The University of the State of New York

The State Education Department
State Review Officer
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No. 18-034

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 Board of Education of the Wilson Central School District

Appearances:
Hodgson Russ LLP, attorneys for respondent, by Ryan L. Everhart, Esq., and Kinsey A. O'Brien, Esq.

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)[1] appeals from a decision of an impartial hearing officer (IHO) which determined that the evaluations conducted by the respondent's (the district's) Committee on Special Education (CSE) were appropriate, dismissed the parent's request for a determination of her son's (the student's) pendency placement, and determined that the educational program recommended for the student for the 2016-17 school year was 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

[1] Both of the student's parents have been involved in the proceedings at various times.

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

The student received speech-language therapy services while in preschool during the 2012-13 school year; however, he was declassified in June 2013 (Dist. Ex. 24 at pp. 17-18).[2] During the 2013-14 school year (kindergarten), the student received speech-language therapy pursuant to

[2] While District Exhibit 24 is consecutively paginated from pages 1 to 155, there is an unnumbered page between pages 115 and 116. However, because the unnumbered page consists of a cover sheet with no information, citation is to the exhibit as paginated.

an accommodation plan developed under section 504 of the Rehabilitation Act of 1973 (section 504 plan) (see 29 U.S.C. § 794[a]), and during the 2014-15 school year (first grade), the student received both speech-language therapy and occupational therapy (OT) pursuant to a section 504 plan (Tr. pp. 396, 398, 479, 622-23; Dist. Exs. 93 at p. 1; 110; 114).

In May 2015, the parents privately obtained a neuropsychological evaluation of the student (Dist. Ex. 102 at p. 1).[3] In a report dated June 2015, the private evaluator determined that the student met the criteria for an unspecified communication disorder and a specific learning disorder with impairment in reading comprehension, and was at-risk for a global learning disorder, an anxiety disorder, and an adjustment-related disorder (id. at p. 6). The evaluator recommended a "more formalized and comprehensive plan of academic support," and that the parents contact the CSE to determine the student's eligibility for special education services (id.). In June 2015, at the end of first grade, following a referral by the student's parent, a subcommittee on special education (CSE subcommittee) convened and found the student eligible for special education and related services as a student with a learning disability (Dist. Exs. 87-90; 95).[4] For the 2015-16 school year (second grade), the CSE subcommittee recommended that the student receive five sessions per week of direct and indirect consultant teacher services in English and math, one 30-minute session per week of small group OT, and three 30-minute sessions per week of small group speech-language therapy (Dist. Ex. 88 at p. 8).

A CSE subcommittee convened in April 2016 for the student's annual review and to develop an IEP for the 2016-17 school year (Dist. Exs. 69; 72-74). The resultant IEP indicated that the CSE subcommittee considered a May 2015 speech-language evaluation report, the June 2015 private neuropsychological evaluation report, a June 2015 OT evaluation report, a March 2016 speech-language progress summary, a March 2016 educational evaluation report, and an April 2016 OT progress summary report (Dist. Ex. 72 at pp. 2-4). The CSE subcommittee recommended that the student receive English instruction in a 12:1+1 special class for one hour per day, direct and indirect consultant teacher services in math in a general education setting for 30 minutes per day, and two 30-minute sessions per week of small group speech-language therapy (id. at p. 10).[5] According to the IEP, the CSE subcommittee determined that the student did not require direct OT services (id. at pp. 2, 7-8; see Dist. Ex. 73 at p. 3).

[3] The private neuropsychological evaluation of the student occurred over three days in May 2015 and the report was completed on June 4, 2015 (Dist. Ex. 102 at p. 1). To avoid confusion in this decision, the date of the private neuropsychological evaluation and report will be referenced as June 2015.

[4] The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

[5] The district is reminded a CSE subcommittee "may perform the functions of the committee on special education pursuant to the provisions of Education Law, section 4402, except when a student is considered for initial placement in . . . (i) a special class" (8 NYCRR 200.3[c][4]). Because the April 2016 IEP represents the student's initial placement in a special class, the district was required to convene a full CSE. Despite this procedural noncompliance, the CSE subcommittee included all of the required members of a CSE, and there is no indication the parent requested that the full CSE convene to review the recommendations made by the CSE subcommittee (8 NYCRR 200.3[c][5]).

Minutes from the April 2016 CSE subcommittee meeting reflect that the subcommittee discussed an eye exam the parents had privately obtained for the student and the parents' request for a "vision therapy evaluation" to occur in September 2016 (Dist. Ex. 73 at pp. 1, 3; see Dist. Ex. 72 at p. 7). The April 2016 CSE subcommittee recommended that a Board of Cooperative Educational Services (BOCES) evaluator conduct the vision evaluation, and in September 2016 the district requested and the parent granted consent for the CSE to conduct a vision evaluation (Dist. Exs. 65; 73 at p. 1). A BOCES teacher of the visually impaired conducted an evaluation for educational vision services in October 2016 (Dist. Ex. 24 at pp. 76-79). The CSE subcommittee reconvened on November 28, 2016 to review the results of the vision evaluation (Dist. Ex. 61 at p. 1). The CSE subcommittee determined that the student did not qualify for vision therapy services and maintained the same recommendation for special education and related services as was recommended in the April 2016 IEP (compare Dist. Ex. 72 at p. 10, with Dist. Exs. 60 at pp. 1-2, 8, 11, and Dist. Ex. 61 at p. 1).[6]

A November 30, 2016 prior written notice indicated that the services recommended were listed in the "enclosed [IEP]," but did not list any specific programs or services (Dist. Ex. 59 at p. 1). The prior written notice also indicated that the CSE had "considered programs and/or services that are less restrictive (more time within the general education setting) but rejected those due to the student's current functioning levels and skills," without specifying any particular options considered (id.). In a letter dated December 14, 2016, the district indicated that the board of education "supported" the recommendations of the November 2016 CSE subcommittee (Dist. Ex. 58).

By prior written notice sent to the parents on February 15, 2017, and March 1, 2017, the CSE requested the parents' consent to conduct "a reevaluation to determine [the student's] educational needs and continuing eligibility for special education services" (Dist. Ex. 56 at p. 1; see Dist. Ex. 24 at pp. 5-6). The district specifically requested consent to conduct an educational evaluation: however, the parents declined to provide consent for that evaluation, "[b]ased on the district's actions of initia[t]ing a hearing and your failure to properly and comprehensively address the issue of reevaluation" (Tr. pp. 120-21; Dist. Exs. 24 at pp. 116-17; 56 at pp. 1, 3).

In a letter dated May 10, 2017, the parents' advocates informed the district's director of special education that the parents disagreed with the March 28, 2016 educational evaluation, the May 11, 2015 speech-language summary report, and the April 28, 2016 OT evaluation (Dist. Ex. 3 at p. 1). The parents further indicated that the district had failed to evaluate the student in all areas of suspected disability and requested four independent educational evaluations (IEEs) from specified providers: a comprehensive reading, writing, and mathematics evaluation; a comprehensive speech-language and central auditory evaluation; a comprehensive OT evaluation including sensory integration; and a comprehensive assistive technology evaluation (id. at pp. 1-

[6] The November 2016 IEP included in the hearing record as district exhibit 60 referenced information from the vision evaluation report, which the district concedes was added to the IEP after the CSE meeting by the evaluator (Dist. Ex. 60 at pp. 4, 8; see Dist. Ex. 8 at p. 1; Tr. pp. 524-25). The parent asserted that this was not the IEP she received following the November 2016 CSE meeting (Dist. Exs. 6 at p. 1-2; 24 at pp. 12-13). The parent asserted that she received the IEP which was contained in district exhibit 24 (Dist. Ex. 24 at pp. 12-13, 45-56). However, for purposes of this decision, district exhibit 60 is cited as the special education services recommended in the IEPs are identical (compare Dist. Ex. 24, with Dist. Ex. 60).

3). Additionally, in a letter dated May 17, 2017, the parents' advocates requested reimbursement from the district for the costs associated with the June 2015 private neuropsychological evaluation not covered by the parents' private insurance, including travel expenses (Dist. Ex. 4 at p. 1).

In a letter to the parents' advocates dated June 1, 2017, the district indicated that the parents did not provide specific reasons for their disagreement with the district's evaluations and that they should provide more information so that the district could "fully assess the IEE requests" (Dist. Ex. 5 at p. 1). In an effort to address the parents' concerns, the district offered to conduct an assistive technology evaluation and updated academic, speech-language, and OT evaluations of the student, "in lieu of the IEEs" requested, as the evaluations the parents disagreed with were all more than one year old (id.). Further, the district denied the parents' request for reimbursement of the costs associated with the private neuropsychological evaluation, asserting that the request was untimely because the evaluation occurred two years ago and was not recommended by the CSE or conducted as an IEE (id. at p. 2).

A. Due Process Complaint Notice

The district, by due process complaint notice dated June 14, 2017, requested an impartial hearing, asserting that its evaluations of the student were appropriate and that it was not required to provide the requested IEEs at the public expense (Dist. Ex. 1 at p. 2). The district asserted that the parents' request for IEEs did not "meet the criteria" of State regulations (id.). Further, the district contended that the parents' requests for IEEs were not made "within reasonable proximity" of the district's evaluations and that to "the degree that the [d]istrict did not perform an evaluation in any specific area, it was because there was no demonstrated need to perform the evaluation" (id.).[7]

The parent, by due process complaint notice dated July 17, 2017, asserted that the district had failed to appropriately evaluate the student in all areas of suspected disability, did not provide the parents with appropriate prior written notice, did not measure the student's progress toward his annual goals, and failed to implement the student's consultant teacher services during the 2016-17 school year (Dist. Ex. 11 at p. 3).

