The University of the State of New York

The State Education Department
State Review Officer
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No. 16-035

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 Dryden Central School District

Appearances:
Hancock Estabrook, LLP, attorneys for respondent, Melinda B. Bowe, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied portions of the parent's requests for relief. The district cross-appeals from that portion of the IHO's decision which found that the educational program and services recommended by its Committee on Special Education (CSE) for the parent's son for the 2015-16 school year was not appropriate. The appeal must be dismissed. The cross-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). 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 hearing record reflects that the student has received diagnoses of autism spectrum disorder and attention deficit hyperactivity disorder (ADHD) (Joint Ex. 42 at p. 18). At the time of the impartial hearing, the student's cognitive functioning was in the low average to average range, with strengths in verbal and visual reasoning and weaknesses in processing speed and working memory (id. at pp. 7, 8, 11, 16, 17). Academically, the student demonstrated the ability to read grade-level texts, participate in a grade-level reading group, perform well on spelling tests, perform basic mathematical skills, and verbally present information for written assignments during the 2014-15 school year (Joint Ex. 37 at p. 7). However, the student's handwriting was difficult to read and frequently resulted in careless mathematical errors (id. at p 7). The student exhibited significant delays in fine motor skills, attentional skills, and social skills (id. at p. 9).

With regard to the student's educational history, the student transferred to the district in first grade, prior to the start of the 2012-13 school year (Joint Ex. 42 at p. 3). A CSE convened in August 2012, found the student eligible for special education as a student with an other health-impairment, and recommended that he receive related services, including speech-language therapy, occupational therapy (OT), and counseling (Joint Ex. 4 at pp. 1, 3, 8, 12). The district reevaluated the student in December 2012, completing psychological, OT, and speech-language evaluations (see Dist. Ex. 1). A CSE convened in December 2012 to review the evaluation reports and, as a result, recommended that speech-language therapy and counseling services be discontinued (see Joint Ex. 6 at pp. 3, 6).

In June 2013, a CSE convened for an annual review meeting and, after reviewing evaluations and reports of the student's performance in first grade, determined that the student was no longer eligible to receive special education services; however, a committee composed of the CSE members developed an accommodation plan pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) (Joint Exs. 7 at pp. 4, 8; 8 at pp. 1-4; 42 at p. 3). During the 2013-14 (second grade) school year the student received support and accommodations based on the accommodation plan (Tr. pp. 63-65; see Joint Exs. 8; 42 at p. 3). According to parent report, the student struggled in second grade and the parent requested another evaluation in February 2014, which was conducted and reviewed at an April 2014 CSE meeting, at which the CSE again determined that the student was ineligible for special education programs and services (Tr. pp. 65-66; Joint Exs. 16; 42 at p. 3). In a letter to the district, dated May 7, 2014, the parent rejected the June 2013 and April 2014 CSEs' findings of ineligibility and requested independent educational evaluations (IEEs) (Joint Ex. 17 at p. 1).

In June 2014, an accommodation plan was developed for the 2014-15 school year; however, in August 2014, the parent rejected the accommodation plan (Joint Exs. 20A; 20B; 21 at pp. 1-4). During the 2014-15 school year, the student attended a general education classroom and received no additional supports (Joint Exs. 21 at p. 4; 42 at pp. 1, 3). The parent obtained private speech-language, physical therapy (PT), OT, and psychological evaluations of the student between May 2014 and October 2014 at either parent or district expense (see Dist. Ex. 16 at pp. 7-25, 46-51). The district convened a CSE meeting in December 2014 (which the parent did not attend) to review teacher reports and the results of the private evaluations, and determined that more evaluations were needed to determine whether the student was eligible for special education (Tr. p. 67; Dist. Ex. 16 at pp. 2-6). Subsequently, the parent obtained the following additional IEEs: a March 2015 functional behavioral assessment (FBA) and behavioral intervention plan (BIP), and a May 2015 neuropsychological evaluation (see Joint Exs. 42, 47).[1]

A CSE convened on May 11, 2015 to conduct an initial review and found the student eligible for special education as a student with autism (Joint Ex. 37 at p. 4).[2] The CSE recommended that the student attend a general education class placement and receive group and

[1] According to the parent's due process complaint notice, these IEEs were the subject of a prior impartial hearing commenced by the district in November 2014, which resulted in a February 2015 IHO decision that ordered the district to fund the FBA and the neuropsychological evaluation (Parent Ex. A1 at pp. 10).

[2] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1][i]; 8 NYCRR 200.1[zz][1]).

individual counseling, individual OT, parent counseling and training, as well as several supplemental aids and services, program modifications, and accommodations, including adult support during academic times throughout the school day as needed (id. at pp. 1, 4, 10-12). The May 2015 IEP included four annual goals to address the student's social/emotional/behavioral and motor needs (id. at pp. 9-10). Due to concerns raised by members of the CSE regarding the student's fine motor, gross motor, and sensory needs, the May 2015 CSE recommended additional evaluations in the areas of assistive technology and PT and a sensory profile to be completed by the teacher (Dist. Ex. 38B at p. 8; Joint Exs. 37 at pp. 1-2; 51 at pp. 205-07, 224). The parent consented to the assistive technology and sensory profile evaluations, but requested an IEE for the PT evaluation, which the district agreed to fund (Tr. pp. 79-80; Dist. Ex. 38E; Joint Exs. 37 at pp. 1-2; 51 at pp. 144, 224, 235, 253-55). The assistive technology evaluation and sensory profile were completed in June 2015 (see Dist. Ex. 50; Joint Ex. 39). Following the May 2015 CSE meeting, the parent sent the district a copy of the IEP with requested corrections and revisions, which included, among other things, a request that the CSE recommend integrated co-teaching (ICT) services for the student (see Dist. Ex. 39).

On the day following the May 2015 CSE meeting, the parties entered into a settlement agreement to resolve issues raised in a January 2015 amended due process complaint notice which was the subject of another administrative proceeding involving the student (see Dist. Ex. 38D).[3] Between May and August 2015, the district and the parent exchanged in several communications relating to the parent's provision of consent for the initial provision of special education services to the student and the parent's disagreement with aspects of the May 2015 IEP (Dist. Exs. 43 at pp. 1-2; 56 at pp. 3-5; 58 at pp. 1, 3; 75; 76 at p. 1; Parent Exs. I-J; Joint Exs. 37 at pp. 2-3; 38 at p. 1; 51 at p. 252).

A CSE reconvened on August 10, 2015 for a reevaluation review and to discuss parent concerns regarding the May 2015 IEP; however, the parent did not attend (Dist. Exs. 52 at p. 9; 57C at p. 3). The August 2015 CSE reviewed the June 2015 sensory profile completed by the student's teacher and the June 2015 assistive technology evaluation, and discussed the additional services of a behavioral consultant (Tr. pp. 122, 125-26; Dist. Exs. 50; 57C at pp. 1, 3-4; Joint Exs. 39; 52 at pp. 2-30, 44-45). The August 2015 IEP placement and related services recommendations remained largely the same as the May 2015 IEP; however, the August 2015 CSE added additional information and recommendations to sections of the IEP, including evaluations/reports, present levels of performance, management needs, annual goals (adding two goals), supplementary aids and services/program modifications/accommodations, assistive technology devices and/or services, and supports for school personnel on behalf of the student (adding a behavioral intervention consult for the team on a monthly basis) (compare Joint Ex. 37 at pp. 4-15, with Dist. Ex. 57C at pp. 3-30). The August 2015 CSE also recommended a sensory program and access to a portable word processor on a trial basis (Dist. Ex. 57C at p. 18).

[3] The January 2015 amended due process complaint notice was not entered into evidence during the impartial hearing. According to the parent's October 2015 due process complaint notice, the "main allegation" in the January 2015 amended due process complaint notice related to the district's reliance on academic intervention services and response to intervention "in lieu" of special education (Parent Ex. A1 at p. 19).

A. Due Process Complaint Notice

In a due process complaint notice, dated October 20, 2015, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for "at least the last two years" (Parent Ex. A1 at pp. 3, 11-41).

As an initial matter, the parent alleged that the district breached the May 2015 settlement agreement (Parent Ex. A1 at p. 19). The parent asserted that the settlement agreement was "null and void" because the district failed to disclose certain necessary conditions for the student to receive the services and had failed to provide the OT services required by the settlement agreement (id.). The parent claimed that, because the district had not provided the required OT services, the due process complaint notice that she withdrew as a condition of the settlement agreement should be reinstated (id.).

Next, the parent asserted that the district wrongfully failed to provide services to the student on the basis that the parent had not provided consent to the entire IEP and further contended that, because she provided consent for the initial provision of services in 2012, she did not have to provide such consent again (Parent Ex. A1 at pp. 20-22, 26). The parent claimed that she provided a consent form on which she listed those portions of the May 2015 IEP which she accepted and rejected, after which the district ceased provision of all services (id. at pp. 25, 26).

With respect to the May 2015 CSE meeting, the parent alleged the CSE predetermined "the IEP, program, services and placement" recommended for the student (id. at pp. 15-17). In particular, the parent argued that the district failed to consider the full continuum of special education services due to its inappropriate reliance on results of a district screening of the student and/or on the provision of response to intervention (RtI) services instead of special education (id. at p. 16). The parent further alleged that the district inappropriately refused to consider the results of the privately-obtained PT evaluation at the May 2015 CSE meeting because it was not conducted in a school setting, sought to conduct a new PT evaluation of the student in order to avoid considering the private PT evaluation, and predetermined that the student should not receive PT services (id. at pp. 12-13). In addition, the parent asserted that the results of the independent PT evaluation established that the student should receive PT services (id. at p. 13).

Turning to the August 2015 CSE meeting and resultant IEP, the parent alleged that the district refused to reschedule the meeting despite her repeated requests (Parent Ex. A1 at pp. 27-28). The parent asserted that, as a result, the district conducted the CSE meeting without her, denying her the right to participate in the IEP development process (id. at p. 28).

As for the August 2015 IEP, the parent alleged that the August 2015 CSE did not adopt all of her requests for revisions or additions to the IEP, which she provided to the district in advance of the meeting, including her request to add academic annual goals to the student's IEP (Parent Ex. A1 at p. 31). With respect to the placement and services recommended, the parent alleged that the district impermissibly refused to recommend ICT services on the student's IEP, notwithstanding that the district "agree[d] to place him" in such a setting "due to his social, emotional and behavioral needs" (id. at p. 31). In addition, the parent alleged that the August 2015 IEP's lack of sufficient services or supports in the student's areas of academic need was evidenced by the district's October 2015 referral of the student for RtI reading services (id. at pp. 31, 36-38). The

parent also alleged that the trial sensory program included in the August 2015 IEP was inadequate because its purpose was "data collection" and asserted that the IEP did not contain any annual goals to address the student's sensory needs (id. at p. 29). Finally, the parent asserted that the district failed to provide the student with special transportation in the morning (id. at pp. 32-33).

The parent interposed numerous requests for relief (see Parent Ex. A1 at pp. 39-41). Relevant to this appeal, the parent requested that the district convene a CSE meeting to develop an IEP which recommended a placement comparable to her proposed IEP (id. at p. 40). The parent requested transportation reimbursement for the 2015-16 school year (id. at p. 41). The parent also sought monetary damages "due to the pain and suffering caused solely by the [d]istrict's failure to provide FAPE to the [s]tudent, deliberate discrimination against the [s]tudent, and continuous retaliation, harassment, coercion, and intimidation of the [p]arent, since July of 2012" (id.). The parent requested that the IHO consider allegations outside of the two-year limitations period "given the ongoing and egregious nature of the allegations" and the district's failure to provide the parent with the required notice of procedural safeguards until June 2014 (id.).[4]

By a second due process complaint notice, dated November 3, 2015, the parent set forth assertions relating to the district's responses to the student's alleged deteriorating social/emotional/behavioral well-being (Parent Ex. A2). The parent alleged that the district failed to respond to her request for a psychiatric diagnostic evaluation, thereby waiving its right to evaluate the student prior to funding an IEE (id. at pp. 1, 3). Accordingly, the parent requested as relief an independent psychiatric evaluation at public expense (id. at p. 5). Additionally, the parent requested an interim alternative educational setting during the pendency of the hearing at either of two specified out-of-district programs (id. at pp. 4-6).

B. Impartial Hearing Officer Decision

On November 16, 2015, the IHO issued an order consolidating the parent's two due process complaint notices (IHO Ex. LVII; see also Pre-Hr'g Tr. p. 49).[5] After three prehearing conferences on November 13, 18, and 23, 2015, the parties continued to an impartial hearing on December 7, 2015, which concluded on March 7, 2016, after 14 days of proceedings (see Pre-Hr'g Tr. pp. 1-

[4] The parent's October 2015 due process complaint notice additionally set forth claims that are no longer at issue on appeal (see Parent Ex. A1). In particular, with respect to the May 2015 CSE and IEP, the parent also asserted that: the district inappropriately permitted a physical therapist with whom the district contracted and the district's attorney to attend the meeting; failed to consider all IEEs or privately-obtained evaluations and, as a result, did not sufficiently describe or address the student's needs in the IEP; failed to recommend speech-language therapy services on the student's IEP; and inappropriately provided for implementation of many of the IEP recommendations by a school social worker (Parent Ex. A1 at pp. 11, 14-16). As for the August 2015 CSE meeting and resultant IEP, the parent again objected to the attendance of the district's attorney, disagreed with the recommendation for assistive technology on a trial basis, and asserted that the CSE adopted a BIP for the student other than the BIP that resulted from the IEEs obtained by the parent (id. at pp. 27, 29-31). The parent also objected to the district's requirement for approval of an eligibility determination by its board of education and its requirement for a prescription as a prerequisite to the district's provision of OT services (id. at pp. 18, 20-24). Finally, the parent sought IEEs resulting from her disagreement with the results of and the CSEs' reliance on a diagnostic reading assessment of the student (id. at pp. 34-35).

[5] On January 29, 2016, the parent filed another due process complaint notice which the IHO declined to consolidate with the instant proceeding (IHO Ex. LXIII).

