regulation defines management needs as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). State guidance provides examples of environmental modifications (i.e., consistency in routine, limited visual or auditory distractions, adaptive furniture), human resources (i.e., assistance in locating classes, following schedules, and note taking), and material resources (i.e., instructional materials in alternative formats) ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 20, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEP_guideDec2010.pdf).²⁸ A student's management needs must be developed in accordance with the factors identified in the areas of academic achievement, functional performance, and learning characteristics, social development, and physical development, and reported in the student's IEP (see 8 NYCRR 200.1[ww][3][i][d], 200.4[d][2][i]; see also "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 20). Additionally, to the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]). Examples in State guidance of supplementary aids and services, accommodations, and program modifications include provision of a note taker, instructional materials in alternative formats, extra time to go between classes, special seating arrangements, highlighted work, books on tape, study guide outlines, use of a study carrel, assignment of supplementary school personnel, behavior management/support plan, or extra time to complete assignments (see "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 40-41; see also Continuum of Special Education Services for School-Age Students with Disabilities," at p.5, Office of Special Educ. Mem. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>).

²⁷ The parent also asserts in general terms that the testing accommodations included in the December 2013 IEP were inadequate. In the due process complaint notice, the parent originally alleged that the testing accommodations were insufficient because the student "failed to receive a group smaller than 12 students despite his inattentiveness" (Parent Ex. A at p. 3). This allegation sounded more akin to a claim that the district failed to implement the mandated testing accommodation. The IHO found that the evidence did not support this allegation (IHO Decision at p. 20) and the parent has not directly challenged this finding. Therefore, the IHO's determination on this issue is final and binding and will not be further addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Alternatively, I would find the parent's allegation insufficiently particularized to allow meaningful review.

²⁸ Additional examples of management needs can be found in the general directions for the use of the State's model IEP form (see "General Directions to Use the State's Model IEP form," Office of Special Educ. Mem. [Revised Mar. 2010], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/directions.htm>).

To address the student's management needs the December 2013 IEP contained the following strategies and supports: ICT services, speech-language therapy, small group instruction, extra time, tutoring in subject areas where necessary, tests read aloud where necessary, and use of a calculator (Dist. Ex. 3 at p. 2). The December 2013 CSE also recommended testing accommodations consisting of: extended time (double time), separate location (no more than 12 students), tests read aloud, and use of a calculator (id. at pp. 2, 10).

The special education coordinator testified that the student could ask for help when needed, he would follow directions, was respectful, and that he did better when given extra time (Tr. p. 33). She also testified that the CSE wanted to leave the IEP "a little bit general" and "didn't want to list certain specific tools" (Tr. pp. 48-49). While some of the strategies preferred by the parent may have been helpful, the hearing record does not indicate that they were necessary for the student to receive an educational benefit (see N.B. & C.B. v. New York City Dep't of Educ., 2016 WL 5816925, at *5 [S.D.N.Y. Sept. 29, 2016] [finding that the omission of certain sensory management techniques from the student's IEP did not deny the student a FAPE]; T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *15 [S.D.N.Y. Mar. 30, 2016] [noting that the law does "not require every aspect of a child's specific educational needs to be detailed in the IEP, as long as the IEP is designed to address those issues"]). For example, the special education coordinator testified as to how graphic organizers would have helped the student to take notes independently but explained it is one of many tools a teacher could use to target a goal directed at improving a student's note-taking skills (Tr. p. 48-49). In this instance, the IEP addressed the student's management need (for assistance with note taking), through an annual goal and a description within the present levels of performance indicating the student would be allowed to copy a peer's notes and compare them to his own to see what was missing (Dist. Ex. 3 at pp. 1-2, 4).

Beyond the identified supports for the student's management needs, the parent does not specify which aids and supports she believes the CSE should have recommended to address the student's needs and nothing in the hearing record indicates that the student required additional supplementary aids, supports, or strategies not discussed elsewhere in this decision in order to receive an educational benefit.²⁹ In light of the above, both the student's management needs and the student's need for supplementary aids, supports and strategies were adequately addressed in the December 2013 IEP.

6. ICT Services

The parent contends that the December 2013 CSE's recommendation for ICT services in a general education classroom was not sufficient to meet the student's needs and suggests that the CSE should have also recommended SETSS to address the student's academic deficits. State regulation defines ICT services as "specially designed instruction and academic instruction

²⁹ While not dispositive as to the provision of FAPE, the rationale given by the district's witness to the question of why the district did not consider certain supplementary aids and modifications to address the student's deficits—that the SESIS computer program does not allow for certain program modifications—is wholly irrelevant (see Tr. pp. 58-59). The provisions of supplementary aids and modifications is dependent on the student's needs, not on how a software application was programed (20 U.S.C. § 1400[d][1][A]-[B]; see Educ. Law § 4402 [3]; see generally Forest Grove Sch. Dist., 557 U.S. at 239; Rowley, 458 U.S. at 206-07).

provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving [ICT] services in a class shall not exceed 12 students" and school personnel assigned to such a classroom shall "minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][1]-[2]).

The December 2013 CSE recommended that the student receive ICT services in a general education classroom in ELA (five times per week), math (five times per week), and sciences (four times per week) (Dist. Ex. 3 at p. 8). According to the district special education coordinator the December 2013 CSE recommended ICT services because the student was taking Regents courses in ELA, math, and sciences (Tr. pp. 35). She further testified that the CSE "had to take into consideration the current program that was in place for the student," which included college courses (Tr. p. 37). She testified that, given the student's then-current program, "no other related services would have been needed," and that no other programs were considered at the time of the December 2013 CSE meeting (Tr. pp. 36-37).

The conclusory explanation of the special education coordinator is insufficient to support the recommendation for ICT services (J.L. v. New York City Dep't of Educ., 2016 WL 6902137 at *6 [E.D.N.Y. Nov. 22, 2016] [finding that the district "failed to explain" the appropriateness of the recommended placement "in the face of the objections raised by [the student's] mother and . . . teacher"]; L.R. v. New York City Dep't of Educ., 2016 WL 3390413 [E.D.N.Y. Jun. 20, 2016] [finding that "[a] more detailed explanation of what justified the . . . placement—with specific reference to [the student's] circumstances—should have been provided to demonstrate the IEP was 'reasonably calculated' to provide benefits based on [the student's] 'unique needs'"], quoting M.O. v. New York City Dep't of Educ., 793 F.3d 236, 238-39 [2d Cir. 2015]). Further, to the extent that the special education coordinator justified the special education program and related services recommended in the December 2013 IEP because the student was taking college courses and, therefore, his schedule would not permit additional services,³⁰ the December 2013 CSE had the obligation to develop an appropriate IEP that would support the student's unique needs, irrespective of any administrative concerns such as scheduling (34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; Adams v. State, 195 F.3d 1141, 1151 [9th Cir. 1999]; Reusch v. Fountain, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] ["Although the Act does not require that each school building in [a district] be able to provide all the special education and related services for all types and severities of disabilities[, i]n all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]; see also Letter to Clarke, 48 IDELR 77 [OSEP 2007] [stating that service delivery determinations must be made by the CSE "based on a child's individual and unique needs, and cannot be made as a matter of general policy by administrators, teachers or others apart from the IEP Team process"]).

