



The University of the State of New York

The State Education Department State Review Officer

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No. 19-014

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 South Orangetown Central School District

Appearances:

Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioner, by H. Jeffrey Marcus, Esq.

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, by Michael K. Lambert, 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) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational program and related services respondent's (the district's) Committee on Special Education (CSE) recommended for her son for the 2016-17 and 2017-18 school years were appropriate. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). 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 in this case began receiving occupational therapy (OT) and physical therapy (PT) at eight months of age through the Early Intervention (EI) program due to developmental delays (see Dist. Ex. 13 at pp. 2-3). At two years of age, the student began receiving speech-language therapy (id. at p. 3). While attending a preschool program (three years to five years old), the student continued to receive OT, PT, and speech-language therapy (id.). For kindergarten (2010-11 school year), the student attended a 12:1+1 special class placement in a district elementary school with continued related services of OT, PT, speech-language therapy, and

counseling (*id.*; see also Dist. Ex. 159 at pp. 1-2).^{1, 2} For first grade (2011-12 school year), the student attended a 12:1+1 "combined [k]indergarten/1st grade" special class placement and received OT, PT, speech-language therapy, counseling, and, at that time, began receiving hearing services (see Dist. Ex. 13 at p. 3; see also Tr. pp. 1858-59).³ The student received similar services in second grade (compare Dist. Ex. 15, with Dist. Ex. 13 at p. 3). For third grade, the student began receiving integrated co-teaching (ICT) services (2013-14 school year), together with OT, PT, speech-language therapy, counseling, and hearing services (five 30-minute sessions per six-day cycle) (see Dist. Exs. 16 at p. 1; 25 at p. 1; see generally Dist. Exs. 19-25).^{4, 5, 6} The student

¹ In March 2011, the student was diagnosed as having a "bilateral sensorineural hearing loss" (Dist. Ex. 13 at p. 2). In summer 2011, the student began wearing hearing aids (see Dist. Ex. 35; see also Tr. p. 1859). Over the course of four days in July, August, and September 2011, the parent privately obtained a neuropsychological evaluation of the student to "assess his current neurocognitive functioning and to provide recommendations for educational and treatment planning" (Dist. Ex. 13 at p. 1).

² For kindergarten through the conclusion of fifth grade, the student attended approximately three different district elementary schools; then, as relevant to this appeal, transitioned to, and attended, the same district middle school for sixth and seventh grades (see generally Dist. Ex. 159).

³ The student received hearing services from the same teacher of the deaf (or teacher of the hearing impaired) throughout his education at the district elementary and middle schools (see Tr. pp. 1856-58, 1861-63; see generally Dist. Exs. 25; 31; 44; 51; 65). This provider attended all of the student's CSE meetings (see Tr. pp. 1856, 1872; see, e.g., Dist. Exs. 4 at p. 1; 5 at p. 1; 6 at p. 1; 7 at p. 2; 8 at p. 2).

⁴ Before the student entered third grade, the parent completed an initial intake form for an assistive technology evaluation (see Dist. Ex. 21 at pp. 2-3; see generally Dist. Exs. 16-17). At that time, the parent noted that the "major emphasis" of the program for the upcoming school year (2013-14) was the "[third] grade curric[ulum]," and further commented that the student was "[one to two] years [plus] behind overall" (Dist. Ex. 21 at p. 5).

⁵ In April 2014 in third grade, the student was administered the "Grade 3" State assessments in mathematics and English language arts (ELA) (see Dist. Ex. 4 at p. 7). The student received a "Level 1" score on both assessments (*id.*). As such, the student was eligible to receive academic intervention services (AIS), which consists of additional, supplementary instruction or support services designed to assist students in meeting State learning standards, and must be made available to students with disabilities, "provided that such services shall not include . . . special education services and programs" (8 NYCRR 100.1[g]). In this case, the hearing record reveals that the student received "building level services"—oftentimes referred to as RtI (or RTI) services (see, e.g., Tr. pp. 36, 46-47, 89-90, 192-93, 443-44, 777-80, 864-66, 885-86, 1053-54). RtI services are defined in State regulation as a multi-level educational approach to targeted academic intervention—adjusted and modified as the student's needs require—to provide systematic and appropriately intensive assistance to students who are not making academic progress at expected rates (8 NYCRR 100.2[ii][1]; see Response to Intervention—Guidance for New York State School Districts, Office of Special Educ. [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf>). State regulation further provides that a district may provide an RtI program in lieu of AIS (8 NYCRR 100.2[ee][7]). While it appears that the district may have provided the student with an RtI program in lieu of AIS, the hearing record does not otherwise clarify this point (see generally Tr. pp. 1-1944; Parent Exs. E; G-H; K-N; S-U; W-Z; CC; EE-HH; JJ-QQ; SS; UU-ZZ; AAA-CCC; Dist. Exs. 1-172; 172A; 173; 173A; 174-204; IHO Exs. I-VI). What is clear, however, is that, after third grade, the student did not take the State assessments in mathematics and ELA administered in fourth grade (April 2015) or in fifth grade (April 2016) (see Dist. Ex. 8 at p. 8).

⁶ At the impartial hearing, the parent testified that, during the student's second grade school year, the district "eliminated self-contained" classrooms "district-wide" and thus, the district did not offer any self-contained options for the student and could only offer "ICT" services (Tr. pp. 534, 606-08, 653-55). Other than the parent's

received similar services in fourth grade (2014-15 school year) (see Dist. Ex. 3 at pp. 1-2, 8; see generally Dist. Exs. 27-36).⁷

On April 10, 2015, a subcommittee of the CSE (CSE subcommittee) convened to conduct the student's annual review and to develop an IEP for the 2015-16 school year (fifth grade) (see Dist. Ex. 4 at p. 1).⁸ Finding that the student remained eligible for special education and related services as a student with a traumatic brain injury (TBI), the April 2015 CSE recommended that the student receive ICT services and the following related services: two 30-minute sessions per six-day cycle of speech-language therapy in a small group (therapy room), one 30-minute session per six-day cycle of individual speech-language therapy (therapy room), one 30-minute session per six-day cycle of OT in a small group (therapy room), one 30-minute session per six-day cycle of individual OT (classroom), one 30-minute session per six-day cycle of individual PT (classroom), one 30-minute session per six-day cycle of individual PT (therapy room), one 30-minute session per six-day cycle of psychological counseling services in a small group (5:1), three 30-minute sessions per six-day cycle of individual hearing services (classroom), and three 30-minute sessions per year of individual "parent training" services (therapy room) (Dist. Ex. 4 at pp. 1, 14).⁹ In addition, the April 2015 CSE subcommittee recommended supplementary aids and services, program modifications, and accommodations including refocusing and redirection; use of visual supports; special seating arrangements; breaking large assignments into smaller, manageable pieces; access to an air conditioner; use of a multiplication table; checking for understanding; positive reinforcement plan; and wait time to construct oral responses (id. at pp. 14-15). With regard to assistive technology devices and services, the April 2015 CSE

testimony, the hearing record did not include any evidence either confirming or denying that the district eliminated self-contained special class placements (i.e., 15:1, 12:1, 8:1, or 6:1) as a placement option in the continuum of services offered by the district in either its elementary or middle schools, other than a 15:1 special class "Academic Center" discussed further below (see generally Tr. pp. 1-1944; Parent Exs. E; G-H; K-N; S-U; W-Z; CC; EE-HH; JJ-QQ; SS; UU-ZZ; AAA-CCC; Dist. Exs. 1-172; 172A; 173; 173A; 174-204; IHO Exs. I-VI). However, the parent described some communications she had with the student and his math teacher, which alluded to the student being placed in a self-contained class for social studies in seventh or eighth grade on a trial basis for a couple of days (see Tr. pp. 684-86).

⁷ Evidence in the hearing record reflects that, during the 2014-15 school year, the student demonstrated "grade level decoding skills, along with accuracy and fluency" and was reading at level "M" as of April 2015 (Dist. Ex. 4 at pp. 1, 8). In addition, the evidence reflects that, during the 2014-15 school year, the student "made progress in his reading comprehension since the beginning of the school year" based upon the "most recent building level assessment (March 2015)" (id. at p. 8). While at that time (April 2015) he remained "below grade level expectations in his reading, (Report Card March 2015)," the student had "advanced four reading levels since the beginning of the school year" (id.). In the final report card for the 2014-15 school year, the student's "reading level" had improved to a "level N" (Dist. Ex. 159 at p. 9). The same report card reflected, however, that the student did not "meet grade level standards"—receiving "1s"—in all areas listed within the "Reader's Workshop" (except for the area "Knows assigned vocabulary words") (id. at pp. 9-10).

⁸ The parent attended the April 2015 CSE subcommittee meeting with a special education advocate (see Dist. Ex. 4 at p. 1; see generally Dist. Ex. 77).

⁹ The student's eligibility for special education and related services as a student with a TBI is not in dispute (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]). TBI means an "acquired injury to the brain caused by an external physical force or by certain medical conditions such as stroke, encephalitis, aneurysm, anoxia or brain tumors with resulting impairments that adversely affect educational performance" (8 NYCRR 200.5[zz][12]).

recommended that the student have access to a "[p]ersonal [a]uditory [t]rainer/FM system" and classrooms with a "[s]ound [f]ield [s]ystem" (id. at p. 15). In addition, the April 2015 CSE recommended supports for school personnel on behalf of the student consisting of teacher of the hearing impaired consultation services (one 15-minute session per week with classroom teachers), educational audiologist consultation services (four 60-minute sessions per year to check sound field system; provide staff training; and for one entire session, work with the "team and the parent in the Fall"), and OT consultation services (three 30-minute sessions per year to assist the teacher in supporting student in the classroom) (id. at pp. 15-16). Finally, the April 2015 CSE recommended strategies to address the student's management needs; created annual goals targeting the student's needs in the areas of study skills, reading, writing, mathematics, speech-language, social/emotional and behavioral, motor skills, and hearing; and recommended testing accommodations (id. at pp. 10-14, 16-17).

As reported in the meeting information comments section of the April 2015 IEP, the parent "questioned the appropriateness of the recommended program" and "shared" that the student was a "'differently abled'" person and should be in a smaller, self-contained environment in order to get the individual support she fe[lt] he need[ed]" (Dist. Ex. 4 at p. 2). The parent's advocate "agreed" (id.). The IEP meeting information summary reflected that the parent requested extended school year services (12-month school year) for the student in the areas of mathematics, speech-language, and reading; however, upon canvassing the CSE, "none of the educators" thought the student required a 12-month school year program as "regression ha[d] never been observed over long breaks during the school year" (id.). The parent disagreed and "request[ed] another meeting to review the final document" (id.).

On June 19, 2015, a CSE subcommittee conducted a "Requested Review," reconvening at the parent's request (Dist. Ex. 5 at p. 1; see generally Dist. Exs. 80-90).¹⁰ After reviewing the recommendations from the April 2015 CSE meeting, the parent—through her attorney—expressed concerns about the "size of [the student's] class and the amount of support that [was] available to [the student] at school" (Dist. Ex. 5 at p. 1). As reflected in the meeting information comments section, the "[c]lassroom teachers shared that this year, progress ha[d] been made particularly in his reading and writing skills"; however, the student remained "below grade level" in mathematics (id. at p. 2). The parent's attorney "suggested a few more items to be considered including extended school year [services], and specialized reading" (id.). The IEP meeting information summary reflected that, "after careful consideration and discussion, the student did not exhibit regression over long breaks and therefore determined to be not eligible for [extended school year]" and additionally, the student would be "receiving building level supports in both reading and math" (id.). Ultimately, the June 2015 CSE decided to recommend the special education program and services from the April 2015 CSE meeting, and reviewed the annual goals, the program, and the testing accommodations (id.).

In a prior written notice pertaining to a proposed reevaluation of the student dated August 24, 2015, the district identified the following as evaluations for which the district sought the parent's consent: a psychological evaluation, an educational evaluation, a classroom observation,

¹⁰ The parent attended the June 2015 CSE meeting with an attorney (see Dist. Ex. 5 at p. 1). The district's attorney also attended the meeting (id.).

an updated social history, a physical examination, a speech-language evaluation, an OT evaluation, a PT evaluation, and a hearing impaired evaluation (see Dist. Ex. 95 at pp. 1-2).¹¹ By letter dated September 18, 2015, the parent enclosed a signed consent form for the abovementioned evaluations (see Parent Ex. E at p. 1). In the letter, the parent clarified that while she had no objections to the evaluations the district intended to conduct, she would take the student to his own physician for the physical examination and complete the updated social history (*id.*). Additionally, the parent described in detail the specific areas the proposed speech-language and hearing impaired evaluations "must explore," as well as explaining that the student's "memory deficits . . . must be explored" in light of his TBI (*id.* at pp. 1-2). Next, the parent noted that it was also necessary for the district to conduct an evaluation related to the student's "diagnosis of Central Auditory Processing Disorder," and also asked the district to conduct a neuropsychological evaluation of the student (*id.* at p. 2). According to the parent, the neuropsychological evaluation was necessary to "enlighten the CSE on how [the student's] T[BI] impact[ed] his cognitive functioning" and to "determine the supports" the student required to "support his areas of disability" (*id.* at p. 3).¹²

On November 18, 2015, a CSE subcommittee conducted a "Reevaluation Review" (Dist. Ex. 6 at p. 1; see generally Dist. Exs. 101; 103-07).¹³ At that time, the CSE reviewed the "most recent psychological, educational, speech[-]language, hearing impaired, [OT] and [PT] evaluations," and discussed information from a "physical, social history and classroom observation" (Dist. Ex. 6 at pp. 2-3; see generally Dist. Exs. 37-45; 161-62).¹⁴ As noted in the meeting information comments, "[a]ll evaluators reported that the student always tried his best and wanted very much to please and be praised for his efforts"; in addition, it was noted that although the student did, "[a]t times," exhibit anxiety, he did not "exhibit such anxiety with known evaluators" (Dist. Ex. 6 at p. 2). After reviewing the evaluative information, "[a]ll members of the CSE indicated their agreement with the current program" and the parent expressed that the student was "having a very good year and it [was] his best group of teachers ever" (*id.*). With the parent's agreement, the November 2015 CSE modified the student's recommended PT services from "individual to small group for one of his session[s] to support his needs"; otherwise, the CSE made

¹¹ The district proposed the reevaluation consistent with its obligation under State and federal regulations to conduct a reevaluation of the student at least once every three years unless the parent and district agreed that a reevaluation was unnecessary (see, e.g., Dist. Exs. 39 at p. 1; 40 at p. 1; 43 at p. 2; 44 at p. 1; see also 34 CFR 300.303[b][2]; 8 NYCRR 200.4[b][4]).

¹² The hearing record does not contain any evidence that the district responded to the parent's September 18, 2015 letter, other than conducting the reevaluations proposed in the prior written notice (see generally Tr. pp. 1-1944; Parent Exs. E; G-H; K-N; S-U; W-Z; CC; EE-HH; JJ-QQ; SS; UU-ZZ; AAA-CCC; Dist. Exs. 1-172; 172A; 173; 173A; 174-204; IHO Exs. I-VI).

¹³ The parent attended the November 2015 CSE subcommittee meeting with the same attorney who attended the June 2015 CSE subcommittee meeting (compare Dist. Ex. 6 at p. 1, with Dist. Ex. 5 at p. 1). The district's attorney also attended the meeting (*id.*).

¹⁴ It appears that district exhibits 39 and 45 are the same "Educational Evaluation" of the student conducted in September 2015 by the student's then-current special education teacher who taught in his fifth grade "ICT class" (Tr. pp. 421-24; compare Dist. Ex. 39, with Dist. Ex. 45, and Tr. pp. 421, 430).

no other modifications to the student's previously recommended special education program and services (id.; compare Dist. Ex. 6, with Dist. Ex. 5, and Dist. Ex. 4).

According to the meeting information comments section, "[b]uilding level services" were offered for the student in "both reading and math" (Dist. Ex. 6 at p. 2). The IEP meeting summary further noted that although the parent "was not in agreement with the additional services" prior to the CSE meeting, she "agreed to the services" and to provide consent for "building services in both reading and math" after the services were "explained to her in detail" (id.; see Dist. Ex. 110 [documenting the parent providing consent for the district to provide "RTI" services to the student in both reading and mathematics in an email dated November 25, 2015]).¹⁵ Near the conclusion of the November 2015 CSE meeting, the parent requested an independent educational evaluation (IEE), neuropsychological (id.).¹⁶

By letter to the parent dated November 23, 2015, the district's director of special education (director) forwarded a copy of the district's policy related to obtaining the IEE requested at the CSE meeting, as well as a list of approximately five evaluators, which the parent also requested (see generally Dist. Ex. 108). At the impartial hearing, the parent testified that, after receiving the IEE information provided by the director, she called each evaluator listed in the district's packet but was unable to secure an evaluator from the list provided (see Tr. pp. 641-43; see also Dist. Ex. 108 at p. 7).