[7] Attached to the district's due process complaint notice as submitted into evidence were the New York State Procedural Safeguards Notice and an "addendum" including "information regarding where an independent educational evaluation may be obtained" (Dist. Ex. 1 at pp. 3-48). In a letter dated July 6, 2017, in response to a June 19, 2017 request from one of the parents' advocates for information about where an IEE could be obtained and the district's criteria for IEEs, counsel for the district "decline[d]" to provide this information "because the District has already determined that it will not pay for the IEEs and has initiat[ed] hearings against the parents" (Dist. Ex. 8 at p. 2; see Dist. Ex. 6 at pp. 4-5). Although State regulations could be read as requiring parents to specifically request this information, federal regulations explicitly require districts to provide this information to parents "upon request for an independent educational evaluation" (34 CFR 300.502[a][2]; cf. 8 NYCRR 200.5[g][1][i]). Furthermore, federal and State regulations provide that parents have the right to obtain IEEs at private expense and that districts must consider IEEs that meet district criteria "in any decision made with respect to the provision of FAPE to the child" (34 CFR 300.502[a][1], [2]; [c][1]; 8 NYCRR 200.5[g][1][v], [vi][a]). Accordingly, despite challenging the parents' right to public funding for the requested IEEs, the district was obligated to provide the information upon request for IEEs (see Application of a Student with a Disability, Appeal No. 17-046).

The parent asserted that the student's pendency placement was the program set forth in the November 2016 IEP that did not include the information relating to the 2016 vision evaluation (Dist. Ex. 11 at p. 6).

In regard to the evaluative information, the parent asserted that the district failed to measure the student's cognitive function, failed to recommend a neuropsychological evaluation to "determine the nature of the [s]tudent's learning disability," failed to recommend an auditory processing evaluation, failed to conduct an OT evaluation before discontinuing OT services, and failed to recommend an assistive technology evaluation (Dist. Ex. 11 at pp. 3-4). Additionally, the parent argued that the district failed to provide the parent with the district's criteria for IEEs when requested, did not perform a speech-language evaluation after the parent provided consent, failed to complete a vision therapy evaluation, and failed to recommend a comprehensive reading evaluation (id.).[8] The parent requested that the previously requested IEEs be conducted at public expense and that the district reconvene a CSE to review the evaluations (id. at p. 5). Further, the parent requested reimbursement for expenses related to the June 2015 private neuropsychological evaluation (id. at p. 6).

The parent asserted that the district failed to provide her with prior written notice that "accurately me[t] the requirements of the Regulations of the Commissioner of Education" on multiple occasions (Dist. Ex. 11 at p. 4). The parent asserted that the district failed to obtain informed consent or provide her with a prior written notice prior to performing a behavioral scale (id.). Further, the parent asserted that the district made changes to the student's IEP without including the parent and failed to obtain board of education approval for the recommendations made by the CSE (id.). The parent requested that the district be directed to provide prior written notice with respect to all requests to evaluate the student, CSE recommendations, and actions proposed and refused by the district (id. at p. 5).

The parent asserted that the district did not "generate annual measurable goals for the [s]tudent for the 2016-2017 school year to meet his documented needs" and failed "to measure progress or lack of progress toward the annual goals" on the November 2016 IEP (Dist. Ex. 11 at p. 4). The parent requested that goals be added to address the student's needs related to auditory processing, short-term memory, and summarizing (id. at p. 6). Moreover, the parent asserted that the district failed to provide "special education and/or related services based on the needs of the Student for the 2016-2017 school year" (id. at p. 4). The parent argued that the district did not provide speech-language therapy three times per week as recommended, and did not provide OT services despite the student's "obvious" need (id.). The parent also contended that the district failed to properly implement the IEP by not providing the student with consultant teacher services in math (id.). The parent requested compensatory education, classroom accommodations and supplementary aids and services, and additional special education and related services for the 2017-18 school year to remedy these failures by the district (id. at pp. 5-6).

[8] The vision therapy evaluation was the subject of another impartial hearing request and SRO decision (Application for a Student with a Disability, Appeal No. 17-046).

B. Impartial Hearing Officer Decision

After a prehearing conference on August 4, 2017, the district filed a motion for summary judgment, which the IHO denied (IHO Decision at pp. 4-5; see IHO Exs. 1-4; 5 at pp. 35-36, 75-77). The parties proceeded to an impartial hearing on October 19, 2017, which concluded on January 26, 2018 after four days of proceedings (Tr. pp. 1-649; Dist. Ex. 17).[9] By decision dated March 14, 2018, the IHO dismissed the parent's due process complaint notice "in its entirety, with prejudice" and granted the relief requested by the district (IHO Decision at p. 28).

The IHO found that the parent did not raise claims regarding the student's pendency placement or whether he was offered a FAPE for the 2017-18 school year in her due process complaint notice and therefore dismissed those claims (IHO Decision at p. 28). The IHO denied the parent's request for reimbursement for the costs associated with the private neuropsychological evaluation, finding that the request was untimely as the evaluation was conducted in June 2015 and the parent did not file her due process complaint notice until July 2017 (id. at p. 22). The IHO dismissed the parent's claim that the district failed to recommend a vision evaluation and failed to provide prior written notice when it sought consent to conduct a vision evaluation as barred by the principal of res judicata because the issues were the subject of a prior impartial hearing and SRO decision (id. at pp. 23, 25).

The IHO next found that the district's May 2015 and March 2016 speech-language evaluations, June 2014 OT evaluation, and March 2016 educational evaluation of the student were appropriate (IHO Decision at pp. 18-20). The IHO found that the district's evaluations were "typically used and generally accepted in the educational setting" and that there was no evidence in the hearing record to support the parent's contentions that the assessments were inappropriate (id.). The IHO concluded that "all of the challenged evaluations/assessments conducted by the [d]istrict were appropriate" (id. at p. 21).

The IHO found that the district relied on the private neuropsychological report provided by the parent to determine the student's cognitive functioning and that because this report was less than three years old, the district was not required to conduct additional cognitive testing (IHO Decision at p. 21). The IHO next determined that "to the extent the parents are claiming that the [d]istrict should have conducted a neuro-psychological evaluation in June 2015, that claim is time barred" (id. at p. 23). Further, the IHO found that the private neuropsychological evaluation and academic assessments conducted by the district[10] confirmed that the student had reading deficits and the testing "was sufficient to assess the student's reading ability," such that the district was not required to conduct additional reading evaluations (id. at p. 24).

[9] The district's and parent's due process complaint notices were consolidated by the IHO on July 31, 2017 (Dist. Ex. 16; see Dist. Exs. 1; 11).

[10] The IHO referenced the "Woodcock-Johnson Tests of Achievement" as "WCJ-III"; a review of the evaluation shows that the evaluator administered the Woodcock-Johnson IV Tests of Achievement (IHO Decision at pp. 9, 20, 24; Dist. Ex. 80 at p. 1).

Further, the IHO determined that the hearing record contained "no evidence to support the parents' contention" that the student required an auditory processing evaluation, an assistive technology evaluation, or a sensory integration evaluation, and denied the parent's request for IEEs in these areas (IHO Decision at pp. 21-22).[11]

The IHO found that the district's failure to provide the parent with its criteria for IEEs upon parent request was a procedural violation; however, he further found that this procedural violation did not deny the student a FAPE (id. at p. 24). The IHO determined that there was no evidence in the hearing record to support the parent's claim that the district conducted a behavioral scale without obtaining informed consent (id. at p. 25). The IHO also found that the district provided the parent prior written notice in November 2016 and the parent's claims regarding prior written notice had no merit (id. at pp. 24-25).

The IHO found that the evidence in the hearing record indicated the changes made to the November 2016 IEP after the CSE meeting were "an administrative error" and that the "parent failed to offer any evidence to rebut the [d]istrict's assertion"; therefore, the IHO determined the claim that the district failed to include the parent when making changes to the IEP was without merit (IHO Decision at p. 25). The IHO further found that the board of education approved the CSE's recommendation (id.).

The IHO found that there was no merit to the parent's claim that the district failed to develop annual goals for the student for the 2016-17 school year and that the district tracked the student's progress toward his annual goals and reported his progress to the parent (IHO Decision at pp. 27-28).

Regarding the student's special education program, the IHO indicated that the evidence in the hearing record showed that OT services were discontinued based on the service provider's observations and that the parents consented to the district's decision to discontinue OT services (IHO Decision at p. 23). The IHO found "based on these facts, without any evidence presented by the parent to the contrary," the district's decision to discontinue OT services did not deny the student a FAPE (id.). Further, the IHO found the record supported the district's decision to reduce the student's speech-language therapy from three days per week to two days per week and that the parents agreed with this decision (id. at pp. 26-27). The IHO determined that there was no evidence in the hearing record to support the parent's claim that the district failed to provide the student with special education or related services for the 2016-17 school year (id. at p. 28).

The IHO found that the district failed to properly deliver indirect consultant teacher services by a special education teacher from September 2016 to March 2017; however, the IHO found that this procedural violation did not deny the student a FAPE (IHO Decision at p. 26).

[11] With respect to the parent's claim that the district failed to conduct a speech-language evaluation after the parent provided consent, the IHO found that the district conducted appropriate speech-language evaluations in 2015 and 2016 and that the parent "failed to present any evidence to the contrary" (IHO Decision at p. 24).

IV. Appeal for State-Level Review

The parent appeals. Initially, the parent asserts that the IHO placed the burden of proof on her to establish that the district's evaluations were not appropriate, when it was the district's burden to establish that its evaluations were appropriate. Also, the parent asserts that the IHO did not properly transmit his decision because he emailed a copy of the decision to her advocates and did not mail the decision to her. Additionally, the parent asserts the IHO erred in not ruling on the issue of pendency. The parent also argues that the IHO erred in finding she was not entitled to reimbursement for expenses related to the June 2015 private neuropsychological evaluation. The parent argues that her request for reimbursement was timely because it was made to the district within two years of the evaluation and the two-year limitations period did not begin to run until the district denied her request for reimbursement.

The parent next asserts that the IHO erred in his determination that the district evaluations "were appropriate because they were 'typically used and generally accepted in the educational setting," and that the IHO erroneously concluded that the district's evaluations were sufficient to determine the student's individual needs. The parent asserts that the district educational evaluation did not appropriately measure the student's ability and that there was no intelligence quotient (IQ) or "any cognitive testing of the student's ability at all" in the district's educational evaluation, which the parent argues is a basic requirement to determine the student's ability. The parent also indicates that the IHO incorrectly referenced the private neuropsychological evaluation "as the means to test cognitive ability," asserting that the neuropsychological evaluation did not measure the student's cognitive ability. The parent asserts that the IHO erred in finding the district was not required to perform a central auditory processing evaluation based on the recommendation for such an evaluation included in the private neuropsychological evaluation report. Moreover, the parent contends that the hearing record reflects that the student's "IEP continues to list the central auditory processing information and symptomology of [an auditory processing disorder] and [that] multiple [d]istrict witnesses testified to the [s]tudent's symptomology of" an auditory processing disorder. The parent argues that the IHO improperly determined that the district did not have to complete an OT evaluation including standardized testing prior to discontinuing OT services. The parent asserts that the occupational therapist who recommended discontinuation of OT services did not know if the student made progress toward achievement of the student's annual goals and that there was no objective testing of the student to determine if his OT deficits were still present. Additionally, the parent asserts that the student's deficits, as reflected in the private neuropsychological evaluation, could have been addressed through assistive technology. Accordingly, the parent asserts that the district failed to evaluate the student in all areas of suspected disability.