172; Tr. pp. 1-1546; Jan. 19, 2016 Tr. pp. 1547-1613; Feb. 18, 2016 Tr. pp. 1546-1636; Tr. pp. 1637-83).[6] In a decision dated April 28, 2016, the IHO concluded that the district failed to offer the student a FAPE for the 2015-16 school year and granted a portion of the relief requested by the parent (see IHO Decision at pp. 65-92).

Relevant to this appeal, the IHO granted the district's motion to dismiss the parent's allegations relating to events that occurred prior to May 12, 2015, as they were barred by the parties' May 2015 settlement agreement, in which the parent expressly released the district from any and all claims and causes of action which existed as of the date of the agreement (IHO Decision at p. 65). The IHO noted that she had previously denied the parent's motion to vacate the order of termination relating to a prior impartial hearing or invalidate the settlement agreement, on the basis that she did not have jurisdiction to enforce the parties' settlement agreement (id. at pp. 7, 65, 88-89; see Pre-Hr'g Tr. pp. 16-18). The IHO denied the district's motion to dismiss the parent's claims to the extent that it argued the settlement agreement had released the district from liability relating to allegations stemming from the May 2015 IEP (IHO Decision at pp. 65-66). Specifically, the IHO found that, while the parent agreed to the May 2015 CSE's recommendations in the settlement agreement, the agreement did not refer to an IEP and the IEP was not provided to the parent until two weeks after the May 2015 CSE meeting (id. at pp. 66-67).

The IHO next found that the parent provided written consent for the initial provision of special education and related services to the student by accepting the student's eligibility and classification, despite rejecting the May 2015 and August 2015 IEPs (IHO Decision at p. 68). However, the IHO found that the district could not be held responsible for not implementing the IEPs because the parent rejected the IEPs and did not give the district permission to provide the services listed in the IEPs (id. at pp. 68-69).

With respect to the May 2015 CSE meeting, the IHO found that, while the parent and her advocate actively participated in the meeting, the CSE impermissibly predetermined that the student would not be placed in a special education program based on the district's "fixed view that a student who [was] not at least two or more years below grade level [was] not qualified to receive a special education program on his IEP" (IHO Decision at p. 76). As a result, the IHO concluded that the district denied the parent an opportunity to participate in the CSE meeting (id.). Next, the IHO found that the CSE considered the parent's privately-obtained evaluations, noting that the CSE discussed the evaluations and included information from them on the August 2015 IEP (id. at p. 75). However, the IHO held that the district committed a procedural violation by disregarding the privately-obtained PT evaluation, finding that the district did not inform the parent or disclose district criteria indicating that a private PT evaluation must be conducted in the school environment to be considered valid (id.).

[6] Due to a pagination error in the transcript, the pages of the impartial hearing are numbered consecutively until the proceedings conducted on February 18, 2016, at which point the pagination in the transcript resumes at page 1547, the same page at which the transcript for the January 19, 2016 proceeding began (compare Jan. 19 2016 Tr. pp. 1547-1613, with Feb. 18, 2016 Tr. pp. 1547-1637). The pages are numbered consecutively following the February 18, 2016 proceeding (see Tr. pp. 1637-83). For purposes of clarity, all citations to the January 19, 2016 and February 18, 2016 transcripts in this decision include the corresponding transcript date.

Turning to the August 2015 CSE meeting, the IHO found that the district failed to make sufficient efforts to ensure that the parent was present at the CSE meeting or was afforded the opportunity to participate in the meeting (IHO Decision at p. 74). The IHO noted that the August 2015 CSE made some changes to the student's IEP that appeared consistent with the parent's previously expressed concerns; however, the IHO concluded that the district significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (id. at pp. 74-75).

With regard to the August 2015 IEP, the IHO found that the student needed annual goals in academic areas to address his learning deficits (IHO Decision at pp. 77-79).[7] In addition, the IHO found that the "student's significant needs justified a special education placement," and the CSE acknowledged that the student required adult support in academics (id.). The IHO found that the IDEA and State regulations did not support the district's decision to place the student in a classroom providing ICT services but not put ICT services on the IEP because the student was not sufficiently below grade level academically (id. at pp. 79-80). The IHO further found that the district could not remedy the IEP by testifying that the adult support listed in supplemental aids and services would be implemented in a classroom providing ICT services (id. at p. 80).

Next, the IHO found that the district's failure to include PT as a related service in the student's IEP was a denial of a FAPE (IHO Decision at pp. 81-82). Specifically, the IHO found that the private PT evaluation, as well as the student's below grade-level gross motor skills, indicated that the student required PT to be able to participate in and receive educational benefits with respect to physical education (id.). The IHO concluded that the student was entitled to receive PT services but found that the hearing record was "silent with respect to a recommended frequency or duration" (id. at pp. 82-83). Turning to the student's sensory needs, the IHO found that, while the June 2015 sensory profile report confirmed the student's significant needs in this area, the August 2015 IEP did not address them in either the description of the student's present levels of performance or the three annual goals included to address his deficits in that area (id. at p. 83). Also with respect to the student's sensory needs, the IHO found that the OT recommendation contained in the IEP was "not reasonably calculated to provide the student a FAPE" (id.).

As for the parent's claim relating to transportation, the IHO found that the recommendation for a monitor on the bus was appropriate to meet the student's needs (IHO Decision at pp. 84-85). The IHO also found that, because the parent rejected the May and August 2015 IEPs, the district was not required to provide the special transportation services and, therefore, the parent was not entitled to reimbursement for travel expenses (id. at pp. 85, 92).

For relief, the IHO ordered the CSE to convene to amend the student's IEP, update his present levels of performance, include ICT services, develop appropriate annual goals in academics and pragmatic language, as well as any other areas needed, and amend the IEP to include four 30-minute sessions per week of pragmatic speech-language therapy or social skills training (IHO Decision at pp. 89-91). The IHO also found that the student was entitled to PT as a related service and that, if the parent exercised her right to an IEE for PT, then the CSE was ordered

[7] The IHO limited her analysis of the IEPs that resulted from the May and August 2015 CSE meetings to the August 2015 IEP (IHO Decision at p. 72).

to consider any recommendation for frequency and duration included within the report (id. at pp. 89, 91).

With regard to compensatory education, the IHO found that the student was deprived of needed special education and related services through the actions of both the parent and the district (IHO Decision at p. 90). The IHO noted that the student was in the same class he would have been in if the August 2015 CSE had included ICT services on his IEP and that he had received academic intervention services (AIS) in reading since October 2015 (id.). However, the IHO concluded it was equitable to require the district to provide the student with the OT and counseling that he would have received under the IEP (id. at pp. 90-91). The IHO noted that had the student not received daily pragmatic speech-language therapy or social skills training, she would have considered awarding such services as well (id. at p. 90).[8]

IV. Appeal for State-Level Review

The parent appeals, seeking to obtain the relief denied by the IHO. In particular, the parent asserts that the IHO erred in denying parent's motion to vacate the order of termination for a previous case based upon the May 2015 settlement agreement. The parent also asserts that the IHO erred in finding that the hearing record did not include information as to an appropriate frequency or duration for a PT recommendation for the student and requests modification of the IHO's order to direct the CSE to convene and include a specified frequency and duration on the student's IEP along with a recommendation for adapted physical education. Further, the parent asserts that the student has attended a general education classroom setting with ICT services as a regular education student for the 2015-16 school year and has, as a result, regressed. Therefore, the parent requests that the IHO's order be modified to direct the CSE to recommend placement of the student in either a district special education class with a small teacher-to-student ratio or an out-of-district placement. Alternatively, the parent requests that the ICT services ordered by the IHO to be included on the IEP be more specific with respect to frequency and duration and subject area (reading, math, and writing). In addition, the parent argues that the IHO erred in not awarding compensatory speech-language therapy, PT, and tutoring services. The parent next asserts that the IHO erred in denying the parent's request for reimbursement of transportation expenses incurred

[8] The IHO made additional determinations that the parties have not appealed. These include: that the IHO did not have jurisdiction to decide the parent's claims regarding violations of Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g); that the fact that certain attendees at the May 2015 CSE did not participate for the entire meeting did not constitute a procedural violation; that the district was permitted to have its attorney present at the August 2015 CSE meeting; that the district's procedure of requiring board approval prior to providing the student with an IEP did not cause an unreasonable delay of the provision of a FAPE to the student; that the assistive technology evaluation and the August 2015 CSE's recommendation that the student use assistive technology for a trail period were appropriate; that the provision of AIS to the student did not deny the student a FAPE; and that the parent was not entitled to an IEE in the area of reading relative to her disagreement with the district's administration of the Diagnostic Reading Assessment and that the parent's requests for an OT IEE and a psychiatric IEE of the student were moot (IHO Decision at pp. 68, 72-73, 77, 84-88). In addition, with respect to unappealed determinations adverse to the district, the IHO found that the CSEs' failure to recommend appropriate speech-language therapy services or intensive social skills training with adequate annual goals in that area constituted a denial of a FAPE to the student (id. at p. 81). Because the parties have not appealed these determinations, they have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

during the 2015-16 school year, arguing that she consented to those services included on the August 2015 IEP and, therefore, is entitled to reimbursement. Finally, the parent requests monetary reimbursement for the pain and suffering caused by the district's failure to provide FAPE to the student, discrimination against the student, and other actions against the parent.

In an answer, the district responds to the parent's allegations and argues that those portions of the IHO's decision from which the parent appealed should be upheld. The district also cross-appeals the IHO's denial of its motions to dismiss relating to the May 2015 settlement agreement and the parent's failure to provide the requisite consent for the provision of special education services. In addition, the district appeals the IHO's determinations that the district failed to offer the student a FAPE based on: predetermination of the student's educational placement; failure to ensure the parent's attendance at the August 2015 CSE; disregard of the private PT evaluation; and failure to include academic annual goals, ICT services, or PT services, or sufficiently address the student's sensory needs in the student's IEP for the 2015-16 school year. As for the relief granted, the district asserts that the IHO erred in ordering compensatory counseling and OT services.

In an answer to the district's cross-appeal, the parent responds to the district's allegations and argues that those portions of the IHO's decision from which the district appealed should be upheld.[9]

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of

[9] The district also filed a reply objecting to, among other things, the parent's characterizations of certain arguments in the district's cross-appeal as "moot."

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

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

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

VI. Discussion

A. Preliminary Matters

1. Settlement Agreement

On appeal, the parent asserts that the IHO erred in denying her motion to vacate the previous order of termination based upon the May 2015 settlement agreement. The parent argues that the settlement agreement is null and void because the district subsequently imposed requirements for its implementation that were not included in the terms of the agreement. The district asserts that the IHO erred in ruling on the parent's claims regarding the May 2015 CSE meeting and resulting IEP as the parties' settlement agreement barred such claims.

Although the parent argues that a request for enforcement of the settlement agreement is distinguishable from her motion to vacate the termination order, the findings she seeks would necessitate a determination that the settlement agreement was breached or otherwise invalid. Federal and State law and regulations do not confer jurisdiction to review or enforce settlement agreements on IHOs or SROs, whose jurisdiction is limited to matters relating to the identification, evaluation, or placement of students with disabilities, or the provision of a FAPE to such students (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1][a]; 34 CFR 300.503[a], 300.507[a][1]; 8 NYCRR 200.5[i][1]; see Application of the Bd. of Educ., Appeal No. 07-043; but see Application of the Bd. of Educ., Appeal No. 04-068). While a settlement agreement may, in some instances, be admissible and relevant to the facts underlying a parties' dispute in a due process proceeding, the administrative hearing officers in due process proceedings in New York lack enforcement mechanisms of their own and the Second Circuit has held that a due process proceeding is "not the proper vehicle to enforce the settlement agreement" (H.C. v. Colton-Pierrepont Cent. Sch. Dist., 341 Fed. App'x 687, 689-90 [2d Cir. July 20, 2009]; see A.R. v. New York City Dep't of Educ., 407 F.3d 65, 78 n.13 [2d Cir. 2005]; see also Honeoye Cent. Sch. Dist. v. S.V., 2011 WL 280989, at *3-*5 [W.D.N.Y. Jan. 26, 2011]). Further, the settlement agreement states that any action to enforce the terms of the settlement agreement should be brought in State Supreme Court or federal district court (Dist. Ex. 38D at p. 3).

Moreover, the IHO also did not have the authority to grant the parent's motion to vacate the previous termination order regardless of the underlying nature of the settlement agreement dispute. An IHO's jurisdiction is limited by statute and regulations and there is no authority for an IHO to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties after a final decision has been rendered (see J.T. v. Dep't of Educ., 2014 WL 1213911, at *10 [D. Haw. Mar. 24, 2014]; see, e.g., Application of the Dep't of Educ., Appeal No. 12-096). Rather, an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).[10] Accordingly, the hearing record supports the IHO's determination not to vacate the settlement agreement (see Application of a Child with a Disability, Appeal No.07-053).

[10] The IHO's original decision to terminate the proceeding relating to the parent's January 2015 amended due process complaint notice was not appealed to an SRO.

Contrary to the parent's request that the agreement be vacated, the district requests that the terms of the agreement be examined to determine which of the parents' claims were foreclosed by its terms. Unlike review or enforcement of a settlement agreement, "there is no . . . prohibition on [an IHO or an SRO's] ability to review and interpret a settlement agreement for the purposes of determining whether jurisdiction exists" (D.B.A. v. Special Sch. Dist. No. 1, 2010 WL 5300946, at *3-*4 [D Minn. Dec. 20, 2010]).

The parties signed the settlement agreement on May 12, 2015 (Dist. Ex. 38D at pp. 1-4). The settlement agreement stated that the parties entered into the agreement to "fully and finally resolve" the issues raised in the parent's amended due process complaint notice dated January 14, 2015 (id. at pp. 1-2). Under the settlement agreement, the parent agreed to withdraw the January 14, 2015 amended due process complaint notice (id. at pp. 2, 5). The settlement agreement contained a paragraph stating that the parties agreed "with the recommendations of the CSE at the May 11, 2015 eligibility meeting" (id. at p. 1).[11] It also contained a release, whereby the parent "released and discharged" the district "from any and all claims and/or causes of action which exist or may exist as of the date of this [a]greement including but not limited to those in connection with the [January 2015 h]earing [r]equest, [and] any claim or cause of action asserted under the IDEA" (id. at p. 2).