The psychologist who conducted the student's neuropsychological IEE testified at the impartial hearing that the parent first contacted him in March or April 2016 (see Tr. pp. 1110, 1117-18, 1445-46; see Dist. Ex. 182 [recording notes from an initial telephone conversation with the parent on March 6, 2016]; see generally Dist. Ex. 53). In an email to the parent dated March 22, 2016, the psychologist sent the parent a copy of his resume (see Dist. Ex. 183; see also Dist. Ex. 53 at p. 1). The parent next contacted the psychologist by email dated May 4, 2016, and

¹⁵ At the impartial hearing, the parent testified that the attorney who attended the November 2015 CSE meeting with her advised her "not to consent to the RTI" services because IEP students could not get RTI services; according to the parent, however, the district initiated the "RTI services" without her consent (see Tr. p. 778). At least one document in evidence reveals that, in an email to the district dated October 29, 2015, the parent refused to provide consent for "RTI" based upon her understanding that such services were "designed" for students who did not have IEPs (Dist. Ex. 107). The evidence in the hearing record reveals that the student received "RTI" services in mathematics and reading during the 2015-16 school year, but does not clarify whether these services began before or after the parent provided consent for such services (see generally Parent Ex. N; Dist. Exs. 163-64). According to the parent, the student received "RTI" services only in the "fourth and fifth grades" (Tr. p. 624). Based upon "RTI" progress reports, at the conclusion of fifth grade in the 2015-16 school year the student was independently reading level "Q" texts, which corresponded to both an end of third grade level and/or beginning to mid-fourth grade level (Dist. Ex. 163 at p. 2; see Tr. pp. 446-49 [describing that the student's reading level improved from a level "N" in September 2015 to a level "Q" by June 2016 and noting that beginning the school year at a level "N" demonstrated that the student did not experience regression during summer 2015 because the student was reading at a level "N" in June 2015]). According to the student's special education teacher, the student's movement from a level "N" to a level "Q" corresponded to "approximately one year's growth" in reading during the 2015-16 school year (Tr. pp. 447-48).

¹⁶ During the 2015-16 school year, the student's hearing services (three 30-minute sessions per six-day cycle) "focused on academic support and enrichment, vocabulary development, preview and review of content material, and self-advocacy skills" (Parent Ex. H at p. 1).

informed him that she was "still waiting to hear back from [the] district regarding the evaluation" (Dist. Ex. 183). The parent asked the psychologist about available evaluation dates, and the psychologist responded in an email on the same day, noting that he had "flexibility in [his] schedule" and could complete the IEE "this summer" after the district approved the evaluation (*id.*). Within hours on the same day, the parent sent an email to the psychologist advising that the "district said to make the appointments with [the psychologist] to start the evaluation" and asked the psychologist what, if anything, he needed from the district (*id.*). Shortly thereafter on the same day, the psychologist sent the parent an email and indicated that he, at that point, needed "some sort of agreement document" and urged the parent to have "someone" contact him to make the arrangements (*id.*).

On May 30, 2016, a CSE convened to conduct the student's annual review and to develop an IEP for the 2016-17 school year (sixth grade) (see Dist. Ex. 7 at pp. 1-3; see generally Dist. Exs. 46-52; 115-17).¹⁷ Finding that the student remained eligible for special education and related services as a student with a TBI, the May 2016 CSE recommended that the student receive ICT services for instruction in ELA, mathematics, science, and social studies, together with three 41-minute sessions per six-day cycle of "Academic Center" support in a 15:1 special class placement (see Dist. Ex. 7 at p. 14).¹⁸ The May 2016 CSE recommended the same frequencies and durations for the student's related services in speech-language therapy, OT, psychological counseling services, hearing services, and "parent training" as recommended by the November 2015 CSE subcommittee; however, the CSE—in the area of PT—modified the previous recommendation from one individual session and one small group session to two 30-minute sessions per six-day cycle of individual PT (compare Dist. Ex. 7 at pp. 14-15, with Dist. Ex. 6 at pp. 13-14). The May 2016 CSE also recommended all of the same supplementary aids and services, program modifications, and accommodations as in the November 2015 IEP; the May 2016 CSE recommended additional supports in this area, including use of a calculator, being provided with a copy of class notes and an additional set of books, and providing "ongoing feedback regarding performance" (compare Dist. Ex. 7 at pp. 15-16, with Dist. Ex. 6 at pp. 14-15). The May 2016 IEP included the same recommendations for assistive technology and devices as in the November 2015 IEP (compare Dist. Ex. 7 at p. 16, with Dist. Ex. 6 at p. 15).

After the May 2016 CSE made the recommendations for the 2016-17 school year, the parent "greatly disagreed with th[ose] recommendations" (Dist. Ex. 7 at p. 2). The parent expressed concerns about the student's transition to the district middle school related to the "multi levels in the middle school, pad lock accessibility for lockers, [the] size of the auditorium and the swimming component of the [physical education] program" (*id.*). The CSE informed the parent that the middle school had an "elevator if necessary," and a "modified lock" could be provided to

¹⁷ The parent attended—and audio recorded—the May 2016 CSE meeting (see Dist. Exs. 7 at p. 1; see generally Dist. Exs. 115-21). The hearing record does not include the audio recording or a transcription of the audio recording from the May 2016 CSE meeting (see generally Tr. pp. 1-1944; Parent Exs. E; G-H; K-N; S-U; W-Z; CC; EE-HH; JJ-QQ; SS; UU-ZZ; AAA-CCC; Dist. Exs. 1-172; 172A; 173; 173A; 174-204; IHO Exs. I-VI).

¹⁸ At the impartial hearing, the student's special education teacher in his mathematics and science classes for sixth grade (2016-17 school year) testified that the student's "ICT classes" consisted of 18 students total, with no more than 6 students with IEPs (Tr. pp. 266, 270-71, 278). The same special education teacher taught the student's daily 15:1 "academic center" special class during the 2016-17 school year, which consisted of 6 total students with IEPs (Tr. p. 303; see Dist. Ex. 7 at pp. 1, 14).

the student (*id.*). With regard to swimming, the CSE also advised that an adjustment could be made for the student to be in "another [physical education] cycle" (*id.*). At that point, the parent produced a "data sheet explaining her understanding" of another special education program located in a neighboring school district (*id.*; see generally Dist. Ex. 124 [describing the parent's desired 15:1+1 special class placement in the neighboring school district 23 miles from the student's home and which allowed access to nondisabled peers]). The parent asked the CSE to "send a packet" to that particular school district, as well as additional neighboring school districts and a Board of Cooperative Educational Services (BOCES), to seek a "more restrictive placement" for the student (Dist. Ex. 7 at p. 2). The CSE agreed to honor the parent's request to send out packets to "explore options" (*id.*).

At the impartial hearing, the parent testified that at the May 2016 CSE meeting, she raised the issue of the neuropsychological IEE evaluation in an attempt to "know what's going on because [she] was trying to hold off the annual review in hopes that . . . the neuropsych[ological IEE would have been] done so the team c[ould] make an appropriate decision for [the student] for middle school" (Tr. pp. 641-42; see generally Dist. Exs. 117-21; but see Dist. Ex. 7 at p. 2 [reflecting no discussion of the neuropsychological IEE evaluation at the May 2016 CSE meeting]). According to her testimony, the parent received the "approval for a provider" at a "higher rate" after the May 2016 CSE meeting at the "end of the school year or maybe [in] early summer" (Tr. pp. 643-44).¹⁹

On or about June 2, 2016, the district sent information packets to the out-of-district public schools and the BOCES identified by the parent at the May 2016 CSE meeting (see generally Dist. Exs. 7 at p. 2; 122-23). In a letter dated June 15, 2016, the specific public school program the parent discussed at the May 2016 CSE meeting notified the district that it did not have an "appropriate program" for the student (Dist. Ex. 123 at p. 8; see Dist. Exs. 7 at p. 2; 124). Similarly, most of the remaining public school programs could not accept the student because the schools did not have an appropriate program for the student, one public school declined to accept the student because it did not have "space availability," and in one instance, the parent visited a proposed BOCES program and indicated no interest in pursuing placement in that program (Dist. Exs. 122 at p. 2; 123 at pp. 2, 4, 6, 8; see generally Dist. Exs. 127; 130-31; 133-34; 136).

In an email dated June 22, 2016, the parent forwarded a letter from the district to the psychologist, who confirmed—in an email to the parent dated June 24, 2016—that the letter was sufficient to "move forward" with the neuropsychological IEE (Dist. Exs. 184-85). Next, the parent forwarded tax documents for the psychologist to complete and return to her in an email dated June 28, 2016; the parent also asked the psychologist to propose dates for the evaluation, which the psychologist sent to her in an email dated July 11, 2016 and which the parent confirmed in an email dated July 19, 2016: to wit, August 30, September 1, and September 8, 2016 (see Dist. Ex. 185; see generally Dist. Exs. 186-92 [describing testing and follow-up related to the neuropsychological IEE]).

¹⁹ At the impartial hearing, the psychologist testified that, by May 4, 2016, he understood that the district had approved the IEE, as well as his rate for the IEE (see Tr. p. 1454; but cf. Dist. Exs. 125 [seeking a "promissory note" from the district—in an email by the parent dated June 2, 2016—for the student's IEE, which, according to the email, the district's attorney had already confirmed the district would fund "several months ago"]; 126-28; 131; 183).

In a letter dated August 12, 2016, the district sent a second information packet to the parent's desired 15:1+1 special class placement in the neighboring school district (see Dist. Ex. 140 at p. 1; see generally Dist. Exs. 141-44).

In an email to the student's ELA teacher dated September 16, 2016, the parent expressed concerns about the student's "difficult time adjusting to the demands of [the teacher's] book assignment" that required a "live presentation to his class" on September 15, 2016 (Parent Ex. NN at p. 1). The parent revealed that the student had "cried at school almost every day" that week, he "cried considerably at home," and he had "expressed fear" of the teacher and "being in [the teacher's] class" (id.). While the parent did not believe the student's behavior reflected a "personal criticism" of the teacher, she did believe it was the student's "way of explaining his inability to fulfill the work" expected of him in that class (id.). The parent attached a video recording of the student's class presentation he had prepared, but had been "incapable of doing," in front of the class (id.). After identifying additional concerns, the parent indicated that the student was "untrusting" of the school psychologist, who—according to the parent's email—told the student "he need not tell anybody when he crie[d] at school, even his own mother" and the student was "completely afraid to tell [her]" (id. at p. 2). Later the same day, the ELA teacher responded to the parent's email (id. at p. 1). The teacher thanked the parent for sharing her concerns, and indicated that he had "detected and underst[ood] [the student's] trepidation regarding" the assignment (id.). The teacher further indicated that they would work to make the student "feel comfortable in class" and identified the special education teacher in the student's ELA and social studies classes "to support his learning" (id.).

In an email to the psychologist dated October 26, 2016, the parent forwarded several attachments for his review and consideration (see Dist. Ex. 194 at p. 1; see generally 195-96). The first attachment consisted of "list" with "highlighted" items the parent asked the psychologist to "include" in his neuropsychological IEE report, as well as "things [she] would love if [the student] had in school" (id. at p. 1; see generally Dist. Ex. 195). The second attachment, according to the parent, consisted of "suggestions" made by the parent's attorney to include in the IEE report "if it [went] in line with [his] observations and testing results" (Dist. Ex. 194 at p. 1; see generally Dist. Ex. 196). In the remainder of the October 26, 2016 email, the parent updated the psychologist about the student (see Dist. Ex. 194 at p. 1). Here, the parent noted that the student had a "math test [that day]" and reported that the student "was obviously freaking out and crying the days prior and every morning and night before the test" (id.). In addition, the parent noted that, during the mathematics test at school, the student "only finished one problem and said he c[ouldn't] do the rest" (id.). The student was allowed to finish the test with his teacher of the hearing impaired when she arrived at school that day, and according to the student, the teacher "read him the questions, and when he couldn't figure it out, [the student] asked her for help and she gave him hints on how to do it and they did the rest of the test together" (id.).

In a follow-up email to the psychologist dated November 10, 2016, the parent indicated she had not "heard back" from him in response to her earlier email, dated October 26, 2016 (Dist. Ex. 197 at p. 1). She further advised the psychologist that the student had an "EEG" scheduled for November 21 and she had attached a copy of the student's first quarter "report card" to the email, which the parent had done so he could "see how bogus [the district's] grading system [was] with [the student]" (id.). The parent expressed amazement that the student had achieved "high honors" in the first quarter, especially given that the student, per the parent's report, had "10 recorded

absences" and had been "tardy at least 20 times," including days attributable to the neuropsychological testing, the student's doctor appointments, and the student's "crying episodes" (*id.*). The parent noted that, based upon the report card, the district had recorded "only 1 or 2 tardies" (*id.*). The parent also noted that she was expecting to receive the student's progress reports in the mail "next week" (*id.*).

In addition to the foregoing, the parent also expressed her concerns about the student's "stress, anxiety and/or his seizures" (Dist. Ex. 197 at p. 1). The parent revealed that the student was "crying almost every day and night regarding new changes to his schedule or because of a test or quiz" (*id.*). Moreover, the student had "cried all th[at] week because he [was] scared of his new rotation of health classes and he cried and was late to school because he had 2 tests [on the same day] for science and ELA" (*id.*). On that particular date, the parent reported that she sat with the student and the district school psychologist "for about 45 minutes . . . until [the student] was fine and walked to class"; she also commented that the school "psychologist tried to make [her] and [the student] look crazy" because, according to the school psychologist, the student "definitely didn't have any tests today" (*id.*). Later, the school psychologist told the parent that "no one ever s[aw] this behavior in school," but then within the hour, he sent the parent an email revealing that the student "did have a test and that he did melt down but he did get himself together" (*id.*).

On December 1, 2016, the psychologist conducting the neuropsychological IEE evaluation completed a classroom observation of the student at the district middle school (Dist. Ex. 53 at pp. 25-27).

By letter dated December 8, 2016, the parent requested "copies, or in the alternative an opportunity to inspect and review a complete copy of any and all personally identifiable records belonging to [the student], located within [the district]" (Parent Ex. T at p. 1). The parent specifically identified in detail the records to be obtained through this request, including a copy of the student's "entire, cumulative, educational file(s) and disciplinary file(s)," and she asked the district to "forward these documents" to her attorney within 45 days of the request (*id.* at pp. 1-2).²⁰

In an email to the district superintendent dated December 13, 2016, the parent set forth the following: "Effective immediately, I object to, and withdraw any prior consent give for, School Psychologist, . . . to provide counseling services or otherwise speak to or be in the company of my son" (Dist. Ex. 145). The parent further indicated that "[a]fter months of watching [this school psychologist] be completely ineffective at supporting my son's emotional needs, [the school psychologist] has also made a series of comments and recommendations that [were] so inappropriate they have jeopardized [my son's] emotional well-being and undermined my maternal relationship with my son, as any shred of trust I might otherwise have had about [the school psychologist]" (*id.*). Continuing in the same email, the parent noted that she was "not waiv[ing] [the student's] counseling services mandated by his IEP"; instead, the parent "urged the school to identify a different and qualified psychologist to deliver [the student's] counseling services, and provide [her] with that person's Resume/CV, within a week from [the superintendent's] receipt of

²⁰ The parent requested that the district send the copies of the student's educational file to the same attorney who had attended the June 2015 CSE subcommittee and November 2015 CSE meetings (compare Parent Ex. T at p. 2, with Dist. Ex. 5 at p. 1, and Dist. Ex. 6 at p. 1).

this email" (*id.*). In an email dated December 14, 2016, the district superintendent responded, indicating that the parent's "concerns [were] noted" and he copied the director on the email for her to follow up (Dist. Ex. 146).

Shortly thereafter in a letter to the parent dated December 16, 2016, the director indicated that she "consulted with the building principal" and "reviewed available options to [the parent's] request to change the school psychologist servicing" the student (Parent Ex. U). At that time, the director noted that the district did "not have availability in any other psychologist schedule to offer a staffing change for the mandated services"; however, the director further noted that the student's current school psychologist was a "licensed school psychologist and he c[ould] continue to provide services" to the student (*id.*). As a final point, the director added that if the parent no longer wanted this particular school psychologist to provide services to the student, the parent's "only option [was] to waive [the student's] attendance for counseling" (*id.*).

In an email to the director dated December 22, 2016, the parent indicated that, contrary to the director's suggestion, waiving the student's mandated counseling services in his IEP was "not an option" (Dist. Ex. 148). The parent explained that her concerns with this particular school psychologist "continuing" to be the student's counselor were "not based on a whim, a personal dislike . . . , or an arbitrary desire to choose [the student's] providers" (*id.*). Rather, the parent made clear that her concerns were "based on the fact that [the school psychologist] ha[d] not and d[id] not provide services" to the student that met his needs (*id.*). According to the parent, this assertion was "substantiated by [the student's] daily tantrums of shrieking screams and tears, and his refusal to enter school each morning, and [the school psychologist's] inability to support [the student] during these episodes, or to take any action with [the student] to prevent such episodes" (*id.*). The parent further noted that, regardless of his licensure, the parent did not believe that the school psychologist was appropriate to be the student's counselor "given his inability to meet [the student's] needs" (*id.*). In closing, the parent indicated that although she was "currently exploring [her] options," she believed that the "schedules of 'any other psychologist' [were] a District, managerial problem, and not one that should impact [the student's] right to receive appropriate counseling services, under the law" (*id.*). Finally, the parent noted that if the district was "unable to modify the schedule of another psychologist who would be appropriate" to meet the student's needs, then the district may "need to hire a new psychologist who [was] appropriate and available" to fulfill the student's counseling services (*id.*).