The parent argues that the IHO erred in finding that the district provided prior written notices relating to the November 2016 IEP in compliance with the Commissioner's regulations. Further, the parent argues the IHO improperly dismissed her claims regarding the prior written notice sent relative to the district's request for consent to conduct a vision evaluation pursuant to res judicata. The parent asserts that the issue of the prior written notice was not previously litigated and that res judicata does not apply. The parent contends that the district failed to provide prior written notice with respect to the March 2016 educational evaluation, March 2016 speech-language evaluation, April 2016 OT evaluation, and October 2016 vision evaluation.

The parent asserts that the IHO erred in finding that changes made to the November 2016 IEP after the CSE meeting were an "administrative error." The parent asserts that the vision evaluation which was the source of the changes made to the IEP was challenged by the parents and determined to be "inappropriate" by an SRO. The parent asserts that the district has not removed this information from the IEP, violating her parent participation rights.

The parent argues that the IHO erred in his determination regarding the student's annual goals as the issue was not whether the district generated annual goals, but whether the goals were measurable. The parent argues that the student's annual goals were not measurable as there was no baseline percentage of accuracy listed in the present levels of performance, which was the way the annual goals were to be measured. Further, the parent contends that the district did not provide the parent with progress reports that included a percentage of accuracy and therefore, she could not know whether the student was making progress toward his annual goals.

The parent asserts the IHO erred in finding that the district provided the student with special education and related services that met the student's needs for the 2016-17 school year. The parent contends that the district failed to provide the student with OT, assistive technology, and counseling services despite the November 2016 IEP identifying needs in these areas.

The parent next argues the IHO erred in finding there was no harm caused to the student by the district's failure to provide the indirect consultant teacher services recommended on the student's IEPs. As relief, the parent requests that the district be directed to supply the requested IEEs at public expense, reimbursement for the June 2015 private neuropsychological evaluation, that the district be directed to provide her with prior written notices that meet the regulations of the Commissioner in the future, and compensatory education to remedy the district's failure to provide indirect consultant teacher services to the student during the 2016-17 school year. Finally, the parent requests a finding that the district's failure to implement pendency denied the student a FAPE.

In an answer, the district generally denies the parent's allegations and requests that the IHO decision be upheld in its entirety.

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. of Hendrick Hudson Cent. Sch. Dist. 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. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). 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 the 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).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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 Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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]), 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]).[12]

VI. Discussion

A. Preliminary Matters

1. IHO Conduct—Burden of Proof

The parent claims that the IHO improperly shifted the burden of proof. Specifically, the parent asserts the IHO incorrectly determined that it was her burden to prove that the evaluations she requested were more appropriate than the evaluations conducted by the district and that she had to demonstrate an assistive technology evaluation was appropriate. The parent asserts that it was the district's burden to prove that its evaluations were appropriate.

Under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

While the IHO used less than optimal language in noting that the parent did not present any witnesses at the hearing to support her contentions, an examination of the IHO's decision reveals that the IHO properly outlined the district's evidence to support his findings that the district evaluations were appropriate and that the district provided the student with an appropriate program (IHO Decision at pp. 18-28). To the extent that the IHO utilized what can be perceived as language shifting the burden of proof, in stating on multiple occasions that the parent did not present evidence to support her allegations, the IHO's use of this language was after assessing the district's witnesses and evidence, and found that the parent failed to present evidence to undermine that presented by the district (IHO Decision at pp. 18-25, 28). Accordingly, the record does not indicate that the IHO misapplied the burden of proof (see id. at pp. 15-28). The IHO, instead, weighed the evidence presented at the impartial hearing and resolved the primary disputed issues in the district's favor (id.). Although the parent disagrees with the conclusions reached by the IHO, such disagreement does not demonstrate that the IHO failed to correctly apply the burden of proof in his analysis. Furthermore, even assuming that the IHO misapplied the burden of proof, I have conducted an impartial and independent review of the entire hearing record and, as discussed below, largely concur with the IHO's determinations (34 CFR 300.514[b][2]; 8 NYCRR

[12] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

279.12[a]). Overall, an independent review of the hearing record demonstrates that the parent had the opportunity to present her case at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]; see generally Tr. pp. 1-218). Thus, the parent's assertions must be dismissed.

2. IHO Conduct—Transmittal of the Decision

The parent claims that the IHO violated her due process rights by sending his decision to her advocates by email rather than by mailing a copy of the decision to her directly. The parent asserts that she did not request or agree to the IHO providing only an electronic copy of the decision. The district asserts that even if the parent's allegation is true, it does not amount to a violation of the parent's rights warranting overturning the IHO's decision, because the parent was not impeded in her ability to timely appeal.

State regulation regarding the method of rendering a decision in an impartial hearing provides as follows:

> the impartial hearing officer shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents and to the board of education.

(8 NYCRR. 200.5[j][5]; see 34 CFR 300.512[a][5]; 300.515[a]).

The hearing record does not reflect that the parent requested an electronic copy of the IHO's decision and, assuming the truth of the parent's allegation, the IHO did not render and mail his decision in compliance with State regulations. Despite this, there is little basis upon which relief may be had as there is no evidence to suggest that the parent or the student suffered any prejudice as a result of this failure. Notably, the parent was able to timely appeal from the IHO's decision. Nevertheless, the IHO is reminded that parties may be prejudiced by irregularities in decision issuance and that the IHO must comply with the applicable methods for rendering and transmitting a decision set forth in State regulation.

B. Pendency

The IHO found that the parent did not raise the issue of pendency in her due process complaint notice (IHO Decision at p. 28). The parent asserts that the IHO erred by dismissing her claim that the district failed to implement pendency during the duration of the hearing. Initially, the hearing record reflects that in her due process complaint notice, the parent "request[ed] that [the student] be maintained in pendency placement for the 2017-2018 school year while the complaint is ongoing unless the District and parent otherwise agree until the complaint is resolved" (Dist. Ex. 11 at p. 6).[13]

[13] Even if the parent had not raised the issue, a student's right to pendency automatically arises as of the filing of the due process complaint notice and, therefore, a request for pendency is not required to be contained in a due process complaint or made "at any particular point in the proceedings" (Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 701 [S.D.N.Y. 2006]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 455 [2d Cir. 2015]; M.R. v.

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171).

The district is obligated to maintain the student's then-current educational placement during the pendency of the proceedings (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]). Whether a student's educational placement has been maintained under the meaning of the pendency provision depends on whether the educational program is "substantially and materially the same" as the student's educational program for the prior school year (Letter to

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Ridley Sch. Dist., 744 F.3d 112, 123-25 [3d Cir. 2014]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199-200 [2d Cir. 2002]). Additionally, considering the focus on maintaining the status quo during the proceeding and the time-sensitive nature of a pendency determination, an IHO may and should promptly address a parent's pendency claims, whenever raised ("Questions Relating to Impartial Hearing Procedures Pursuant to Sections 200.1, 200.5, and 200.16 of the Regulations of the Commissioner of Education, as Amended Effective February 1, 2014," at p. 7 [Office of Special Educ. Rev. Sept. 2016] [noting that, if there is a dispute regarding a student's pendency placement, it is incumbent upon the IHO "to render a written decision regarding pendency as soon as possible and prior to determining any other issue relating to the evaluation, identification or placement of a student or the provision of a free and appropriate public education"] [emphasis added], available at http://www.p12.nysed.gov/specialed/dueprocess/documents/qa-procedures-sep-2016.pdf).

Fisher, 21 IDELR 992 [OSEP 1994]; see Application of a Student with a Disability, Appeal No. 16-020).

The parent contends that the district failed to implement pendency because the district implemented the version of the November 2016 IEP that included changes made after the meeting. As noted previously, the November 2016 CSE subcommittee convened to review results from an October 2016 vision evaluation and determined that the student was not eligible for vision services (Dist. Exs. 60 at p. 2; 61 at p. 1). On December 1, 2016, the BOCES teacher of the visually impaired inputted information from her evaluation into the IEP (Dist. Ex. 8 at p. 1). The additional information added to the November 2016 IEP included the test results from the vision evaluation and a summary of the evaluator's report which included additional classroom recommendations to address the student's diagnosis of amblyopia beyond the management needs and testing accommodations contained in the IEP (Dist. Ex. 60 at pp. 4-5, 8). These additional recommendations were frequent rest periods when doing close work or during testing, a reading guide to reduce eye fatigue, preferential seating with the student's good eye towards instruction, and a slant board to reduce eye strain (id. at p. 8). The student's special education teacher testified that she implemented the IEP that contained the recommendations of the vision evaluator after the November 2016 CSE subcommittee meeting (Tr. pp. 126-27). However, it is unclear from the hearing record whether the additional classroom recommendations made by the vision evaluator were implemented. The two IEPs contain recommendations for the same special education and related services: a 12:1+1 special class for English five times per week for one hour, direct and indirect consultant teacher services in math five times per week for thirty minutes in the general education setting, and two 30-minute sessions per week of small group speech-language therapy (compare Dist. Ex. 24 at p. 54, with Dist. Ex 60 at p. 11). Further, both IEPs contain the same management needs, annual goals, and testing accommodations (compare Dist. Ex. 24 at pp. 52-53, 55, with Dist. Ex. 60 at pp. 9-10, 12).

The only difference between the two versions of the November 2016 IEP was the additional information from the student's district vision evaluation, consisting of test scores and additional recommendations for classroom modifications, to the student's present levels of performance (compare Dist. Ex. 24 at pp. 45-56, with Dist. Ex. 60). Since there was no change to the student's special education program and the modifications to the present levels of performance constitute a minimal change to the IEP, the district properly implemented pendency. The differences do not support a conclusion that the district failed to implement pendency; especially considering that the November 2016 meeting was convened to review and discuss the vision evaluation.