As the IHO found, the parent's agreement to the CSE's recommendations does not bar the parent from challenging the May 2015 IEP (IHO Decision at pp. 66-67).[12] The settlement agreement does not refer to an IEP (Dist. Ex. 38D at p. 1). Further, whereas the settlement agreement unambiguously releases the district from claims raised in the parent's January 2015 amended due process complaint notice, a review of the entire settlement agreement supports a finding that it does not waive claims relating to a FAPE for the 2015-16 school year, even if those claims were based on events that took place on or before May 12, 2015 (Dist. Ex. 38D at pp. 1, 2; see N.W. v. Dist. of Columbia, 107 F. Supp. 3d 141, 148-49 [D.D.C. 2015]; Application of a Child with a Disability, Appeal No. 96-067).

Assuming the May 2015 settlement agreement did not preclude claims in existence at the time of the May 2015 CSE meeting, such as the parent's claims regarding the May 2015 CSE process, as discussed below, these claims are without merits and do not support a finding that the district denied the student a FAPE for the 2015-16 school year. Further, as described below, even if the claims relating to the recommendations in the May 2015 IEP were foreclosed by the May 2015 settlement agreement, the August 2015 IEP superseded the May 2015 IEP as the operative IEP and the parent was not barred from pursuing such challenges (see M.P. v. Carmel Cent. Sch. Dist., 2016 WL 379765, at *5 [S.D.N.Y. Jan. 29, 2016]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also Application of the Dep't of Educ., Appeal No. 12-215). Therefore,

[11] The director of student services testified that the parent's advocate requested the addition of the clause that stated the parties were in agreement with the recommendations of the May 2015 CSE (Tr. p. 86; see Dist. Ex. 38D at p. 1).

[12] There is no evidence in the hearing record as to when the May 2015 IEP was finalized and provided to the parent. The parent alleged in her due process complaint notice and the IHO noted that the parent received the IEP two weeks after the CSE meeting (IHO Decision at p. 67; see Parent Ex. A1 at p. 18).

the parents' claims arising from the May 2015 and August 2015 CSEs meetings and the August 2015 IEP are discussed below.

2. Consent for Initial Provision of Services

The district asserts that the IHO erred in finding that the parent provided the requisite consent when she accepted only the student's eligibility and classification but rejected the provision of services contained in the May and August 2015 IEPs.[13]

According to the IDEA and federal and State regulations, a district "must obtain informed consent" from the parent of a student with a disability "before the initial provision of special education and related services" to the student (20 U.S.C. § 1414[a][1][D][i][II]; 34 CFR 300.300[b][1]; 8 NYCRR 200.5[b][1][ii]).[14] In addition, the district must make "reasonable efforts to obtain informed consent" from the parent, which requires that the district keep a record of attempts to secure such consent through "detailed records of telephone calls made or attempted and the results of those calls; copies of correspondence sent to the parent and any responses received; and detailed records of visits made to the parent's home or place of employment and the results of those visits" (34 CFR 300.300[b][2], [d][5]; 300.322[d]; see 8 NYCRR 200.5[b][1]; Parental Consent for Services, 71 Fed. Reg. 46633-34 [Aug. 14, 2006]). When a parent fails to respond to a request for consent or refuses to consent to the provision of special education and related services, the district will not be considered to be in violation of the requirement to make a FAPE available to the student because of the failure of the district to provide the student with the special education and related services for which district sought consent (20 U.S.C. § 1414 [a][1][D][ii][III][aa]; 34 CFR 300.300[b][3][ii]; 8 NYCRR 200.5[b][4][i]).

The parent's due process complaint notices did not assert that the district failed to offer the student a FAPE based upon a failure to implement the program services in the IEP (i.e., the program and services for which the district sought consent) (see Parent Exs. A1-A2).[15] Absent an assertion that the district failed to implement the student's IEP, the district's argument that it cannot

[13] The district argues that the parent failed to rebut the State complaint decisions, dated August 13, 2015, and September 3, 2015, which found that the parent failed to provide consent for the initial provision of services (Dist. Exs. 61 at p. 9; 62 at p. 6). While findings made in a State complaint may be offered as evidence in an impartial hearing, such findings do not have preclusive effect in an impartial hearing (8 NYCRR 200.5[*l*][2][viii][3]; Letter to Lieberman, 23 IDELR 351 [OSEP 1995]; see Lucht v. Molalla River Sch. Dist., 57 F. Supp. 2d 1060, 1065 [D. Or. 1999] [holding that, based upon Letter to Lieberman, res judicata did not attach in an impartial hearing following a State complaint process concerning the same student]). This is particularly so after a full impartial hearing and the development of a full record, whereas, in contrast, there is no indication as to what evidence the State complaint decisions relied upon.

[14] As defined in the federal and State regulations, consent means: the parents have been informed of all relevant information in their native language or other mode of communication, that they understand and agree in writing to the activity for which consent is sought, that the written consent form fully describes the activity for which consent is sought, lists any records that will be released and the people to whom any records will be released, and further that the parent must be aware that the consent is voluntary, may be revoked at any time, and if revoked, that revocation is not retroactive (34 CFR 300.9; 8 NYCRR 200.1[*l*]).

[15] The exception is the parent's claim related to transportation; however, as discussed below, while framed as an implementation claim, the parent actually disagreed with the recommendation for special transportation in the August 2015 IEP.

be considered to be in violation of the requirement to make a FAPE available to the student is inapposite (see 34 CFR 300.300[b][4][i]; 8 NYCRR 200.5[b][4][i]; Application of a Student with a Disability, Appeal No. 08-094). However, to the extent the parent's provision of consent or lack thereof is relevant to the question of equitable relief, it is discussed below.

B. May 2015 CSE Process

1. Predetermination

The district asserts that the IHO erred in finding that the May 2015 CSE predetermined the student's placement in a general education setting. The district argues that the May 2015 CSE considered the continuum of services and the parent and her advocate fully participated in the May 2015 CSE meeting. The parent agrees that both she and her advocate "did participate actively" in the May 2015 CSE meeting but, nonetheless, argues that, in recommending a general education classroom placement for the student, the CSE imposed its "fixed view" that certain placements on the continuum were only available to students who performed academically at a level a specific number of years below grade level (Answer to Cross-Appeal ¶ 18).

The consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. 2010]). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013], quoting M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 506 [2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).[16]

During the May 2015 CSE meeting, the district special education teacher described the different types of supports or programs and services the district provided (Tr. p. 713; Dist. Ex. 38B

[16] The parent additionally points to evidence that the comments and recommendations of the district-contracted physical therapist who attended the May 2015 CSE meeting were predetermined and communicated to the parent in an email by the physical therapist's supervisor. To the extent that this is asserted as a basis for the parent's predetermination claim, this claim is without merit. According to the hearing record, in the email to which the parent refers, the supervisor summarized the substance of his conversation with the physical therapist about the upcoming May 2015 CSE meeting (Tr. pp. 1225-26; Parent Ex. N at p. 1). However, "predetermination is not synonymous with preparation" Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006]). To the extent the email reflects that the physical therapist had some pre-formed opinions in advance of the meeting, there is no indication that she did not possess the requisite open mind with respect to the content of the student's IEP. As discussed further below, the May 2015 CSE considered the parent's private PT evaluation but decided not to adopt its recommendations and to acquire more information before determining whether the student required school-based PT.

at p. 8; Joint. Ex. 51 at pp. 214-15, 236). She stated that students who were functioning one to two years below grade level, were able to access the grade-level curriculum, and had success in the grade level curriculum would typically receive AIS (Joint Ex. 51 at pp. 211-12, 214).[17] She further stated that the student was performing close to or just slightly below grade-level (id. at pp. 214-15). She indicated that, in order to receive direct consultant teacher services, the student would need to be performing two or more years below grade level, struggling with academics, and having difficulty with grade level expectations (id. at p. 215).[18] She further indicated that students receiving ICT were functioning more than three years below grade level (id.).[19]

Prior to reaching the recommendation for a general education classroom placement, the May 2015 CSE discussed the appropriateness of other placements or services for the student, including the private neuropsychologist's recommendation for either a small student-to-teacher ratio or ICT services with an additional aide or other adult to provide individual support (Joint Ex. 51 at p. 236; see Tr. p. 245; Dist. Ex. 38B at pp. 4-5; Joint. Ex. 51 at pp. 90-91, 98-101). The director of student services reiterated that the student was not functioning far enough below grade level in the academic realm for some of the other placements or services available in the district (Joint Ex. 51 at 237-38). However, in addition to the district's more rigid view of the availability of particular placements or services, the CSE also discussed the appropriateness of the placements or services as they related to the student's needs. The director of student services indicated that a special class (including a 12:1, an 8:1+1, or a 6:1+3) would not be appropriate for the student (Joint Ex. 51 at p. 236). Several CSE members discussed that both the student and the parent would be unhappy if the student attended a 6:1+3 special class because the student was so "bright" and did not need that level of support (id. at p. 245). With regard to whether the student needed adult support from a special education teacher in particular, the district special education teacher explained that the student did not need a teacher to sit and work with him and that he already had acquired the sorts of skills that would warrant that level of support (id. at pp. 245-46).

The May 2015 CSE discussed and recommended on the student's IEP the provision of adult support during academic times (Joint Ex. 51 at p. 228; see also Dist. Ex. 38B at p. 8). During the CSE meeting, the director of student services explained that the recommendation for adult support could be implemented in an ICT classroom and that, notwithstanding that the student did not need ICT services for academic needs, he would benefit from the behavioral support available in such a setting (Joint Ex. 51 at pp. 239, 241; see also Tr. pp. 713, 781). However, the CSE declined to include a recommendation for ICT services on the IEP (Joint Ex. 51 at pp. 240-41). The director

[17] State regulations define AIS as "additional instruction which supplements the instruction provided in the general curriculum and assists students in meeting the State learning standards . . . and/or student support services which may include guidance, counseling, attendance, and study skills which are needed to support improved academic performance" but does not include special education services and programs (8 NYCRR 100.1[g]). AIS "shall be made available to students with disabilities on the same basis as nondisabled students" (id.).

[18] The district plan for special education for the 2014-15 school year stated that consultant teacher services were provided to students in any grade based on the identified needs of the students as determined by the CSE (Parent Ex. L at p. 3; see Tr. pp. 1506-07).

[19] The district plan for special education for the 2014-15 school year stated that ICT services were provided to a group of students with disabilities who were functioning academically two or more grade levels below expectations in the general education classroom (Parent Ex. L at p. 3).

of student services ended the program discussion by asking whether the May 2015 CSE agreed that the student's IEP would not include a recommendation for support from a special education teacher but that the recommended adult support would be provided in the classroom by either a program aide or a regular or special education teacher (id. at pp. 249-50). The parent and her advocate expressed their understanding of or agreement with this description (id. at p. 250).

Neither the May 2015 IEP, the May 2015 prior written notice, nor the May 2015 CSE meeting meetings indicate what other programs were considered at the May 2015 CSE meeting (Dist. Ex. 38B at pp. 8-9; Joint Ex. 37 at pp. 1, 4-15). However, the transcript of the May 2015 CSE meeting indicates that the May 2015 CSE discussed ICT services along with 12:1, 6:1+3, and 8:1+1 special classes (see Joint Ex. 51 at pp. 236-50). Contrary to the IHO's finding, the May 2015 CSE maintained the requisite open mind by discussing the evaluation reports, listening to verbal reports about the student, discussing the neuropsychologist's opinion on the program recommendations, twice discussing the program recommendation amongst themselves, describing the continuum of special education program and services, and responding to the parent's questions and concerns, as well as informing the parents that the May 2015 CSE's program decision was based upon the student's needs and not a district policy (see Dist. Ex. 38B at pp. 1-8; Joint. Ex. 51 at pp. 2-250).

Although not present in this case, there may be special instances when strict adherence to a general policy–such as the district's representations that certain placements on the continuum were only available to students that performed a specific number of years below grade level—is unwarranted because of specific information about a student's deficits before a CSE that dictates against such deference. Therefore, the district is cautioned that taking positions solely based on broad general policies that lack any exceptions may, in some instances, ultimately lead to a failure to address unique needs of a student (34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; Adams v. State, 195 F.3d 1141, 1151 [9th Cir. 1999]; Reusch v. Fountain, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] ["Although the Act does not require that each school building in [a district] be able to provide all the special education and related services for all types and severities of disabilities[, i]n all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]; see also Letter to Clarke, 48 IDELR 77 [OSEP 2007] [stating that service delivery determinations must be made by the CSE "based on a child's individual and unique needs, and cannot be made as a matter of general policy by administrators, teachers or others apart from the IEP Team process"]). In this case, however, the hearing record does not support the IHO's determination that the May 2015 CSE predetermined the student's placement recommendation.

2. Consideration of Evaluative Information

The district asserts that the IHO erred in finding that the May 2015 CSE failed to consider the parent's private PT evaluation. Specifically, the district argues that the private PT evaluation report was "extensively reviewed line by line" at the May 2015 CSE meeting.

In developing the recommendations for a student's IEP, the CSE must consider: the results of the most recent evaluation of the student; the student's strengths; the concerns of the parents for

enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). However, neither the IDEA nor State law requires a CSE to "'consider all potentially relevant evaluations'" of a student in the development of an IEP or to consider "'every single item of data available'" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 340 [S.D.N.Y. 2013], quoting F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581-82 [S.D.N.Y. 2013]; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013]). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs, the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at *9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *7-*9 [S.D.N.Y. Oct. 12, 2011]). Furthermore, "[c]onsideration does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight" (S.W. v. New York City Dep't of Educ., 92 F. Supp. 3d 143, 158 [S.D.N.Y. 2015]; see T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]). Moreover, the IDEA "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" (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]).