According to the evidence in the hearing record, the district received a copy of the neuropsychological IEE report on February 17, 2017 (see Tr. p. 141; Dist. Ex. 53 at p. 1). The parent testified at the impartial hearing that she received a "draft" copy of the neuropsychological IEE report at the "same time" as the district (Tr. pp. 1782, 1799). After receiving the neuropsychological IEE report, the director testified that she read the report, provided copies to the student's service providers as it would be relevant for them to have that information, and determined that a CSE meeting needed to be coordinated to review the test results (Tr. pp. 142-43). By letter dated February 17, 2017, the district provided the parent with notice that a CSE meeting was scheduled for March 16, 2017 (Tr. pp. 143-144; Dist. Ex. 149 at p. 1).

In a "Level I Assessment" completed on or about March 4, 2017 in preparation for the student's annual review meeting, the student self-reported the following as strengths: "being happy, friendly, [and] never giv[ing] up"; in addition, the student self-reported the following as what he

did "best:" "school, math, HW, [and] getting things done before its due" (Parent Ex. W at pp. 1, 3). With regard to what "activities, jobs or chores" he disliked, the student self-reported "laundry, putting dishes away, [and] studying" (*id.* at p. 3). The parent listed the following as the student's strengths: "always works hard, even when it's difficult for him" and "perseverance" (*id.*). Next, the parent identified "activities, jobs or chores" the student disliked as "reading every day, waking up [and] cleaning up" (*id.*). According to the student's other responses, he wished to "study math" after graduation, and noted that in order to accomplish that goal he needed to "study a lot of math [and] memorize equations in order to have a career w[ith] a lot of math" (*id.* at pp. 3-4). The parent identified her desire for the student to "further his studies/education" after graduation" and that the student needed "more studying [and] life [and social] skills" to accomplish that goal (*id.*). With respect to his future plans and what "behaviors" he would need to reach "successful employment," the student indicated he needed to "not be so scared, perseverance, bravery, [and] be able to concentrate"; in response to the same question, the parent reported that the student needed "confidence, responsible, organized, punctual, [and] positive" (*id.* at p. 4).

On March 6, 2017, the parent emailed the director that she was unavailable on March 16, 2017 for the CSE meeting and requested that the meeting be rescheduled for "either the last week of April or anytime in May," preferably in the morning (Dist. Ex. 150). According to the director, the CSE meeting was cancelled and by letter dated April 3, 2017, the district notified the parent that the meeting was rescheduled for May 9, 2017 (Tr. p. 145; Dist. Ex. 151). On May 8, 2017—due to an urgent family matter—the parent again requested that the CSE meeting be rescheduled, which the district accommodated and rescheduled for May 30, 2017 (Dist. Exs. 153; 154 at p. 1).

On May 30, 2017, a CSE convened to review the results of the neuropsychological IEE, conduct the student's annual review, and develop an IEP for the 2017-18 school year (seventh grade) (see Tr. p. 148; Dist. Ex. 8 at pp. 1-3; see generally Dist. Exs. 53; 154-57). The May 2017 IEP reflected September 5, 2017 as the projected IEP start date and June 22, 2018 as the projected IEP end date (see Dist. Ex. 8 at p. 1). Finding that the student remained eligible for special education and related services as a student with a TBI, the May 2017 CSE recommended continuation of the same programs and services as recommended by the May 2016 CSE, including the same supplementary aids and services, program modifications, and accommodations; assistive technology devices and services; and supports for school personnel on behalf of the student (compare Dist. Ex. 8 at pp. 1, 15-17, with Dist. Ex. 7 at pp. 1, 14-16). The May 2017 CSE, however, modified a portion of those recommendations as follows: the 15:1 special class ("Academic Center") would occur daily rather than three sessions per six-day cycle; the individual session of speech-language therapy was discontinued; the classroom OT session was to be provided in a small group and not individually; hearing services were to be provided in the classroom rather than the therapy room; and the duration of the OT consultation was reduced (compare Dist. Ex. 8 at pp. 1, 15-17, with Dist. Ex. 7 at pp. 1, 14-16).

According to the evidence in the hearing record, the parent received a copy of the student's "STAR" reports in June 2017 (see Tr. pp. 683, 1023-24; see also Parent Ex. HH at pp. 1, 3 [indicating the "Parent Report for [the student]" had been printed on June 23, 2017]). According to the "STAR" report in reading, the student achieved an independent reading level (IRL) of "3.7"—which, as explained in the report, reflected the "grade level at which [the student] [was] at least 80% proficient at recognizing words and comprehending reading material" (Parent Ex. HH at p. 1). The same "STAR" report noted that it was "important to understand that these test scores

provide[d] only one picture of how [the student] [was] doing in school" (*id.*). Similarly, the "STAR" report in mathematics reflected that the student achieved a percentile rank of 21, which was characterized in the report as "below average" (*id.* at p. 3). Again, the same "STAR" report noted that it was "important to understand that these test scores provide[d] only one picture of how [the student] [was] doing in school" (*id.*).²¹

In a letter to the director dated June 23, 2017 and captioned "RECORDS REQUEST—THIRD REQUEST," the parent indicated that at the student's "May 26, 2016 . . . CSE meeting" she requested "hard data regarding his progress on his IEP goals to be compiled and sent to [her]" (Parent Ex. GG at p. 1). The parent further indicated that "at approximately 2 hours and 11 minutes into the recording of the CSE meeting," the director responded to her request for records by stating "'it's a very busy time of year right now'" (*id.*). The parent continued in the letter, noting that she "emailed and made a written records request" for the student's "entire file" on December 8, 2016, and shortly thereafter, on or about December 13, 2016, the director specifically acknowledged to the parent that she had received the request for records and was "working on it" (*id.*). According to the letter, the parent had not, to date, received the requested records (*id.*). Therefore, similar to her written request for records dated December 8, 2016, the parent requested "copies, of any and all personally identifiable records belonging to [the student], located within [the district]" (*compare* Parent Ex. GG at p. 1, *with* Parent Ex. T at p. 1). The parent specifically identified in detail the same records to be obtained through this request as she had requested in the December 8, 2016 letter, including a copy of the student's "entire, cumulative, educational file(s) and disciplinary file(s)"; however, in this instance, the parent asked the district to "forward these documents" to her, personally rather than forwarding the copies to her attorney, within 45 days of the request (*compare* Parent Ex. GG at pp. 1-2, *with* Parent Ex. T at pp. 1-2).²²

The evidence in the hearing record revealed that the student continued to attend a district middle school for the 2017-18 school year for seventh grade (*see generally* Parent Ex. XX).²³

²¹ The evidence in the hearing record also included a "Growth Report" version of the "STAR" reports—which reflected the student's performance on both the initial and final administrations of the assessments in reading and mathematics—printed on June 20, 2017 (*compare* Parent Ex. EE at pp. 1-2, *with* Parent Ex. HH at pp. 1, 3). The "Growth Report" for reading reflected a "3.5" grade equivalent based upon the initial administration of the assessment on September 19, 2016, and a "3.9" grade equivalent based upon the final administration of the assessment on May 22, 2017 (Parent Ex. EE at p. 1). In the area of mathematics, the "Growth Report" reflected a "3.6" grade equivalent based upon the initial administration of the assessment on September 14, 2016 and a "5.3" grade equivalent based upon the final administration of the assessment on May 24, 2017 (*id.* at p. 2). The evidence in the hearing record does not clarify whether the parent received the "Growth Report" version of the "STAR" reports or the "Parent Report for [the student]" version (*see generally* Tr. pp. 1-1944; Parent Exs. E; G-H; K-N; S-U; W-Z; CC; EE-HH; JJ-QQ; SS; UU-ZZ; AAA-CCC; Dist. Exs. 1-172; 172A; 173; 173A; 174-204; IHO Exs. I-VI).

²² The parent did "cc:" the same attorney on the June 23, 2017 letter (*compare* Parent Ex. GG at p. 2, *with* Parent Ex. T at p. 2).

²³ The evidence in the hearing record includes a "Student Diagnostic Report Enterprise Test" printed on September 15, 2017 (Parent Ex. ZZ). The report reflected "STAR Reading Scores," which indicated that the student achieved a "3.7" grade equivalent and a "3.4" IRL on the assessment administered on September 15, 2017 (*id.*). In addition, the report identified "Domain Scores" that were defined as estimates of the student's "percent of mastery on skills

A. Due Process Complaint Notice

By due process complaint notice dated November 22, 2017, the parent alleged, as relevant to the school years at issue in this appeal, that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 and 2017-18 school years (see Dist. Ex. 1 at pp. 1, 5-11).²⁴ With respect to the 2016-17 school year, the parent alleged that the district failed to "timely convene" a CSE meeting by "December 4, 2016 to draft a new IEP, denying [the student] a FAPE" (id. at pp. 5, 7). Relatedly, the parent alleged—"upon information and belief"—that the district did not convene a CSE meeting "again until May 3, 2017," and as a result, the student did not have a "valid IEP for six months, almost the entire second half of his sixth grade year, further denying him a FAPE" (id. at p. 7). Next, the parent asserted that the district's failure to convene a CSE meeting "at any point during or shortly after the nearly three-month-long period in which [the student] was unable to enter the school building"—and missing "all of his core classes from September through the end of December of 2016"—constituted a "gross deprivation of [a] FAPE" (id. at pp. 5, 7). The parent also indicated that, during this same three-month-long period, the district "failed to offer any support" to address the student's anxiety and school refusal (id.). In addition, the parent asserted that the district failed to convene a CSE meeting to "consider [the student's] failure to meaningfully progress or to create a new IEP with an appropriate placement recommendation" after receiving the student's "STAR test scores" in June 2017, which indicated that his reading and mathematics skills "remained below average" and at "third grade levels" (id.).

More generally, the parent accused the district of a "long history of failing to respond" to her requests for "assistance, failing to follow procedural guidelines, and failing to provide [the student] with an appropriate education" (Dist. Ex. 1 at p. 7). As examples, the parent noted having to make "numerous requests for an independent evaluation before the evaluation was offered"; making "three separate record requests" (from December 2016 through the current date, November 22, 2017), which the district had not yet provided to the parent; making repeated inquiries into waiving the student's foreign language requirement, which the district ignored; and finally, "repeatedly request[ing] data from the [d]istrict in support of [the student's] purported academic progress," which the district failed to produce (id. at pp. 7-8).

Turning to the 2017-18 school year, the parent alleged that the May 2017 CSE failed to consider a "more supportive, specialized placement" for the student given his "continued struggles to concentrate, work independently, and produce information at the pace of his classmates," as well as acknowledging his "propensity to become anxious and overwhelmed" (Dist. Ex. 1 at p. 8). The parent also alleged that the CSE denied her request for "another" neuropsychological evaluation of the student (id.). In addition, the parent asserted that the CSE failed to consider any other placement option for the student, and recommended the "same ICT classroom" where the

... at a seventh grade level" (id.). The domain scores ranged from a low score of 14 ("Range of Reading and Level of Text Complexity") to a high score of 34 ("Vocabulary Acquisition and Use") (id.).

²⁴ The attorney who prepared the parent's November 2017 due process complaint notice was not the same attorney who, on occasion, attended CSE or CSE subcommittee meetings with the parent; who the parent identified as the attorney to whom the district should send copies of the student's educational records in the December 8, 2016 letter; or who the parent identified as the attorney she copied on the June 23, 2017 letter request for records (compare Dist. Ex. 1 at pp. 1, 12, with Parent Ex. T at p. 2, and Parent Ex. GG at p. 2).

student failed to make "meaningful progress since the fourth grade, denying him a FAPE" (*id.*). The parent also asserted that the addition of daily "self-contained 'academic center' support [was] grossly inadequate" (*id.* at pp. 8-9). Next, the parent indicated that the student continued to struggle with "severe anxiety" related to his participation in his "core classes," completing homework assignments, and his ability to keep up with classwork (*id.* at p. 9). According to the parent, the student's teachers failed to provide her with information about the student's "anxiety and frustration tolerance" (*id.*). The parent also indicated that since the student had not been provided with a "new counselor" per her request, the student had not received any counseling services during the 2017-18 school year (*id.*).

Next, the parent indicated that while she "recently participated" in parent conferences and received information that the student was making progress, the district "has been unable to produce any evidence of progress" (Dist. Ex. 1 at p. 9). The parent continued to express concern about the district's refusal to waive the foreign language requirement given the student's continued difficulties in the class and whether the student would pass the class in the 2017-18 school year (*id.*).

Turning to the May 2017 IEP, the parent alleged that the present levels of performance "lacked meaningful detail and failed to explain [the student's] present levels, needs, and strategies to address those needs" (Dist. Ex. 1 at p. 9). In particular, the parent indicated that the present levels of performance failed to "provide meaningful insight as to how to address any of [the student's] anxiety and coping skills" (*id.*). While noting that the present levels of performance indicated that the student was "very anxious with peers and adults," the parent further indicated that the IEP failed to "explain what has been or can be done to alleviate the anxiety" (*id.*). Similarly, the parent noted that the IEP revealed that the student needed to "develop effective coping strategies to deal with his stress and anxiety," but failed to provide "any coping strategies that have been effective in the past" (*id.*). As a result, the parent alleged that the present levels of performance failed to comply with State and federal regulations by failing to sufficiently describe the student's "strengths or developmental and functional needs in these areas" (*id.*).

Next, the parent asserted that the annual goals in the May 2017 IEP were not appropriate and "not specifically designed to effectively" address the student's needs (Dist. Ex. 1 at p. 9). The parent further asserted that the annual goals were not measurable, vague, failed to comply with State and federal regulations, and failed to "contain sufficient specificity by which to guide instruction and intervention, evaluate progress, or gauge the needs for continuation or revision" (*id.*). The parent also alleged that the IEP failed to include annual goals to address the student's needs in mathematics ("mathematical concepts, problem solving, math facts, and performing numerical operations") and his low self-esteem (*id.* at pp. 9-10). Additionally, the parent alleged that the district failed to implement the counseling services mandated in both the May 2016 and May 2017 IEPs, and, "upon information and belief," the student "often attend[ed] class without [the] transmitter" recommended for his hearing loss, which made him "unable to access his education" (*id.* at p. 10).

As two final points, the parent asserted that the district failed to provide the student with "intensive remedial services as part of his educational program" for both school years consistent with guidance issued by the United States Department of Education (USDOE) on or about

November 16, 2015 (Dist. Ex. 1 at p. 10). And finally, the district failed provide the student with "appropriate specially designed instruction" for both school years (*id.* at pp. 10-11).

As relief, the parent sought determinations that the district failed to offer the student a FAPE for the 2015-16, 2016-17, and 2017-18 school years (see Dist. Ex. 1 at p. 11). In addition, the parent requested a finding that the violations "significantly impeded" their ability to participate in the decision-making process (*id.*). The parent also requested an order directing the district to (1) reconvene a CSE meeting in order to provide the student with an IEP that included a recommendation for a "smaller, specialized, private school placement" as well as "increases supports and services; (2) provide the student with a new neuropsychological evaluation with an evaluator of the parents' choosing; (3) to conduct independent related services evaluations in the areas of OT, PT, speech-language therapy, and hearing therapy; (4) to provide compensatory educational services in OT, PT, and speech-language therapy by providers of the parents' choosing, together with round-trip transportation costs, "to compensate for the above-noted failures"; (5) providing the student with "unlimited access to private 1:1 compensatory tutoring services," by a provider of the parents' choosing, "to compensate for the above-noted failures"; an award of additional services to be determined by the IHO as appropriate; and finally, payment of attorneys' fees (*id.*).

B. Facts Post-Dating the Due Process Complaint Notice

After being appointed, the IHO—on January 1, 2018—scheduled a "telephone conference" with the parties, which was held on January 5, 2018 (see IHO Decision at p. 5).²⁵ On or about January 16, 2018, the district filed a motion to dismiss the parent's claims related to the 2015-16 school year (*id.*). Shortly thereafter, at the behest of the parent, on January 18, 2018, the student was assessed at Huntington Learning Center (HLC) (see Parent Ex. JJ at p. 1; see generally Parent Exs. JJ-KK). In March 2018, a CSE convened to conduct the student's annual review and to develop an IEP for the 2018-19 school year (eighth grade) (Tr. pp. 609, 686, 976-77, 1024).

C. Impartial Hearing Officer Decision

On April 11, 2018, the parties proceeded to an impartial hearing, which concluded on September 18, 2018, after six additional days of proceedings (see Tr. pp. 1-1944).^{26, 27} In a

²⁵ The hearing record does not include a transcript or written summary of the January 5, 2018 prehearing conference as required by State regulation (8 NYCRR 200.5[j][3][xi]). During the prehearing conference the parties scheduled hearing dates, the first of which was to occur on March 5, 2018 (Tr. pp. 3-4).

²⁶ As a result of a referral at the student's most recent CSE meeting, the student was administered a "WADE screener" for Wilson Reading Support (WRS) in May 2018, which indicated that he did not "qualify as a student who need[ed] Wilson Reading support" (Parent Ex. AAA at pp. 1-2). On May 16, 2018, the student was also administered an "F&P Reading Screener" to determine whether the student had a "deficit in the area of reading comprehension" (Parent Ex. BBB at p. 1).