Additionally, in the request for review, while the parent objects to the inclusion of the information related to the vision evaluation as a violation of her right to participate in the development of the IEP, she does not assert any substantive harm related to the inclusion of the additional information (Req. for Rev. ¶¶ 9, 13). Contrary to the parent's contention, the November 2016 CSE subcommittee convened to review the October 2016 vision evaluation results and the evaluator presented information from the evaluation, including the additional classroom recommendations, at the November 2016 CSE subcommittee meeting, which the parent attended (Dist. Exs. 61 at p. 1; 62 at p. 1).

Lastly, although the SRO in the prior appeal involving this student awarded the parent an independent functional vision therapy evaluation at public expense, the SRO did not find the

district's vision evaluation to be "inappropriate" as the parent asserts. The SRO found that the IHO erred in determining that the district's evaluation was "appropriate and sufficient" (Application of a Student with a Disability, Appeal No. 17-046). However, a full reading of the decision shows that the SRO determined that the district's evaluation did not "fully assess the student's needs" based on testimony presented at the impartial hearing, not because the SRO found the findings made by the BOCES evaluator to be inappropriate (id.). The SRO determined that the IEE requested by the parent "would potentially assess the student's visual functioning and needs that were not assessed by" the district (id.). Additionally, the hearing record in the prior proceeding indicated that the IEE would evaluate the student in areas that "may be related to the student's specific difficulties with reading" and the SRO found that the IEE "may provide valuable insight into the student's needs related to his inability to visualize and his subsequent deficits in comprehension" (id.). Further, the SRO went through the district's evaluation in great detail and noted that the district did assess the student in several areas that were "similar, if not the same" as areas in which the IEE would assess the student (id.). Accordingly, the prior appeal does not support finding that it was improper for the CSE subcommittee to consider the results of the district's vision evaluation.

C. Neuropsychological IEE Reimbursement Request

The parent asserts that the IHO erred in finding her claim for reimbursement for costs associated with the June 2015 private neuropsychological evaluation was untimely. The parent claims that she filed her due process complaint notice within two years of the district denying her request for reimbursement and therefore, her request was timely.

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]). New York State has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

The private neuropsychological evaluation report was reviewed by the CSE subcommittee during the June 2015 meeting (Dist. Ex. 88 at p. 2). The June 2015 CSE subcommittee determined that the student was eligible for special education and related services and used the neuropsychological report, among other things, to determine the student's educational needs and special education program (see Dist. Exs. 88; 89). Further, the parent signed an acknowledgment of receipt of a procedural safeguards notice on June 23, 2015, which included information regarding the parent's right to obtain an IEE at public expense, as well as the parent's right to file a due process complaint notice and the required contents of a complaint (Dist. Ex. 92; see Procedural Safeguards Notice at pp. 6-7, 16 [Office of Special Educ., Apr. 2014], available at http://www.p12.nysed.gov/specialed/formsnotices/psgn/PSGN-April2014.pdf; see also 20 U.S.C. § 1415[d][2]; 34 CFR 300.504[c]). Based on these facts, the parent knew or should have known of her right to request an IEE at public expense, as well as her right to request an impartial hearing, by no later than June 23, 2015. The parent did not file her due process complaint notice until July 17, 2017, more than two years after she knew or should have known of her ability to file a due process complaint notice including a claim for reimbursement of the costs of the private

neuropsychological evaluation (20 U.S.C. § 1415[f][3][C]). Therefore, the parent's claim for reimbursement is time barred.[14]

The parent's argument that she had two years to file a complaint from the date the district denied her claim for reimbursement is without merit. The parent does not present any legal argument to support her proposition. The IDEA provides that the two year statute of limitations runs from the date the parent knew or should have known of the action that formed the basis of the claim (20 U.S.C. § 1415[f][3][C]). In this instance, the alleged action that forms the basis of this claim is not the denial of reimbursement, but the district's use of the evaluation report in June 2015, as the parent should have been aware of the claim that the district had failed to adequately evaluate the student no later than the time the district relied on her privately-obtained evaluation to determine the student's eligibility and develop his IEP. Therefore, the IHO correctly determined that the parent's claim for reimbursement is time barred.

D. Request for IEEs

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]. If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

Pursuant to the IDEA, federal and State regulations, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree, and must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary

[14] Because of my resolution of this issue, it is unnecessary to address the district's denial of the parents' request for reimbursement on the alternate ground that the evaluation did not constitute an IEE (Dist. Ex. 5 at p. 2).

(8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). Pursuant to State regulation, a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability (see 8 NYCRR 200.4[b][4]). The reevaluation "shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; 8 NYCRR 200.4[b]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

A relevant area of factual inquiry regarding the appropriateness of the district's evaluations in this case are the comprehensiveness of the assessments conducted and whether the student's areas of need were adequately identified and assessed. Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

According to the CSE subcommittee meeting information summary and the April 2016 IEP, the April 2016 CSE subcommittee considered teacher reports, classroom functioning, parent information, committee discussion, and the following evaluative information: May 2015 State and district-wide assessment results, the June 2015 neuropsychological evaluation report, a May 2015 speech-language evaluation report, a June 2015 OT progress summary report, a March 2016 speech-language evaluation report, results from a March 2016 administration of the Woodcock-Johnson IV Tests of Achievement (WJ-IV ACH), and an April 2016 OT progress report (Dist. Ex. 72 at pp. 1-5; see generally Dist. Exs. 76; 79; 80; 93; 97; 102).[15]

[15] The April 2016 CSE subcommittee meeting was convened to develop the student's program for the 2016-17 school year (Dist. Ex. 72 at p. 1). Review of the April 2016 and November 2016 IEPs shows that both IEPs recommended the same special education program (compare Dist. Ex. 60, with Dist. Ex. 72).

1. Cognitive Functioning

On appeal, the parent asserts that the IHO erred in referencing the private neuropsychological evaluation "as the means to test [the] cognitive ability of the [s]tudent," and further alleges that the neuropsychologist did not measure the student's cognitive functioning, nor did the district via the "educational evaluation," and no IQ was obtained.[16] For the reasons discussed below, the hearing record does not support the parent's claim that the district lacked information about the student's cognitive abilities.

Regarding the student's cognitive functioning, the April 2016 IEP included results from the June 2015 neuropsychological evaluation report (compare Dist. Ex. 72 at pp. 4-5, with Dist. Ex. 102). According to the June 2015 neuropsychological evaluation report, the NEPSY-II Developmental Neuropsychological Assessment (NEPSY-II) was administered to obtain "a comprehensive description of [the student's] cognitive functioning" (Dist. Ex. 102 at p. 4). Based on results from the NEPSY-II, the evaluator indicated that the student performed in the average to above average range in the areas of manual motor speed/dexterity, visual perception, visual-motor integration, visual memory, cross-modal (auditory-visual) memory, basic language comprehension and expression, concept formation, and social perception (id.). The student exhibited variable functioning in the areas of visual and auditory attention, and he displayed borderline to impaired range skills in the areas of phonological processing, rapid automatic naming, and auditory working memory on the NEPSY-II (id.). In summary, the evaluator stated that the student's cognitive testing profile included relative strengths in visual processing and functions, with skill delays in areas such as auditory recall, phonological processing, rapid naming, task shifting, and error monitoring (id. at p. 6). Accordingly, the parent's argument that the June 2015 neuropsychological evaluation did not measure cognitive functioning is without merit.

To the extent that the parent argues on appeal that the district failed to obtain an IQ to determine the student's cognitive functioning, "[n]either the [IDEA] nor the Part B regulations require the use of IQ tests as part of an initial evaluation or a reevaluation" (Letter to Baumtrog, 39 IDELR 159 [OSEP 2002]; see Letter to Campbell, 110 LRP 1024 [OCR 2003]). Rather, the district must ensure that "assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a general intelligence quotient" (8 NYCRR 200.4[b][6][iii]; see 34 CFR 300.304[c][2]). As described above, the district had information regarding the student's functioning in a range of cognitive domains, and the parent does not assert any particular area of cognition that was not sufficiently evaluated.

In light of the above, the hearing record supports the IHO's determination that the district appropriately relied on the June 2015 private neuropsychological evaluation results as a measure

[16] On appeal, the parent characterizes the IHO's decision as stating that the WJ-IV ACH was used to measure the student's "ability" appropriately—implying that the WJ-IV ACH assessed cognitive functioning—rather than academic achievement. However, a plain reading of the IHO's decision clearly indicates that the IHO determined that the WJ-IV ACH was administered to "obtain the student's academic functioning" and measured the student's "abilities in reading, math and writing" (IHO Decision at p. 20). Additionally, the IHO determined that although the district did not conduct its own evaluation of the student's cognitive ability, it appropriately relied on the results on the private neuropsychological evaluation (id. at p. 21).

of the student's cognitive abilities. The fact that the district did not obtain the student's IQ does not render the information available to the CSE subcommittee inappropriate as the parent suggests, and the district had sufficient evaluative information to determine the student's cognitive needs.

2. Speech-Language and Auditory Processing

The parent alleges on appeal that the IHO erred in finding the district's May 2015 and March 2016 speech-language evaluations were appropriate because the standard the IHO used did not result in an evaluation that would assist in determining the student's individual needs.[17] Contrary to the parent's assertion; however, evidence in the hearing record shows that the district adequately evaluated the student and identified his speech-language and auditory processing needs.

The hearing record shows that the speech-language pathologist who conducted the May 2015 evaluation had worked with the student since the beginning of the 2014-15 school year (first grade) (Tr. pp. 336-37; Dist. Exs. 79; 97). Results from the May 2015 speech-language evaluation report indicated that while the student's articulation skills were within the average range, he exhibited moderate receptive language delays (standard score 73) and severe expressive language delays (standard score 65) following administration of the Clinical Evaluation of Language Fundamentals-4 (CELF-4) (Dist. Ex. 97 at p. 1). The speech-language pathologist testified that the CELF-4 subtests measured receptive language skills such as understanding language and comprehension; expressive language skills such as the ability to verbally express language and use sentence structure/grammar skills; and language content that included word classes, following directions, and linguistic concepts (Tr. pp. 333, 356-57). According to the May 2015 speech-language report, the student had difficulty following directions with linguistic concepts, immediately recalling spoken sentences, using correct grammatical forms, and formulating sentences given a specific word and picture, which were "many of the same weaknesses he has shown over the last few years" (Dist. Ex. 97 at p. 1; see Tr. p. 339). Additionally, the report noted that the student exhibited weaknesses in "his ability to process language-auditory memory skills and comprehension skills" (Dist. Ex. 97 at pp. 1-2).