What is lacking from the special education coordinator's testimony, as well as from the hearing record as a whole, is information known to the CSE regarding the student's academic needs sufficient to evaluate the appropriateness of the recommended placement. Although the March

³⁰ The special education coordinator testified more explicitly that the December 2014 CSE considered the student's schedule (see Tr. pp. 42, 91-93). As for the December 2013 CSE, it is less clear what the coordinator meant by stating that the CSE had to consider the student's college courses.

2013 educational evaluation lacked specifics with regard to the student's then-current reading and writing abilities, the scores reported by the evaluator suggest that the student had delays in at least some areas of reading, math, and writing (Dist. Ex. 10). Notably, the March 2013 educational evaluation indicated that the student's broad reading skills fell within the "[l]ow range" and his math abilities fell within the "[l]ow [a]verage range" (*id.* at pp. 1-2). The evaluation described the student's ability to decode words as better developed than his ability to reason, draw inferences, and read short passages quickly (*id.*). The March 2013 educational evaluation further indicated that, while the student's math calculation skills were a relative strength and he could apply various math concepts to solve one-step word problems read to him, the student could not solve division problems or multiply numbers with decimals and had difficulty solving two-step problems that involved money or purchases (*id.* at p. 2). Additionally, the March 2013 evaluation reported that the student performed at a 3.0 grade equivalent on the writing samples subtest of the W-J III (*id.*). Finally, the March 2013 educational evaluation indicated that the student continued to need special education services to progress academically (*id.* at p. 3). Based on this information, the evidence indicates that the student needed special education academic support but the hearing record is insufficient to conclude that the recommended ICT services were adequate to address these needs. In addition to the deficiencies in the CSE's documentation of the evaluative information—which placed into question many of the CSE's recommendations including the ICT services—the district also failed to explain its reasoning in a way that related the recommendation back to the student's special education needs.

Finally, the December 2013 IEP indicated that the student benefitted academically from tutoring, suggested that he continue attending tutoring, and recommended "tutoring in subject areas where necessary" in the management needs section of the December 2013 IEP (Dist. Ex. 3 at pp. 1-2). Initially, the manner in which the tutoring is referenced in the IEP is such that it was not a mandated service (*id.*). Instead, the tutoring was framed as a resource in which the student could participate at his or his parent's own option with no requirement attached to the tutoring relative to the frequency, duration, location, or subject areas of instruction or the type of threshold service level requirements (i.e., staffing qualifications, maximum student-to-staff ratios, etc.) attached to special education services such as resource room or consultant teacher services (see 8 NYCRR 200.1[m], [rr]; 200.4[2][v][b][7]; 200.6[f]; see also Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 6-11).^{31, 32} Therefore, under the circumstances of this case, the reference to the student's non-mandated participation in "tutoring" does not establish that the CSE contemplated the student's receipt of special education academic support in addition

³¹ While the hearing record does not indicate that the tutoring in this case consisted of academic intervention services (AIS) contemplated by State regulations—i.e., "additional instruction which supplements the instruction provided in the general curriculum" available to disabled and nondisabled students (8 NYCRR 100.1[g]; see 8 NYCRR 100.2[ee])—by way of analogy, State regulation specifically contemplates that AIS be made "available to students with disabilities" provided that such services are provided in a manner consistent with such students' IEPs (8 NYCRR 100.1[g]). According to State guidance, AIS are provided in addition to, and must not supplant, special education services (see "Academic Intervention Services: Questions and Answers," at p. 5, Office of P-12 Mem. [Jan. 2000] [emphasis added], available at <http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf>).

³² There would have been no impediment to the December 2013 CSE recommending tutoring as a part of the student's mandated special education program if deemed necessary for the student to receive a FAPE. That is, the fact that some "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]).

to the recommended ICT services. Moreover, the after-the-fact evidence on which the IHO relied regarding the student's actual participation in tutoring, his grades by the end of the 2013-14 school year, and his promotion to the twelfth grade (see IHO Decision at p. 15; Tr. pp. 38, 86-88; Dist. Exs. 4 at p. 2; 20; IHO Ex. XI), while relevant to the below discussion of compensatory services, should not be considered in determining whether the December 2013 IEP offered the student a FAPE because the evidence relates to services beyond those required in the IEP or information about the student's progress, which was unavailable to the CSE and, therefore, cannot be used to assess the CSE's recommendations at the time they were made (R.E., 694 F.3d at 186; see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]).

In summary, given the limited information regarding the evaluative data on which the December 2013 CSE relied, the evidence in the educational evaluation that the student had academic needs in the areas of writing, reading, and math, the lack of any explanation in the hearing record regarding the CSE's recommendation, and the optional manner in which the tutoring was included in the IEP, the hearing record is insufficient to support a determination that the ICT services were adequate to ensure the student received educational benefit.

Based on the foregoing, due to the procedural violations and substantive errors in the development of the December 2013 IEP, and in the resultant IEP, the evidence in the hearing record shows that the district failed to offer the student a program that was reasonably calculated to enable him to receive educational benefit (Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]).