²⁷ The student continued to attend a district middle school in the 2018-19 school year for eighth grade. In an email dated November 1, 2018, the parent, through her attorney, advised the IHO and the district's attorney that she withdrew "all claims related" to the 2015-16 school year and, thus, would limit her closing brief to be submitted to the IHO to issues pertaining to the 2016-17 and 2017-18 school years (IHO Ex. III at p. 1). The parent submitted a closing brief to the IHO on November 5, 2018 (see IHO Ex. V at p. 39). The district submitted

decision dated December 19, 2018, the IHO concluded that the district offered the student a FAPE for the 2016-17 and 2017-18 school years (IHO Decision at pp. 26-40). The IHO discussed evidence of the student's educational history including evaluations, prior CSE meetings and progress reports regarding the student from the 2013-14 school year through May 2016 (IHO Decision at pp. 11-16). The IHO also reviewed record evidence from May 2016 through June 2017 including reading assessments, teacher reports, related service provider reports, IEP recommendations, report cards, annual goal reports, STAR testing, emails, record requests, and witness testimony (*id.* at pp. 16-23). Among the evidence that the IHO examined in relation to the seventh grade, (July 2017 through June 2018), was STAR testing from late in the 2016-17 school year, additional reading assessments, an HLC report, report cards, undated teacher progress reports, witness testimony, and IEP goal reports (*id.* at pp. 23-36).

With regard to the parent's claims that she was denied meaningful participation because the CSE's did not consider or allow the parent to adequately present her concerns with the student's programming, the district delayed completion and consideration of the neuropsychological IEE, and the district failed to provide the parent with data that was inconsistent with the student's progress, the IHO determined that each challenged meeting was approximately two hours in duration, the evaluators discussed each of their reports, the parent had the opportunity to ask questions and present concerns, and her concerns were considered along with other diagnoses and evaluative material presented by the parent (IHO Decision at p. 26). The IHO noted that the CSE's disagreement with the parent or its decision not to give materials the same weight as the parent did not show that the parent was denied meaningful participation (*id.*).

The IHO reviewed in detail the evidence regarding the parent's November 2015 request for an IEE, the district's agreement and provision of a list of evaluators,²⁸ the parent's selection of an evaluator other than those on the list provided by the district, the district's decision to waive the general fee cap for the parent's preferred evaluator, the parent's failure to provide written confirmation to the independent evaluator, the time for the evaluator to assess and observe the student and draft and correct the report, the district's receipt of the IEE, scheduling of a CSE meeting and the parent's request to reschedule the meeting until May 2017 (*id.* at pp. 27-28). The IHO found that any undue delay in conducting and completing the IEE was not attributable to the district (*id.* at p. 28).²⁹

According to the parent, the district failed to provide STAR reports in relation to the student's reading and math progress. The IHO determined that during fifth grade (2015-16 school

its closing brief to the IHO on November 21, 2018 after delays with mailing (see IHO Ex. IV at p. 36).

²⁸ The IHO decision has a typographical error indicating that the district's agreement was in November "2016" however, as described above in the Facts and Procedural History the district's agreement occurred in November 2015.

²⁹ The IHO's finding that the district did not cause any delays in conducting or reviewing the IEE has not been challenged on appeal. Accordingly, it has become final and binding on the parties and shall not be reviewed on appeal (34 CFR 300.514 [a]; 8 NYCRR 200.5[j][5][v]; see 8 NYCRR 279.8[c][4] [noting that "[a]ny issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

year), there was no STAR testing of the student (IHO Decision at p. 28). With regard to the 2016-17 school year, the IHO determined that the student made progress, but that "[p]recise comparability to other assessments and evaluative material [could not] be determined from the evidence in the record" (*id.* at p. 29). The IHO noted while the STAR reports were not referenced in the May 2017 IEP, other materials were presented to the CSE that asserted "very significant student deficits with regard to, among other things, independent reading. The parent's belief that the district's program would not result in meaningful educational gains in view of the student's deficits were made known to the district which concluded otherwise" (*id.*). Thus, assuming without deciding that the district had some completed STAR reports in its records when the CSE met on May 30, 2017, the IHO found that the failure to provide the reports to the parent did not result in the parent being denied meaningful participation in the May 2017 CSE meeting (*id.*).

In relation to both the 2016-17 and 2017-18 school years, the IHO addressed the implementation of counseling services, the student's hearing deficit, and the description of the student in his IEPs and the parent's claims about the reliability of grade level information and district assessments of progress (IHO Decision at pp. 29-33). The IHO determined that the parent withdrew consent for the student to receive counseling from a particular school psychologist because of comments that student reported to the parent as made by the student's school psychologist; however, the school psychologist, at the time of the hearing, testified as to a different version of events from those reported by the student (*id.* at pp. 29-30). The IHO determined that the parent rejected a meeting with the district's superintendent when she learned another staff member would be present (*id.* at p. 30). The IHO found that the district did not have another provider available and continued to offer the student counseling services (*id.*) According to the IHO, the district was not proactive in the matter, but there was no support that the district denied the student counseling services and no basis for providing compensatory counseling services (*id.*).

The IHO reviewed the evidence regarding the student's mild to moderate hearing loss, including the student's report to the independent evaluator that he could not hear well in his ELA class (IHO Decision at pp. 30-31). The IHO also reviewed evidence from the teacher of the deaf, who testified that the student never reported difficulties to hear and determined that the student did not report any difficulties to anyone at the district (*id.* at p. 31). During the 2017-18 school year, the IHO found that the student periodically refused to use his hearing aids, which prevented use of the FM system provided by the district (*id.*). The IHO concluded that the evidence did not show that the district failed to consider or address the student's hearing deficits, nor did hearing difficulties resulting from action or inaction on the part of the district significantly impact the education that the student received (*id.*).

With regard to district reports of the student's progress, the IHO noted that the district personnel did not report "grade levels" in the present levels of performance or annual goal areas of the IEP because the district believed they were not valid assessments, and that percentile data and standard scores were considered a better measure of the student's ability compared to same aged peers (IHO Decision at p. 31). The IHO found that the providers assessed progress based upon the extent to which the student's annual goals were achieved and that services were to be provided at the student's level (*id.*). The IHO noted the district's use of the STAR assessments and the grade equivalents thereon, but that the hearing record was unclear as to the number of

assessments routinely given each year (*id.* at p. 32).³⁰ The IHO determined that the evidence did not support the parent's claim that the CSE failed to reconvene to consider information learned after the initial CSE meeting for the 2016-17 school year and that the parent did not assert such a claim for the 2017-18 school year (*id.* at p. 33). The IHO also determined that the parent did not request that the CSE reconvene for either school year at issue (*id.*).

With regard to the May 2016 IEP, the IHO determined that it was appropriate for the CSE to recommend continuation of the ICT program that the student had received for several years (IHO Decision at pp. 33-35). The IHO noted that the student was progressing satisfactorily on his reading, writing, and math goals and that the student had showed an advance of four Fountas and Pinnell reading levels (*id.* at p. 33). The IHO found that the student continued to test in the average range in all reading areas during his triennial evaluation conducted by his fifth grade special education teacher, although the student sometimes required repetition of questions several times (*id.* at pp. 33-34). The IHO found the student's fifth grade special education teacher and the director offered convincing testimony regarding the accuracy of the description of the student's progress, that he was the "shining star" of the fifth grade class, that he had kept up with what the class was learning, and that he was able to access the curriculum (*id.* at p. 34). The student's fifth grade special education teacher believed the proposed programming for sixth grade was appropriate for the student because he "did so well in a very similar program for [fifth] grade" (*id.*) The IHO noted the parent's concerns with lack of progress on certain goals but accepted the special education teacher's explanation that the student had made progress on the goals while not meeting them (*id.*). The IHO rejected the parent's claim that the IEP lacked recommendations for "small groups" with instruction in reading, finding that the fifth grade special education teacher explained how such instruction was provided within the context of an ICT class (*id.* at pp. 34-35).

Next, the IHO also concluded that the May 30, 2017 IEP was appropriate for the student (see IHO Decision at pp. 35-40). The IHO noted that the CSE considered the written and/or oral reports from each of the student's providers during the 2016-17 school year as well as prior evaluations and that they indicated progress in varying degrees (*id.* at p. 35). The IHO acknowledged the student's anxiety and school refusal during the 2016-17 school year, but found that once the student entered school, his behavior became "unexceptional" and was managed by district staff, even during the six week period of "extreme difficulty" (*id.*). The IHO also determined that the district developed a plan to address his school refusal and anxiety by approximately December 1, 2016, and that the student's behaviors became manageable thereafter (*id.*). The IHO rejected the parent's claims regarding the CSE's consideration of social/emotional issues because the parent had continued refusing the counseling services as offered by the district (*id.* at p. 36). With regard to the IEE, the IHO concluded that the evaluator's findings of the student's strengths and weaknesses were consistent with information previously provided to the CSE (*id.*). The IHO determined that the IEE supported that the student had made progress with the previous year's ICT programming (*id.*). The IHO found that the recommendations for "small group or individual instruction for 'high value material', 'focused tutoring in math' detailed behavior plans' and 'a systematic communication protocol' between home and school" were consistent with the programming recommended by the CSE insofar as the ICT included two teachers with the opportunity for 1:1 and small group instruction, the student's school refusal had

³⁰ Again, the IHO noted that there were no STAR assessments given in fifth grade but that some were administered in sixth grade (IHO Decision at p. 32).

been successfully addressed, there was a classroom-wide behavior plan to which the student responded, and the district had an online system that provided comprehensive information to parents on a daily basis if desired (*id.*). The IHO concluded that "although [the independent evaluator] knew the student was in an ICT program he did not indicate in a very comprehensive report any concerns about the appropriateness of that program discernable to the CSE" (*id.*). The IHO noted that, at the time his evaluation was before the CSE, the independent evaluator did not express concerns in the areas as later tested by HLC and the IHO expressed a lack of confidence in his testimony because the evaluator's opinion may have changed subsequent to the CSE meeting after reviewing the HLC January 2018 testing (*id.* p. 37). The IHO also discussed testimony from the student's sixth-grade math and science teacher, who was also the special education teacher in his academic center, the support teacher in his study hall, and his case manager (*id.*). The sixth-grade teacher reported that with the supports provided, the student was able to handle the curriculum and pass his classes (*id.*) The IHO reviewed the supports provided to the student, the methods of goal measurement that the teacher used, and her collaboration with the student's other teachers (*id.* a pp. 37-38). The IHO noted the sixth grade teacher's observations of the student's progress during the 2016-17 school year and her belief that the proposed seventh grade IEP was appropriate because the student had progressed with similar supports and accommodations in a program with typically developing peers (*id.* at p. 38). The IHO also found the teacher of the deaf's testimony convincing (*id.*). The IHO also noted that it was undisputed "that the student required substantial academic assistance to be able to keep up with his [sixth] grade class and the district acknowledged, without specifying the degree, that he was functioning below grade level in various areas including comprehension" (*id.*). The IHO acknowledged the differences in reporting regarding the student's independent reading level on the STAR assessment verses other assessments, "but nothing in the record discussing the comparability and/or the reliability of the assessments or the reliability of the STAR assessment indication of four months growth during that school year" (*id.* at pp. 38-39). The IHO determined that there was insufficient information to conclude that the student's independent reading level had advanced significantly in one year (*id.* at p. 39). However, upon considering the totality of the student's programming, with support the student continued to succeed with grade-level content, notwithstanding the lack of change in his independent reading level, particularly in math, which was an area of relative weakness as identified by the independent evaluator (*id.*). The IHO determined that the programming proposed by the CSE for the 2017-18 school year was nevertheless overall reasonably calculated to enable meaningful progress in the student's unique circumstances (*id.* at p. 40). Consequently, the IHO dismissed the parent's claims (*id.*).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in finding that the district provided the student with a FAPE for the 2016-17 and 2017-18 school years. While the parent's request for review enumerates 39 issues presented for review, the parent's objections to the IHO's findings primarily relate to the following issues: that the IHO erred in finding that the student made progress in reading, writing, and math during the school years at issue; that the IHO erred in finding that the parent was not denied meaningful participation in the development of the 2016-17 and 2017-18 IEPs because the district did not provide reading and math data and because the CSE did not reconvene based on data available subsequent to the development of the IEPs at issue; that the IHO erred in finding the district's continued recommendation for ICT services with related services was appropriate; and that the IHO erred in finding the district addressed the student's

social/emotional difficulties, including school refusal, and in particular that the IHO erred in finding that there was no basis for compensatory counseling services.³¹

With respect to the student's progress, or lack thereof, the parent contends: that the district did not meet its burden of proving the student made progress in reading and writing, that the IHO erred in finding "the student had a history of success including with independent reading comprehension with virtually the same program," that the repetition of annual goals indicated "a long-term failure to progress," that the IHO erred by not accepting the parent's claims that the district's reports of progress for the 2016-17 school year were unreliable and that the parent "repeatedly questioned the reliability of the district's reports concerning the student's ability," that the IHO erred in her assessment of the neuropsychological IEE and whether academic testing showing scores in the average range indicated progress, and that the IHO did not consider testing done by HLC in determining whether the student made progress. The parent further objects to the IHO's consideration of the overall record in finding that the student made progress despite the IHO's conclusion that there was an "apparent failure to meaningfully advance in the critical area of independent reading."

Regarding the recommendations of the May 2016 CSE and May 2017 CSE for ICT services with related services, the parent contends that the ICT services were not supportive enough for the student. The parent contends that the IHO erred in finding that small group instruction was a part of the program recommended in the May 2016 IEP. With respect to the May 2017 IEP, the parent contends that the IHO erred in finding that the recommendation for ICT services included small group and one-to-one instruction consistent with the recommendations contained in the neuropsychological IEE report. The parent further contends that the IHO erred in finding that the evaluator who conducted the neuropsychological IEE did not indicate concerns about the appropriateness of ICT services in his report and that the IHO did not credit the evaluator's testimony that indicated ICT services were inconsistent with small group instruction. The parent also objects to the IHO's crediting the director's testimony that the evaluator had said "the student was 'in a good program,'" instead of the evaluator's testimony.

The parent requests a finding that the district denied the student a FAPE for the 2016-17 and 2017-18 school years and further requests compensatory educational services as relief, including 529 hours of one-to-one tutoring at HLC and compensatory counseling services "by a provider of the parent's choosing at customary rates."

In an answer, the district responds to the allegations raised in the request for review. The district also generally objects to any claims that were not raised in the parent's due process complaint notice, asserts that the hearing record does not support an award of "reimbursement," and asserts that the IHO's findings are supported by the hearing record.

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

³¹ The parent also alleges that the IHO erred in finding that the district appropriately addressed the student's hearing issues.

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]).³²

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

I will first address the parent's challenges to the IHO's determinations regarding the parent's ability to participate in the development of the IEP's at issue in this appeal.

A. Parent Participation

Turning to the issue of parental participation and the parent's challenges to the IHO's findings, the parent alleges that the IHO erred in finding that the evidence did not support that the parent was denied meaningful participation for the 2016-17 and 2017-18 school years. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City

³² 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).

Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"].³³

In this appeal, the parent asserts that she requested more "hard data" or "the actual raw data" in the days and months after the May 2016 CSE meeting; however, the parent does not point to any evidence in the hearing record that the IHO overlooked when weighing the question of whether the parent was significantly impeded from participating in the development of the student's May 2016 IEP. As detailed in the facts and procedural history above, the CSE heard the parent's concern that the student should be in a "more restrictive" setting and sent packets for consideration by other public school district and BOCES programs as the parent requested, albeit no other suitable out-of-district program was found. Consequently, the parent presents no basis for disturbing the IHO's parental participation determinations for the 2016-17 school year.

The parent's challenge to the IHO's findings regarding her participation in the May 2017 CSE meeting is similarly unavailing. With respect to the May 2017 CSE meeting the parent points to STAR reports from June and September 2017 as well as a May 2018 reading assessment. The IHO correctly noted that assessment information that post-dated the May 30, 2017 CSE meeting could not have been considered by the parties during that meeting, and that it was not clear when the district became aware of the data from the May 2017 STAR assessments (IHO Decision at p. 28). At best, the parent points to evidence that shows that additional STAR testing may have been conducted by the time the CSE met on May 30, 2017. However, even if the progress results had therein been compiled and made available to the parent by the date of the meeting,³⁴ the results were not so inconsistent with the district's view that the student was making progress toward his annual goals that it prevented the parent from expressing her concerns that the student's programming was insufficiently supportive or her belief that the student should have been placed in a special class setting. In other words, the STAR report from June 2017 added one more measure regarding the student's progress and may have further enhanced the parent's participation, but it did not present a fundamental change in the student's known strengths and weaknesses, even if the report had been printed and made available to the May 2017 CSE.

Instead the IHO, in a thorough and well-reasoned decision, explained for both school years how available reports were presented by CSE participants, how the parent was allowed to ask

³³ The IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

³⁴ As noted above, the STAR Report for the 2016-17 school year bears the date that it was printed, June 20, 2017 (Parent Ex. EE).

questions and present concerns, and how the parent's proffered materials and the neuropsychological IEE report were considered by the CSE (IHO Decision at pp. 26-29). The IHO also correctly noted that the parent did not raise the issue of a failure of the CSE to reconvene in her due process complaint notice nor does the evidence show that she requested that the CSE reconvene as new reports became available (IHO Decision at p. 33; Dist. Ex. 1). As detailed in the facts and procedural history above, the CSE considered the neuropsychological IEE report. The fact that district personnel had a different opinion regarding the student's prior progress and placement did not mean that the parent's participation was significantly impeded (see, e.g., P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *17 [S.D.N.Y. Feb. 25, 2015] [noting that the parents' and their experts' disagreement with the DOE staff's IEP recommendation does not amount to denial of meaningful participation]). Having reviewed the evidence in the hearing record and the parent's challenges to the IHO's decision, I find insufficient reason to depart from the IHO's determinations regarding parental participation and I adopt her findings of fact and conclusions that the parent was not denied meaningful participation as my own.