When the student was reevaluated in March 2016 by the same speech-language pathologist, his score was in the low average range in receptive language (standard score 87), and in the borderline low average range in expressive language (standard score 81) on the Clinical Evaluation of Language Fundamentals-5 (CELF-5) (Dist. Ex. 79; see Dist. Ex. 97 at p. 2). In her report, the speech-language pathologist indicated that the student demonstrated improvement in his basic sentence comprehension, use of correct word structures, understanding of word classes, and ability to formulate sentences, but had difficulty following directions (specifically two and three step commands involving orientation), demonstrating a clear understanding of linguistic concepts (e.g., neither, nor, after, beginning, before), immediately recalling spoken sentences, and responding to questions based on a short paragraph read to him (Dist. Ex. 79). Areas the student exhibited "the most trouble with" included responding to questions about sequencing of events and making

[17] In his discussion of the district's speech-language and OT evaluations of the student, the IHO found that the evidence showed the evaluations were conducted with the standard/appropriate protocols and that the evaluations were typically used and generally accepted in the educational setting in order to determine a student's speech-language or OT needs (IHO Decision at pp. 19-20).

predictions (id.). The speech-language pathologist noted that the student often asked for clarification and repetition of information, and that he did better when information was simplified and examples were provided (id.). The report indicated that the student demonstrated "mildly delayed" receptive and expressive language skills, and the speech-language pathologist testified that the student's March 2016 scores "all came out showing some nice improvement," and were "quite a bit better" than his May 2015 scores (Tr. pp. 360-62; Dist. Ex. 79 at p. 1).

Turning to the parent's claim that the district's evaluations of the student were deficient because they did not specifically evaluate his auditory processing needs, review of the April 2016 IEP shows that it included results from both the May 2015 and March 2016 speech-language evaluations described above, and the June 2015 private neuropsychological evaluation report (compare Dist. Ex. 72 at pp. 3-4, with Dist. Exs. 79; 97; 102). According to the June 2015 neuropsychological evaluation report, the student followed directions well, but frequently needed information repeated, or additional time for consideration of information and formulation of a response (Dist. Ex. 102 at p. 3). On tasks measuring the student's auditory attention he exhibited performance patterns related to weaknesses in language comprehension, and "frank weakness" in phonological processing, rapid automatic naming, and auditory working memory skills (id. at p. 4). On a listening task, the student needed frequent repetition of questions, his response times were very lengthy, and he was stronger responding "true or false" to single statements as compared to giving open-ended responses after listening to longer passages (id.). The evaluator concluded that aspects of the student's profile were consistent with the pattern seen in children with auditory processing disorders, and suggested that the parents may want to have the student evaluated "by a speech/language professional" to determine if he met the diagnostic criteria for an auditory processing disorder (id. at p. 7).

Review of the April 2016 IEP shows that information about the student's language and auditory processing difficulties from the speech-language evaluation and private neuropsychological evaluation reports is reflected in the present levels of performance (compare Dist. 72 at pp. 2-5, with Dist. Exs. 79; 97; 102). The speech-language pathologist testified that the student had observable language processing needs, and auditory processing difficulties such as weak memory skills and poor listening skills (Tr. pp. 369, 373; see Dist. Ex. 72 at p. 6). She further testified that the student's language and auditory processing needs were addressed in the IEP under management needs, such as having verbally presented information repeated, shortened, and chunked, allowing additional processing time, providing an environment with structure, consistency, and routine, giving verbal and visual prompts, and explaining directions (Tr. pp. 369-373; see Dist. Ex. 72 at p. 8). She also testified that the testing accommodations provided in the IEP (i.e., extended time, minimal distractions, directions read, directions simplified, additional examples) had a positive impact on the student's language processing (Tr. p. 372; see Dist. Ex. 72 at p. 11). Additionally, I note that the evaluator who conducted the private neuropsychological evaluation included in her report several educational recommendations to address the student's needs (i.e., a highly structured classroom setting with the availability of a second teacher and small group arrangements for instruction, classroom accommodations that specifically addressed the student's difficulty with comprehending instructions and responding promptly, testing accommodations, and speech-language therapy, which were included in the April 2016 IEP (compare Dist. Ex. 102 at pp. 6-7, with Dist. Ex. 72 at pp. 8, 10, 11).

Although in June 2015 the private evaluator indicated the parent may wish to have the student evaluated to determine if the student met the criteria for an auditory processing disorder (Dist. Ex. 102 at p. 7), the 2016 speech evaluation had not yet been completed and the speech-language pathologist testified that the student's auditory processing difficulties were addressed in his IEP through the use of accommodations and management needs (Tr. pp. 369-73, 383-86). The speech-language pathologist testified that she did not believe there were any additional services beyond what was included in the April 2016 IEP that were required to address the student's language processing or auditory processing concerns (Tr. pp. 385-86). She further testified that it was not necessary or appropriate to conduct an auditory processing evaluation at the time the June 2015 recommendation was made because "[t]he norms for the auditory processing tests are not established until the age [of] eight" and that it was not appropriate to consider a diagnosis of an auditory processing disorder after the student was diagnosed with a "more global" learning disorder (Tr. pp. 480-83). The student's second and third grade special education teachers also testified that they did not observe any auditory or processing needs that were not addressed by the student's then-current IEP (Tr. pp. 38, 40, 59, 94, 97-98, 123, 252-53, 268).

Based on a review of the hearing record, the district appropriately assessed the student's speech-language functioning. In addition, the district incorporated many of the educational recommendations included in the June 2015 neuropsychological evaluation report into the April 2016 IEP. The hearing record does not show that the student's speech-language and auditory processing needs went unidentified. Rather, the parent acknowledges that the IEP contained information regarding the student's auditory processing difficulties, and district witnesses testified with respect to the manner in which these needs arose in the school setting. Further, although the district did not specifically evaluate the student for an auditory processing disorder, "the CSE subcommittee had enough information regarding [the student's auditory processing needs] to develop an IEP that addressed his individual needs. In other words, the performed evaluations were 'sufficiently comprehensive to identify all of the student's special education needs'" (M.B. v. City Sch. Dist. of New Rochelle, 2018 WL 1609266 at *12 [S.D.N.Y. Mar. 29, 2018], quoting 8 NYCRR 200.4[b][6][ix]).

3. OT

The parent appeals the IHO's finding that the district's April 2016 OT progress summary of the student was sufficient to determine the student's needs despite not including standardized testing results.[18]

The hearing record reflects that the district occupational therapist conducted an OT evaluation of the student in June 2014 (Tr. p. 595; Dist. Ex. 112).[19] The June 2014 OT evaluation report included the results from administrations of the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2), the Beery-Buktenica Developmental Test of Visual-Motor

[18] To the extent the parent asserts the April 2016 OT progress summary was deficient because it did not assess how the student's needs may be accommodated by assistive technology, that claim is addressed below.

[19] The occupational therapist who conducted the June 2014 evaluation testified that the handwritten 2015 date on the evaluation report was an error, and that the report should have been dated June 2014 (see Tr. pp. 597-99; Dist. Ex. 112 at p. 4).

Integration, Sixth Edition (Beery VMI), the Motor-Free Visual Perception Test, Third Edition (MVPT-3), and clinical observations of sensory integration (Dist. Ex. 112). In combination, these measures provided an assessment of the student's functioning in the following areas: fine motor skills (precision and integration), manual dexterity, upper limb coordination, visual-motor integration, motor-free visual perception, and sensory integration (id. at pp. 1-2). The occupational therapist provided a description of the student's graphomotor skills, noting that he printed words legibly, and that his letter formation, letter size, and letter placement was adequate (id. at pp. 2-3). According to results of the June 2014 OT evaluation, the student exhibited average muscle tone and strength throughout his upper body, but he had difficulty with fine motor skills (slightly below average), motor planning, following multi-step directions in the correct order, and positioning himself in space (i.e., next to, in front of) (Dist. Ex 112 at pp. 2-3; see Tr. pp. 599-601). The occupational therapist noted that the student required verbal and visual cues to understand directions and complete activities, and it was more difficult for him to attend to directions as testing went on (Dist. Ex. 112 at p. 3). In the report, the occupational therapist provided suggestions to improve the student's attention including completing large motor movements before table top activities and simple hand exercises to "wake up" his hands and fingers, as well as providing manipulatives for math and spelling, which she opined may help the student complete "paperwork in a more accurate and organized fashion" (id. at p. 4).

The June 2015 OT progress summary report reflected that the student received one 30-minute session per week of group OT during the 2014-15 school year, and at the end of that school year continued to exhibit difficulty with motor planning, fine motor skills, and attention to task (Dist. Ex. 93 at pp. 1-2). During the 2015-16 school year the student continued to receive one 30-minute session per week of group OT services focusing on improving on-task behavior, as well as organization of himself, his work, his work space, and his movement (Dist. Ex. 76 at p. 1). The April 2016 OT progress summary indicated that the student's ability to complete gross motor movements in a more timely manner had improved, but the student continued to need demonstration, repetition, routine, extra time, visual and verbal cues, assistance to complete all classroom tasks, and a structured learning environment to be successful in learning—accommodations provided for in the April 2016 IEP (Dist. Exs. 72 at p. 8; 76 at pp. 1-2). Additionally, the occupational therapist testified that she used clinical observation to assess the student's sensory integration needs during the time she worked with him, and that she never observed anything that suggested the student had sensory integrative concerns or deficits (Tr. pp. 636-37).