C. December 2014 CSE and IEP

1. Consideration of Evaluative Information and Present Levels of Performance

The parent asserts that the December 2014 CSE failed to review any evaluative materials or documents during the December 2014 CSE meeting. Additionally, the parent alleges that the student's functional levels were listed incorrectly on the December 2014 IEP.³³

On December 23, 2014, the CSE convened for the student's annual review (Dist. Ex. 4 at p. 3). According to the district special education coordinator who chaired the meeting, the December 2014 CSE based its recommendations on the student's college transcript, high school transcript, "former" IEP, teacher progress reports, and speech-language therapy reports (Tr. pp. 40, 76-77; see Dist. Exs. 12; 13; 20). The "evaluation results" section of the December 2014 IEP reflected the student's grades on numerous Regents examinations, the number of cumulative credits earned by the student, and the student's cumulative average (Dist. Ex. 4 at p. 1). The IEP also noted that the student was administered a Level II Vocational Assessment the day before the December 23, 2014 CSE meeting (id. at pp. 1, 2). Consistent with the parent's assertion, the

³³ To the extent that the parent's petition alleges that the student had not been evaluated in the area of speech-language "in years," the parent raises this allegation for the first time on appeal and, as no claim pertaining to the sufficiency of the evaluative information is stated in the parent's due process complaint notice (Parent Ex. A; see 20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]). In any event, given the information available to the December 2013 CSE in the speech-language progress report (see Dist. Ex. 13), this deficiency would not be dispositive of a FAPE.

hearing record does not indicate that the December 2014 CSE considered the January or October 2013 OT evaluations or the March 2013 educational evaluation (Dist. Exs. 9-11), and the consideration of the student's December 2013 IEP would have been of limited utility given the above discussion of its inadequate description of the student needs (see Dist. Ex. 3 at pp. 1-2).

Notwithstanding this, the hearing record indicates that the CSE did consider two teacher progress reports completed on December 2, 2014, one for chemistry and the other for geometry (Tr. pp. 76; Dist. Ex. 12). The first report indicated that, in chemistry, the student was a hard worker, made every effort to complete his assignments, and participated in class and was very respectful (Dist. Ex. 12 at p. 1). The progress report further described the student as "not afraid to vocalize his answer to a question be it wrong or right" and noted that he worked well individually or with a group but that he would occasionally be found "dozing off in class" (id.). The report also noted that the student would forget information easily but would make "every effort to learn and get his work done" (id.). The second report, for geometry, described the student as "willing to take risks with regards to participation in class and explaining his reasoning" (id. at p. 2). The geometry report indicated that the student had improved his written arguments to support his calculations and that his work had become "markedly clear to read and follow" (id.). The report further indicated that the student's weakness in geometry was "largely due to his organization of his classwork notes and materials," and that he had been working on consolidation of his notes so that he would have "one definite place to refer to" when doing assignments and assessments (id.).

The hearing record also contains an undated speech-language student progress report, which, according to the district special education coordinator, the December 2013 CSE considered (Tr. pp. 76-77; Dist. Ex. 13).³⁴ The speech-language student progress report indicated that the student had been working to improve his overall language, such as his ability to accurately express his ideas in writing, comprehend a passage and paraphrase it, and improve his vocabulary (Dist. Ex. 13 at p. 1). The report indicated that the student's attendance was sporadic at the beginning of the school year but that he had since shown increased responsibility regarding his attendance, that he required "moderate-max" prompting to ensure that his writing accurately reflected his intended ideas, and that he remained engaged throughout therapy sessions and was respectful towards peers and adults (id.). The speech-language student progress report detailed the student's then-current goals which targeted: his ability to write grammatically correct sentences, focusing the on the correlation between intended and actual written content; accurately and succinctly paraphrasing a passage presented verbally or in writing; and expanding his vocabulary (id.). The report concluded with a recommendation that the student continue to receive speech-language therapy for two 45-minute sessions in a group of 5 and also that he continue working on his then-current goals until they were met (id. at p. 2).

According to the district special education coordinator, the student's speech-language therapist attended the December 23, 2014 CSE meeting and shared her report with the committee (Tr. pp. 76-77). In addition to reflecting some of the contents of the speech-language student progress report, the December 2014 IEP indicated that the student was aware of his language delays and would occasionally become frustrated and that he could verbalize a response to an

³⁴ Although the speech-language student progress report itself is undated, it was entered into evidence, without objection, with a date of December 3, 2014 (Tr. pp. 12, 76-77, 111-12).

answer but was not able to clearly write the response (Dist. Ex. 4 at p. 1). Likewise, the present levels of performance expanded on the teacher progress reports.³⁵ In geometry, the December 2014 IEP indicated that the student benefited from: teacher check-ins to ensure his notes were in the "class designated section" and to keep him focused in class; extra time for in-class assessments and tests; and one-to-one help from his teachers (id. at p. 2). The December 2014 IEP further indicated that the student benefitted from teacher modeling of problems, working in pairs with stronger students, step-by-step instructions on how to solve geometry problems, and "constant teacher check ins" (id.). In chemistry, the December 2014 IEP indicated that the student came to class prepared and handed homework in on time, participated and worked well with his peers, and was a "hard worker" and very respectful (id.). The IEP further described that the student struggled with comprehension of chemistry readings and answering questions based on a given science text and that he needed to improve his ability: to read a given chemistry text; to determine the central ideas; and to summarize complex concepts and information by paraphrasing into simpler, accurate terms verbally and in his writing when given a set of chemistry reading comprehension questions (id.). The December 2014 IEP indicated that the student benefitted from underlining key words while reading, using a graphic organizer to help him comprehend text, verbally explaining what he had read, and teacher check-ins (id.). Furthermore, the IEP described the student as distracted at times and indicated that he exhibited "tired behavior such as dozing off during lessons" (id.). Finally, the December 2014 IEP indicated that the student benefitted from seating towards the front of the classroom and teacher prompting to stay focused during class (id.).

The December 2014 IEP indicated that the student had shown progress in chemistry and mathematics classes; however, the CSE recommended continued ICT services in these classes because he did not pass them the previous school year and needed these credits to graduate from high school (Dist. Ex. 4 at p. 2). The IEP further indicated that the student was receiving ICT services so he would have additional supports within the classroom (id.).

With respect to speech-language therapy, the December 2014 IEP indicated that the student worked well in a small group, was an independent thinker, and voiced his own opinion (Dist. Ex. 4 at p. 2). Additionally, the IEP described that the student worked well when he was able to relate the lesson to a real-life interest, and that his attention occasionally drifted but he could be redirected back to task (id.). Finally, the December 2014 IEP indicated that the student required extra time to process and organize his ideas before expressing them either verbally or in writing (id.). The summary page of the IEP indicated that the student performed at a tenth grade instructional/functional level for reading and math (id. at p. 14).³⁶

While the December 2014 CSE again failed to adequately memorialize the information relied upon in developing the IEP, in contrast to the December 2013 IEP, the hearing record includes testimony showing that the December 2014 CSE considered information from a variety of sources (i.e., report cards, transcripts, a prior IEP, written teacher and speech-language progress reports, and verbal reports at the CSE meeting), and the present levels of performance in the

³⁵ The December 2014 CSE meeting attendance page reflects that a regular education teacher attended the meeting (Dist. Ex. 4 at p. 17). According to the hearing record, that regular education teacher was the student's geometry teacher during the 2013-14 and 2014-15 school years (Dist. Exs. 12 at p. 2; 19 at p. 2; 20 at pp. 1, 3).