B. 2015-16 School Year and Progress

The parent generally asserts on appeal that the IHO erred in determining that the student exhibited progress pursuant to his IEPs, which provided him with—among other things—ICT and related services, such that continuing with that program and placement recommendation for the 2016-17 school year offered him a FAPE.

A student's progress under a prior IEP may be a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parent expresses concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. June 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [Dec. 2010]).

In order to address the parent's allegation, a review of the information contained in the hearing record regarding the student's progress made during the 2015-16 school year is warranted. For the 2015-16 school year the April 2015 CSE subcommittee—continued by the June 2015 CSE subcommittee—recommended that the student receive daily ICT services for 4 hours and 20 minutes per day (Dist. Exs. 4 at pp. 1, 14; 5 at pp. 1, 14). State regulation defines ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]).

The April and June 2015 CSE subcommittees also recommended the following related services: two 30-minute sessions per six-day cycle of speech-language therapy in a small group (therapy room), one 30-minute session per six-day cycle of individual speech-language therapy (therapy room), one 30-minute session per six-day cycle of OT in a small group (therapy room), one 30-minute session per six-day cycle of individual OT (classroom), one 30-minute session per six-day cycle of individual PT (classroom), one 30-minute session per six-day cycle of individual PT (therapy room), one 30-minute session per six-day cycle of psychological counseling services in a small group (5:1), three 30-minute sessions per six-day cycle of individual hearing services

(classroom), and three 30-minute sessions per year of individual "parent training" services (therapy room) (Dist. Exs. 4 at pp. 1, 14; 5 at pp. 1-2, 14-15). In addition, the April and June 2015 CSE subcommittees recommended supplementary aids and services, program modifications, and accommodations including refocusing and redirection; use of visual supports; special seating arrangements; breaking large assignments into smaller, manageable pieces; access to an air conditioner; use of a multiplication table; checking for understanding; positive reinforcement plan; and wait time to construct oral responses (Dist. Exs. 4 at pp. 14-15; 5 at p. 15). With regard to assistive technology devices and services, the April and June 2015 CSE subcommittees recommended that the student have access to a "[p]ersonal [a]uditory [t]rainer/FM system" and classrooms with a "[s]ound [f]ield [s]ystem" (Dist. Exs. 4 at p. 15; 5 at pp. 15-16). In addition, for the 2015-16 school year, the CSE subcommittees recommended supports for school personnel on behalf of the student consisting of teacher of the hearing impaired consultation services (one 15-minute session per week with classroom teachers), educational audiologist consultation services (four 60-minute sessions per year to check sound field system; provide staff training; and for one entire session, work with the "team and the parent in the Fall"), and OT consultation services (three 30-minute sessions per year to assist the teacher in supporting student in the classroom) (Dist. Exs. 4 at pp. 15-16; 5 at p. 16).

1. Reading

With respect to reading, the student's fifth grade report card indicated that during the first trimester he read below grade level, and although he decoded text accurately, the student demonstrated literal comprehension of text, such that he needed to slow down his reading pace, and support and scaffolding to "think deeply" about the texts he read (Dist. Ex. 159 at p. 13). Second trimester reports indicated that the student had improved his independent reading level and was using strategies to "stretch his thinking" (*id.*).³⁵

The student's March 16, 2016 IEP annual goals progress report indicated the student was progressing satisfactorily toward all three IEP reading goals for the year (Parent Ex. L at pp. 1, 3). The student was expected to achieve the goals related to slowing the rate of his reading to increase comprehension, answering two "why" questions based on evidence from the text, predicting the outcome of a presented story, and verbally identifying the author's purpose for writing the story (*id.* at p. 3).³⁶ The March 2016 RtI progress report indicated the student had mastered all of the phonics and decoding skills measured, two of three reading strategies skills, and two of three vocabulary development skills (Dist. Ex. 163 at p. 1).³⁷ Regarding reading comprehension, the

³⁵ Although unclear if available at the time of the May 2016 CSE meeting, the third trimester report card noted that although the student was still performing below grade level in reading, he had "worked hard to think more deeply about texts and use[d] teacher scaffolding to challenge his thinking" (Dist. Ex. 159 at p. 13). Additionally, as of the third trimester the student was approaching grade level standards related to knowledge of assigned vocabulary words and met grade level standards regarding effort (*id.* at p. 14).

³⁶ Although not necessarily information available to the May 2016 CSE, the student's final 2015-16 IEP annual goals progress report reflected that the student had achieved all three of his IEP reading annual goals (Dist. Ex. 10 at pp. 1-2).

³⁷ The 2015-16 RtI progress report indicated that the student's reading progress remained relatively the same from December 2015 to March 2016 except for reading fluency (Dist. Ex. 163 at pp. 1-2). At the time of the December

RtI progress report indicated the student had mastered three of the five comprehension skills targeted and three of the four reading fluency skills (*id.* at p. 2).³⁸

Discussion at the May 2016 CSE meeting reflected teacher reports that the student had shown "tremendous improvement" in his ability to access the curriculum with supports (Dist. Ex. 7 at p. 2). Present levels of reading performance developed in May 2016 indicated that the student had made slow, steady progress toward comprehension goals with moderate assistance, and demonstrated grade level decoding skills, accuracy, and fluency (*id.* at p. 8). The present levels of performance also indicated that as per the most recent building level assessment (March 2016), the student continued to progress in reading comprehension, although his reading comprehension remained below grade level expectations (*id.*). According to the student's fifth grade special education teacher, the student's reading progressed from a Fountas and Pinnell level N in September 2015 to a level Q in June 2016—substantial growth— indicating advancement of an entire grade level (Tr. pp. 422-23, 447-449; see Dist. Ex. 163 at p. 2).³⁹

2. Mathematics

With respect to mathematics, the student's fifth grade first trimester report card indicated that the student needed teacher support, reteaching, practice, and review to retain the information he was learning (Dist. Ex. 159 at p. 13). By the second trimester, the report card indicated that the student had exhibited growth and, with "limited support," solved multiplication and division algorithms and used strategies that were taught (*id.*). Although the student was performing below grade level regarding his ability to apply process skills to problem-solving and knowledge of basic division facts, the report card indicated that the student was approaching grade level standards regarding knowledge of mathematical concepts, ability to compute accurately, and knowledge of basic subtraction and multiplication facts, and was exceeding grade level standards with respect to knowledge of basic addition facts (*id.* at p. 14).⁴⁰ The March 2016 RtI progress report for mathematics indicated that the student demonstrated progress toward all skills related to procedural fluency, behaviors that supported learning, and his ability to show work when solving problems (Dist. Ex. 164 at p. 1). The RtI progress report also documented that the student was

2015 reporting the student was developing skills related to fluency, whereas, by March 2016 the student had mastered three of the four fluency-related skills measured (*id.* at p. 2).

³⁸ The March 2016 RtI progress report indicated that with respect to the remaining skills not mastered the student was developing those skills, and by June 2016, the student had mastered 17 out of 21 of the skills targeted (Dist. Ex. 163 at pp. 1-2).

³⁹ The student's fifth grade special education teacher testified that although the student did not meet grade level standards, he was a student with an IEP, and he made growth "against himself" (Tr. pp 468-69). She stated that when compared to his same age and grade peers he did not exhibit growth, but when compared to himself he made "tremendous growth" (Tr. p. 469).

⁴⁰ The student's third trimester report card indicated that the student had "demonstrated growth as a mathematical thinker" and practicing math facts and concepts would help "solidify the skills he ha[d] learned this year" (Dist. Ex. 159 at p. 13). By the end of the school year, the student had improved his performance since March 2016 and exceeded grade level standards for knowledge of basic subtraction facts (*id.* at pp. 13-14).

beginning to show progress related to his ability to express mathematical ideas and apply problem solving strategies (*id.*).⁴¹ The March 2016 IEP annual goal progress report reflected that the student was satisfactorily progressing toward all four of the mathematics goals and was anticipated to achieve the goals by the end of the 2015-16 school year (Parent Ex. L at p. 5).⁴² In May 2016 the CSE developed present levels of performance which indicated that the student showed slow, but steady, progress toward his computation and word problem annual goals, noting that differentiated instruction and materials had assisted the student's access to grade level concepts (Dist. Ex. 7 at p. 8).

3. Writing

With respect to writing, the student's fifth grade first trimester report card indicated that the student had demonstrated improved stamina in that he wrote for longer periods of time (Dist. Ex. 159 at p. 13). By the second trimester, the report card reflected that the student had composed a "feature article" on a particular topic, benefitting from talking through the information before writing it down (*id.*).⁴³ Additionally, the second trimester report card reflected that the student was approaching grade level standards in all areas of "[writer's workshop]" with the exception of reviewing, revising, and editing work independently (*id.* at p. 14). In spelling, the student had improved his ability to apply spelling strategies and knowledge of assigned words to a level that met standards for his grade (*id.* at pp. 13-14). The March 2016 IEP annual goals progress report indicated that the student was progressing satisfactorily and was expected to achieve the targeted writing goal to craft a one to two paragraph response with the support of a graphic organizer using a topic sentence, three to five supporting details and a concluding sentence (Parent Ex. L at p. 4).⁴⁴ The student's fifth grade special education teacher testified that in November 2015 the student's writing samples reflected short, rote sentences and by February 2016 the student wrote a nonfiction piece "using expert vocabulary," bold print, introductions and conclusions that demonstrated to her the student "took what he was taught and applied it" (Tr. pp. 452-53).

4. Related Services

In addition to the student's progress related to reading, mathematics, and writing, the March 2016 IEP annual goals progress report indicated that the student was progressing satisfactorily toward two of two study skills goals, two of five speech-language goals, two of four

⁴¹ Although created after the May 30, 2016 CSE meeting, by June 2016, the mathematics RtI progress report reflected improvement from "beginning" progress to "developing" progress related to the student's ability to express mathematical ideas and to apply problem-solving strategies (Parent Ex. N).

⁴² Although created after the May 2016 CSE meeting, by June 2016, the student had achieved three out of four mathematics IEP annual goals, and had been progressing satisfactorily toward the fourth goal (Dist. Ex. 10 at p. 3).

⁴³ The third trimester report card indicated that the student had, with support, "completed a persuasive piece that had him gather and analyze evidence, as well as form opinions" (Dist. Ex. 159 at p. 13).

⁴⁴ Although created after the May 2016 CSE meeting, the June 2016 IEP annual goal progress report indicated that the student achieved his writing annual goal (Dist. Ex. 10 at pp. 2-3).

social/emotional goals, four of four hearing goals, and two of six motor goals (and had achieved two of the motor goals) (Parent Ex. L at pp. 1, 6-9). Of the remaining goals, five were progressing gradually and two of the student's social/emotional goals were progressing inconsistently (*id.* at pp. 6-8).⁴⁵

The speech-language pathologist reported in March 2016 that the student demonstrated improvement in all the goal areas presented, identified slow but steady progress in higher level thinking, and that the student was becoming more adept at retaining new vocabulary and expressing conclusions in greater detail (Dist. Ex. 47 at p. 1). The speech-language pathologist noted that the student followed directions more consistently and had shown growth in his ability to identify irrelevant information and exclude it from conversational speech (*id.* at pp. 1-2).⁴⁶

The April 2016 OT progress report noted that the student demonstrated improvement in his ability to persevere, endure, and attend during therapy (Dist. Ex. 49 at p. 1). She noted steady progress with the student's graphomotor skills, including that he demonstrated generally legible handwriting and appropriate letter/word spacing (*id.*). The report indicated that the student was progressing satisfactorily toward a goal to improve his ability to independently organize written material on a page and that he had achieved two goals related to using strategies to enhance his accuracy for school related tasks, which incorporated various visual skills and improving his typing skills (*id.* at pp. 1-2). May 2016 present levels of performance indicated that the student continued to improve his bilateral hand coordination/in-hand manipulation skills when working on various table-top tasks (Dist. Ex. 7 at p. 10).

The April 2016 PT progress report indicated that the student had steadily improved and achieved a goal regarding improving his underlying trunk and muscle strength, and demonstrated improvement in skills related to maintaining prone extension position, and slight improvement in his range of motion and flexibility of his lower extremities (Dist. Ex. 50 at pp. 1-2). In May 2016, the physical therapist reported that the student continued to make "slow gains" in his proximal muscle strength (Dist. Ex. 7 at p. 10).

The May 2016 hearing impaired services summary noted that the student transitioned "nicely" to the fifth grade, had good relationships with peers, and implemented self-advocacy skills with growing frequency (Dist. Ex. 51 at pp. 1-3). The 2016 hearing impaired services summary also indicated the student worked hard and demonstrated understanding of classroom content, had a good grasp of the curriculum, and could implement new skills and concepts with minimal assistance (Dist. Ex. 51 at p. 2). In May 2016, present levels of performance indicated that

⁴⁵ Although not necessarily information available to the May 2016 CSE, the June 2016 IEP annual goals progress report indicated that the student achieved two of two study skills goals, one of five speech-language goals (while making "good progress" toward the remaining goals although he did not reach the established criteria), one of four social/emotional goals, two of four motor goals, and four out of the four established hearing goals (Dist. Ex. 10 at pp. 3-7).

⁴⁶ The March 2016 speech-language progress summary indicated that although the student demonstrated improvement in overall receptive and expressive language skills, weaknesses in those areas continued to hinder the student's ability to adequately access the academic curriculum (Dist. Ex. 47 at p. 2).

although the student's auditory memory skills impacted his learning, his auditory comprehension skills were "continuing to improve" (Dist. Ex. 7 at p. 8).

The May 2016 counseling summary indicated the student's behaviors related to anxiety had diminished, he actively engaged in typical play with peers, and that he had begun to accept parental separation (Dist. Ex. 52). The clinician indicated the student was more engaged in social conversations which showed improvement from the previous year, and noted that the student's progress toward goals included his ability to learn and use appropriate coping skills, develop a greater understanding of peer relationships, and display more mature behaviors when interacting socially (Dist. Ex. 52). In May 2016, teacher reports reflected that the student had shown "tremendous improvement" over the past school year relative to his self-confidence and that social/emotional progress was evident in the student's ability to generalize appropriate, learned behaviors in social settings at school (Dist. Ex. 7 at p. 2). With respect to the student's social development, present levels of performance developed in May 2016 indicated that the student was friendly, socially accepted by his peers, and motivated to learn and manage his own anxieties (*id.* at p. 9). Additionally, "[m]ost often" the student demonstrated independence in following classroom routines and complying with teacher directives (*id.*). Most notably the present levels of performance indicated that the student had "learned to appropriately cope with his frustrations or when he feels overwhelmed," he was taking "more social risks," and engaged in typical activities with his peers (*id.*). Lastly, the present levels of performance indicated that, although the student engaged in some immature behaviors, those behaviors were diminishing (*id.*).

Therefore, a review of the evidence in the hearing record shows that the student demonstrated progress—albeit slower in some areas than the parent would have preferred—in both academic skills and related service areas, while receiving ICT and related services during the 2015-16 school year.

C. May 2016 IEP

Having concluded that the student made progress during the 2015-16 school year, the next issue to address is whether, as the district asserts, the educational program offered to the student in the May 2016 IEP—which was very similar to the program provided in the June and November 2015 IEPs—was reasonably calculated to enable the student to receive educational benefits. In contrast, the parent asserts that the 2016-17 school year program and placement were not appropriate, and that the IHO erred in finding that the May 2016 IEP "was not defective" for failing to include a recommendation for small group instruction. Upon review, the evidence in the hearing record does not support the parent's assertions. As such, the IHO's conclusion that the district offered the student a FAPE for the 2016-17 school year will not be disturbed.

The May 2016 CSE recommended that the student receive ICT services for instruction in ELA, mathematics, science, and social studies, together with a new recommendation for three 41-minute sessions per six-day cycle of "[a]cademic [c]enter" support in a 15:1 special class placement (compare Dist. Ex. 7 at p. 14, with Dist. Ex. 6 at pp. 13-14). The May 2016 CSE recommended the same frequencies and durations for the student's related services in speech-language therapy, OT, psychological counseling services, hearing services, and "parent training" as recommended by the November 2015 CSE subcommittee; however, the CSE—in the area of PT—modified the previous recommendations from one individual session and one small group

session to two 30-minute sessions per six-day cycle of individual PT (compare Dist. Ex. 7 at pp. 14-15, with Dist. Ex. 6 at pp. 13-14).⁴⁷ The May 2016 CSE also recommended all of the same supplementary aids and services, program modifications, and accommodations as in the November 2015 IEP; the May 2016 CSE recommended additional supports in this area, including use of a calculator, being provided with a copy of class notes and an additional set of books, and providing "ongoing feedback regarding performance" (compare Dist. Ex. 7 at pp. 15-16, with Dist. Ex. 6 at pp. 14-15). The May 2016 IEP included the same recommendations for assistive technology and devices as in the November 2015 IEP (compare Dist. Ex. 7 at p. 16, with Dist. Ex. 6 at p. 15).