The May 2015 IEP included a list of the evaluations and reports considered by the CSE, which included the October 2014 private PT evaluation report (Joint Ex. 37 at p. 5; see Tr. pp. 350, 353-54). According to a physical therapist with whom the district contracted ("district-contracted physical therapist"), the purpose of her participation in the May 2015 CSE meeting was to share and read the October 2014 PT evaluation report (Tr. pp. 1183, 1215). The district-contracted physical therapist testified and the transcript and minutes of the May 2015 CSE meeting reflect that the district-contracted physical therapist reviewed the October 2014 PT evaluation report at the May 2015 CSE meeting "paragraph by paragraph," reviewed the recommendations in the report, and made her own recommendations (Tr. pp. 1183-84; Dist. Ex. 38B at p. 6; Joint Ex. 51 at pp. 124-144). Specifically, the district-contracted physical therapist recommended that an additional PT evaluation of the student be conducted in the school setting (Tr. p. 1186).

Additionally, the May 2015 prior written notice, as well as the testimony of the director of student services, reflects that the May 2015 CSE reviewed and considered the October 2014 PT evaluation report but rejected its recommendations as the evaluation did not address the student's ability to function in or access the school environment (Tr. pp. 282, 284, 290, 391-92, 405-06; Joint Ex. 37 at p. 1; see also Tr. pp. 78, 189). The director of student services also testified that the May 2015 CSE wanted a further evaluation because they believed that they did not have enough information about the student's ability to function in and navigate the school environment in order to determine if the student qualified for school-based PT services (Tr. pp. 391-92, 405-06, 424-25).

The IHO questioned the validity of the weight the May 2015 CSE afforded to the recommendations in the October 2014 private PT evaluation on the basis that the December 2014 CSE had previously considered the same evaluation without mentioning the simulated school setting in which the private PT evaluation was conducted (IHO Decision at p. 75). However, the hearing record does not support the IHO's reasoning on this point. As discussed further below in the discussion of the student's PT needs, the December 2014 CSE considered the parent's private PT evaluation and also mentioned that the simulated school setting of the private PT evaluation was an issue (Dist. Exs. 16 at pp. 3-4; 17 at p. 1).

Based on the foregoing, the hearing record indicates that the May 2015 CSE considered the parent's private PT evaluation but—as permitted under the IDEA—decided not to adopt its recommendations (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).

C. August 2015 CSE Process

The district asserts that the IHO erred in finding that the district failed to ensure the parent was present or afford her the opportunity to participate in the August 2015 CSE meeting. In particular, the district argues that it provided timely notice to the parent in advance of the August 2015 CSE meeting, responded to the parent's concerns regarding the meeting notice and CSE meeting participants, and would have rescheduled the August 2015 CSE meeting if the parent indicated that she was not able to attend the August 2015 meeting. The district also argues that the IHO failed to consider the weight of the evidence demonstrating the lengthy history of the parent's past failure to attend scheduled CSE meetings and her objection to the district counsel's presence at the CSE meetings.

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]; see Dervishi v. Stamford Bd. of Educ., 2016 WL 3548246, at *2 [2d Cir. June 27, 2016] [noting that, while the IDEA does not require parents' presence at meetings, it does require that parents be given the opportunity to participate in the decision about their child's educational placement]). In addition, federal and State regulations require school districts to take steps to ensure parent participation in CSE meetings, including: notifying the parent prior to the meeting, scheduling the meeting at a mutually agreed upon time and place, and the use of "other methods" such as teleconferencing (34 CFR 300.322[a], [c]; 8 NYCRR 200.5[d][1]). A district may conduct a CSE meeting without a parent in attendance if it is unable to convince the parents that they should attend; however, in such instances, the district is required to maintain detailed records of its attempts to ensure the parents' involvement and its attempts to arrange a mutually agreed upon time and place for the meeting (34 CFR 300.322[d]; 8 NYCRR 200.5[d][3], [4]).

Following the May 2015 CSE meeting, by emails dated June 9, 2015, the parent provided the director of student services with an original and a revised copy of a proposed IEP that she created for the student for the 2015-16 school year (Dist. Ex. 39 at pp. 1-2).[20] In an email to the director of student services dated June 24, 2015, the parent requested a CSE meeting to develop "a reasonably calculated IEP" for the student (Parent Ex. J at p. 24).[21] In a prior written notice dated July 14, 2015, the district responded to the parent's June 9 and June 24 emails (Dist. Ex. 76 at pp. 1-2). The district informed the parent that the extensive modifications to the student's IEP that she requested in her June 9, 2015 email would be subject to consideration by the CSE during a meeting convened for that purpose (id.). The district proposed to schedule a CSE meeting to review the parent's concerns, as well as to review the June 2015 assistive technology evaluation, and the June 2015 sensory profile report (id. at p. 2; see Joint Ex. 39; Dist. Ex. 50). By a meeting notice dated July 29, 2015, the district informed the parents that a CSE meeting was scheduled for August 10, 2015 at 9:30 a.m. for the purpose of a "reevaluation review" and listed the names and titles of the people who would be attending the CSE meeting (Dist. Ex. 52 at p. 1).

In two emails sent in early August 2015,[22] the parent expressed her disagreement with the purpose and the attendees listed on the meeting notice for the scheduled August 10, 2015 CSE meeting (Dist. Ex. 52 at pp. 4-6; Parent Ex. Q at p. 2). The parent indicated that the stated purpose (i.e., a reevaluation review) was not consistent with the prior written notice dated July 14, 2015 in which the district proposed a CSE meeting to review the parent's concerns, the assistive technology evaluation, and the sensory profile report, and she requested a revised notice (Dist. Ex. 52 at pp. 4, 6; Parent Ex. Q at p. 2). The parent also requested that the meeting notice include additional attendees, including a physical therapist, a board certified behavior analyst, and the occupational therapist who conducted the OT evaluation (Dist. Ex. 52 at pp. 5-6; Parent Ex. Q at p. 2). Further, the parent requested the district's attorney, the secretary, the second regular education teacher, and the second occupational therapist be removed as attendees because they did not possess knowledge or special expertise regarding the student (Dist. Ex. 52 at pp. 4-6; Parent Ex. Q at p. 2). In her second email, the parent requested that the meeting be rescheduled and that the district provide prior written notice if it refused to reschedule the meeting (Parent Ex. Q at p. 2). The parent expressed that she would like the opportunity to participate in the meeting but that she would not do so because the meeting violated "federal regulations" and because the district insisted on the attendance of its attorney (id.). The parent requested that, if the CSE convened without her, that the district record the meeting and provide her a copy of such recording (id.).

In a letter dated August 7, 2015, which was provided to the parent in an email attachment on the same date, the district responded to the parent's two August 2015 emails (see Dist. Ex. 52

[20] The parent sent a final copy of the IEP she created in an email on June 18, 2015 (Dist. Ex. 39 at pp. 3-43).

[21] The director of student services testified that this June 24, 2015 email did not look familiar and she did not recall it but that her email address was listed in the email (Tr. pp. 1499-1500). However, the prior written notice dated July 14, 2015 references an email dated June 24, 2015 in which parent requests a CSE meeting (Dist. Ex. 76 at p. 2).

[22] The first email was sent on August 1, 2015 (Dist. Ex. 52 at p. 4). The hearing record does not indicate the date of the second email but the district responded to the second email on August 7, 2015 (see Parent Ex. Q at p. 2).

at p. 7; Parent Ex. Q at p. 2).[23] The district agreed to revise the purpose of the August 10, 2015 CSE meeting listed on the meeting notice (Dist. Ex. 52 at p. 7). In a meeting notice dated, August 7, 2015, the district indicated that the meeting was scheduled as requested by the parent to review the parent's concerns, the assistive technology evaluation, the sensory profile report, and the current recommendations for programs and services for the student (id. at p. 9). The district included a board certified behavior analyst as an attendee on the meeting notice (id. at pp. 7, 9). However, the district did not accede to the parent's request for additional attendees (see id. at p. 9). The district did not explain why the parent's request for attendance of a physical therapist was denied but indicated that the occupational therapist listed on the July 29, 2015 meeting notice was familiar with the student, and the occupational therapist whose attendance the parent requested was unavailable to attend the meeting (see id. at pp. 7-8).[24] The district declined to remove any of the attendees set forth in the original meeting notice and set forth its reasoning (Dist. Ex. 52 at p. 7; compare Dist. Ex. 52 at p. 9, with Dist. Ex. 52 at p. 1). The district did not specifically address the parent's request to reschedule the August 10, 2015 CSE meeting (id. at pp. 7-8).

Subsequently, in four emails sent over the weekend before the August 10, 2015 CSE meeting, the parent expressed her disagreement with the August 7, 2015 letter and meeting notice and again requested that the meeting be rescheduled (Dist. Ex. 52 at p. 13; Parent Exs. O at pp. 1-4; P; Q at pp. 1-2). There is no evidence in the hearing record that the district responded to any of the emails or otherwise attempted to reschedule the August 2015 CSE meeting. The record demonstrates that there were three weeks before the 10-month school year began in September, within which time a CSE meeting could have been scheduled (Joint Ex. 37 at p. 4; Dist. Ex. 57C at p. 3; see Application of the Bd. of Educ., Appeal No. 07-087). The CSE meeting proceeded in the parent's absence on August 10, 2015 (Tr. p. 125; Dist. Exs. 57A; 57C at pp. 1, 3; Joint Ex 52 at pp. 1-2).

The evidence contained in the hearing record does not demonstrate that the district took steps to ensure that the parent was present at the CSE meeting or was afforded the opportunity to participate through an accommodation of her request for a rescheduling of the meeting (see 34 CFR 300.322[a]; 8 NYCRR 200.5[d]; Bd. of Educ. v. Horen, 2010 WL 3522373, at *18 [N.D. Ohio Sept. 8, 2010] [finding a procedural violation where parents asked for a postponement but the district did not respond or follow up with the parents the morning of the CSE meeting]; J.N. v. D.C., 677 F. Supp. 2d 314 [D.D.C. 2010] [finding that the district did nothing to accommodate the parent's timely, diligent, and reasonable efforts to reschedule the meeting]; Application of the Bd. of Educ., Appeal No. 09-124; Application of a Child with a Disability, Appeal No. 04-046). There is also no evidence in the hearing record of any attempts by the district to contact the parent when she did not appear at the August CSE meeting. Moreover, there is no evidence in the hearing record to support the statements in the August 10, 2015 prior written notice and the August 2015

[23] The parties stipulated that Parent Exhibits O through R would be admitted into evidence as proof of the sender and recipient of the emails but not as proof of the truth of the matters asserted in the emails (Feb. 18, 2016 Tr. pp. 1563-54).

[24] At the impartial hearing, the occupational therapist, who conducted the sensory profile report and whose attendance the parent requested, testified that she could not attend the August 2015 CSE meeting because her contract with the district was for ten months so she worked only from September to June and she was out of town when the August 2015 CSE meeting occurred (Tr. p. 957).

IEP that the parent refused to attend the August 2015 CSE meeting (Dist. Ex. 57C at pp. 1-2; Doug C. v. Hawaii Dep't of Educ., 720 F.3d 1038, 1044 [9th Cir. 2013] [noting that parental involvement requires the agency to include the parents in a CSE meeting unless they affirmatively refused to attend]; Horen, 2010 WL 3522373, at *15 [noting that the Ninth Circuit has held that a request to reschedule does not constitute refusal to meet]; Application of the Dep't of Educ., Appeal No. 13-051; but see A.L. v. Jackson Cnty. Sch. Bd., 635 Fed. App'x 774, 780 [11th Cir. Dec. 30, 2015] [finding that repeated refusals to attend four separately scheduled meetings during a four month period in person or by telephone were tantamount to refusal to attend]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F.Supp.2d 387, 392, 396 [S.D.N.Y. 2010] [finding that, when contacted by telephone, the parent affirmatively declined to participate in the CSE meeting]). In an August 31, 2015 email to the district director, the parent reiterated that she did not refuse to attend the August 2015 CSE meeting (Dist. Ex. 58 at p. 2). Further, contrary to the district's assertion, the hearing record does not demonstrate a lengthy history of the parent's past failures to attend scheduled CSE meetings. The hearing record indicates that the only CSE meeting that the parent did not attend was the December 2014 CSE meeting (Tr. pp. 226-28; Dist. Exs. 16 at pp. 1, 2, 6; 17 at p. 2). The parent did not refuse to attend the December 2014 CSE meeting but, rather, the parent was participating in an impartial hearing against the district in another proceeding involving the student on that date (Tr. p. 228).

In the parent's absence, the August 2015 CSE was able to address some, but not all, of her concerns. The hearing record shows that the August 2015 CSE reviewed the parent's proposed IEP and amended the student's IEP to include test scores from the independent evaluators' reports, added additional information to the student's present levels of performance, and considered the parent's request to attach the BIP to the student's IEP, identify additional resources to address the student's management needs, and develop academic annual goals (see Dist. Ex. 57D at pp. 3-5, 15-18; Dist. 52 at pp. 30-42; compare Dist. Ex. 57C at pp. 11-13, 16, with Dist. Ex. 39 at pp. 1-12, 14-15, 19, 22, 34). However, among other things, the August 2015 CSE was unable to address the parent's concerns regarding the student's need for PT (Dist. Exs. 57C at p. 1; 57D at pp. 3, 14; Joint Ex. 52 at p. 31). The director of student services confirmed that the August 2015 CSE attempted to address the parent's concerns but noted that there were significant differences between the IEP that the CSE developed for the student for the 2015-16 school year and the one that the parent proposed, notably that the parent's version included a special class placement, PT, speech-language therapy, additional accommodations, and an aide on a small bus as special transportation (Tr. pp. 97, 133-34; 1493). Here, a major purpose of the August 2015 CSE meeting was to discuss the parent's concerns regarding the student's 2015-16 IEP and, although the CSE attempted to extrapolate those concerns from the parent's proposed IEP, it was not an adequate substitute for the parent's actual participation in the meeting.