³⁶ According to the district special education coordinator, the tenth grade level was based on the fact that the student "had met tenth grade requirements" (Tr. pp. 80-81).

December 2014 IEP described some actual skill areas and included information generally consistent with both the teacher and provider progress reports. Overall, the present levels of performance included in the December 2014 IEP described the academic, developmental, and functional needs of the student that aligned with information available to the CSE (see 34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]) with a notable exception. As noted above, the hearing record does not indicate that the CSE considered the March 2013 educational evaluation, which is the only document in the hearing record generated at the time of the CSE meeting that described the student's needs in ELA (see Dist. Ex. 10 at pp. 1-2). The district special education coordinator testified that there was no discussion by the student's teachers about his writing needs but indicated, instead, that the speech-language therapist discussed the student's expressive language needs at the CSE meeting (Tr. p. 62). However, the hearing record shows that the December 2014 CSE did review the student's prior IEP in which ICT services were recommended in his ELA class but no teacher progress report was included in the hearing record with regards to the student's needs in ELA. Furthermore, while considering a State-wide assessment is not inappropriate when developing IEP recommendations, relying on the fact that the student passed a Regents exam is not sufficiently comprehensive to identify all of the student's special education and related services needs (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Based on the foregoing, the hearing record supports a finding that the December 2014 CSE failed to consider the available evaluative information to understand the student's needs in the areas of ELA. This procedural violation, alone, would be insufficient to support a determination that the district significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]). However, as described below, the lack of information about the student's needs in ELA results in an inability to judge the appropriateness of the remaining content of the IEP relating to this area of need (see L.O., 822 F.3d at 110-11).

2. Annual Goals

The parent asserts that the December 2014 IEP included lofty, vague, and overly broad annual goals, which failed to address his academic and social/emotional deficits. The parent further argues that the IHO erred in finding the annual goals appropriate despite acknowledging the lack of ELA goals. Specifically, the parent asserts that the IEP failed to include any encoding or decoding goals, ignored the student's needs related to reading comprehension, and lacked any ELA, spelling, vocabulary, or written objectives. In addition, the parent asserts that the IEP failure to address the student's math deficits, focusing on geometry when the student could not complete introductory math level programs.

The December 2014 IEP contains approximately seven annual goals designed to improve the student's skills in receptive and expressive language, ability to comprehend chemistry writings and texts, and ability to solve geometry problems related to geometric shapes and congruence (Dist. Ex. 4 at pp. 5-9). Specifically, with regard to speech-language skills, the December 2014 IEP contains three annual goals related to improving the student's expressive language skills as demonstrated by an ability: to write grade-level grammatically correct sentences focusing on the correlation between his intended content and actual written content results, given moderate prompts and sentence stem prompts; to improve receptive and expressive language skills as

demonstrated by an ability to accurately and succinctly paraphrase (written or verbal) a grade-level passage presented (written or verbal) in five or fewer sentences with moderate verbal prompts; and to improve vocabulary skills as demonstrated by an ability to use 25 new grade-level vocabulary words correctly in grammatically correct sentences given verbal and visual cues and modeling (id. at pp. 5-6). In chemistry, the December 2014 IEP contained two annual goals designed to improve the student's ability: (1) to answer five comprehension questions based on a paragraph of chemistry information, and (2) to determine the central ideas, conclusions of a text, summarize complex concepts, processes, or information presented in a grade-level scientific text by paraphrasing them in simpler but accurate terms (id. at pp. 7-8). In geometry, the December 2014 IEP contained two annual goals designed to improve the student's ability to complete a page of 10 geometric problems involving geometric shapes, and complete a page of 10 geometric examples proving congruence between two given shapes on a graph (id. at pp. 8-9).

In contrast to the December 2013 IEP, given the more specific description of the student's areas of strength and deficit in the present levels of performance in the areas of chemistry, geometry, and speech-language, the appropriateness of the annual goals in the December 2014 IEP may be evaluated and do align with the student's identified areas of need (compare Dist. Ex. 4 at pp. 1-3, with Dist. Ex. 4 at pp. 5-9). However, as the IHO observed, the December 2014 IEP does not contain specific annual goals targeting the student's ELA needs (see Dist. Ex. 4 at pp. 5-9). While, the annual goals developed for speech-language skills and chemistry address, to some extent, reading comprehension, vocabulary development, and written expression skills—goals that could potentially assist the student in developing his reading and writing skills (see Dist. Ex. 4 at pp. 5-8)—without further assessment or detail regarding the student's decoding and reading fluency it is not possible to know whether these goals sufficiently addressed the student's needs or whether additional annual goals were warranted. The extent to which this contributes to a finding that the district denied the student a FAPE is addressed below.

3. Behavioral, Attentional, and Social/Emotional Needs—Special Factors, Counseling, and Speech-Language Therapy

The parent argues that the December 2014 CSE failed to recommend an FBA or a BIP for the student despite the student's interfering behaviors and inability to focus and attend. The parent also asserts that the December 2014 CSE should also have recommended counseling due to the student's frustration, difficulty with organization, and need for individual attention. Additionally, as with the December 2013 IEP, the parent contends that the student required speech-language therapy to be delivered in a one-to-one setting due to his distractibility rather than in a group as mandated by the December 2014 IEP.

For reasons similar to those set forth above for the December 2013 IEP, the hearing record shows no evidence that the student's behaviors interfered with his learning or that of other students. The December 2014 teacher progress reports indicated that: in math class, the student was usually on task, got along well with his peers, and benefited from prompts as he tended to lose focus; and in chemistry class, the student at times became distracted or demonstrated tired behavior, such as dozing off (Dist. Ex. 4 at pp. 1, 2). These descriptions of the student in the school setting do not necessarily reflect problematic behaviors that would warrant a BIP (see G.B., 145 F. Supp. 3d at 252; J.S., 104 F. Supp. 3d at 406). Furthermore, the hearing record shows that, to address the student's lack of focus, staying on task, and dozing off, the December 2014 IEP recommended strategies to address the student's management needs and testing accommodations, summarized in

more detail below, as well as the ICT services, such that, even assuming an FBA or a BIP was warranted, the lack of such a recommendation by the December 2014 CSE would not result in a finding that the district failed to offer the student a FAPE (Dist. Ex. 4 at pp. 2, 3; see A.C., 553 F.3d at 172-73).