"Although past progress is not dispositive, it does 'strongly suggest that' an IEP modeled on a prior one that generated some progress was 'reasonably calculated to continue that trend'" (S.H., 2011 WL 6108523, at *10, citing Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153 [10th Cir. 2008]; see also C.S. v. Yorktown Cent. Sch. Dist., 2018 WL 1627262, at *18 [S.D.N.Y. Mar. 30, 2018]; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. Appx. 64, 67 [upholding district court's conclusion that because the student made progress in previous years, the later, similar IEPs were reasonably calculated to enable progress]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011] [determining that evidence of likely progress was "the fact that the [challenged IEP] was similar to a prior IEP that generated some progress"]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011] [finding that when the student made some progress under a previous IEP, it was not unreasonable for the CSE to propose an IEP "virtually identical to" the previous one]; M.C., 2008 WL 4449338, at *16 [determining that when the IEP at issue mirrored a past IEP under which the student "demonstrated significant progress," the IEP at issue was reasonably calculated to afford the student educational benefit]; see generally Application of a Student with a Disability, Appeal No. 12-064; Application of the Bd. of Educ., Appeal No. 11-128).⁴⁸ In this instance, as described in detail above, the student demonstrated overall progress during the 2015-16 school year such that the CSE's decision to recommend a similar program and placement for the 2016-17 school year—with the addition of a 15:1 special class discussed below—was reasonably calculated to enable the student to receive educational benefits.

As noted previously, the May 2016 added a recommendation for the 2016-17 school year for the student to receive instruction in a 15:1 academic center special class (Dist. Ex. 7 at p. 14).⁴⁹

⁴⁷ With the parent's agreement, the November 2015 CSE modified the student's recommended PT services from "individual to small group for one of his session[s] to support his needs"; otherwise, the CSE made no other modifications to the student's previously recommended special education program and services (Dist. Ex. 6 at p. 2; compare Dist. Ex. 6, with Dist. Ex. 5, and Dist. Ex. 4).

⁴⁸ At least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

⁴⁹ The director testified that although the academic center special class was a 15:1 student-to-teacher ratio, the district "never really ha[d] more than eight or nine" students in the class (Tr. p. 167). The special education teacher of the 15:1 academic center special class during the 2016-17 school year testified there were six students in the class (Tr. pp. 270, 303-04). Thus, to the extent that the parent contends that the May 2016 IEP was not appropriate because it failed to include a recommendation for "small group instruction," overall, the parent does not otherwise specify what she believes to be a "small group" for purposes of instruction, illustrating a common

According to the director, the academic center was "delivered" by a special education teacher, generally one who was "typically" with the student in some of his ICT classes, and who "knows the curriculum and the work requirements and helps develop study skills and strategies and support homework needs during his school day" (Tr. pp. 167-68). The special education teacher of the 15:1 special class the student attended during the 2016-17 school year testified that in the academic center students had the opportunity to finish assessments or tests, work on study skills and homework, and she provided reteaching opportunities if necessary (Tr. pp. 268, 270, 276-78). In addition to the 15:1 special class, the hearing record reflects that students received instruction in a "small group" within the ICT "classes." Specifically, the student's sixth grade special education teacher indicated that the student "needed the same supports that were in place for all the students that were in [ICT classes]" and stated the benefit of having a second teacher in the classroom to reteach and provide instruction in a "smaller" group (Tr. pp. 302-03). The student's fifth grade special education teacher testified that during the 2015-16 school year the student received small group instruction within the ICT class (Tr. pp. 448-49). Additionally, the May 2016 IEP provided the student with 11 sessions per 6-day cycle of either small group or individual related services (see Dist. Ex. 7 at pp. 14-15). Therefore, I decline to disturb the IHO's finding that the May 2016 IEP was appropriate.⁵⁰

1. School Refusal—Fall 2016

Turning next to the parent's allegation on appeal that the IHO erred in determining that the district developed an effective plan to address the student's social/emotional difficulties which led to his school refusal behaviors, as described below, the hearing record reflected that the student's team held frequent team meetings to discuss the school refusal behavior, spoke with the student, monitored his school activities to assess the cause of his behaviors and, after identifying the cause, put a plan in place to address his anxiety related to homework and tests, which resulted in a decrease in school refusal behaviors. Therefore, the hearing record supports the IHO's decision

predicament: that often what is considered "small" in terms of class size is in the eye of the beholder (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 335 [E.D.N.Y. 2012], *aff'd*, 725 F.3d 131 [2d Cir. 2013] [holding "[t]hat the size of the class in which [the student] was offered a placement was larger than his parents desired does not mean that the placement was not reasonably calculated to provide educational benefits"], and is not relevant to whether a placement provides appropriate services to meet a student's needs (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015]). The parent's allegation also ignores the fact that the May 2016 CSE recommended the additional support of the 15:1 academic center special class placement, which effectively mirrored the student-to-teacher ratio of the parent's desired placement in a 15:1+1 special class in a neighboring school district (see Dist. Ex. 124).

⁵⁰ Although not disputed issue by the parties on appeal, as described in the facts and procedural history above, the evidence shows that that during the 2015-16 school year the student received RtI supports; however, there is little detail regarding the particulars of the strategies (see Parent Ex. N; Dist. Ex. 163). The hearing record does not contain any clear information on the topic thereafter. Recently the United States Department of Education explained that RtI services are neither required nor prohibited by IDEA after a student has been found eligible for special education (Letter to Zirkel, 73 IDELR 241 [OSEP 2019] [noting that while there is nothing in IDEA that prohibits children with disabilities who are receiving special education and related services under IDEA from receiving instruction using RtI strategies, all special education and related services must continue to be provided consistent with each child's IEP]).

that the district effectively addressed the student's emotional difficulties that led to his school refusal behaviors.

Review of the hearing record shows that during fall 2016 (sixth grade) the student began demonstrating behaviors related to refusing to enter the school. Specifically, the parent testified that the student presented with school refusal behaviors as early as September 2016, which became increasingly worse and occurred frequently through December 2016 (Tr. pp. 554-59, 673). According to the parent, the student "had a very, very difficult time getting into school, constantly crying, constantly missing the bus" (Tr. p. 554). Once at the school, the parent testified that "getting [the student] into the [school] building was a nightmare"; he went in and out of the school, "was constantly crying, screaming" that he was scared, did not want to be there and wanted to go home, and that she spent from 30 to 90 minutes or more trying to get him into the building (Tr. pp. 554-55).

The student's special education teacher during the 2016-17 school year testified that initially, the student's transition from elementary to middle school was "pretty good," and that from September to the middle of October 2016 she "did not see any major significant anxiety" that staff was not able to successfully work through (Tr. pp. 279-80). She further testified that the student was "really receptive" to the strategies in place at the beginning of the school year to address the student's anxiety (Tr. p. 279). Those strategies included having the student request to speak with the teacher "outside," where he would verbalize what he was feeling, and the teacher would hear the student's concern and distract him which would "clear the air" and enable him to "reset" (Tr. pp. 279-80). To manage the student's anxiety about assignments the special education teacher testified she would take two or three minutes to review the assignment with the student one-on-one and explain the expectation, which was usually enough for the student to "move on" (Tr. pp. 280, 334-35). Staff who provided supports to the student in the classroom included the special education teacher, the regular education teacher, a teaching assistant, an occupational therapist, and a teacher of the deaf (Tr. pp. 281-84). If the teacher was not available to assist the student when he became anxious about an assignment, the teaching assistant explained the activity, talked the student through it, and got him set up (Tr. p. 282). To address the student's test anxiety, the special education teacher would oftentimes have the teacher of the deaf administer tests to the student during study hall (Tr. pp. 280, 283). The teacher of the deaf also reviewed homework with the student and worked on long-term projects with him (Tr. pp. 283-84). Staff who supported the student outside of the classroom included his guidance counselor, school psychologist, and physical therapist (Tr. pp. 284-85).

According to the special education teacher, around the second week of October 2016 the parent met with "a big team" including herself, another special education teacher who worked with the student, his two "core teachers," the school psychologist, the guidance counselor, the occupational therapist, and the speech-language pathologist (Tr. pp. 286-87). From her perspective, it was a "positive meeting," in that staff shared their opinion that the student's transition had been successful despite some periods of anxiety throughout the day that he was able to "move through," he was accessing the curriculum, independently navigating the building from class to class, and successfully using the lock on his locker (Tr. pp. 287-88).

However, the hearing record reflects that toward the end of October 2016 the student exhibited "more anxiety coming into school," and difficulty transitioning into the building in the

morning (Tr. pp. 280-81, 288, 394-95). According to the special education teacher and the school psychologist, the student's behaviors at that time included refusing to get out of the car; crying; screaming; verbalizing that he did not feel safe, was scared and/or that he did not want to go to school; and holding on to his mother and not wanting to leave her (Tr. pp. 288, 396-97). Despite these behaviors, the special education teacher testified that once the student entered the building "the rest of his day would be similar to how it had been from September up until the middle of October" (Tr. p. 289). The school psychologist also testified that once the student got into school and the day started, the student exhibited only "minor" issues related to anxiety that were easily remedied by the teacher (Tr. p. 403).

The school psychologist testified that when the student demonstrated school refusal behaviors staff moved him to the guidance office to speak with him and try to understand what caused his anxiety (Tr. pp. 397-398).⁵¹ Because the student's team was "really concerned" about the student's behavior—particularly since it was a significant shift from how the student had been during the first six to eight weeks of school—they met weekly to try to discern the reasons for the student's behavior and to develop a plan to address the issue (Tr. pp. 290-91, 398-99). The school psychologist testified that initially the team was concerned that the source of the student's difficulty was due to "bullying," or fear of one of his teachers (Tr. pp. 396, 399).⁵² Because the student was expressing that he did not feel safe at school, the school psychologist testified that the student was monitored in the school yard, in the classroom, and while walking in the hallway (Tr. p. 398). Additionally, the school psychologist spoke with the student during counseling sessions to try to determine if he had had any negative interactions with other students, while at the same time his teachers were "paying attention" to see if the student was being "picked on" (*id.*).

After monitoring the student in various settings, talking with the student and parent, and collaborating during team meetings, staff determined that the source of the student's anxiety and school refusal was due to his concerns about unfinished homework, and/or feelings of not being prepared for tests (Tr. pp. 165-66, 291-92, 400). Having identified the source of the student's school refusal behaviors, the team proposed a plan to address his anxiety and support the student so that he was able to attend school without demonstrating behaviors that interfered with successful school attendance (Tr. pp. 290-291, 400-01, 419). The plan involved using a teaching assistant who had a good relationship with the student to greet him at the door to help with the transition into school, and bring the student to the library where he had a few minutes to "decompress" before going straight to class (Tr. pp. 166-67, 291-92, 401, 419-20).⁵³ The teaching assistant would also "talk him through" any anxiety regarding homework or tests (Tr. pp. 290-91). Additionally, the team made a "shift" in the focus of the student's time in his academic center special class—which was at the end of the day—to homework completion so that the student did not have to go home and have the stress of doing homework at home (Tr. pp. 166, 291-92, 400). The student was also

⁵¹ The student's mother testified that when the student exhibited school refusal the security guard would call the guidance counselor, the school psychologist, the principal or assistant principal, or the "aide" who would attempt to assist the student (Tr. pp. 559-60).

⁵² During the process of determining the factors that contributed to student's behavior, the team examined the student's fear of English class, but ascertained it was not related to the teacher because the student had the same teacher for social studies and he did not express fear regarding going to social studies class (Tr. p. 399).

⁵³ Time spent with the teaching assistant in the library varied between 10-30 minutes (Tr. pp. 419-420).

encouraged to attend a building-level, after-school program that offered homework assistance on those days he did not complete all of his homework during the academic center special class (Tr. pp. 166, 292-93). To address the student's test anxiety, plans were put in place to ensure he did not have to take two tests on the same day (Tr. pp. 404-05). The school psychologist testified that once school staff figured out a solution and how to handle the student's anxiety, the student would often tell his mother it was okay for her to go home and then staff moved the student into the classroom (Tr. p. 400). The school psychologist stated that once the plan was in place and the student knew what the structure was, the behaviors started to decrease, and they saw less and less of it (Tr. p. 404).

According to the special education teacher, the student's school refusal behavior lasted "about six weeks, from the middle of October up until winter break" (Tr. p. 294). She further testified that when the student returned from winter break the school refusal behavior was not a regular issue, only occurring at "very random and isolated" times, noting that in general the student was "transitioning beautifully like he had been in the fall" (*id.*). The parent testified that at the end of December the student's school refusal behavior happened less often, but persisted for the rest of the school year although to a less severe extent (Tr. p. 672). The school psychologist stated that around the third quarter (February/March 2017) the student's school refusal behavior "went away" (Tr. p. 405).

Based on the foregoing, the hearing record presents sufficient evidence to support the IHO's decision that the district effectively addressed the student's social/emotional difficulties that led to his school refusal behaviors.

D. May 2017 IEP

1. Annual Goals

The parent asserts on appeal that the IHO erred in concluding that the annual goals "contained in the IEPs at issue" did not indicate a "long-term failure to progress through repetition of goals purportedly already met in previous school years."⁵⁴ As more specifically defined in the memorandum of law, the parent alleges that the IHO erred in finding that the district developed an appropriate IEP for the 2017-18 school year, in part because some of the academic annual goals were "repetition of the same and even less ambitious reading and writing goals over several years" (Parent Mem. of Law at pp. 16-18). The district denies this allegation in its answer, and further asserts that this issue was not raised in the due process complaint notice.⁵⁵

⁵⁴ The parent cites to page 34 of the IHO's decision for this claim. Review of the IHO's decision reflects the testimony of the student's fifth grade special education teacher and her explanation of the differences between the annual goals in the student's 2015-16 IEP versus the goals in his 2016-17 IEP (see IHO Decision at pp. 33-34; see also Tr. pp. 486-93). Review of the parent's due process complaint notice shows the parent raised issues regarding the annual goals in the September 8, 2015 IEP—which were withdrawn (see IHO Exs. III; V)—and the goals contained in the September 2017 IEP, but not the May 2016 IEP (see Dist. Ex. 1 at pp. 5, 9-10).

⁵⁵ The parent's due process complaint notice cannot be reasonably read to include a claim about the annual goals for the 2016-17 school year as the parent's only allegation regarding the 2016-17 school year was that a CSE meeting did not take place and a new IEP was not created until May 2017 (see Dist. Ex. 1 at p. 7). Although the

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][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]).

According to the description of the student's present levels of reading performance contained in the May 2017 IEP the student was a "motivated reader and enjoy[ed] time spent reading in the classroom" (Dist. Ex. 8 at p. 9). The IEP further indicated that the student was making "slow, steady progress toward his comprehension goals" and that he required prompts to read at a slower pace and remain focused on the text (*id.*). Specific to the student's reading comprehension skills, the IEP reflected that the student often read to complete a task, rather than engage with the text and think about what he was reading, which negatively affected his critical thinking ability and caused him to miss critical pieces of content-area information (*id.*). Additionally, the IEP indicated that the student benefitted from reminders to self-monitor for comprehension when reading independently and that he demonstrated literal comprehension skills independently when he was engaged and read at a slower rate (*id.*). Finally, the IEP noted that the student's critical thinking skills continued to develop and that the student benefitted from teacher support to "go beyond the words of the text to infer about the characters or the author's meaning" (*id.*).⁵⁶

The May 2017 IEP annual reading goals addressed the student's need to identify key supporting details to better comprehend what he was reading, and when provided material, read a paragraph or story out loud with appropriate expression and fluency (Dist. Ex. 8 at p. 13). Both annual goals specified criteria to determine when the goal was achieved (70 percent success over

IHO acknowledged the parent's assertion that the district's claims about the student's progress were contradicted by the annual goals developed for the 2016-17 school year, the parent's assertion appears to have first been raised in the parent's post-hearing brief (see IHO Decision at p. 34; IHO Ex. V at pp. 27-28). Therefore—despite the parent's arguments contained in the memorandum of law relating to the May 2016 IEP—I will not address the parent's annual goals claim on appeal relating to the 2016-17 school year (see Parent Mem. of Law at pp. 8-9, 11-12). Review of the due process complaint notice shows the parent alleged that the annual goals in the September 2017 IEP were not appropriate because they were "not specifically designed to effectively address [the student's] needs, were not measurable, were too vaguely-stated . . . , and did not contain sufficient specificity . . ." and that the IEP did not offer annual goals to address the student's math needs and low self-esteem (see Dist. Ex. 1 at pp. 9-10). Although the issue the parent now presents about the 2017-18 IEP annual goals is not what she alleged in her due process complaint notice, relating instead to the improper repetition of goals which she asserts shows a lack of progress, I will address her claim about the student's May 2017 IEP annual goals as presented on appeal out of an abundance of caution (Req. for Rev. ¶13; Parent Mem. of Law at pp. 17-18).

⁵⁶ On appeal the parent alleges that the IHO erred in finding the CSE was aware of the student's reading comprehension deficits and reflected those deficits in the IEP. However, as described herein, the May 2017 IEP adequately described the student's reading comprehension deficits and the supports used to improve that skill (Dist. Ex. 8 at p. 9).