While the parent is correct that the April 2016 OT progress summary report does not include standardized test results, the occupational therapist testified that the report was based upon her direct observations of the student over the course of the 2015-16 school year, it identified the student's areas of need, and indicated they would be addressed "on a daily basis within his classroom setting across all academic areas" (Tr. pp. 607-08; Dist. Ex. 76; see Dist. Ex. 72 at p. 8). The hearing record demonstrates that the CSE subcommittee had adequate information about the student's attention, fine motor skill, and motor planning needs, and does not suggest that these needs were not being addressed or that the student had needs in areas addressed by OT services of which the district was not aware (C.S. v. Yorktown Cent. Sch. Dist., 2018 WL 1627262, at *12-*13 [S.D.N.Y. Mar. 30, 2018] [noting that updated standardized testing was not necessary when an evaluation had been conducted within the last year and no concerns were raised at the CSE meeting regarding the student's needs or the need for further evaluation]).

4. Assistive Technology

The parent's May 10, 2017 letter to the district requesting IEE's included a request for a comprehensive assistive technology evaluation. On appeal, the parent asserts that she requested an assistive technology evaluation based on the district's failure to assess the student in all areas of suspected disability and further asserts that the April 2016 OT progress summary was deficient because it did not assess how assistive technology might have accommodated the student's needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. 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]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121).

Federal and State regulations define an assistive technology service as "any service that directly assists a student with a disability in the selection, acquisition, or use of an assistive technology device," including "[t]he evaluation of the needs of a student with a disability" (8 NYCRR 200.1[f][1]; see 34 CFR 300.6[a]). Furthermore, State regulations include assistive technology services within the definition of related services, the "developmental, corrective, and other supportive services as are required to assist a student with a disability" (8 NYCRR 200.1[qq]).

The IHO determined that there was no evidence to support the parent's contention that the student required an assistive technology evaluation (IHO Decision at p. 22). However, there is also no evidence in the hearing record that the district considered the parent's request for an assistive technology evaluation, that the CSE discussed whether the student had a need for assistive technology, or, if they did, an explanation as to why an assistive technology evaluation was not necessary. Initially, while a district is required to provide prior written notice regarding its refusal to fund the cost of the requested assistive technology evaluation, including an explanation as to why the district refused to take the requested action (see 8 NYCRR 200.5[a][1], [3][ii]), the district failed to provide prior written notice or assert in its due process complaint notice an explanation as to why it did not conduct an assistive technology evaluation or why an evaluation was unnecessary. The district's due process complaint notice did not specifically address the parent's request for an assistive technology evaluation and instead provided a general statement that "[t]o the degree that the District did not perform an evaluation in any specific area, it was because there was no demonstrated need to perform the evaluation" (Dist. Ex. 1 at p. 2). During the hearing, the director of special education testified that district staff never indicated that they suspected the student might have a need that required assistive technology (Tr. p. 515). However, there was no testimony as to whether the CSE subcommittee ever considered if the student required assistive technology. Additionally, while both the speech-language pathologist and occupational therapist testified that they did not believe the student required any services or interventions beyond what was recommended in his April 2016 IEP, this testimony is generalized and does not specifically

address the question as to whether the CSE considered this factor or discussed assistive technology for the student or what information an assistive technology evaluation may or may not have provided (Tr. pp. 384-86, 612-17).

Although proving a negative (that the student did not need an assistive technology evaluation) is a difficult position, and something that at times may only be shown by the absence of evidence (see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *14 [S.D.N.Y. Mar. 28, 2013]), in this instance the district has not shown sufficient engagement with the question as to whether the student needed to be evaluated in the area of assistive technology as the district has not provided an explanation for its decision not to fund an IEE. Since the district did not explain or demonstrate its position that an assistive technology evaluation was unnecessary, the IHO's finding with respect to an assistive technology evaluation is modified and the parent's request for an IEE at public expense in the area of assistive technology is granted.

E. Parental Participation & Due Process

1. Prior Written Notice

The parent asserts that the district failed to provide her with prior written notice following the November 2016 CSE subcommittee meeting that met the requirements of the regulations.[20] Additionally, the parent asserts that the district failed to provide her with prior written notice for the October 2016 vision evaluation that the district conducted, or when it requested consent to re-evaluate the student prior to November 2016. The parent argues that the IHO erred by finding the district complied with the regulations regarding prior written notices and requests that the district be directed to comply with the regulations in the future.

State and federal regulations require that a district provide parents of a student with a disability with prior written notice "a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a free appropriate public education to the student" (34 CFR 300.503[a]; 8 NYCRR 200.1[oo]; 200.5[a][1). Pertinent to the parent's arguments, pursuant to State and federal regulation prior written notice must include a description of the action proposed or refused by the district; an explanation of why the district proposed or refused the action; a description of the other options that the CSE considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action; and a description of the other factors relevant to the CSE's proposal or refusal (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]).

The district entered five prior written notices into the record, none of which is a prior written notice relating to the district's request for parental consent for the October 2016 vision evaluation (see Dist. Exs. 56, 59, 69, 83, 87). Additionally, the district is required to provide the parent with a prior written notice before evaluating the student (8 NYCRR 200.5[a][5]). The

[20] Specifically, the parent asserts that the prior written notice following the November 2016 CSE subcommittee did not provide specific information about the meeting, what was reviewed, the options considered, or why they were rejected by the CSE subcommittee.

hearing record contains no indication that the district complied with this regulation relative to the October 2016 vision evaluation.[21]

Further, the prior written notice dated November 30, 2016 does not comply with the regulations (Dist. Ex. 59; see 34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]).[22] The November 30, 2016 prior written notice refers the parent to the "enclosed IEP" for the description of the action proposed or refused, the explanation as to why the action was proposed or refused, and for a description of the evaluations used by the CSE to make its recommendations (Dist. Ex. 59 at p. 1). As the district is already required to ensure that parents are provided with a copy of their student's IEP (8 NYCRR 200.4[e][3][iv]), merely incorporating the IEP by reference in the prior written notice is not a sufficient method for providing the parent with notice of the information required to be included in the prior written notice.

The district's failure to provide prior written notice to the parent in compliance with State and federal regulations constitutes a procedural violation. However, the parent has not asserted any substantive harm related to the district's failure to comply with the regulations. Additionally, there is no indication in the hearing record that any of the above procedural errors interfered with the parent's ability to participate in the development of the student's educational program. Accordingly, the procedural violations associated with the district's prior written notices do not rise to the level of a denial of FAPE as they did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

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[21] The IHO determined that this issue was barred by res judicata. While the doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B. v. Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *4 [S.D.N.Y. Jan. 13, 2012]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19, 2006]), it only applies when: "(1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding" (K.B., 2012 WL 234392, at *4; see Grenon, 2006 WL 3751450, at *6). Although the first two elements are arguably met, the record does not support a determination that the third element has been met. Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. 2013]). The prior appeal involving this student was commenced by a district due process complaint notice which asserted that the district's October 2016 vision evaluation was "appropriate and sufficient" (see Application of a Student with a Disability, Appeal No. 17-046). Accordingly, the IHO who presided over the prior proceeding determined that "the parent's procedural arguments, including the district's failure to provide the parent with prior written notice relating to its refusal to provide an IEE at public expense . . . were not raised in the due process complaint notice and were outside the scope of the hearing" (id.). The SRO similarly indicated that the "only matter at issue" in the prior proceeding was the "substantive appropriateness of the district's evaluation" (id.). Thus, whether the district complied with its obligation to provide prior written notice was not at issue in the prior proceeding, nor does the district point to any authority that the parent was required to interpose a due process complaint notice raising any claims she may have had relating to the district's vision evaluation.

[22] The parent only makes specific allegations regarding the November 2016 prior written notice; however, I note that the June 2015 and June 2016 prior written notices also failed to comply with State regulations in the same areas as the November 2016 prior written notice (see Dist. Exs. 69; 87).

Nonetheless, going forward, the district should provide the parent with prior written notice in compliance with State and federal regulations (see 34 CFR 300.503; 8 NYCRR 200.5[a]). It is noted that the student will soon be due for a triennial review based the CSE's classification of the student in June 2015. The district should comply with the prior written notice regulations when conducting this review of the student. Moreover, the district is reminded that it is required to provide the parent with prior written notice at the same time it requests parental consent to evaluate the student (8 NYCRR 200.5[a][2]).

2. Board of Education Approval

State regulations require that "the board of education shall arrange for appropriate special programs and service" to be provided to a student with a disability upon a recommendation from the CSE (8 NYCRR 200.4[e][1]; see 8 NYCRR 200.4[d]). The district's director of special education testified that the November 2016 IEP with the changes from the vision evaluator was sent to the board of education and that the board of education approved the IEP with the vision evaluation information included (Tr. pp. 525, 557-58, 560-61). The parent was provided with notification that the board of education "supported" the CSE subcommittee's recommendations at its December 13, 2016 meeting (Dist. Ex. 58). As previously discussed, the parent objects to the inclusion of certain findings and recommendations from the October 2016 vision evaluation. However, as previously noted the two IEPs were substantially similar and contained the same special education program and related services recommendations for the student. The fact that the board of education approved an IEP containing additional information inputted by the vision evaluator after the November 2016 CSE meeting, although arguably a procedural violation of State regulation, did not rise to the level of a denial of a FAPE.

F. Annual Goals

The parent asserts on appeal that the student's 2016-17 IEP annual goals were not measurable.[23] Specifically, the parent asserts that the goals were "to be measure[d] by a percentage of accuracy"; however, the IEP lacked a starting or baseline percentage of accuracy. Further, the parent asserts that the IEP annual goal progress reports reflected "some generic progress statements" rather than the percentage of accuracy and therefore, provided "no real information to the parent" about the student's progress toward his annual goals. However, as discussed below, the April 2016 CSE subcommittee developed the student's annual goals based on his needs, and the hearing record supports a finding that the annual goals were appropriate and measurable and that the district appropriately reported the student's progress to the parent.

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

[23] In the request for review, the parent cites to the November 2016 IEP as support for her claim that the IEP annual goals are not appropriate. However, the hearing record shows that the student's annual goals for the 2016-17 school year were developed at the April 2016 CSE meeting, reflected in the April 2016 IEP, and were not changed in November 2016 (compare Dist. Ex. 60 at p. 10, with Dist. Ex. 72 at pp. 1, 9). Therefore, the analysis of the appropriateness of the annual goals in this decision refers to the April 2016 IEP.