As to the parent's contention related to counseling, the hearing record shows that the student occasionally became frustrated due to his awareness of his language delays (Dist. Ex. 4 at p. 1). The hearing record also shows that the student exhibited difficulty staying on task and focused at times but that these issues were addressed through recommended strategies, small group instruction, testing accommodations, and ICT services (id. at pp. 1-3, 10, 11). Furthermore, as noted above, the district special education coordinator testified that the student "never exhibited any kind of anxiety towards anything in his classroom that warranted the need for counseling services" and that counseling was never really brought up in any of the IEP meetings (Tr. pp. 37, 55). Notwithstanding the student's reported difficulty with feeling overwhelmed with his workload, the hearing record does not indicate that the student required counseling as a related service in order to receive educational benefit (Tr. p. 56; Dist. Ex. 4 at p. 3).

Contrary to the parent's contention that the student required individual speech-language therapy due to his distractibility, for reasons similar to those set forth above, the hearing record demonstrates that the recommended group speech-language therapy was appropriate to support the student's speech-language needs. The December 2014 CSE continued the type, frequency, and duration of speech-language therapy services that were recommended in the December 2013 IEP (compare Dist. Ex. 3 at p. 8, with Dist. Ex. 4 at p. 10). Specifically, the December 2014 CSE recommended that the student receive speech-language therapy twice per week for 40 minutes per session in a group of five (Dist. Ex. 4 at p. 10). Additionally, the speech-language therapy sessions were to be provided in the therapy room, which could provide a quieter and less distracting environment (id.). The undated speech-language student progress report indicated that the student made progress with his current goals and was expected to complete one within several weeks (Dist. Ex. 13 at p. 2). The progress report further indicated that the student had shown increased responsibility regarding attendance, and that he required "moderate-max" prompts to ensure that his writing accurately reflects his intended ideas (id. at p. 1). Furthermore, the December 2014 IEP indicated that: the student worked well in a small group; he was an independent thinker and voiced his own opinion regardless of other group members' answers; he occasionally drifted but was easily redirected; and that he required extra time to process and organize his ideas before expressing them (id. at pp. 1-2). Based on the foregoing, the hearing record does not support a finding that the student exhibited distractibility to such a degree that he required speech-language therapy on an individual basis in order to receive a FAPE.

In summary, with respect to the December 2014 IEP, the hearing record supports the IHO's determinations that the student did not exhibit interfering behaviors warranting an FBA or a BIP, did not exhibit social/emotional needs warranting a recommendation of counseling, and did not exhibit distractibility to a degree that warranted a recommendation for individual rather than group speech-language therapy.

4. Writing Needs—Occupational Therapy and Assistive Technology

As with the analysis above with respect to the December 2013 IEP, a review of the hearing record does not support the parent's contention that the student required OT in order to receive a

FAPE. The district special education coordinator testified that the student received OT up until his triennial evaluation, at which time it was determined that he was no longer eligible for OT (Tr. p. 47). Despite the discontinuation of OT services as of March 2013 (Parent Ex. S at p. 23; see Tr. p. 93), the student was reported on the December 2014 IEP as having improved the organization of his writing and his writing was described as "markedly clearer to read and follow" (Dist. Ex. 4 at p. 1; 12 at p. 2). To the extent the student continued to struggle with the organization of his coursework notes and materials, this was addressed by checking in with the teacher to make sure his notes were in the designated section (Dist. Ex. 4 at p. 2). The hearing record contains no additional information, garnered between the time of the last OT evaluation in October 2013 and the development of student's December 2014 IEP that would suggest that the student's fine motor needs had changed, that OT services were warranted, or that further evaluation was necessary in the area of OT.

With respect to assistive technology, between the December 2013 and December 2014 CSE meetings, the district obtained no new information that would warrant a different finding than outlined above; that is, that the CSE failed to identify the student's need for assistive technology and either provide it or document reasons why it was not necessary (Tr. p. 101; Dist. Ex. 4 at pp. 1-3).

5. Management Needs, Testing Accommodations, and Supplementary Aids and Supports

The parent argues that the December 2014 IEP failed to provide the student with sufficient modifications and resources to address the student's management needs, specifically identifying a lack of positive peer-models, word maps, manipulatives, visual aids, a multi-sensory learning environment, preferential seating, cueing, redirecting, positive reinforcement, sentence starters, or 1:1 support. Additionally, the parent asserts in general terms that the IEP failed to include any supplementary aids or supports and that the student's "testing accommodations were reduced despite his needs" (Pet. ¶ 32).

Some of the strategies identified by the parent were included in the December 2014 IEP, such as visual aids in the form of graphic organizers, preferential seating, and redirecting in the form of teacher check-ins (Dist. Ex. 4 at p. 3). Overall, to address the student's management needs the December 2014 IEP contained the following strategies and supports: ICT services, speech-language therapy, teacher prompts, extra time for assessments and classwork, graphic organizers, small group instruction, teacher check-ins, preferential seating, and teacher modeling (Dist. Ex. 4 at p. 3). The December 2014 CSE also recommended testing accommodations consisting of: extended time (double time), separate location (no more than 12 students), and tests read aloud (id. at pp. 11). Changes in student's the management needs from the December 2013 to the December 2014 IEP included the addition of teacher prompts, graphic organizers, teacher check-ins, preferential seating, and teacher modeling (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 4 at p. 3).³⁷ The only change in the student's testing accommodations was the removal of the use of a calculator as an accommodation (compare Dist. Ex. 3 at p. 10, with Dist. Ex. 4 at p. 11).

³⁷ Unlike the December 2013 IEP, the December 2014 IEP does not include tutoring as a support for the student's management needs (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 4 at p. 3).

As discussed above, the evaluative information available in the hearing record does not indicate that the student's needs changed significantly from the prior school year. Pertinent to the student's management needs, the December 2014 teacher progress reports described the student's distractibility and fatigue (Dist. Ex. 12). To address the student's lack of focus, staying on task, and dozing off, the December 2014 IEP recommended strategies such as teacher prompts, and preferential seating towards the front of the class, small group instruction, teacher check-ins, and teacher modeling, as well as testing accommodations and ICT services (Dist. Ex. 4 at p. 3).

Similar to the analysis of the December 2013 IEP, the strategies favored by the parent but missing from the December 2014 IEP (positive peer-models, word maps, manipulatives, a multi-sensory learning environment, cueing, positive reinforcement, and sentence starters) may have been helpful; however, the hearing record does not indicate that they were necessary for the student to receive an educational benefit (see N.B. & C.B., 2016 WL 5816925, at *5; T.C., 2016 WL 1261137, at *15).