10 weeks; 75 percent success over 10 weeks); the method of how progress was measured (work samples; class participation); and the schedule with which progress towards the goal would be measured (by the end of each marking period) (*id.*).

In the memorandum of law the parent asserts that the May 2017 IEP annual goal relating to the student's reading comprehension was "nearly identical" to the April 2014 IEP annual goal that states the student would identify the main ideas and pertinent details, and sentences which relate to the main idea and details with minimal prompting (compare Dist. Ex. 3 at p. 11, with Dist. Ex. 8 at p. 13).⁵⁷ The April 2014 IEP present levels of performance—drafted at the end of third grade—indicated that the student was at that time, reading below grade level and that his reading comprehension subtest score was in the below average range (Dist. Ex. 3 at p. 7). While the hearing record revealed that the student's reading comprehension skills remained an area of need, the student exhibited progress in reading, such that due to the level of text the student was expected to comprehend pursuant to the May 2017 IEP—for seventh grade—developing skills, including the identification of the key details to support comprehension, remained an appropriate goal (Tr. pp. 168-69; Dist. Exs. 3 at p. 7; 8 at pp. 2, 8, 10, 13; see Dist. Exs. 159 at pp. 7-8; 166 at p. 1).

The parent further asserts in the memorandum of law that a comparison between written language goals from the November 2015 and May 2017 IEPs shows "regression" because the student had allegedly achieved the November 2015 goal to compose a two paragraph writing task, and the May 2017 IEP only required that the student compose one paragraph (compare Dist. Ex. 4 at p. 12, with Dist. Ex. 8 at p. 13).⁵⁸ The November 2015 IEP present levels of performance for writing—developed when the student was in fifth grade—indicated that the student independently composed a short paragraph with "simple and direct" sentences (Dist. Ex. 4 at p. 8). The annual goal in the November 2015 IEP required the student to write a two paragraph response about one subject that included a topic sentence, three to five supporting details, and a concluding sentence, with moderate assistance (*id.* at p. 12). According to the present levels of performance in the May 2017 IEP, the student continued to work on "paragraph and essay development," benefitting from use of a graphic organizer to develop a topic with details and organization (Dist. Ex. 8 at p. 9). Additionally, the May 2017 IEP indicated that the student was learning to respond to questions by including text evidence to support his written response (*id.*). The corresponding May 2017 IEP annual goal required the student to "independently write a one paragraph composition that [was] logical, sequential, and include[d] a topic sentence with supporting details," reflecting not only the requirement that the student independently exhibit the skill, but also at a more complex level than in November 2015 (compare Dist. Ex. 4 at p. 12, with Dist. Ex. 8 at p. 13). Therefore, the parent's

⁵⁷ To the extent the parent otherwise makes a general allegation in the memorandum of law that the May 2017 IEP included goals that were "nearly identical to goals from older IEPs" without further specification, I decline to "research and construct" the parent's arguments or guess which IEPs she is referring to (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 350 Fed. App'x 749, 752 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]).

⁵⁸ Review of the May 2017 written language annual goals reflects that, consistent with State regulation, they contain criteria for determining goal achievement (70 percent), a method of how progress toward the goal will be measured (writing samples), and a schedule by which progress will be measured (by the end of each marking period) (Dist. Ex. 8 at p. 13).

assertion that a comparison of the student's writing annual goals from November 2015 and May 2017 shows "regression" is without merit.

Additionally, in the memorandum of law the parent asserts that the May 2017 CSE "reduced expectations"—referencing the criteria for mastery—for achievement of the student's academic annual goals. Generally, the criteria for mastery of the student's academic annual goals contained in the May 2016 IEP and the May 2017 IEP are within the 70 percent to 80 percent range (compare Dist. Ex. 7 at p. 12, with Dist. Ex. 8 at p. 13). One of the annual goals which measured skills related to reading comprehension between the two IEPs remained at 70 percent (compare Dist. Ex. 7 at p. 12, with Dist. Ex. 8 at p. 13). While at first it appears that the other academic annual goals reduced criteria for mastery between the two IEPs, a more careful review shows that either the skill being measured was different, or the goals in the May 2017 IEP required a more advanced skill or level of independence from the student to achieve those goals. For example, the student's reading fluency annual goal in the May 2016 IEP required him to reduce his reading rate to increase fluency with 80 percent success, while the May 2017 annual goal required the student to "read a paragraph or story out loud with appropriate expression" as well as fluency with 75 percent success, an arguably more difficult task to achieve (compare Dist. Ex. 7 at p. 12, with Dist. Ex. 8 at p. 13). The student's May 2016 written language annual goals required 80 percent mastery "with moderate assistance" (Dist. Ex. 7 at p. 12). Although the May 2017 IEP written language annual goals required 70 percent mastery, they were to be accomplished without moderate assistance; one goal required the student to perform the skill independently (Dist. Ex. 8 at p. 13). Similarly, a May 2016 mathematics annual goal required the student to solve word problems using supportive techniques, such as underlining key words and selecting a matching strategy/picture with 80 percent success, while the May 2017 mathematics annual goal now required the student to "solve multi-step word problems" with 70 percent accuracy but, again, without the supports provided in the previous school year (compare Dist. Ex. 7 at p. 12, with Dist. Ex. 8 at p. 13).

Therefore, contrary to the parent's assertion, a review of the academic annual goals from the May 2016 and May 2017 IEPs does not show that the CSE "reduced expectations" for the student's achievement of the goals.

2. ICT Services

a. 2016-17 School Year and Progress

The parent asserts on appeal that the IHO erred in finding that the student made progress during the 2016-17 school year, such that the CSE's recommendation for a program and placement including ICT services was appropriate to provide the student with a FAPE. The parent further contends that the IHO erred in finding that the May 2017 CSE's recommendations were consistent with those from the neuropsychological IEE report.

Just as the student's progress during the 2015-16 school year was relevant to the development of the May 2016 IEP, the student's progress during the 2016-17 school year, under

the programming set forth in the May 2016 IEP, is relevant to the development of the student's IEP for the 2017-18 school year.⁵⁹

The hearing record contains a 2016-17 IEP annual goals progress report dated May 2017, that reflected the student's progress toward his annual goals as of November 2016, January 2017, and April 2017 (see generally Parent Ex. CC). According to the report, the student improved from a "[p]rogressing [g]radually" (the student was making less than anticipated progress) designation earlier in the school year, to a "[p]rogressing [s]atisfactorily" (the student was making satisfactory progress and was expected to achieve the goal) by April 2017 on one of one study skill goals, two of two reading goals, one of two writing goals, and two of two mathematics goals, reflecting progress in his ability to: independently initiate and complete a teacher assigned activity within a specified time; reduce reading rate to increase fluency and intelligibility; answer "wh" questions about texts read; produce a written piece including specific components and supporting details; using strategies to solve math problems; and accurately solve math calculation problems and check his work (id. at pp. 2-3).⁶⁰

The 2016-17 STAR reading report reflected that in September 2016 the student read at the third grade fifth month level (9th percentile) and in May of 2017 the student read at the third grade ninth month level (8th percentile), indicating a progression of four months according to this measure (Parent Ex. EE). The 2016-17 STAR mathematics assessment indicated that in September 2016 the student achieved a third grade sixth month (9th percentile) level, and that in May 2017 the student had progressed to the fifth grade third month level (21st percentile), which reflected a full grade level plus seven month increase in mathematic skills according to this measure (Parent Ex. EE at p. 2). Additionally, the student's 2016-17 report card indicated that the student received final grades for the year of 82 (science), 81 (ELA), 80 (social studies), 77 (mathematics), and 94 (Spanish) (Dist. Ex. 159 at p. 17).

Review of information developed in May 2017 also reflects that the student had demonstrated progress in academic areas. As previously discussed above, present levels of reading performance indicated that the student was making slow, steady progress toward comprehension goals and that he demonstrated grade level decoding skills, accuracy, and fluency (Dist. Ex. 8 at p. 9). Additionally, the student's critical thinking skills continued to develop and when engaged and reading at a slower rate, the student demonstrated literal comprehension skills independently (id.). Present levels of the student's writing performance reflected that the student was making progress in written expression and benefited from graphic organizers and teacher support to develop a topic with details and organization, and to add complexity to his writing, and respond to questions by including text evidence to support his response (id.). The math present levels of performance indicated that the student showed improvement in skills and confidence when

⁵⁹ Although, the student's performance over the course of the 2016-17 school year is relevant for prospective educational planning for the 2017-18 school year, the student's performance during the 2017-18 school year is impermissibly retrospective with respect to planning for the 2017-18 school year (R.E. v. New York City Dep't of Educ., 694 F.3d 167, 186-87 [2d Cir. 2012]).

⁶⁰ The June 2017 IEP annual goals progress report indicated that the student achieved the study skills goal, and two out of two mathematics goals (Parent Ex. FF at pp. 2, 5). Additionally, the progress report reflected that the student continued to progress satisfactorily, but did not achieve the two reading and the two writing goals (id. at pp. 3-4).

approaching mathematical tasks and was making slow steady progress regarding computation and word problem goals with moderate support (*id.*). Additionally, the student had demonstrated improvement in his ability to memorize basic math facts and that using a calculator had been successful in allowing the student to focus on the greater mathematical concepts rather than the calculations (*id.*).

Additionally, with respect to study skills the May 2017 IEP annual goal progress report indicated the student was progressing satisfactorily toward his goal of independently initiating and completing a teacher assigned activity within a teacher specified time (Parent Ex. CC at p. 2). The May 2017 present levels of performance noted the student had demonstrated improvement in focus and attention during large group class lessons and was developing the ability to initiate work independently (Dist. Ex. 8 at p. 9). With support, the student had been successful in identifying and utilizing an organization system that worked for him, was successfully recording daily assignments, came prepared to class, and organized material with decreasing support (*id.*). Also with support, the student demonstrated growth in his ability to review classroom material to prepare for tests and quizzes, and when utilizing study skill strategies, the student demonstrated less test-taking anxiety and greater confidence (*id.*).

The hearing record shows that the student also demonstrated progress in related service area skills over the course of the 2016-17 school year. OT reports of progress from March and May 2017 reflected that the student was progressing satisfactorily and expected to achieve his IEP annual goals related to visual closure and visual perceptual skill tasks, and his ability to organize and appropriately space written work, and improve bilateral hand coordination for typing activities (Parent Ex. CC at p. 5; Dist. Exs. 60 at p. 1; 66). By May 2017, the student had achieved the IEP annual goal related to his ability to type 20 words per minute (goal 18 words per minute) and had shown improvement in handwriting skills including increased legibility, copy skills, spatial organization, spacing and alignment of letters (Dist. Exs. 60 at pp. 1-2; 66). In addition, present levels of performance developed in May 2017 indicated that the student continued to demonstrate progress with bilateral hand coordination/in-hand manipulation skills when working on various table top tasks (Dist. Ex. 8 at p. 11).

According to the May 2017 IEP annual goals progress report, by April 2017 the student had achieved two of the five speech-language goals and was progressing satisfactorily on the remaining goals (Parent Ex. CC at pp. 3-4). Specifically, the student exhibited progress in his ability to identify curriculum-related vocabulary, express conclusions, discuss main ideas, convey extended explanations, and provide detail descriptions to answer questions accurately about a story or event (*id.*). Progress was evident in his ability to verbally discuss an object in terms of attributes/functions, similarities/differences to other objects; and compare and contrast that information (*id.* at p. 4). The student also demonstrated progress in the ability to recall and comprehend a sequence of five events present orally, using concise meaningful language, and clarifying miscommunications when providing directions or describing an event or topic (*id.*). Additionally, the May 2017 speech-language progress summary indicated the student had learned to independently ask for repetition and clarification as needed, and required minimal teaching support when using those tools (Dist. Ex. 64). The report also noted that the student's vocabulary was consistently improving, he could compare and contrast objects, and verbally describe objects in terms of similarities and differences, attributes, and functions without teacher support (*id.*). The

student also demonstrated the ability to classify objects, and use and identify a variety of categories independently (*id.*).

The May 2017 PT progress report indicated the student "continue[d] to steadily improve his underlying trunk muscle strength," which carried over to gross motor tasks such as stair negotiation (Dist. Ex. 62 at p. 1). The May 2017 IEP annual goals progress report reflected that the student was progressing satisfactorily toward his motor skills goals including maintaining full body flexion and extension, and improving range of motion and flexibility (Parent Ex. CC at pp. 5-6; Dist. Ex. 62 at pp. 1-2). The May 2017 present levels of performance noted that relative to gross motor skills the student made slow gains in proximal muscle strength and negotiated the stairs in a crowded hallway without difficulty (Dist. Ex. 8 at pp. 10-11).

The May 2017 hearing services summary reported that the student was using self-advocacy skills with growing frequency and noted the student was attentive and focused in the classroom (Dist. Ex. 65 at p. 2). This summary report also indicated that the student demonstrated a good grasp of the curriculum and could implement new skills and concepts with minimal assistance (*id.*). The provider noted in the hearing services summary that the student's ability to attend to tasks continued to improve, his auditory comprehension skills showed "much success," his stamina had increased, and he was able to attend to longer, more complicated passages (*id.* at p. 3; see Dist. Ex. 8 at p. 9). As reported in the May 2017 IEP annual goals progress report, the student was progressing satisfactorily toward his hearing goals, including his ability to use and care for his FM system and bring it to class, summarize and locate two key concepts from information presented in class, preview/review content area vocabulary, and exhibit self-advocacy skills (Parent Ex. CC at pp. 6-7).⁶¹

For the 2017-18 school year the May 2017 CSE recommended continuation of the same programs and services as recommended by the May 2016 CSE, as well as the same supplementary aids and services, program modifications, and accommodations; assistive technology devices and services; and supports for school personnel on behalf of the student (compare Dist. Ex. 8 at pp. 1, 15-17, with Dist. Ex. 7 at pp. 1, 14-16). The May 2017 CSE, however, modified a portion of those recommendations as follows: the 15:1 special class ("Academic Center") would occur daily

⁶¹ In the due process complaint notice, the parent alleged that the student "often attends class without his [FM] transmitter, and is thus unable to access his education" (Dist. Ex. 1 at p. 10). On appeal, the parent generally asserts that the IHO erred in finding that the district addressed the student's hearing issues (Req. for Rev. ¶8). The parent's claim on appeal is related to testimony that the student refuses to wear his hearing aid due to discomfort, which appears to be born out by the hearing record (see Tr. pp. 1876-77; Dist. Ex. 67 at p. 2). However, the FM system recommended on the student's IEPs indicates that the FM system was to be incorporated with the student's private hearing aids (Dist. Exs. 7 at p. 16; 8 at p. 17). The student's teacher of the deaf explained that the FM system works with the student's hearing aids and that it cannot be used if the student does not use his hearing aids (Tr. pp. 1859, 1865). The teacher of the deaf testified that as students get older, they can outgrow the ear molds for their hearing aids, which can then create feedback (Tr. pp. 1894-95). She also testified that she believed the student had gotten new ear molds and that she believed it was the parent's responsibility obtain them (Tr. pp. 1893, 1899). The parent testified that she requested assistive technology to function with the student's hearing aids; however, there is no indication that she requested the district to replace the student's hearing aids (see Tr. pp. 953-54). The teacher of the deaf also explained that the district has a sound field system in all of the student's classes that "is a great backup option" if the student is not using his personal FM system (Tr. pp. 1879-81). Based on the above and considering the specific claims raised by the parent, the hearing record does not provide any basis for departing from the IHO's determination that the district addressed the student's hearing needs.

rather than 3 sessions per 6 day cycle; the individual session of speech-language therapy was discontinued; the classroom OT session was to be provided in a small group and not individually; hearing services were to be provided in the classroom rather than the therapy room; and the OT consultation was reduced to 15 minutes per session (compare Dist. Ex. 8 at pp. 1, 15-17, with Dist. Ex. 7 at pp. 1, 14-16). Additionally, the May 2017 IEP included 25 annual goals to address the student's study skill, reading, writing, mathematics, speech-language, social/emotional, motor, and hearing needs (Dist. Ex. 8 Ex. 8 at pp. 13-15).

b. Neuropsychological IEE Recommendations

The parent asserts on appeal that the IHO erred in determining that the May 2017 CSE considered the neuropsychological IEE report recommendations and that the CSE's at conclusion that the student's 2017-18 special education program and placement were consistent with those recommendations was "reasonable." The evidence in the hearing record indicates that the May 2017 CSE considered the neuropsychological IEE report, and as permitted under the IDEA—did not adopt all of its recommendations (see J.D. v. New York City Dep't of Educ., 2015 WL 7288647, at *14 [S.D.N.Y. Nov. 17, 2015]; T.G., 973 F. Supp. 2d at 340 [stating that "'although a CSE is required to consider reports from private experts, it is not required to follow all of their recommendations'"], quoting M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *12 [S.D.N.Y. Feb. 16, 2011]; J.C.S., 2013 WL 3975942, at *11 [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson, 325 F. Supp. 2d at 145).