Based on the above, the evidence in the hearing record supports the IHO's determination that the district's failure to ensure the parent's attendance at the August 2015 CSE meeting "significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a [FAPE] to the student," such that the student was deprived a FAPE for the 2015-16 school year (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

D. August 2015 IEP

Under some circumstances, because of the procedural denial of FAPE arising from the district's failure to ensure the parent's participation at the August 2015 CSE meeting, it would be of limited value to proceed and consider the parent's challenges to the content of the IEP developed for the student for the 2015-16 school year. However, the nature of the relief sought by the parent (compensatory services, among other things) and the continuing discord between the parent and the district counsels further examination of the parties' respective arguments. Furthermore, notwithstanding the procedural denial of a FAPE arising from the August 2015 CSE meeting, the August 2015 IEP will be examined as the operative IEP. As the last IEP created by the CSE prior to the date for implementation and, further, consistent with the principals articulated by the Second Circuit relating to a district's opportunity to remedy defects in an IEP "without penalty" during a resolution period, the August 2015 IEP will be treated as the operative IEP for the student's 2015-16 school year (see R.E., 694 F.3d at 187-88; M.P., 2016 WL 379765, at *5 [concluding that a later-developed IEP was the operative IEP, even though it was developed after the parent's placement decision but before the due process complaint notice and, therefore, not in the context of a resolution session]; see also McCallion, 2013 WL 237846, at *8; Application of the Dep't of Educ., Appeal No. 12-215).[25] With that said, evidence relating to both the May 2015 and the August 2015 CSEs is relevant to the review of the ultimate recommendations included in the operative August 2015 IEP.

1. Annual Goals

The district asserts that the IHO erred in finding that the student's IEP was inadequate because it failed to include academic annual goals. Specifically, the district argues that, when determining the student's need for annual goals for academics, the IHO failed to consider the third grade regular education teacher's testimony as to the student's test performance, ability to read at grade level, and participation in a grade level reading group.

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

[25] Treating the August 2015 IEP as the operative IEP is particularly relevant to the dispute over the student's sensory needs, discussed below, since the August 2015 CSE had before it new information about and added recommendations to the IEP to address the student's needs in this area. If the May 2015 IEP was instead reviewed to examine if it sufficiently addressed the student's sensory needs, it would be largely an academic exercise since any compensatory remedy arising from a violation on this basis would necessarily take into account the updated information available to the August 2015 CSE. And, if that new information supported the manner in which the August 2015 IEP addressed the student's sensory needs, the original violation would be largely remedied notwithstanding that the parent did not participate in the August 2015 CSE meeting. It is in this sense that the reasoning set forth by the Second Circuit in R.E. is analogous to the present circumstances. With that said, the context of the resolution session discussed in R.E. also contemplates a parent's participation and the district's amendment to the IEP does nothing to remedy the procedural defect arising from its failure to ensure the parent's participation at the August 2015 CSE meeting.

measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The May 2015 CSE discussed the student's needs and determined the areas of concern included: attention/focus, social/behavioral/pragmatic communication, and fine motor skills (Joint Ex. 51 at p. 204). To address the student's needs, the May 2015 IEP included three social/emotional/behavioral annual goals, which focused on the student's peer interactions, attention, and problem-solving skills, and one motor annual goal, which addressed the student's functional pencil grasp and handwriting needs (Joint Ex. 37 at pp. 9-10 see Tr. pp. 403, 432-33). The August 2015 IEP included an additional social/emotional/behavioral annual goal that addressed self-monitoring and self-regulation, as well as an additional motor goal that addressed visual motor skills (compare Joint Ex. 37 at pp. 9-10, with Dist. Ex. 57C at pp. 15-16; see Tr. pp. 433-34). Based on a review of then-current evaluations and teacher reports, the May 2015 and August 2015 CSEs determined that the student did not exhibit significant academic deficits and as a result, academic annual goals were not recommended (Joint Exs. 51 at pp. 211-12, 246; 52 at p. 42).

According to the May 2015 private neuropsychological evaluation report, the student's basic reading skills were in the average range for word reading (standard score 98), word decoding (standard score 95), reading fluency (standard score 106), and reading comprehension (standard score 94) on the Woodcock-Johnson, Test of Achievement-Third Edition (WJ-III) (Joint Ex. 42 at pp. 9, 25). The evaluator noted that the student's reading was dysfluent and he lacked appropriate prosody even though he scored in the average range on reading fluency (id. at p. 9). The student performed in the average range when he was asked questions verbally about what he read (WJ-III passage comprehension standard score 94, Gray Oral Reading Test [GORT] comprehension scaled score 9, Wechsler Individual Achievement Test-Third Edition [WIAT-III] reading comprehension standard score 108); however, the student performed "in the impaired range" when he was asked to read passages and answer multiple choice questions without support (Gray Silent Reading Test [GSRT] standard score 69) (id. at pp. 9, 25). The evaluator opined that the student had obtained age and grade appropriate reading skills but struggled to apply them to more complex tasks without support due to low effort, stamina, and impulsive responding when working independently (id. at p. 9). To address the student's difficulties with respect to effort, stamina, and working independently, the August 2015 IEP included: counseling to assist with the development of strategies to help the student with focus, attention, and self-regulation; adult support during academic times throughout the day for refocusing and redirection; and accommodations such as verbal cueing, allowing for breaks, modified homework assignments, and additional time to complete assignments (Dist. Ex. 57C at pp. 11-18; see Tr. pp. 266-67).

The student's third grade regular education teacher indicated at the May 2015 CSE meeting that the student passed the level 28 (end of second grade/beginning of third grade) oral reading fluency portion of the Diagnostic Reading Assessment (DRA) in February 2015, but did not pass the reading comprehension section due to the writing requirement (Tr. pp. 346-47; Dist. Ex. 57C at p. 10; Parent Ex. HH at p. 1; Joint Ex 51 at p. 145). The teacher reported that the student was in a grade-level reading group, was able to read grade-level texts, used strategies to figure out unknown words, and usually corrected miscues that interfered with meaning, but that his phrasing was not always accurate and he had difficulty showing comprehension due to his difficulty with

writing (Dist. Ex. 57C at pp. 5, 10; Parent Ex. HH at p. 1; Joint Exs. 9 at p. 16; 51 at p. 146). On the student's report card, the teacher recommended that the student read nightly and occasionally read out loud to improve his fluency (Joint Ex. 9 at p. 15). However, according to the May 2015 neuropsychological evaluation, the parent reported that the student refused to do most homework and that the parents struggled to find a behavioral system to improve the student's motivation and follow through with homework (Joint Ex. 42 at p. 4). To address this need, the August 2015 IEP included a monthly team meeting along with parent training and counseling to help coordinate between home and school and provide training to the parent (Dist. Ex. 57C at pp. 16, 18; Joint Ex. 51 at pp. 221-24).

With respect to the student's writing skills, the May 2015 neuropsychological evaluation report indicated that the administration of subtests of the WJ-III and WIAT-III revealed that the student had average to above average skills in the areas of phonological processing (including spelling and word decoding) (standard score 114), writing fluency (standard score 102), and writing sentences when given additional structure, such as provision of target words (standard score 101) (Joint Ex. 42 at pp. 9-10, 17, 25). According to the evaluator, the student's handwriting was illegible at times and the physical act of handwriting appeared to cause him frustration (id. at p. 17). The student's third grade teacher also reported that the physical act of writing was difficult for him and that the student frequently rushed through assignments and disregarded lines and letter size (Dist. Ex. 57C at p. 11; Parent Ex. HH at p. 2). However, the teacher reported that, when provided with grid paper, the student was able to write smaller and make letters more uniform in size and, when the student typed responses or had the teacher scribe his responses for him, he showed an ability to produce summaries, letters, responses to literature, and basic short stories (Dist. Ex. 57C at p. 11; Parent Ex. HH at p. 2). The teacher indicated that the student did well on spelling tests, when given the time in class to do weekly study (Dist. Ex. 57C at p. 11; Parent HH at p. 2). To address the student's difficulty with handwriting, the May 2015 CSE recommended two 30-minute individual weekly sessions of OT, a fine motor annual goal, and an assistive technology evaluation (Joint Exs. 37 at pp. 2, 10, 11; 51 at pp. 204-05, 224, 236). After reviewing the June 2015 assistive technology evaluation, the August 2015 CSE recommended that the student have access to a portable word processor to support him in producing written work, in addition to the previous recommendations (Tr. pp. 1239, 1250; Dist. Exs. 57 C at p. 18; 57D at pp. 2-3; Joint Ex. 52 at pp. 8-30).

According to results of the May 2015 neuropsychological evaluation report, the student scored below average in the areas of math calculation (standard score of 89), applied problems (standard score of 80), and math fluency (standard score of 71) on the WJ-III (Joint Ex. 42 at pp. 9, 25). The evaluator stated that the student had difficulty when required to quickly and automatically solve simple addition and subtraction problems and mathematical word problems, and his slow scanning and processing speed, weak fine motor skills, and attention impacted his performance (id. at p. 9). The evaluator also reported that the student required redirection and repetition to stay on task (id.). According to the student's third grade teacher, the student had good basic math skills and abilities, but his poor handwriting frequently resulted in careless errors (Dist. Ex. 57C at p. 11; Parent Ex. HH at p. 3). The teacher indicated that the student's inability to compute calculations quickly and fluently slowed him down (id.). However, the teacher also reported that the student did not complete homework or study math facts and told her that he did not have to do math in class or take notes because his mother told him he did not have to, and that these factors impacted the student's progress (Tr. pp. 674-75). The teacher indicated, while the

parent had reported that the student did not understand the homework and required step-by-step one-on-one instruction, the student was able to independently complete some of the more difficult homework problems in school with no difficulty (Tr. pp. 680-82). The teacher went on to say that, even though it often appeared that the student was not paying attention to a lesson, he continued to do well on tests and quizzes and had a very good sense of math (Tr. p. 684). As noted previously, the August 2015 IEP addressed the student's difficulties with attention by providing counseling and annual goals to develop strategies to remain focused and on-task, along with providing additional adult support for refocusing and redirection (Dist. Ex. 57C at pp. 14, 15, 16-17). To address the student's difficulty with processing speed, the August 2015 IEP included accommodations such as modified homework assignments and additional time to complete assignments and tests (Dist. Exs. 51 at pp. 228-35; 57C at pp. 17-19).

According to the testimony of the director of student services, the school psychologist, and the classroom teacher, based on all of the information available to the May 2015 CSE, the CSE determined that the student did not need academic annual goals or a placement that included the support of a special education teacher; therefore, annual goals focused on areas such as reading, mathematics, or writing were not included on the student's IEP (Tr. pp. 348-49, 403, 525, 742-44, 1334-35; Dist. Ex. 38B at p. 9). The director of student services testified that the student was functioning slightly below grade level, but not to the point of receiving AIS at the time of the May 2015 CSE meeting (Tr. p. 435). According to the May 2015 CSE meeting transcript, the members of the CSE determined that the student needed refocusing and redirection, but not special education instruction for academic skill-building because the student already had such skills (Joint Ex. 51 at p. 246).

Thus, while the student exhibited some deficits in the academic realm, the annual goals and supports in the August 2015 IEP aligned with the student's needs in the areas of attention, motivation, ability to work independently, and handwriting, each of which impacted the student's academic functioning. Furthermore, every deficit area of the student's functioning need not have had a corresponding goal in the IEP in order to offer a FAPE (see, e.g., J.L. v. City Sch. Dist., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013] [the failure to address all areas of need though goals does not necessarily constitute a denial of a FAPE]). Therefore, the hearing record supports the views expressed by the May and August 2015 CSEs that the annual goals and accommodations included in the August 2015 IEP were consistent with the student's identified needs and that additional academic annual goals were not required in this instance (see A.H., 394 Fed. App'x at 722 [finding that math annual goals were unnecessary in light of evaluations indicating that the subject was not a particular area of weakness]; Application of a Student with a Disability, Appeal No. 15-095; Application of a Student with a Disability, Appeal No. 15-020; Application of a Student with a Disability, Appeal No. 10-074).

2. Adult Support

The district asserts that the IHO erred in finding that the student required ICT services to address his identified needs. Specifically, the district argues that the CSEs appropriately recommended additional adult support in the general education classroom to address the student's academic needs.

According to the private neuropsychologist, the student struggled with working independently and needed "constant 1-to-1 support or adult support," without which he could not focus (Tr. pp. 1376, 1379; see Joint Ex. 42 at pp. 17, 19-20). The neuropsychologist testified that the student was unable to keep up with classwork because he could not sit and complete assignments in class without support and his inability to maintain his focus would also affect his ability to work independently (Tr. p. 1377; see Joint Ex. 51 at p. 73).[26] According to the neuropsychologist, the student required additional support in the classroom and a smaller classroom setting (Tr. pp. 1391-93; Joint Ex. 42 at p. 19). The neuropsychologist stated that "[the student] would likely perform best in a small classroom setting with a small teacher-to-student ratio where the academic demands match his intellectual potential with the support he needs" (Joint Exs. 42 at p. 19; see also Joint Ex. 51 at p. 90). However, she stated that, alternatively, the student might be successful in a larger collaborative classroom with a special education teacher but would require additional support to manage the larger setting, such as a 1:1 classroom aid to assist with redirection, focus, and organization (Joint Ex. 42 at p. 19; see also Joint Ex. 51 at p. 90). She indicated an additional aide in the classroom would be mostly for refocusing and redirecting the student to make sure he was attending to what was going on in the classroom, and that adult support during testing could be provided by an aide or a special education teacher (Tr. pp. 1415, 1449-50; Joint Ex. 51 at pp. 90-91). In addition to adult support, the neuropsychologist acknowledged that some of the accommodations she recommended in her report were included in the May 2015 IEP, such as the recommendations for an FBA and a BIP, allowing for breaks, chunking of assignments, special seating arrangements, graphic organizers, modified homework assignments, and additional time to complete assignments (Tr. pp. 1374-76, 1424-26; compare Joint Ex. 42 at pp. 19-23, with Joint Ex. 37 at pp. 11-12).