6. ICT Services

The parent contends that the December 2014 CSE's recommendation for ICT services in a general education classroom was not sufficient to meet the student's needs and suggests that the CSE should have also recommended SETSS to address the student's academic deficits.

The December 2014 IEP recommended that the student receive ICT services for mathematics and sciences (Dist. Ex. 4 at p. 10). The student received a similar program under the December 2013 IEP, which recommended ICT services for mathematics, ELA, and sciences (compare Dist. Ex. 3 at p. 8, with Dist. Ex. 4 at p. 10). A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. June 24, 2013]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Dec. 2010], at p. 18, available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year, which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir. 2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

The December 2014 IEP indicated that, although the student did not need to pass any more Regents exams to graduate, ICT services were recommended in mathematics and science because the student did not pass those classes during the 2013-14 school year and he needed the class

credits in order to graduate (Dist. Ex. 4 at p. 2). The December 2014 IEP also indicated that the student would receive compensatory SETSS for chemistry and geometry (*id.* at p. 3). However, the mediation agreement noted in the December 2014 IEP is not an appropriate consideration in terms of evaluating the appropriateness of the December 2014 IEP, as the agreement to provide SETSS for the remainder of the 2014-15 school year was an attempt to settle complaints filed concerning the prior school year (*see* Dist. Exs. 4 at p. 3; 5).³⁸ As the student did not pass either chemistry or geometry despite the ICT services delivered pursuant to the December 2013 IEP, the hearing record does not support the CSE's continued recommendation for ICT services in these subjects in the December 2014 CSE without other special education academic support (Tr. pp. 39, 86-88; Dist. Ex. 3 at pp. 1-2).³⁹

The IHO determined that the district special education coordinator "credibly" testified that, based on parent concerns, district staff from the CSE met with the parent September 2014 and offered to provide the student with SETSS in mathematics, during the morning session (Tr. p. 42). The district special education coordinator testified that the parent declined the district's offer of SETSS because the student was attending college courses during the morning session and she did not want him to return to the high school for the proposed SETSS (Tr. pp. 42, 91-93). The special education coordinator testified that additional services had to take place during that time due to the teacher's availability (Tr. pp. 92-93); however, as noted above, the provision of special education instruction and services within a public school setting is to be determined by a student's needs and not based on convenience of the district's class schedules (*see* 34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; *Adams*, 195 F.3d at 1151; *Reusch*, 872 F. Supp. at 1425-26; *Placements*, 71 Fed. Reg. 46588; *see also* *Letter to Clarke*, 48 IDELR 77). Moreover, the parent's preference regarding the student's schedule would not be an appropriate justification for the December 2014 CSE's recommendations, (1) because the discussion took place outside of the CSE process and the parent did not ultimately attend the December 2014 CSE meeting;⁴⁰ and (2) because even if the parent voiced this preference at the CSE meeting, this would not relieve the district of its obligation to ensure that the student's entire special education program and related services aligned with the student's needs (*Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 657-58 [8th Cir. 1999] [noting that although the district's obligation "to permit parental participation in the development of a child's educational plan should not be trivialized . . . , the IDEA does not require school districts simply to accede to parents' demands"]; *cf. Loretta P. v. Bd. of Educ.*, 2007 WL 1012511, at *6 [W.D.N.Y. Mar. 30, 2007] [observing that no party claimed "that the [d]istrict's acquiescence to the parents' request for home instruction was compatible with the IDEA or [the student's] right to an IEP which satisfied the [d]istrict's obligation to provide a [FAPE]"]).

Finally, the district special education coordinator testified that the December 2014 CSE based its decision not to provide the student with the support of ICT services in his ELA class on

³⁸ The extent to which these services may be considered in the context of a compensatory award is discussed below.

³⁹ During the 2013-14 school year, the student received a 55 in geometry and chemistry (Dist. Ex. 20 at p. 2). Review of the December 2014 student report card indicated the student's grades in chemistry and geometry as of the second semester leading up to the December 2014 CSE meeting were 65 and 75 respectively (*id.* at p. 3).

⁴⁰ As noted above, the parent's nonattendance at the December 2014 CSE meeting was not raised in the parent's due process complaint notice as an issue to be resolved at the impartial hearing and, therefore, does not factor into the determination that the district denied the student a FAPE.

the fact that the student had passed his ELA Regents and had completed all required ELA classes necessary to receive a diploma (Tr. p. 41). She further testified that the student had done well in the class and, therefore, he "did not necessarily need additional support services in that area," and that the student was in an early college program, and that his current ELA class was just an elective (*id.*). However, the hearing record indicates that the student continued to struggle with reading and writing skills (Dist. Exs. 4 at pp. 1-5, 12; 13). Furthermore, as noted above, while the hearing record included progress reports for science, math, and speech-language therapy, the hearing record did not include a progress report from the student's ELA teacher and the district did not otherwise present evidence that the CSE had sufficient information available to it in order to justify this recommendation (*see* Dist. Exs. 12-13).

In summary, given the student's grades in Chemistry and Geometry leading up to the December 2014 CSE meeting, the recommendation for ICT services in these subjects offered insufficient support and the district's justifications for the recommendations—i.e., the scheduling concerns and the parent's purported declination of SETSS—are insufficient to support a finding that the recommendations were sufficient. In addition, given the limited information regarding on what evaluative data the December 2014 CSE relied on regarding the student's ELA needs, the hearing record is insufficient to support a determination that the IEP was sufficient absent any special education support or service to address the student's needs in the area of ELA.

7. Transition Services

Next, the parent contends that the December 2014 IEP contained inappropriate or insufficient post-secondary goals and activities. Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; *see* Educ. Law § 4401[9]; 34 CFR § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable post-secondary goals based upon age-appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).⁴¹ An IEP must also include the transition services needed to assist the student in reaching those goals (*id.*). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]). It has been found that "the failure to provide a transition plan is a procedural flaw" (*M.Z.*, 2013 WL 1314992, at *6, *9, citing *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 398 [5th Cir. 2012] and *Bd. of Educ. v. Ross*, 486 F.3d 267, 276 [7th Cir. 2007]; *see also A.D. v. New York City Dep't of Educ.*, 2013 WL 1155570, at *11 [S.D.N.Y. Mar. 19, 2013]).

The December 2014 IEP includes results from a Level II Vocational Assessment, which reported that the student was interested in attending college and then law school after graduation

⁴¹ In addition, State regulations require districts to conduct vocational assessments of students age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]).