Among other evaluative materials, the evidence in the hearing record reflects that the May 2017 CSE considered the neuropsychological IEE report (Tr. pp. 162-63; Dist. Ex. 8 at pp. 2, 3).⁶² The neuropsychological IEE was conducted over several sessions from August 2016 through October 2016 followed by a classroom observation on December 1, 2016 (Dist. Ex. 53 at p. 1). The neuropsychological IEE report included results of interviews with school staff and the parent, an extensive review of the student's records including report cards, progress reports from teachers and related service providers, a classroom observation, a 2015 district psychological evaluation report, and various other evaluation, educational, and medical reports going back to March 2011 (id. at pp. 1-27). The neuropsychological IEE report also reflected the direct testing results from numerous evaluation tools that assessed the student's social/emotional, cognition, motor abilities, sensation/perception, attention/concentration, speech-language ability, behavioral functioning, and academic achievement among other related areas (id. at pp. 27-51, 59-61).

Upon completion of the evaluation, the evaluating psychologist (evaluator) reported that "virtually all of [the student's] intellectual, cognitive and academic performances fell in the [a]verage range" (i.e., between the 25th and 74th percentiles), "which encompass[ed] two-thirds

⁶² The May 2017 IEP indicated that in addition to the neuropsychological IEE report, the May 2017 CSE considered the following reports that were developed after the May 2016 CSE meeting: a May 2017 audiological update, a May 2017 hearing services progress summary, a May 2017 PT progress summary, a May 2017 speech-language progress summary, an April 2017 doctor's letter requesting an airconditioned environment, a March 2017 OT progress summary, a March 2017 report card, a March 2017 teacher progress summary, and a March 2017 level 1 transition assessment (Dist. Ex. 8 at p. 3; see Parent Ex. Z; Dist. Exs. 53; 59-60; 62-65; 167).

of children his age" (Dist. Ex. 53 at p. 53). According to the evaluator, the student was "earning admirable grade with age-appropriate materials on age-appropriate tests, and he performed well during this evaluation on the academic achievement tests (*id.* at p. 58).⁶³ He also reported that he was "quite optimistic" about the student's learning potential, due to his "good memory, intact language skills, and [a]verage [l]anguage [a]rts abilities; further explaining that "[t]hese are the many ingredients required of a successful student" (*id.* at p. 57).

Despite the student's overall performance in the average range the evaluator noted a number of weaknesses, and opined that student's "most significant limitation" was that although the student could focus his attention in the moment (provided he was not anxiously overwhelmed), he was unable to sustain that attention over time (*id.* at p. 54).⁶⁴ The evaluator indicated that when the student was required to perform tasks independently or recall information after several minutes his performance demonstrated a marked decrease (*id.*). According to the evaluator, the student's physical and cognitive weaknesses and impairments resulted in a number of "functional limitations," which included social functioning, emotional functioning (such as difficulty with emotional modulation, anxiety, depression) and psychological functioning (such as low self-esteem, feelings of inadequacy) and learning problems (Dist. Ex. 53 at p. 55). The evaluator opined that the student's more debilitating limitation was his level of worry and anxiety, which adversely affected his ability to complete homework, tests, and oral presentations as well as transition back to school after breaks (*id.*). Worry and anxiety also affected the student's level of separation anxiety, fear about going to school, and general feelings of worry and apprehension, and his ability to calmly listen to novel instructions (*id.*).

The neuropsychological IEE report put forth a number of recommendations for the student's educational team to consider (Dist. Ex. 53 at pp. 56-57). The evaluator stated that the student's curriculum would need to be adjusted in light of his significant impairment in his ability to concentrate while learning and working independently (*id.* at p. 56). The evaluator indicated that in learning situations where a teacher was lecturing, or when the student was left for an extended period to work on his own, the student would not be able to sustain his attention to acquire much information from the lecture and would not effectively be able to work independently (*id.*). The evaluator indicated that for "high-value material, [the student] will likely need to be instructed individually or in a small group," noting that if there was minimal background, or ambient noise, this learning could occur in the classroom (*id.*). Other recommendations included that the student be allotted more time to complete school work due to his slower rate of producing verbal and

⁶³ The evaluator testified that he was "impressed" the student had scored in the average range on most academic measures with the exception of math, and further noted that "to some degree I would attribute [the student's] success at attaining those fundamental educational abilities to his education" (Tr. pp. 1572-73).

⁶⁴ The neuropsychological IEE report noted that the student's other weaknesses were in speech sound discrimination in his left ear, gross motor skills, fine motor dexterity for both hands, cognitive production speed, and math problem solving (Dist. Ex. 53 at pp. 53-55). The evaluator also questioned the presence of seizure activity (*id.* at pp. 54-55). Additionally, the report reflected parent, teacher, and student reports regarding their perceptions of the student's "behavioral and emotional problems" (*id.* at p. 54). The evaluator offered the student diagnoses of Bilateral Germinal Matrix Hemorrhages with External Hydrocephalus, Cerebral Palsy, Generalized Anxiety Disorder, Developmental Disorder of Scholastic Schools Skills, Unspecified and "Rule/out-Seizure Disorder/Absence Epileptic Syndrome" (*id.* at p. 56).

written information, and receive focused tutoring in math and detailed behavioral plans to address situations that result from the student's anxiety and feelings of being overwhelmed (id. at p. 57). The evaluator noted that the student "clearly enjoys and presumably benefits from interacting with his [neurotypical] classmates. To facilitate his ongoing social and emotional development, it is suggested that he continue to interact with his peers as often as his academic program permits" (id.).⁶⁵ Additionally, the evaluator suggested development of a plan for the student to complete some of his homework at home and a systematic communication protocol between home and school. (id.).

The May 2017 CSE meeting information summary indicated that "all members of the CSE" reviewed the neuropsychological IEE report (Dist. Ex. 8 at p. 2). Specifically noted in the meeting information summary was the evaluator's finding that the student's most significant impairment was his ability to sustain concentration while learning and working independently, that he produced verbal and written information more slowly than peers, that his math skills were weaker than his language arts abilities, and that in particular circumstances, the student could become anxious and overwhelmed (id.). Additionally, the summary noted the evaluator's optimism concerning the student's learning potential, due to his good memory and intact language and language arts skills (id.). According to the director, the CSE "felt [the evaluator's] report was very representative of [the student], and that "[a]t no point did [the evaluator] indicate any change in program would be required" (Tr. pp. 162-63).⁶⁶

The parent alleges on appeal that the IHO erred in determining that the program recommended for the 2017-18 school year included one to one and small group instruction consistent with the neuropsychological evaluator's recommendations. Although the evaluator testified during the impartial hearing that what he meant by "small group" was a group of one to three students "but not more than that," this detail is not contained in the neuropsychological IEE report and was not information available to the May 2017 CSE (compare Tr. p. 1579, with Dist. Ex. 53). The evidence shows that, at best, the evaluator was ambiguous about the extent to which the student needed small group instruction. The neuropsychological IEE before the CSE noted that in December 2016, the ICT had children working in small groups of five and six (Dist. Ex. 53 at p. 26), and during the impartial hearing, the director also testified that the student received ICT services in a class that was "very small" with no more than six students with IEPs and two full-time teachers, noting that ICT "programs" were "very small high ratio programs" (Tr. pp. 204-05). As described above, the special education teachers of the student's fifth and sixth grade programs testified about the small group teaching opportunities that occurred in ICT classes (Tr. pp. 276-78; 302-03, 448-49). Other opportunities for individual and small group instruction provided in the May 2017 IEP included the daily, 41 minute 15:1 special class, and three sessions per six-day cycle of individual hearing services (Tr. p 1862; Dist. Ex. 8 at p. 15). According to the teacher of the deaf—who provided the student's hearing services in his classroom—she assisted students with hearing loss in mainstream settings by supporting their curriculum and her "priority" was "to pre-teach material and reinforce what they [were] learning in class" (Tr. pp. 1856-58; see Dist. Ex. 8 at p. 15). She further testified that she was in contact with the student's "core class" teachers who

⁶⁵ The exhibit had a typographical error (Tr. p. 1804).

⁶⁶ The director testified that district staff "thought [the evaluator] did an excellent job," noting that he spoke with school staff and completed "a very conclusive evaluation" (Tr. pp. 163-64).

told her "what's been going on in class," which she retaught and reviewed with the student (Tr. p. 1862). Additionally, the teacher of the deaf stated that before the student went to class, she introduced new content to him that she thought he might struggle with (Tr. p. 1862).

Accordingly, comparison of the recommendations contained in the neuropsychological IEE report and the May 2017 IEP supports the IHO's findings that the May 2017 CSE's recommendations for the student were appropriate and provided him with appropriate services and supports to address his concentration difficulties, need for individual and small group instruction and wait time to prepare/answer questions, and access to typical peers (compare Dist. Ex. 8 at pp. 15-18, with Dist. Ex. 53 at pp. 56-57). The evidence does not support that the CSE was required to adopt services for the student consisting of 1:1 instruction and instruction in a group not to exceed three students. The district was also mandated by the IDEA to ensure that the student was placed with non-disabled peers to the maximum extent appropriate—with access to non-disabled peers being among the recommendations of in the neuropsychological IEE report—and the ICT services supported this objective. In consideration of the progress the student exhibited with the supports and services implemented in the May 2016 IEP as described above, and that the May 2017 CSE's recommendations were not inconsistent with those included in the neuropsychological IEE report, I find no reason to disturb the IHO's finding that the May 2017 IEP was reasonably calculated to enable the student to make progress appropriate in light of his circumstances.

E. Implementation of Counseling Services

The parent appeals from the IHO's determination that there was no basis for compensatory counseling services and challenges the IHO's findings related to the implementation of counseling from December 2016 through the 2017-18 school year.

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]).

As discussed above, the May 2016 CSE recommended that the student receive one 30-minute session of psychological counseling services in a small group per six-day cycle (Dist. Ex. 7 at p. 15). The district school psychologist assigned to the sixth grade began providing the student with counseling services at the start of the 2016-17 school year (Tr. pp. 392-93). On December 13, 2016, the parent sent a letter to the district superintendent indicating that she did not want the school psychologist to continue providing services to her son and requested that a different school psychologist deliver the student's counseling services (Dist. Ex. 145). The parent indicated in her email that the school psychologist "made a series of comments and recommendations that are so inappropriate they have jeopardized [the student's] emotional well-being and undermined my maternal relationship with my son, as any shred of trust I might otherwise have had about [the school psychologist]" (*id.*). The superintendent responded the next day that he noted the parent's concerns and forwarded the message to the director (Dist. Ex. 146).⁶⁷ On December 16, 2016, the director sent a letter to the parent indicating that she consulted with the building principal and determined that there were no other school psychologists available to provide the student with his mandated counseling services (Dist. Ex. 47). She further advised the parent that the school psychologist who had been providing the student with counseling is a State licensed school psychologist and that he could continue providing counseling services (*id.*). The parent was advised that if she did not want the school psychologist to continue providing services, her only option was to waive the student's attendance at counseling (*id.*). The director did not respond to the parent's stated reasons for not wanting the school psychologist to provide services (*id.*).⁶⁸ The parent responded to the director by email on December 22, 2016, in which the parent reiterated that she was not waiving counseling services but had concerns regarding the school psychologist (Dist. Ex. 148).⁶⁹ After December 13, 2016, the student no longer participated in counseling with the district; however, the school psychologist whom the parent objected to remained available to provide that service (Tr. pp. 410-11, 567-68). The director indicated that the parent communicated frequently to her and the building principal that the parent wanted a different provider for the student's counseling services; however, there is no indication of any further response by the director or the building principal (Tr. p. 152).

As noted by the IHO, at the time of the hearing, the school psychologist and the parent testified as to different versions of the events leading up to the parent's December 2016 correspondence (*see* IHO Decision at pp. 29-30). According to the parent, the student told her that the school psychologist told him not to tell the parent when he cried at school and not to tell the

⁶⁷ In her December 13, 2016 email, the parent also raised concerns about the director being present in a proposed meeting with the superintendent (Dist. Ex. 146).

⁶⁸ The director testified that she did not have any idea why the parent sent the initial letter to the district superintendent (Tr. p. 149).

⁶⁹ The parent's December 22, 2016 email did not allege the same concerns regarding the school psychologist as her earlier email, but instead more generally asserted that the school psychologist was not providing appropriate services, which she believed was substantiated by the student's school refusal and daily tantrums (Dist. Ex. 148). I do not find that the questioning of a staff member's ability to address a student's needs by a parent, alone, would require a school district to assign different personnel as this would simply afford parents a veto power over staffing assignments. That is not contemplated by the IDEA; however, it would be permissible for a parent to raise the concern at a CSE meeting and ask the CSE to respond.

parent about that conversation (Tr. pp. 564-66, 922, 1768-69).⁷⁰ The school psychologist testified that on one occasion, the parent, student, and the school psychologist were together and the parent left without explanation (Tr. pp. 407-08). According to the school psychologist, he then had a discussion with the student to find out if the parent was upset with the student or the school psychologist, and further discussed the student's behaviors with the student and tried "to see if he understood how his behavior was affecting other people" (Tr. pp. 408, 410). While the situation appears to be a misunderstanding that could have been corrected at the time of the parent's initial letter to the district superintendent, as noted by the IHO, "there is no evidence that the district was proactive in this matter" (IHO Decision at p. 30).

A district may refuse a parent's request for a preferred service provider and select its own provider, as long as the selection appropriately meets the student's needs (G.K. v. Montgomery Cnty. Intermediate Unit, 2015 WL 4395153, at *13 [E.D. Pa. July 17, 2015] see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 171 [2d Cir. 2014] [in assessing whether the parent's selection of private service providers was reimbursable as part of the student's educational program under pendency, the Second Circuit noted that "[i]t is up to the school district to decide how to provide that educational program, at least as long as the decision is made in good faith"]). Additionally, as noted above, 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). In this instance, the parent's unsubstantiated allegations, at a minimum, called into question the nature of the service being provided. Considering the substance of the allegation, the district should have taken measures to either clarify any misunderstanding or, at least, investigate the allegation before allowing the student to forego counseling services at the parent's behest. As the hearing record indicates that the district was not proactive in addressing this issue, the district is responsible to make up for the mandated counseling services that the student missed after December 13, 2016.

As discussed above, the student stopped participating in counseling services after December 13, 2016. The May 2017 CSE continued to recommend that the student receive one 30-minute session of psychological counseling services in a small group per six-day cycle (Dist. Ex. 8 at p. 15). The school psychologist who provided the student's counseling services during the 2016-17 school year, up to December 13, 2016, was present at the May 2017 CSE meeting (id. at p. 2). The May 2017 IEP indicated that the student needed "to develop effective coping strategies to deal with his stress and anxiety" and needed "a better understanding of how some of his irrational thoughts contribute to his anxiety" (id. at p. 10).

The parent, school psychologist, and director were all present at the May 2017 CSE meeting (Dist. Ex. 8 at p. 2). According to the parent, at the May 2017 CSE meeting, she asked who was "grading" the student's progress towards his counseling goals because she did not believe the student was participating in counseling, and the director responded that it might have been a mistake (Tr. pp. 680-81). The school psychologist did not testify as to what happened during the May 2017 CSE meeting other than to state that the student continued to be recommended for counseling services (Tr. p. 412). In discussing how the district addressed the student's anxiety

⁷⁰ The parent raised similar concerns in a September 2016 e-mail to the student's ELA teacher indicating that the student was not trusting of the school psychologist because the school psychologist told him that "he need not tell anybody when he crie[d] at school, even his own mother" (Parent Ex. NN at p. 2).

about completing homework, the director testified that the CSE "hoped [the student] would go to [the] school psychologist, to get additional strategies to help him through this" but "the parent did not allow him to go to the school psychologist and counseling" (Tr. pp. 166-67). She did not otherwise testify as to what was discussed at the May 2017 CSE meeting regarding counseling services.

Although the May 2017 CSE indicated the student still had social/emotional needs and included counseling as a related service, there is no indication that the CSE discussed, in any way, why the student was not participating in counseling services. As the district is responsible for implementing the student's IEP, and the district was aware of the parent's concerns and did not take any steps to look into them, the district is responsible to make up for the counseling services the student did not participate in for the 2017-18 school year. Accordingly, for the services missed during the second half of the 2016-17 school year and for the 2017-18 school year, the district is directed to provide the student with 45 30-minute sessions of psychological counseling services to be provided by someone other than the school psychologist who provided the student with psychological counseling services during the 2016-17 school year.⁷¹

VII. Conclusion

In summary, the evidence in the hearing record supports the IHO's determinations that the May 2016 and May 2017 CSEs' recommendations of ICT services, in conjunction with a 15:1 academic support special class, as well as related services and program accommodations described above, were reasonably calculated to enable the student to receive educational benefits for the 2016-17 and 2017-18 school years. However, considering the reasons the student did not participate in counseling from December 13, 2016 through the end of the 2017-18 school year, the district is directed to make up for the psychological counseling services the student missed.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated December 19, 2018 is modified by reversing that portion which found that the student was not entitled to compensatory counseling services; and

IT IS FURTHER ORDERED that the district shall provide the student with 45 30-minute sessions of compensatory counseling services in accordance with the body of this decision.

Dated: **Albany, New York**
March 1, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER

⁷¹ The 45 sessions are based on a 180-day school year with a service recommendation of one session per six-day cycle. Additionally, I express no opinion regarding the parent's claims against the school psychologist based upon this hearing record other than that the district did not provide any evidence that it followed any policy or procedure regarding an allegation of harassment, bullying, and/or abuse of a student by a district staff member. Instead the district merely showed that it continued to offer the services of the same psychologist against whom the parent rendered the allegations.