U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

Regarding the student's reading needs, the student's second grade consultant teacher testified that the student was good at decoding, but he struggled with comprehension (Tr. p. 258; see Dist. Ex. 72 at p. 6). The consultant teacher stated that the student took a long time to answer questions, needed to be led to the answer at times, and had difficulty looking back at a story to find answers (Tr. pp. 258-59).[24] The April 2016 IEP included a goal that stated when presented with narrative and/or informational text from content area subjects at the student's instructional level, the student would answer questions to demonstrate an understanding of text while referring explicitly to the text as the basis for the answers (Dist. Ex. 72 at p. 9). The April 2016 IEP indicated that the student's progress in reading comprehension was to be measured quarterly based on work samples, with the criteria of 60 percent success (id.). The third grade special education teacher who provided the student's special class ELA instruction during the 2016-17 school year testified that the annual goals addressed the student's difficulty comprehending text and answering questions about texts (Tr. pp. 38, 40-41).

With respect to written expression, the student's second grade consultant teacher reported that the student exhibited difficulty with grammar, sentence structure, and organization (Dist. Ex. 72 at p. 6). The written language annual goal on the April 2016 IEP stated that when given a writing assignment, the student will write up to two paragraphs with relevant content that includes a logical introduction and closing statement written with proper sentence structure and grammar, to be measured quarterly through work samples, with the criteria of 80 percent success when provided with moderate assistance (Dist. Ex. 72 at p. 9).

The student's second grade special education teacher reported to the April 2016 CSE subcommittee that the student had made good progress in math and had a basic understanding of mathematical concepts; however, he often got "tripped up" on directions, needed reminders, visual cues, and extra examples to complete math work (Tr. pp. 294-98; Dist. Ex. 72 at p. 6).[25] The April 2016 IEP included an annual mathematics goal that stated when given a multi-step problem, the student would use a graphic organizer or other strategy to categorize the information and identify which operations to use to correctly solve the problem (Dist. Ex. 72 at p. 9). This goal was to be assessed quarterly using work samples, and the criteria was 80 percent success with moderate assistance (id.). The third grade consultant teacher testified that "moderate assistance" meant that the student needed assistance such as repeating or rephrasing directions, providing help or another

[24] Although the consultant teacher stated that during the 2015-16 school year (second grade) the student struggled with reading comprehension, in March 2016 the student achieved a standard score of 93 on the passage comprehension subtest of the WJ-IV ACH (Tr. pp. 257-59; Dist. Exs. 72 at p. 4; 80).

[25] The special education teacher's report of the student's needs in the area of mathematics included in the April 2016 IEP was consistent with descriptions of the student's needs included in the June 2015 neuropsychological evaluation report (compare Dist. Ex. 72 at p. 6, with Dist. Ex. 102 at p. 5).

opportunity, or giving him more time, because the student could not complete the goal independently (Tr. pp. 152-53).

The April 2016 IEP included the student's CELF-5 borderline to low average test score results from the March 2016 speech-language summary report (compare Dist. Ex. 72 at p. 4, with Dist. Ex. 79 at p. 1). According to the IEP, the student had shown improvement in basic sentence comprehension, use of correct word structures, understanding word classes and formulating sentences; however, he continued to demonstrate weaknesses in understanding linguistic concepts, following directions, recalling sentences, and comprehending paragraphs (Dist. Ex. 72 at p. 6). Additionally, the IEP indicated that during therapy sessions the student often asked for clarification and repetition of information and questions; performing better when information was simplified and examples were provided (id.). The speech-language pathologist testified that the annual goals and management needs included in the April 2016 IEP addressed the student's needs with respect to sentence structure, comprehension, and memory (Tr. pp. 340-49). The April 2016 IEP also included a study skills goal that addressed following multi-step directions with three verbal cues, with criteria of 80 percent success, measured quarterly by structured observations of targeted behavior, and a speech-language goal which addressed following multi-step directions presented orally that incorporated basic linguistic language, with mastery criteria of 4 out of 5 trials, measured monthly by observation checklists (Dist. Ex. 72 at p. 9).

As discussed above, review of the hearing record reflects that the annual goals developed for the 2016-17 school year addressed the student's identified needs and included the required evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal.

Additionally, the parent's argument that the annual goals were not appropriate because they lacked a baseline is without merit as State regulations neither mandate nor preclude a CSE from developing IEP goals that are expressed in terms of a specific "grade level" or "baseline" (see Lathrop R-II School Dist. v. Gray, 611 F.3d 419, 424-25 [8th Cir. 2010][noting that baseline data is not required for goals and a school district cannot be compelled to include more in an IEP than is required by law]; R.B. v. New York City Dep't. of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013] [explaining that with respect to drafting annual goals, "nothing in the state or federal statute requires that an IEP contain 'baseline levels of functioning' from which progress can be measured"], aff'd 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; Hailey M. v. Matayoshi, 2011 WL 3957206, at *23 [D. Haw. Sept. 7, 2011] [rejecting the claim that goals were inadequate because they lacked baseline levels or grade levels and holding that goals are appropriate if they are capable of measurement and directly relate to the student's areas of weakness identified in the present levels of educational performance]). Furthermore, "the goals are stated in absolute terms and can be measured without reference to a baseline" (R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 434 [S.D.N.Y. 2014]).

Turning next to the parent's argument that the district did not properly measure and report the student's progress towards his annual goals, the student's third grade ELA special education teacher testified that the student made progress in reading comprehension during the 2016-17 school year, as measured by gains in his Lexile score on the Scholastic Reading Inventory (Tr. pp.

46-48; see Dist. Ex. 36).[26] The special education teacher testified that the reading specialist took the first AIMSweb probe during the first or second month of school to get baseline data, and then the special education teacher tracked the student's progress toward his annual goal in reading by doing AIMSweb probes approximately every two weeks, as well as conducting running records and informal questioning to check for comprehension (see Tr. pp. 48-49, 88-89; Dist. Ex. 33 at p. 2).[27] The special education teacher stated that she completed a quarterly report to inform the parents of the student's progress toward his IEP goals, and the student made gradual progress toward his reading goal over the year; however, his progress was inconsistent (Tr. pp. 51-53; Parent Ex. F at p. 3).

The special education teacher testified that she saved writing samples in a portfolio to track the student's progress and that some of the writing samples were sent home (Tr. pp. 50, 83). She further stated that the student often required assistance with writing assignments because he could not do them independently (Tr. pp. 84-85).[28] According to the student's progress report, he made satisfactory progress towards his writing goal throughout the 2016-17 school year, but he required quite a bit of assistance (Tr. pp. 84-85; Parent Ex. F at p. 4).

The student's third grade math consultant teacher testified that she measured the student's progress every two weeks by recording his grades (percentage correct) on assignments that involved multi-step problems, and parents were given quarterly reports of his progress (see Tr. pp. 107-08; Parent Ex. F at p. 5). The consultant teacher discussed a form she used to monitor the student's progress that included at least five (percentage) grades per marking period, from which she calculated an average (Tr. pp. 110-11; Dist. Ex. 39 at p. 5). According to the student's IEP progress report, the student made progress during the 2016-17 school year and he achieved his annual goal in math (Parent Ex. F at p 5). The student's report card for 2016-17 reflected that the student had met grade level standards in mathematics (Dist. Ex. 34 at p. 2).[29] The student's AIMSweb scores in mathematics were well above average for math computation, but below average for mathematical concepts and applications (Dist. Ex. 33 at p. 1).[30] The consultant teacher explained the discrepancy between the grades and AIMSweb scores, opining that the student's report card grades were the accumulation of all his homework and classwork, whereas the

[26] The student's Lexile performance level of 460 was below grade level when he was tested in September 2016; however, the student was on grade level by February 2017 with a Lexile level of 558, and he remained on grade level for the remainder of the year, with a final Lexile level of 760 in June 2017 (Dist. Ex. 36).

[27] The student's AIMSweb reading scores improved over the course of the 2016-17 school year and were in the average range (Dist. Ex. 33 at p. 2).

[28] The student's March 2016 broad written language standard score on the WJ-IV ACH was 101 (Dist. Exs. 72 at p. 4; 80).

[29] The student's March 2016 broad mathematics standard score on the WJ-IV ACH was 103 (Dist. Exs. 72 at p. 4; 80).

[30] AIMSweb testing was conducted in the fall, winter, and spring of the 2016-17 school year (Dist. Ex. 33).

AIMSweb scores were a "snapshot" of performance that was conducted three times per year (Tr. pp. 160-61).

The speech-language pathologist testified that she tracked the student's progress toward his speech-language annual goal on a monthly basis by recording a percentage correct in a session, and after a period of gradual progress, the student ultimately met his goal (Tr. pp. 364-69; Dist. Ex. 39 at p. 9). The speech-language pathologist stated that she reported progress to parents by sending home a progress report every ten weeks (Tr. pp. 366-67).

The hearing record demonstrates that the student's April 2016 IEP annual goals were measurable and that the district documented the student's progress towards his goals. The hearing record indicates the district sent progress reports to the parent on a quarterly basis, consistent with the IEP (see Parent Ex. F; Dist. Exs. 55; 72 at p. 10).[31] To the extent the parent claims the district failed to report the student's progress using language similar to the language contained in the criteria for measuring whether the annual goals are being achieved (i.e., reporting the student's progress with reference to a percentage of accuracy), federal and State regulations contain no requirements for districts to report progress toward annual goals in a specific manner (34 CFR 300.320[a][3]; 8 NYCRR 200.4[d][2][iii][b], [c]). The State Education Department's Office of Special Education has issued guidance indicating that "[t]he method or combination of methods to inform the parents of their child's progress is left to local discretion" and that "reports to the parent do not need to be lengthy or burdensome, but they need to be informative" ("Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 36, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). The guidance indicates that "the report to parents could include a statement of the goals with a written report of where the student is currently functioning in that goal area and/or a rating of progress to indicate whether the student's progress to date will likely result in the student reaching the goal by the end of the year" (id.). The guidance provides, as an example of how progress may be reported to parents, a goal which includes as evaluative criteria a specific percentage of accuracy; however, the sample progress reports include no reference to the percentage accuracy attained by the student during each reporting period but instead provide information regarding the student's then-current functioning with respect to the goal (id. at p. 37). While it may be more helpful to the parent to use consistent language, the fact that the annual goals' criteria for success was measured by a percentage does not require the district to report progress toward the goals in the exact same fashion. Therefore, although the progress reports did not come with percentages of accuracy, this does not negate the fact that the district properly and adequately measured and reported the student's progress towards his annual goals.