(Dist. Ex. 4 at p. 2). The IEP further indicated that the student felt his strengths were his strong communication and language skills; however, he was aware that his handwriting and writing quality needed to improve (*id.*). Furthermore, the December 2014 IEP reported that the student felt that, in order to accomplish his goals, he needed help with his time management, organizational skills, and wrist movement (*id.*). The December 2014 IEP contained the following recommendations to address the student's transition needs: to strengthen the student's reading comprehension in chemistry so that he could answer questions based on a given text using graphic organizers and highlighters; to improve his geometry skills; to meet with a college or career counselor about researching colleges with law degrees; and to independently research colleges and universities and narrow down which areas of law he may be interested in pursuing (*id.* at p. 5). Additionally, the December 2014 IEP indicated that the student's postsecondary goals were to attend a four-year college after graduation and then law school upon college graduation and to eventually secure full-time employment and live independently (*id.* at pp. 4-5). To meet the student's post-secondary goals, the December 2014 IEP recommended a coordinated set of transition activities and services designed: to assist the student with passing his geometry and chemistry classes; to improve his expressive and receptive language skills; to gain work experience and earn a pay check by continuing in the school's "TOP" program,⁴² and to research colleges that offered law degrees and fields of law independently (*id.* at p. 12). Although the results of the Level II Vocational Assessment are not a part of the hearing record, to the extent that the December 2014 IEP references the assessment, the information included in the IEP is consistent with the recommended post-secondary goals (compare Dist. Ex. 4 at pp. 4-5 with Dist. Ex. 4 at p. 12). Overall, the evidence in the hearing record supports a finding that the December 2014 IEP provided for goals, activities, and services to help the student prepare for post-secondary activities, employment, and living. Therefore, in this instance, any defects in the transition plan do not contribute to a finding of a denial of FAPE (see *M.Z.*, 2013 WL 1314992, at *9; *A.D.*, 2013 WL 1155570, at *11; *D.B.*, 2011 WL 4916435, at *9).

However, as a whole, due to the procedural violations and substantive errors in the development of the December 2014 IEP, and in the resultant IEP, the evidence in the hearing record supports a finding that the district failed to offer the student a program that was reasonably calculated to enable him to receive educational benefit (*Gagliardo*, 489 F.3d at 112; *Frank G.*, 459 F.3d at 364-65).

E. Relief—Compensatory Services

The parent asserts that the IHO erred in his determination that the student was not entitled to compensatory services, including by applying an incorrect legal standard to arrive at his conclusion. The parent also asserts that the IHO improperly considered the student's graduation status in rendering his decision. The district asserts that the student's passing grades and graduation are proof that it provided the student with an educational benefit, and as such, the student is not entitled to an award of compensatory services.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (*Wenger v. Canastota*, 979 F. Supp. 147 [N.D.N.Y. 1997]).

⁴² The district special education coordinator described "TOP" as an acronym for the "teaching opportunities program" and testified that it is a program for students with disabilities to perform office work for teachers or administrators on the high school campus (Tr. pp. 79-80).

Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];⁴³ 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). The Second Circuit has held that compensatory educational services may only be awarded to a student who is no longer eligible for special education by reason of age or graduation where the district has committed a gross violation of the IDEA, which resulted in the "denial of, or exclusion from, educational services for a substantial period of time" (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; Garro v. State of Conn., 23 F.3d 734, 737 [2d Cir. 1994], citing Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989], aff'g prior holding in Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]).

Compensatory education may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of 21]; see generally R.C. v. Bd. of Educ., 2008 WL 9731053, at *12-*13 [S.D.N.Y. Mar. 6, 2008], report and recommendation adopted, 2008 WL 9731174 [S.D.N.Y. July 7, 2008]). 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]; see, e.g., Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE).

⁴³ If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student shall be entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever shall first occur (Educ. Law § 4402[5][a]).

In this instance, the student graduated from high school with a Regents diploma in July 2016 (IHO Ex. XI) and is accordingly no longer eligible for special education. The parties disagree as to what impact the student's graduation should have on the legal standard to be applied, as the student graduated after the conclusion of the hearing and the May 4, 2016 post-remand telephone conference, but prior to the record close date and the issuance of the IHO's October 12, 2016 decision. Given the fact that graduation and receipt of a high school diploma are generally considered to be evidence of educational benefit (Pascoe v. Washington Cent. Sch. Dist., 1998 WL 684583, at *4, *6 [S.D.N.Y. Sept. 29, 1998]; see also Rowley, 458 U.S. at 207 n.28; Walczak, 142 F.3d at 130), the receipt of which terminates a student's entitlement to a FAPE (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; 200.4[i]), when taken together with the Second Circuit's standard requiring a gross violation of the IDEA during the student's period of eligibility (see Garro, 23 F.3d at; Mrs. C., 916 F.2d at 75), it is a rare case where a student will graduate with a high school diploma and yet still qualify for an award of compensatory education (see, e.g., Application of a Student with a Disability, Appeal No. 13-215; Application of a Student with a Disability, Appeal No. 13-110; Application of a Student with a Disability, Appeal No. 11-159). In this case, even putting aside the gross violation standard, a review of the district's failures during the 2013-14 and 2014-15 school years, the services the student actually received during that period, and the student's achievements—due in no small part to the student's own efforts and drive—shows that the student benefitted from instruction to the extent that an award of compensatory education would not be an appropriate form of relief.⁴⁴

The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E. Lyme Bd. of Educ., 790 F.3d at 456; 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

⁴⁴ According to the district special education coordinator, by the end of the 2014-15 school year, the student had completed 39.66 out of the 44 credits needed to graduate and, if he chose, could graduate early in January 2016 (Tr. pp. 43-44). Therefore, as of the date of my decision before remand in March 2016, it is likely that the student had sufficient credits to graduate and, as noted above, he did graduate just a few months later in June. Accordingly, had I reached the question of compensatory education in July 2016, I would have reached the same conclusion, since the student's graduation was imminent and, therefore, the relief sought would undoubtedly have extended beyond the student's graduation and ineligibility for special education (see L.O., 822 F.3d at 125).

"[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"]).

Prior to a discussion of the specific relief sought by the parent, a summary of the areas in which the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years is warranted. With respect to the December 2013 CSE and IEP, the evidence in the hearing record is insufficient to conclude that the December 2013 CSE considered the most recent evaluative information about the student, sufficiently described the student's present levels of performance in the IEP, developed annual goals or recommended sufficient academic support aligned with the student's math, reading, and writing needs, or considered assistive technology for the student. With respect to the December 2014 CSE and IEP, the evidence in the hearing record is insufficient to conclude that, with particular respect to the student's ELA needs, the CSE considered the most recent evaluative information or sufficiently described the student's ELA needs or developed ELA goals. Additionally, with respect to the December 2014 CSE and IEP, the district again failed to establish that the CSE considered the student's need for assistive technology and failed to adequately explain how the support of ICT services in math and science were adequate to provide the student with educational benefit.