In contrast to the neuropsychologist's report of the student's constant need for 1:1 support, the student's third grade regular education teacher stated that the student needed reminders to get started on independent work and to continue working because he was unfocused, but that he was then usually able to work independently on a task until he was done with it (Tr. pp. 799-804). She stated that the student had the academic knowledge to do independent work and completed most tasks after receiving adult support to get started, although at times he might need prompting to continue (Tr. pp. 753, 803-04). The teacher testified that the May 2015 CSE discussed the student's need for adult support to start tasks and stay engaged with tasks, as well as ways that adult support could be provided in the district, such as in an general education classroom with ICT services or a teacher's aide (Tr. pp. 713-14; see also Tr. pp. 781-82; Joint Ex. 51 at pp. 73, 90, 239-46).

Based on a review of the hearing record, the May 2015 CSE, including the parent and her advocate, discussed the neuropsychologist's recommendation regarding the student's need for additional adult support and a smaller student-to-teacher ratio, as well as possible ways to provide this support to the student (Tr. pp. 244-48; Dist. Ex. 51 at pp. 90-91, 228, 239-41, 244-46, 249-50). The director of student services testified that the May 2015 CSE discussed the supports available to students in the district and the recommendation was made to place the student in an ICT classroom setting, not because he needed the academic support, but because of the extra staff

[26] The neuropsychologist evaluated the student over three days in an outpatient setting, interviewed the parent, reviewed records, and had the parents and teacher complete behavior rating scales; however, she did not observe the student in school or speak to teachers or other school personnel regarding the student's functioning in school (Tr. pp. 1411-13; Joint Ex. 42 at pp. 1-2, 5, 12, 14-15).

that were in the classroom (Tr. pp. 245-46; Joint Ex. 51 at pp. 239-40, 245-46). She also indicated that adult support would be implemented throughout the school day as needed by adults in the classroom, including the regular education teacher, special education teacher, and classroom aide (Tr. pp. 246, 255; see also Jan. 19, 2016 Tr. p. 1587; Joint Ex. 51 at pp. 90-91, 228-35, 239-42, 244). The director of student services indicated that adult support was intended to provide the student with redirection, refocusing, and additional assistance so he could access the curriculum (Tr. p. 404; see also Tr. p. 78; Jan. 19, 2016 Tr. p. 1587; Joint Ex. 51 at pp. 90, 239). The director of student services also stated that the May 2015 CSE discussed the parent's concerns, including placements where the student would not be successful, more restrictive placements, and services the student did not need (Tr. pp. 1532-33). This discussion included the neuropsychologist's recommendation for a placement that included appropriate intellectual and social matches for the student and the reasons why self-contained classes would not be appropriate for the student (Joint Exs. 42 at p. 19; 51 at pp. 235-45).

Throughout the learning characteristics and management needs sections of the August 2015 IEP, the CSE noted that the student required adult support to remain on task, engage in academic tasks, ensure work completion, and increase appropriate class participation (Dist. Ex. 57C at pp. 11- 14). According to the August 2015 IEP, the student's management needs included: difficulty with organization; requiring breaks throughout the day; difficulty sitting at a desk; frequently making loud, disruptive noises and needing reminders to lower his voice; engaging in off-task behaviors when demands were put on him and requiring a BIP; and requiring the support of assistive technology to address his writing needs (id. at p. 14). The student's third grade regular education teacher discussed how she addressed the student's management needs, such as by providing him with two desks in the classroom to organize supplies, allowing the student to sit at his desk or sit on the floor with his peers during whole group activities, allowing the student to take tests in the hallway or on the floor, scribing for the student when requested, allowing him to take breaks, and letting him go to lunch or physical education a few minutes before the rest of the class to help with transitions (Dist. Ex. 57C at p. 11; Parent Ex. HH at pp. 4-7). The hearing record shows that the student made progress during the 2014-15 school year in a general education classroom and the student's needs remained largely the same for the 2015-16 school year; therefore, it was reasonable for the CSE to recommend a general education placement with additional adult support for the 2015-16 school year (Parent Ex. HH at pp. 1-4; Joint Ex. 9 at pp. 13-16).

Despite the parent's preference for a special class placement for the student, the information available to the May 2015 and August 2015 CSEs established that the student could receive educational benefit in the general education class setting with the use of supplementary aids and services and, therefore, removing the student from the general education environment would have violated LRE principles (see 20 U.S.C. § 1412[a][5][A]; see also 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21). The continuum of special education services for student with disabilities include a variety of services that may be delivered to a student who attends a general education class, such as ICT services (8 NYCRR 200.6[g]; see "Continuum of Special Education Services for School-Age Students with Disabilities," at i, 1, Office of Special Educ. [Nov. 2013], available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf). State regulation defines ICT services as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]).

The "maximum number of students with disabilities receiving [ICT] services in a class shall not exceed 12 students" and school personnel assigned to such a classroom shall "minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][1]-[2]). State guidance issued in November 2013 elaborated that ICT services provide for the delivery of primary instruction to all of the students attending such a setting ("Continuum of Special Education Services for School-Age Students with Disabilities," at 14-15). Other services on the continuum for students attending regular education classes include direct consultant teacher services (which consist of instruction provided by a certified special education teacher for the purpose of adapting the content, methodology, or delivery of instruction to aid a student to benefit from general education classes) and resource room services (which provide supplemental instruction by a special education teacher) (8 NYCRR 200.1[m][1]; [rr]; see 8 NYCRR 200.6[d], [f]; "Continuum of Special Education Services for School-Age Students with Disabilities," at 10, 14-15). These supports all involve the support of a special education teacher, which the CSEs explicitly found the student did not require.

Supplementary aids and services may also be recommended for students in general education classes in the form of "aids, services and other supports . . . to enable students with disabilities to be educated with nondisabled students to the maximum extent appropriate in accordance with the [LRE]" and may include the assignment of supplementary school personnel (8 NYCRR 200.1[bbb]; "Continuum of Special Education Services for School-Age Students with Disabilities," at 5; see "'Supplementary School Personnel' Replaces the Term 'Paraprofessional' in Part 200 of the Regulations of the Commissioner of Education," VESID [Aug. 2004], available at http://www.p12.nysed.gov/specialed/publications/policy/ suppschpersonnel.pdf). Supplementary school personnel "means a teacher aide or a teaching assistant" (8 NYCRR 200.1[hh]). A teaching assistant may provide "direct instructional services to students" while under the supervision of a certified teacher (see 8 NYCRR 80-5.6[b], [c]; see also 34 CFR 200.58[a][2][i] [defining paraprofessional as "an individual who provides instructional support"]). A "teacher aide" is defined as an individual assigned to "assist teachers" in nonteaching duties, including but not limited to "supervising students and performing such other services as support teaching duties when such services are determined and supervised by [the] teacher" (8 NYCRR 80-5.6[b]). State guidance further indicates that a teacher aide may perform duties such as assisting students with behavioral/management needs ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 20).

As described above, attention/focus, social/behavioral/pragmatic communication, and fine motor skills were the student's greatest area of need in the classroom and, therefore, the support of an additional adult in the classroom was an appropriate recommendation, even if it was implemented by a teacher aide. That the CSE contemplated that the recommendation for adult support might be implemented by the student's attendance in a setting that provided more support than the student needed in order to receive a FAPE is not, in turn, a denial of a FAPE (see Application of a Student with a Disability, Appeal No. 12-169 [placement of a student in a 12:1+1 special class instead of a 12:1 special class would not be a material or substantial deviation from the student's IEP]; Application of a Student with a Disability, Appeal No. 11-042 [although the assigned school may have provided ten periods of SETSS per week, as opposed to the five periods

recommended in the student's IEP, this did not constitute a deprivation of a FAPE]).[27] However, the district is reminded that "[w]hen recommending special education services in a student's IEP, the [CSE] must use the special education services terms as used in the regulations" ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 2). Accordingly, it would have been more in line with State regulations to identify the support recommended in the August 2015 IEP as being that of supplementary school personnel or, more specifically, a "teaching assistant" or "teacher aide." However, the ambiguity of the recommendation does not amount to a denial of a FAPE in this instance.

3. Physical Therapy

The district asserts that the IHO erred in finding that the CSE's failure to recommend PT was a denial of FAPE. Contrary to the IHO's finding, the hearing record does not demonstrate that school-based PT was necessary for the student to receive educational benefits.

An IEP must include a statement of the related services recommended for a student based on such student's specific needs (8 NYCRR 200.6[e]; see 20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]). "Related services" is defined by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" and includes physical therapy (20 U.S.C. § 1401[26][A] [emphasis added]; see 34 CFR 300.34[a]; 8 NYCRR 200.1[qq]).

Although the October 2014 private PT evaluation indicated that because the student's performance in his school setting was "so profoundly impacted by his motor deficits, he qualifie[d] for school based physical therapy," the hearing record does not bear this out (Dist. Ex. 16 at p. 16). The October 2014 private PT evaluation did not include or consider information related to the student's functioning in the school environment (Dist. Ex. 16). As a consequence, as the CSE concluded, it carries little weight in the consideration of whether the student required PT services in order to benefit from special education (see Letter to Geigerman, 43 IDELR 85 [OSEP 2004]).

The hearing record reflects that the October 2014 PT evaluation obtained by the parent was initially discussed at the December 2014 CSE meeting (Dist. Exs. 16 at pp. 3-4; 17 at p. 1).[28] December 2014 CSE meeting minutes reflect that, at that time, a physical therapist with whom the district contracted ("district physical therapist") reviewed the private PT evaluation and noted that the "Motor Proficiency" test utilized to evaluate the student was not typically used in a school as it "doesn't address if the student is able to be safe and function in the school setting" (Dist. Ex. 16

[27] The IHO found that evidence that the student would be placed in a ICT setting impermissibly retrospective (IHO Decision at p. 80); however, as the transcript of the May 2015 CSE meeting reflects the CSE's discussion of this manner of implementing the IEP recommendation for additional adult support (Joint Ex. 51 at pp. 239, 240-41), it does not constitute after-the-fact testimony used to "rehabilitate a deficient IEP" but instead "explains or justifies the services listed in the IEP" and, thus, may be considered (R.E., 694 F.3d at 186).

[28] The hearing record reflects that the parent was not in attendance at the December 19, 2014 CSE meeting (see Dist. Ex. 16 at pp. 1, 2, 6).

at p. 3).[29, 30] She further indicated that the PT evaluation "need[ed] to be related to the environment" and that the October 2014 evaluation did not include such information (id. at p. 4).[31] Additionally, the December 2014 CSE meeting minutes reflect that the parent reported to the physical therapist who completed the October 2014 PT evaluation that the student could not access some of the playground equipment; however, the minutes further indicate that no one in the school had been contacted to confirm this or to provide information regarding the student's functioning in the school setting (id. at pp. 3-4). Furthermore, the December 2014 CSE meeting minutes also reflect that, while the student's physical education teacher indicated that the student's gross motor skill levels were below or approaching grade level, he also indicated that the student was able to participate fully and safely, in the physical education class (id. at p. 3). He added that, at times, the student needed reminders that he was able to perform the skills he had previously demonstrated (id.). Consistent with this, the hearing record also reflects that a recent medical report by the student's doctor indicated that the student had been cleared for "full participation in sports and [physical education] class" (id. at p. 6; see also Dist. Ex. 16 at p. 32). Accordingly, the December 2014 CSE meeting minutes reflect that the district physical therapist indicated there was no need for PT services in the school setting based on the information given (Dist. Ex. 16 at p. 4).

As discussed above, the hearing record reflects that the October 2014 PT report was similarly discussed at the May 2015 CSE meeting (Tr. pp. 282-84, 288, 290, 391-92, 1182-84; Dist. Ex. 38B at pp. 1, 2, 6; Joint Ex. 51 at pp. 122-32, 135-45). Transcripts of the May 2015 CSE meeting indicate that the district-contracted physical therapist summarized the report as well as the PT referral forms completed by district personnel (Joint Ex. 51 at pp. 123-136). She explained how PT services were determined for school-age students, making the distinction between the clinical October 2014 PT evaluation and a school-based PT evaluation, where the student's ability to function in various school environments would be assessed (id. at pp. 135-37; see also Tr. pp.

[29] The physical therapist who attended the December 2014 CSE meeting was not the same district-contracted physical therapist who attended the May 2015 CSE meeting (compare Dist. Ex. 16 at p. 1, with Joint Ex. 37 at p. 4). To distinguish the two, the physical therapist who attended the December 2014 CSE meeting will be referred to as the "district physical therapist."

[30] Testimony by the district-contracted physical therapist indicated that the motor proficiency test utilized in the October 2014 PT evaluation was the Bruininks-Oseretsky Test of Motor Performance (Tr. p. 1185).

[31] According to the December 2014 CSE meeting minutes, the district physical therapist stated that, if she evaluated the student, she would look at the student's sit position, his ability to open doors and travel in the hallway, his use of water fountains, his activities in the lunchroom such as carrying a tray, and his ability to access the restroom, the bus, and the playground (Dist. Ex. 16 at p. 4). She indicated that she would look at all aspects of his gross motor functioning in school to make sure he was able to move in a timely, safe, and appropriately manner in the school (id.).

282-83, 1186-88).[32] She indicated that physical therapists use information provided in PT referral forms to determine exactly what a child is having trouble with in school with regard to their ability to access their school environment (Joint Ex. 51 at p. 133).