G. Special Education Program

The parent asserts that the district failed to provide the student with special education to address his needs for the 2016-17 school year as the April 2016 CSE subcommittee did not recommend OT, counseling, or assistive technology services. However, review of the hearing

[31] There is no indication in the hearing record that the parent requested further detail from the district about the student's progress toward any particular goal.

record reflects the IHO correctly determined that the district provided an appropriate program to the student for the 2016-17 school year.

The occupational therapist testified that she measured the student's OT progress during the 2015-16 school year by keeping a record (daily notes) of the student's writing samples and his ability to follow directions (Tr. p. 632). She further testified that her observations of the student's improved ability to organize himself, his work, and his work space, and his improved ability to follow directions—while also ensuring the student could "do that" within the classroom—were factors in her decision to discontinue direct OT services (Tr. pp. 611-12).[32] Additionally, the occupational therapist indicated that she would be available for consultation if the teacher had any concerns (Tr. p. 612; see Dist. Ex. 76 at p. 2). The occupational therapist testified that the April 2016 IEP addressed OT-related needs in the physical development and management needs sections of the IEP, which included a list of strategies that would assist the student in the classroom, such as using visual and verbal cues, and providing demonstration, repetition, and routine (Tr. pp. 613-14; see Dist. Ex. 72 at pp. 7-8). The occupational therapist testified that the April 2016 IEP included annual goals that would assist the student with any residual OT needs, such as goals that addressed following multi-step directions with three verbal cues and the use of graphic organizers (Tr. pp. 614-15; see Dist. Ex. 72 at p. 9). The occupational therapist also testified that testing accommodations included on the April 2016 IEP would address the student's OT needs in the classroom, by allowing extra time and providing additional examples as repetition in case the student did not understand the first time (Tr. p. 615; see Dist. Ex. 72 at p. 11). The occupational therapist stated that she did not believe there were any other necessary interventions or services that would assist the student in the classroom, other than what was included on the April 2016 IEP (Tr. pp. 616-17). The student's second grade consultant teacher also testified that she did not observe anything to suggest that the student had OT needs in the classroom (Tr. p. 267). The student's regular education teacher and special education teachers for the 2016-17 school year also testified that the student did not exhibit any OT needs in the classroom (Tr. pp. 58, 122, 219-20). The third grade consultant teacher stated that the student did a nice job planning his space and organizing his material in front of him, and had very nice handwriting (Tr. p. 122). The April 2016 CSE subcommittee's determination to discontinue direct OT services based on the recommendations of the student's occupational therapist, who determined that the student's OT needs could be met within the classroom, did not result in a denial of a FAPE (Tr. pp. 609-12; Dist. Ex. 76 at pp. 1-2).

On appeal, the parent alleges that the CSE subcommittee did not recommend counseling to address the student's anxiety despite including anxiety as an area of need on the April 2016 IEP. The student's second grade consultant teacher described the student as a very happy, easygoing child who worked hard, put forth a lot of effort, volunteered to answer questions, and was willing to say when he did not know something and ask for help (Tr. p. 257). According to comments in the social development section of the April 2016 IEP, the teacher noted that the student's personal character (courtesy, respect, attentiveness, responsiveness, following structure/rules, and concern for work quality) were areas of strength; however, the teacher indicated that the student appeared to "get worked up and nervous" due to wanting to do his best work (Dist. Ex. 72 at p. 7). The IEP also indicated that the student worried about being able to complete work that he missed when he

[32] The occupational therapist testified that the parent did not express disagreement with the decision to discontinue OT services (Tr. pp. 611, 617).

left the classroom for related services and noted the parent's concerns about the student's anxiety (id.). Review of the June 2015 private neuropsychological evaluation report shows that the evaluator used behavioral observations, completion of standardized parent and teacher behavior assessment report forms, projective drawings, and discussion with the parent and the student's then-current teacher to assess the student's emotional skills and needs (Dist. Ex. 102 at pp. 1, 3-5). Behavioral observations in the June 2015 neuropsychological evaluation report reflected a cooperative student who followed directions, put forth good effort, and was concerned about the quality of his work (id. at pp. 3-4). The evaluator indicated that based on parent and teacher ratings on the Behavior Assessment System for Children, Second Edition, anxiety, as it related to the student's academic challenges, was an area of concern (id. at pp. 5-6). However, she also opined that the student's "extroverted personality, diligence, and desire for academic success are assets that will serve him well by inviting positive support and collaboration" (id. at p. 7). While the evaluator did not make any specific recommendations to address the student's anxiety—such as counseling services—she did recommend a highly structured classroom setting, small group arrangements for instruction, accommodations (i.e., directions repeated, checks for understanding, additional time), testing accommodations, and monitoring of the student's academic progress (id. at pp. 6-7). Given that neither the parents nor any of the student's providers identified a need for counseling services at the April 2016 CSE subcommittee meeting, and considering that the April 2016 IEP included the recommendations from the June 2015 neuropsychological evaluation report, the parent's claim that the lack of counseling services during the 2016-17 school year denied the student a FAPE is without merit (compare Dist. Ex. 72 at pp. 8-11, with Dist. Ex. 102 at pp. 6-7).

As to the parent's claim that the April 2016 IEP failed to provide the student with assistive technology "to assist with organization and reading comprehension," as described above, the IEP addressed those areas of need through the provision of special class instruction, consultant teacher services, a reading comprehension annual goal, and IEP management needs, such that any failure to recommend assistive technology did not rise to the level of a denial of a FAPE (Dist. Ex. 72 at pp. 8-10). As I am ordering an assistive technology evaluation IEE, it follows that the CSE will reconvene to consider the results of the evaluation and recommend services as appropriate on a going-forward basis.[33]

H. IEP Implementation—Indirect Consultant Teacher Services

The parent argues on appeal that the IHO erred in determining that the district's failure to properly deliver indirect consultant teacher services for mathematics from September 2016 through March 2017 did not result in a denial of FAPE.

State regulations define direct consultant teacher services as "specially designed individualized or group instruction provided by a certified special education teacher . . . to a student with a disability to aid such student to benefit from the student's regular education classes" and indirect consultant teacher services are defined as "consultation provided by a certified special education teacher . . . to regular education teachers to assist them in adjusting the learning

[33] While not endorsing the district's failure to assess the student's need for assistive technology, the parent has not identified any particular relief she considers necessary to remedy the district's failure to provide the student with assistive technology devices during the 2016-17 school year.

environment and/or modifying their instructional methods to meet the individual needs of a student with a disability who attends their classes" (8 NYCRR 200.1[m]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

The April 2016 CSE recommended five 30-minute sessions per week of consultant teacher services for mathematics, direct and indirect, to begin in September 2016 (Dist. Ex. 72 at p. 10). As discussed above, the April 2016 IEP also included environmental and human or material resources to address the student's management needs, including: requiring verbally presented information to be repeated, shortened, chunked, or supported by visual cues; visual and verbal prompts; extra time to process new information; repeated practice until learning has been consistently demonstrated; directions and assignments read and explained; and next steps of the teaching process broken down into small manageable chunks (id. at p. 8). The student's third grade consultant teacher testified that she was in the student's classroom every day for 40 minutes during math instruction, where she provided her assigned students with support during whole class and small group instruction, as well as in a separate location during exams (Tr. pp. 97-100). The consultant teacher stated that she provided at least 30 minutes of direct consultant teacher support daily, but she was in the student's classroom for 40 minutes each day (Tr. pp. 145-46). According to the consultant teacher, she provided direct support to the student by: scaffolding tasks to make sure new skills were understood, providing extra practice and examples, rephrasing or teaching material in a different way, repeating and clarifying directions, breaking word problems down into parts, providing visual cues, and allotting for extra time for the student to formulate a response of finish a task (Tr. pp. 99-103, 148-50). The consultant teacher indicated that she implemented indirect consultant teaching by meeting with the classroom teacher after each lesson and discussing

how the students were doing, who might need "a little more help," and what might be helpful for the student to be successful (Tr. p. 104).[34]

The student's third grade teacher had been teaching for 20 years in the district and was certified in elementary education, with a master's degree in special education (Tr. p. 207). The third grade teacher testified that the student received 30-40 minutes of direct consultant teacher services in her classroom every day during math instruction (Tr. pp. 209-11). The teacher also stated that she worked collaboratively with the consultant teacher to plan for the student's instruction on a weekly basis and they discussed the student's needs and how they were going to meet his needs (Tr. pp. 211-13). For example, the teacher testified that she and the consultant teacher discussed the student's comprehension and understanding of word problems as an area of need in mathematics, ways to improve the student's confidence, and independently focus on the question and pull out key points (Tr. pp. 212-13).

Based on a review of the hearing record, the parent's argument that the IHO erred in that the student was denied a FAPE resulting from the district's failure to properly deliver indirect consultant teacher services for math is without merit. Consistent with the program recommendations in the April 2016 IEP, the hearing record reflects that the district appropriately delivered consultant teacher services for mathematics to the student during the 2016-17 school year.

VII. Conclusion

Based on the above findings, the IHO's denial of the parent's request for an assistive technology IEE is reversed. The remainder of the IHO's findings are affirmed.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated March 14, 2018, is modified, by reversing so much thereof as denied the parent's request for an assistive technology IEE at public expense; and

IT IS FURTHER ORDERED that the district shall provide an independent assistive technology evaluation of the student at public expense in accordance with the body of this decision.

Dated: **Albany, New York**
April 27, 2018

STEVEN KROLAK
STATE REVIEW OFFICER

[34] According to the hearing record, the consultant teacher acknowledged that she had testified in a previous hearing that she provided direct consultant teacher services to the student and that her aide provided indirect services to the student (Tr. pp. 143-145). The consultant teacher added that she had made a mistake with respect to her testimony in the previous hearing regarding indirect consultant teacher services and clarified that she provided both direct and indirect consultant teacher services to the student (Tr. pp. 182-83). The consultant teacher stated that she was now clearer about the meaning of indirect services, which involved the time she spent providing insight and recommendations to the classroom teacher to enable the student to be successful, rather than her previous misconception that it was the time the aide spent working with the student (id.).