The bulk of the district's violations are procedural, such as those relating to consideration of evaluative information, present levels of performance, annual goals, and assistive technology. Generally, a denial of FAPE cannot be based on procedural inadequacies, unless 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]). Similarly, the availability of compensatory education for a procedural violation of the IDEA is contingent on whether the violation caused a substantive denial of a FAPE (A.W. v. Middletown Area Sch. Dist., 2015 WL 390864, at *13 [M.D. Pa. Jan. 28, 2015]). Accordingly, the focus of the analysis regarding compensatory services potentially available to the student is on the area in which the district substantively denied the student a FAPE, i.e. the sufficiency of the ICT services for both school years.

The parent seeks compensatory services in the form 813 hours of 1:1 tutoring with HLC, as well as make-up counseling and OT services. As the omission of counseling and OT from the student's IEP did not contribute to the determination that the district failed to offer the student a FAPE, those forms of relief are denied. As to the tutoring, the parent's request was based on HLC's calculation that a total of 955 hours of tutoring would "bridge [the student's] academic gap" (see Tr. p. 160). From that total, the parent subtracts a portion of the 177 hours of SETSS awarded through the mediation agreement with the district, not including the 35 hours of SETSS that focused on subject tutoring in chemistry (see Tr. p. 160, 167-68; Dist. Ex. 5). The hearing record indicates that, after taking into account the 177 hours the student received, HLC determined that

the student required 813 hours outlined in the program map in areas such as: math, "core readers," splinter skills, vocabulary development, and writing (Tr. pp. 150-60; Parent Ex. K at p. 4).

Here, while additional violations are identified above, the district's denial of a FAPE substantively related to level of academic support provided to the student (i.e., the insufficiency of the recommended ICT services). While the tutoring and compensatory SETSS services received by the student (Tr. pp. 39, 86-88) were inappropriate considerations with respect to the analysis of FAPE, they are pertinent in determining the level of relief available (see L.O., 822 F.3d at 114-15, 125). The district special education coordinator discussed how the student received tutoring in addition to the IEP services during the 2013-14 school year, and explained that he attended Saturday Academy (tutoring provided by the school for three hours on Saturdays), "afterschool school-based tutoring" where students could work closely with teachers twice per week, and that the school provided one-to-one peer tutoring for students attending college courses (Tr. pp. 39, 86-89). The hearing record also shows that the student received compensatory services based on a mediation agreement regarding a portion of the 2013-14 school year, consisting of 160 hours of SETSS between November 2014 and June 2015 (Tr. pp. 138, 151, 175; see Dist. Ex. 5 at p. 1). The provision of tutoring and the additional 160 hours of SETSS, while not on the student's IEP, allowed the student to progress academically, and should be considered in a qualitative evaluation of a compensatory award.

The student's progress is also a relevant consideration. For the 2014-15 school year, the student passed all of his academic courses with a cumulative grade point average of 75.43, including: English 5 (90); English 6 (93), Geometry (65), Chemistry 1 (70), Chemistry 2 (75), and his college-level courses, including Freshman Composition (65), Psychology in the Modern World (65), and Politics and Government (75) (Dist. Exs. 18 at p. 2; 20 at pp. 1-5). Additionally, the student passed all of his courses during the 2015-16 school year, including but not limited to: English 7 (80), Algebra 2 and Trigonometry (65), Elements of Science (80), and Forensic Science (85) (IHO Exhibit XI). Finally, the student also achieved Regents exam grades of 88 (ELA), 82 (global history), 73 (physical settings), 85 (U.S. history), 65 (algebra), and 79 (living environment) (see Dist. Exs. 4 at p. 1; 20 at p. 1-2). The hearing record shows that the student did indeed graduate with a Regents diploma in July 2016 (see IHO Exs. VIII; X; XI).

The director of HLC noted that the student's passing grades were "impacted by the fact that he's a diligent student," who "shows up on time," "participates," "has a positive attitude," and "hands in his homework" (Tr. p. 171). The private neuropsychologist also attribute the student's success to his dedication and hard work (Tr. p. 197). Likewise, both the director of HLC and the private neuropsychologist attributed the student's success on the Regents exams to the student's effort (Tr. pp. 148-49, 218, 225). The private neuropsychologist added that the student's "average to high-average intelligence" also contributed to his success (Tr. p. 218). However, both the HLC directors and the private neuropsychologist noted that the student did well with multiple choice questions as opposed to test formats requiring "open-ended responses," and the HLC directors emphasized that the student's performance on the Regents did not "mean he [would] be able to manage himself out there in the world" (Tr. pp. 149, 170-71, 218-19; see Tr. p. 165-66).

Nevertheless, while the December 2013 and 2014 IEPs were insufficient on their own to ensure the student received educational benefit, the student took advantage of optional tutoring that the district made available to him and received benefit from the tutoring he attended at HLC during the 2014-15 school year, thereby achieving the position that he would have occupied but

for the district's violations—that place being graduation with a Regents diploma (see Reid, 401 F.3d at 518). In other words, no compensatory education is required for the district's denial of a FAPE, since the deficiencies were already mitigated (see Phillips v. District of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]). While the parent's frustration with the district is understandable, the purpose of compensatory education is not to punish the district (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] ["The purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]). I also sympathize with the parent's desire for the student to receive HLC tutoring to "bridge the gap" or to reach the grade level expectations placed on nondisabled students (see Tr. p. 173), but compensatory services should also not be designed for the purpose of maximizing the student's potential or to guarantee that the student achieves a particular grade-level in his areas of need (see Application of a Student with a Disability, Appeal No. 16-033; cf. Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

VII. Conclusion

Based on the foregoing, the evidence in the hearing record supports a finding that the district failed to offer the student a FAPE based on the December 2013 and 2014 IEPs; however, the hearing record also demonstrates that an award of compensatory educational services is not appropriate (Reid, 401 F.3d at 518; Mrs. C., 916 F.2d at 75).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated October 12, 2016, is modified by reversing those portions which determined that the district offered the student a FAPE for the 2013-14 and 2014-15 school years based upon the December 2013 and December 2014 IEPs.

Dated: Albany, New York
January 12, 2017

SARAH L. HARRINGTON
STATE REVIEW OFFICER