In this regard, the district-contracted physical therapist noted that the PT referral checklists showed that the student did not exhibit difficulties in the school environment, specifically: that he did not trip or fall, including in the classroom, hallways, stairs, and cafeteria; that he had no issues using the playground equipment; and that his ability to walk through the school or classroom had no impact on his success in the school environment (Joint Ex. 51 at pp. 133-34; see also Tr. pp. 1189,1191; Dist. Ex. 16 at pp. 17-18;).[33] She noted that the PT referral further indicated that: with regard to the classroom/library and art, the student was able to position at all work stations, access all work material, and move between all work stations; he was able to open and close all doors and move through doorways, travel the required distance in hallways move through crowded hallways, and use the water fountain; and, in the lunchroom, he was safe on a slippery floor, able to go through the lunch line, carry a lunch tray, maneuver in a tight space, and sit at a lunch table (Joint Ex. 51 at p. 134; see also Tr. p. 1191; Dist. Ex. 16 at pp. 17-18). The district-contracted physical therapist also noted that the PT referral indicated that: with regard to the restroom, the student was safe on a wet floor, that he could move in and out of a toilet stall, sit or stand at the toilet, and access the faucet, soap, and towels; on the playground, the student could access the playground, play on outdoor equipment, and negotiate stairs or ramps; and, during assemblies and sports events, the student was able to access the assembly room/gymnasium and the athletic field and could sit with peers (Joint Ex. 51 at p. 135; see also Tr. p. 1191; Dist. Ex. 16 at p. 17). With regard to accessing the school bus, the parent indicated that on one occasion the student fell coming off the bus and it was later determined that he had a congenital defect of a tibial torsion in his left leg, which resulted in a foot turn-out (Joint Ex. 51 at pp. 134-35). A doctor note cleared the student for all school activities after the date of this incident (Dist. Ex. 16 at pp. 6, 32).

In addition, the May 2014 CSE meeting minutes documented input by the student's physical education teacher that further demonstrated that the student's functioning in school did not impede his ability to access the school environment (Dist. Ex. 38B at p. 5; see also Joint Ex. 51 at pp. 112-22). The meeting minutes reflect that the physical education teacher indicated that, although the student's gross motor skill level was below grade level, he was not sure if it was due to attention or low skill ability and further that the student's skill level was "not a concern" as the

[32] Consistent with this, testimony at the hearing by the district-contracted physical therapist also explained how school-based PT is different from clinical PT services in that the former is used to support a student's educational program to help students access the same educational environment as other students in the school (Tr. pp. 1186-87). Similar to discussion by the district physical therapist at the December 2014 CSE meeting, the district-contracted physical therapist testified that, in evaluating a student's access to education, she would look at how the student moves about the school, such as their ability to access the playground, whether they are able to get a school lunch tray and sit at a lunch table with other students, whether they are able to sit in the chair provided in the school and be able to do their work, and "basically whether they're able to do the same things that are expected of other students in the school and that classroom and at that grade level" (Tr. pp. 1187-88).

[33] The district director of student services indicated that the initials "KS" on the playground, assemblies/sports events section of the PT referral were probably those of a playground monitor (Dist. Ex. 16 at p. 17; Joint Ex. 51 at p. 133).

student was "still able to participate in everything" (Dist. Ex. 38B at p. 5; see also Tr. p. 393; Joint Ex. 51 at pp. 112, 117).

Based on the above, notwithstanding the recommendation in the October 2014 private PT evaluation, the bulk of the information available to the May 2015 CSE, from sources that observed the student in the school environment, revealed that the student did not require PT services in order to benefit from special education. Therefore, the evidence in the hearing record does not support the IHO's finding that the student "is entitled to physical therapy services" (IHO Decision at pp. 82-83).

4. Sensory Needs

The district asserts that the IHO erred in finding that the student's sensory needs were not sufficiently addressed in the IEP. The district argues that the IHO failed to consider the recent OT sensory profile report reviewed by the August 2015 CSE and the resulting sensory annual goal and trial program that were added to the student's IEP.

The hearing record reflects that the May 2015 IEP identified the student's sensory needs based on the information the CSE had at that time, which in large part focused on the student's difficulties related to maintaining his focus of attention, distractibility, and self-regulation and their effects on the student's ability to function in class (Dist. 38B at pp. 1-5, 7-8; Joint Ex. 37 at pp. 7-9, 11-14). To address these needs, the May 2015 IEP included the supports and strategies to address the student's management needs that are summarized above, as well as testing accommodations such as the provision of five-minute breaks for every 30 minutes of testing as needed, checking for understanding, directions read to student, extended time [1.5], and tests administered in a location with minimal distractions (Joint Ex. 37 at pp. 9-14; see also Tr. p. 924). In addition, one of the annual goals included in the May 2015 IEP addressed the student's ability to develop and utilize strategies to help him focus on and attend to his classwork, classroom activities, and instructions provided by teachers and adults (id. at pp. 9-10).

The evaluative information available to the May 2015 CSE included a private OT evaluation report completed on October 21, 2014 (compare Dist. Ex. 16 at pp. 19-22, with Joint Ex. 37 at p. 5). This report included the results of a sensory questionnaire that was completed by the parent and which indicated the student exhibited sensory processing dysfunction in the areas of sensory processing (auditory, visual, vestibular, touch, multisensory, and oral sensory processing), modulation (sensory processing related to endurance/tone, body position and movement, sensory input affecting emotional responses, and visual input affecting emotional responses), and behavior and emotional responses (emotional/social responses and behavioral outcomes of sensory processing) (Dist. Ex. 16 at p. 21). However, the report did not include a sensory profile completed by school personnel that would reflect information regarding the student's sensory functioning in school (see id. at pp. 19-22). Accordingly, the May 2015 CSE recommended that a sensory profile be completed by the student's teacher (Tr. p. 914; Joint Ex. 51 at pp. 205-07). The student's sensory processing weaknesses were confirmed by a sensory profile completed by the student's third grade regular education teacher in June 2015 and reviewed by the

August 2015 CSE (Tr. pp. 122, 125-26; Dist. Exs. 50 at pp. 1-4; 57C at pp.1, 3-4; Joint Ex. 52 at pp. 2-8).[34]

A review of the present level of physical performance section of the August 2015 IEP reveals that the results of the June 2015 sensory profile report were documented in the IEP (Dist. Ex. 57C at p. 13). The August 2015 IEP indicated that, based on the results of the teacher questionnaire, the student presented with sensory needs that may impact his ability to participate in activities throughout the day and that he may benefit from support, particularly the classroom movement strategies that were included in the report (id.).[35] The August 2015 IEP included many of these strategies, some which were to be implemented in the hallway, such as wall push-ups, jumping in place, jumping in sequences that are adult directed, or jumping in a manner similar to hop scotch, and some to be implemented in the classroom, such as "helper" activities including passing out papers, erasing the board, running errands to the office, and dumping the recycling bin (compare Dist. Ex. 57C at p. 13, with Dist. Exs. 50 at p. 4; see also Tr. p. 964). The August 2015 IEP also referenced whole class activities that were described in the report including the "5,4,3,2,1" game where the teacher has students do five different movements in descending order, "Brain Gym" activities, and "Brain Breaks" activities, which the report indicated were described in attachments to the report (compare Dist. Ex. 57C at p. 13, with Dist. Exs. 50 at p. 4).[36] Consistent with the report, the IEP further noted that the sensory strategies should be trialed and documented for a period of four to six weeks to assess their effectiveness, and that other options to be considered included the use of a weighted vest, a weighted lap belt, ankle weights, therabands at the bottom of the student's chair, and a sit disc (compare Dist. Ex. 57C at pp. 13, 18, with Dist. Exs. 50 at pp. 3-4; see also Tr. pp. 924-25, 955-56, 966, 968).

The June 2015 sensory profile report reflected that the student's teacher rated the student's sensory functioning as "Much More Than Others" for each of the categories assessed by the

[34] The sensory profile report consisted of a "Sensory Profile 2," which is described in the report by the occupational therapist, as "a standardized tool involving subjective questionnaires that are used for understanding a child's sensory processing patterns in the context of everyday life, and how sensory processing may be contributing to or interfering with participation" (Dist. Ex. 50 at p. 2).

[35] The June 2015 sensory profile report provided details of the specific categories assessed by the Sensory Profile 2 including measures of: the degree to which a student is interested in and his pleasure with sensation (Seeking/Seeker); the degree to which a student is bothered by sensory input and needs to control the amount and type of input (Avoiding/Avoider); the student's ability to notice sensation (Sensitivity/Sensory); and the student's awareness of available sensation (Registration/Bystander) (Dist. Ex. 50 at p. 2). The report also indicated that the Sensory Profile 2 measured the student's response with regard to: sensory and behavioral categories including auditory, visual, touch, movement, oral and behavioral; and school factors including the student's need for external supports to participate in learning (i.e., difficulty keeping materials and supplies organized), the student's awareness and attention within the learning environment (i.e., student wants to wipe hands quickly during messy tasks), the student's tolerance within the learning environment (i.e., is distressed by changes in plans, routines, or expectations), and the student's availability for learning within the learning environment (i.e., interacts or participates in groups less than same-aged students) (id. at pp. 2-3). The report included strategies to support the student's sensory needs based on the teacher's ratings of the student in each of the categories noted above (id. at pp. 3-4).

[36] Although the June 2015 sensory profile report indicated that at least three attachments were included in the report, the exhibit included in the hearing record includes one attachment that describes the "Roll Some Brain Breaks" activity (see Dist. Ex. 50 at p. 5).

Sensory Profile 2 (Dist. Ex. 50 at p. 3). However, the IEP included more valuable information by describing specific strategies that would address the student's specific sensory needs identified by the sensory profile (compare Dist. Ex. 57C at p. 13, with Dist. Exs. 50 at p. 3).

In addition, the August 2015 IEP also reflected the student's sensory needs in the description of the student's management needs. For example, the IEP reflected that the student had difficulty with the organization of supplies, that sitting was difficult for him, that he was "usually seen hanging over his desk or fidgeting in his chair," that he made loud, disruptive noises especially during unstructured times, and that he required reminders to lower his voice and engage in tasks (Dist. Ex. 57C at p. 14). The management needs also noted that the student required breaks of four to five minutes throughout the day and that he took his math tests in the hallway (id. at pp. 14, 19).

With regard to the annual goals the IHO indicated that the student's IEP included three goals addressing his needs related to OT: one that focused on fine motor and writing skills; a new goal added at the August 2015 CSE meeting that addressed the student's visual motor skills; and a third goal which the IHO stated "addresse[d] the student's need to self-monitor and self-regulate" (IHO Decision at p. 83). The IHO opined that the student's sensory needs were not sufficiently addressed by any of these IEP goals (see id.). However, the last three lines of the third goal, which the IHO did not mention, indicate that this goal addressed the student's sensory needs (Dist. Ex. 57C at p. 16). The entirety of the third goal stated that the student would practice self-monitoring and self-regulation throughout the school day in order to determine when to utilize sensory strategies (i.e. weighted vest, movement breaks, etc.) and that this would be supported by the classroom teacher (id.). Additionally, the director of student services testified that this annual goal was added after the August 2015 CSE reviewed the sensory profile report completed by the teacher and was intended to assist the student in realizing for himself when he needed a break so that he could remain focused and on task (Tr. pp. 433-34). The district occupational therapist who prepared the sensory profile report indicated that this was a sensory integration annual goal (Tr. p. 955).

Based on the above, the IHO erred in finding that the student's sensory needs were not sufficiently addressed in the August 2015 IEP (see E.P. v. New York City Dep't of Educ., 2016 WL 3443647, at *12 [S.D.N.Y. June 20, 2016]; T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *15 [S.D.N.Y. Mar. 30, 2016]; G.B. v. New York City Dep't of Educ., 145 F. Supp. 3d 230, 250 [S.D.N.Y. 2015]; D.N. v. New York City Dep't of Educ., 2015 WL 925968, at *7 fn 5 [S.D.N.Y. Mar. 3, 2015]).

5. Special Transportation Services

The parent asserts that the IHO erred in denying her request for reimbursement of transportation expenses incurred during the 2015-16 school year. On appeal, the parent appears to argue that, because she accepted the recommendation in the August 2015 IEP for transportations services, notwithstanding the nature of the recommendation (an adult attendant on the school bus), she was instead entitled to provide the transportation at district expense. Review of the parent's due process complaint notice clarifies the basis for the dispute (Parent Ex. A1 at pp. 32-33). The parent believed that the student's morning bus included too many students and, therefore, "opted to transport [the student] since the [d]istrict refuse[d] to provide the special education

transportation they agreed to in the IEP" (id. at p. 32). Accordingly, rather than a claim that the district failed to implement the student's IEP, the parent's claim is really aimed at the appropriateness of the recommendation included in the August 2015 IEP and will be reviewed as such.

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Specialized transportation must be included on a student's IEP if required to assist the student to benefit from special education (Application of a Child with a Disability, Appeal No. 03-053). If a CSE determines that a student with a disability requires transportation as a related service in order to receive a FAPE, the district must ensure that the student receives the necessary transportation at public expense (Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; see 8 NYCRR 200.1[ww]).

The State Education Department has indicated that a CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and that an IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate" ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1375 [11th Cir. 1997]; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]). When reviewing the transportation provisions made for a student by a district, the relevant question is whether the transportation arrangements are appropriate to meet the student's needs (Application of a Child with a Disability, Appeal No. 03-054).

Here, the district transportation supervisor provided a verbal report to the May 2015 CSE regarding the student's bus experience during the 2014-15 school year (Dist. Ex. 38B at p. 5; Joint Ex. 51 at pp. 108-09). She reported that the student traveled on a bus that had an aide for other students (Joint Ex. 51 at p. 108). She reported that the last correspondence that she had with the parent was in December 2014 and the student had not had any issues on the bus either before that time or since (Dist. Ex. 38B at p. 5; Joint Ex 51 at p. 108). She indicated that the student did very well on the bus in the morning and sat with a friend near an adult in the front of the bus both in the morning and afternoon (id.). She informed the August 2015 CSE that the student told the aide if there was a problem (Dist. Ex. 38B at p. 5; Joint Ex. 51 at p. 109). She reported that the bus ride in the morning was 30 minutes and the one in the afternoon was approximately 12 to 25 minutes and included fewer students (Dist. Ex. 38B at p. 5). She concluded her report by stating that there were no bus conduct reports, phone calls, or issues at school regarding the student's bus ride (Joint Ex. 51 at p. 109).

In addition to the district transportation supervisor's verbal report, the May 2015 CSE also reviewed the May 2015 neuropsychological evaluation report, which included information and a recommendation regarding the student's transportation needs (Joint Ex. 37 at pp. 1, 5). In the May 2015 neuropsychological evaluation report, the evaluator recommended that the student travel on a "special education bus" due to the student being bullied and the inability of the aide to manage the student's needs on the regular school bus (Tr. pp. 1407-08; Joint Ex. 42 at p. 23). The evaluator explained that her recommendation was based upon the parent's report that the student was bullied (Tr. pp. 1408, 1427). Other than the parent's report, the hearing record does not indicate that the student was bullied on the bus (see Tr. p. 135; Dist. Ex. 56 at p. 2).

During the May 2015 CSE, the district director suggested that the special transportation service of a monitor on the school bus be added to the student's IEP because the student currently had a monitor on the bus and the district transportation supervisor reported that the presence of the monitor on the bus worked for the student (Joint Ex. 51 at p. 224). None of the CSE members expressed any disagreement with the district director's suggestion (id. at pp. 224-25). As a result, the May 2015 CSE recommended the presence of a monitor on the bus (Dist. Exs. 37 at pp. 1, 14; 38B at p. 8). The district director testified that the special transportation service of a bus with an attendant was added to the student's IEP and the student had the same service under his previous accommodation plan and prior IEP (Tr. p. 79).

Following the May 2015 CSE meeting, the parent suggested in her proposed IEP that the student travel on a bus with fewer than 15 students and have an aide or bus attendant (Dist. Ex. 39 at p. 43). The district director listed special transportation as one of the areas in which the IEP developed by the parent significantly differed from the one developed by the May 2015 CSE (Tr. p. 97). Taken as a whole, the hearing record indicates that support available to the student on the school bus during the 2014-15 school year was sufficient to allow the student to benefit from special education such that the recommendation for that level of support for the student on his IEP for the 2015-16 was appropriate.

Even the parent's claim was deemed one of failure to implement, the hearing record reveals that while the parent indicated her acceptance of the transportation services in the IEP, she unilaterally opted to transport the student herself. Specifically, the parent sent an email to the district director on September 8, 2015, a day before the projected start date of the August 2015 IEP, stating that transportation was the only part of the IEP that she accepted (Dist. Exs. 57C at p. 3; 59 at p. 1). However, in the September 8, 2015 email, the parent notified the district that she would be providing special transportation in the morning for the student and submitting a request for reimbursement, but provided no explanation as to why (Dist. Ex. 59 at p. 1). In a letter dated October 2, 2015, the district informed the parent that she would not be reimbursed if she chose to drive the student herself in lieu of accepting the transportation provided by the school and indicated that the student was currently on a bus with a monitor to assist students, which was consistent with the recommendation in the August 2015 IEP (Dist. Ex. 59 at p. 7; Dist. Exs. 57C at p. 20). Accordingly, the district provided the student with the special transportation services listed in the student's August 2015 IEP (compare Dist. Ex. 59 at p. 7, with Dist. Ex. 57C at p. 20), and the hearing record supports the IHO's conclusion that the parent was not entitled to reimbursement for travel expenses (Application of the Bd. of Educ., Appeal No. 11-069).

E. Relief

Having found that the district "significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a [FAPE] to the student" by failing to ensure the parent's attendance at the August 2015 CSE meeting, the next inquiry is what relief, if any, is appropriate to remedy that violation. The parent requests: compensatory speech-language therapy, PT, and tutoring services; a district special class placement with a small teacher-to-student ratio or an out of district placement; and monetary reimbursement for pain and suffering. The district asserts that the IHO erred in ordering compensatory services. The district argues that, by ordering the district to provide compensatory OT and counseling services, the IHO held the district responsible for not providing the student with services to which the parent did not provide consent. The district argues that the IHO failed to consider the parent's conduct in fashioning a compensatory services award.

1. Compensatory Education

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Compensatory education may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of 21]; see generally R.C. v. Bd. of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; see, e.g., Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE).

The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E. Lyme Bd. of Educ., 790 F.3d at 456; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at

123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't of Educ., Appeal No. 11-075). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30, 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

It is inherently a speculative inquiry to contemplate how the parent's attendance at the August 2015 CSE meeting may have impacted the CSE's recommendations for the student's educational program for the 2015-16 school year. However, as detailed above, there is nothing in the hearing record to indicate that the CSE should have recommended PT services or that the August 2015 IEP insufficiently addressed the student's academic needs such that an award of tutoring would be warranted. Moreover, these recommendations were reached at the May 2015 CSE meeting, at which the parent actively participated and had ample opportunity to express her disagreement. As for speech-language therapy services, the IHO found a denial of a FAPE based on the insufficiency of the CSE's recommendations, which the district did not appeal, but ordered daily pragmatic speech or social skills training to be included on the student's IEP going forward and concluded that compensatory educational services in this area were not also required in order to remedy the denial of a FAPE in this area (IHO Decision at p. 90). The counseling compensatory services, discussed below, will sufficiently address the student's needs related to pragmatic speech

and social skills.[37] Therefore, there is nothing in the hearing record to support a modification of the IHO's remedy on this point. Accordingly, the hearing record does not support a finding that speech-language therapy, PT, or tutoring compensatory services would be reasonably calculated to provide the educational benefits that likely would have accrued but for the district's procedural violation (see Reid, 401 F.3d at 524).

Turning to the IHO's award of compensatory OT and counseling services, contrary to the district's argument that the IHO held the district responsible for not providing the student with services to which the parent did not provide consent, the IHO ordered the district to provide the compensatory OT and counseling services on an equitable basis (IHO Decision at p. 90). However, the IHO did not examine the impact of the parent's non-consent in great detail in this context; therefore, the district's assertions about the parent's failure to provide consent are hereby examined to determine whether this equitable remedy should be reversed or reduced.

The parent sent the district three consent forms. First, by emails dated June 24 and August 16, 2015, the parent sent the district a consent form that she created and signed on June 24, 2015, indicating that she consented to the provision of special education services in part and listing the parts of the IEP she accepted and rejected (Dist. Exs. 43 at pp. 1-2; 56 at pp. 3-4; see also Tr. pp. 120, 135-36, 1502-03; Jan. 19, 2016 Tr. p. 1568).[38] The attachment stated that the consent provided the district permission to provide special education services once agreed upon by the CSE, but was not intended to be an agreement regarding the specific services that would be provided or agreement with the IEP (Dist. Exs. 43 at p. 2; 56 at p. 4). In particular, the parent indicated in the consent form that she accepted the recommendations for OT and counseling but rejected the annual goals written for them (Dist. Exs. 43 at p. 2; 56 at p. 4). After receiving the first consent form, the district notified the parent in a prior written notice dated July 14, 2015 that she had failed to provide consent for initial provision of services (Dist. Ex. 76 at p. 1; see also Jan. 19, 2016 Tr. pp. 1599-1601). In addition, in the August 2015 IEP, the district indicated that the parent refused to provide consent for services (Dist. Ex. 57C at p. 3; see also Tr. p. 130).

Subsequent to the August 2015 CSE meeting, which the parent did not attend, the parent sent the district two emails dated August 16 and August 31, 2015, with the district-created consent

[37] Results of the 2014 private speech-language evaluation report reflected a significant difference between the student's receptive and expressive language scores (with significantly higher receptive language scores) and poor social language skills (Dist. Ex. 16 at pp. 8-9). However, school personnel including the student's then-current regular education teacher, special area teachers, and previous district speech-language therapist reported no concerns regarding the student's expressive language skills, indicating the student was "able to use language to ask and answer questions like any typical third-grade student" (Dist. Exs. 16 at p. 13; 38B at p. 7). The district speech-language therapist noted that the 2014 private speech-language evaluation included a pragmatics profile completed by the parent and examiner, but not by school personnel, and the student may have possibly scored considerably higher if rated by school personnel (Dist. Ex. 16 at p. 13). Although speech-language therapy was not recommended, the district speech-language therapist recommended a social skills group to address the student's needs in the area of pragmatic language (Dist. Exs. 16 at p. 13; 38B at p. 7).

[38] Prior to sending the first consent form, the parent indicated in a June 24, 2015 email to the director of student services that she agreed with the May 2015 CSE's eligibility and classification determination (Parent Ex. J). She also indicated that consent for services constituted consent to implement the IEP and she would not consent to implement an IEP to which she did not agree (id.) The director of student services testified that this exhibit did not look familiar to her but that the email address listed was hers (Tr. pp. 1499-1500).

form attached, signed and dated June 24, 2015 and August 31, 2015, respectively, on which the parent checked the box granting consent for the initial provision of special education services but added "in part" and indicated she was accepting the determination of eligibility and rejecting the IEP (Dist. Exs. 56 at pp. 3, 5; 58 at p. 1; see Tr. pp. 135-36, 138-39).[39]

The district director of student services testified that she did not have a conversation with the parent to determine her intentions regarding consent for the initial provision of services (Tr. p. 1573). She further testified that the second consent form did not provide consent for initial provision of services because the parent indicated that she rejected the entire IEP and was only accepting the eligibility determination (Tr. pp. 1571-73).

OT and counseling services were not areas of the student's IEP about which the district and parent significantly disagreed (compare Joint Ex. 37 at pp. 10-11, with Dist. Ex. 39 at pp. 33-35; see Tr. p. 97), and the parent originally specified that she consented to the provision of those services to the student. Although she subsequently indicated her refusal to consent to the entire IEP, her reluctance to articulate any agreement was commensurate with the entire breakdown in communication between the parties, likely fueled in no small part by the parent's absence from the August 2015 CSE meeting and the district's communication to the parent that her consent was insufficient due to her statement of disagreement with the IEP recommendations. Due to these failures in collaboration and communication, the OT and counseling services were not provided to the student and were appropriately awarded by the IHO on an equitable basis. However, as the parent's consent for the delivery of services to the student remains unresolved, the district shall not be held liable for failure to deliver the compensatory services absent receipt of the parent's consent that it do so.

The district is correct that it should not be held accountable for failing to offer the student a FAPE if the only impediment thereto is the parent's continued refusal to provide consent to permit the district to provide services. Under the circumstances of this case, the district did not otherwise offer the student a FAPE, and an equitable award is appropriate. The parent is cautioned that failures to cooperate with the district's attempts to provide her son a FAPE may be a basis in the future for a denial of an award of compensatory education (French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471-72 [2d Cir. Nov. 3, 2011]).

2. Other Relief

With regard to the parent's request for monetary reimbursement for pain and suffering, such relief is a form of compensatory damages which are not available in the administrative forum under the IDEA (see Taylor v. Vt. Dep't. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Board of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483 [2d Cir. 2002]; see R.B. v. Bd. of Educ., 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]).

[39] There is an additional fourth consent form that the parent created but the director of student services testified that she did not see this document until December 7, 2015, the evening of the first day of the impartial hearing (see Tr. p. 1489; Jan. 19, 2016 Tr. p. 1569; compare Parent Ex. I, with Dist. Ex. 43 at p. 2, and Dist. Ex. 56 at p. 4).

Regarding the parent's request for a district special class placement or out of district placement, such prospective relief would be inappropriate under the circumstances. In addition, the IHO's order directing the CSE to recommend a particular program and services must be modified based on the above determinations reversing the IHO's conclusions related to predetermination and the CSE's consideration of the evaluative information, as well as the appropriateness of the August 2015 with respect to annual goals, additional adult support, PT, and support for the student's sensory needs.[40] A CSE is tasked with assessing a student's needs from year to year, and it would be inappropriate to unnecessarily interfere with this process by ordering amendment of the student's IEP without any knowledge or evidence regarding the annual review of the student's current needs or services conducted subsequent to the matters under review in this proceeding (see Student X, 2008 WL 4890440, at *16 [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). The appropriate course is to require the parties to come into compliance with the statutory process envisioned under the IDEA and to effectuate equitable relief to remediate past harms that have been explored through the development of an appropriate evidentiary record. Therefore, the parent's request to direct the student's placement going forward is denied.

VII. Conclusion

For the reasons set forth above, the hearing record supports a finding that the district denied the student a FAPE for the 2015-16 school year. In addition, the hearing record supports the IHO's award of compensatory OT and counseling services to remediate the district's denial of a FAPE. The record reveals that there has been a serious breakdown in the communication and cooperation between the parties. The time has come to put a solution in place so that the parent and the district can return to the collaborative process called for by the IDEA (see Schaffer v. Weast, 546 U.S. 49, 53 [2005] [describing the cooperative process as the "core of the [IDEA]"], citing Rowley, 458 U.S. at 205-06; see also 20 U.S.C. § 1400[c][5]). The IHO acted within the bounds of discretion in fashioning a viable, if not perfect, compensatory remedy under the circumstances of this case and I decline to set it aside.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the district convene a CSE within 15 days of the date of this decision; , and

IT IS FURTHER ORDERED that the IHO's decision, dated April 28, 2016, is modified by reversing those portions that directed the CSE to develop academic annual goals for the student and include ICT and PT services on the student's IEP, unless the CSE determines that such

[40] Inquiry was made of the parties as to whether or not the CSE had already convened. At the time the parties communicated their response, the CSE had not yet convened to implement the IHO's order. The CSE is, therefore, directed to convene within 15 days of this decision. While the IHO's order is modified with respect to the required content of the IEP to be developed, the CSE should consider whether or not such recommendations are appropriate for the student based upon any new information available to the CSE about the student.

recommendations are appropriate to include on the student's IEP based upon the information before it about the student's strengths and needs;

IT IS FURTHER ORDERED that the IHO's decision, dated April 28, 2016, is modified by providing that the district's provision of compensatory OT and counseling services shall be conditional upon the district's receipt of the parent's consent for the delivery of such services to the student.

Dated: **Albany, New York**
August 8, 2016

SARAH L. HARRINGTON
STATE REVIEW OFFICER