



The University of the State of New York

The State Education Department

State Review Officer

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No. 16-064

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New Rochelle City School District

Appearances:

The Cuddy Law Firm, PLLC, attorneys for petitioner, Kerry McGrath, Esq., of counsel

Bond, Schoeneck & King, PLLC, attorneys for respondent, Sara M. Richmond, 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 the decision of an impartial hearing officer (IHO), which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended and provided for her son for the 2013-14 and 2014-15 school years was appropriate and which denied her request for compensatory education. The district cross-appeals from the portion of the IHO's decision which found that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16 school year. The parent's appeal must be dismissed. The district's cross-appeal must be sustained.

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 student is bilingual, presents with severe global developmental delays, and has received diagnoses of hydrocephalus, macrocephaly, diplegia, a seizure disorder, Dandy Walker malformation, autism, and intellectual disability (Dist. Exs. 6 at p. 1; 9; 35 at p. 5; 36). The student received early intervention services beginning at age six months, and "therapies" at a full day program from age nine months to five years (Dist. Ex. 8). Subsequently, the student received instruction in special classes, related services, and a home-based program (see Tr. pp. 2359-61; Dist. Exs. 8; 36 at p. 3).

On May 6, 2013, a subcommittee of the CSE (CSE subcommittee) convened for a reevaluation review of the student's program and to develop the IEP for the 2013-14 school year (Dist. Ex. 2 at p. 1). Despite discussion and reports of progress, the parent advised the May 2013 CSE subcommittee that she did not see the student progressing, especially in academics, and that "[the student's] current program [wa]s not making a difference" (id.). For the 2013-14 school year, the May 2013 CSE subcommittee found that the student was eligible for special education as a student with multiple disabilities and recommended a 12:1+2 applied behavioral analysis (ABA) special class placement, two hours per day of shared aide services, and related services consisting of one weekly 30-minute session of individual bilingual speech-language therapy, twice weekly 30-minute sessions of bilingual speech-language therapy in a group of five students, twice weekly 30-minute sessions of individual occupational therapy (OT), twice weekly 30-minute sessions of OT in a group of three students, one 30-minute session per week physical therapy (PT), and four one-hour sessions per week of individual home-based services (id. at pp. 2, 18-19). The May 2013 CSE subcommittee also recommended that the student attend an adapted physical education class with a teaching assistant and classroom aide on alternate days, and receive door-to-door special transportation services with a matron (id. at pp. 18-19, 21). The May 2013 CSE subcommittee further recommended that the student receive 12-month services during July and August 2013; however, the parent advised the CSE subcommittee that the student would not be available to attend the program because she planned to travel out-of-state with the student for the entire summer (id. at pp. 2, 19-20).

On June 4, 2014, a CSE subcommittee convened for an annual review of the student's program and to develop his IEP for the 2014-15 school year (Dist. Ex. 11 at p. 1). The parent reported her concerns with the student's lack of academic progress, and opined that the student had regressed with respect to his independent living skills (id.). The June 2014 CSE subcommittee recommended 12-month services, a 12:1+2 special class placement, shared aide services as needed, and related services consisting of one 30-minute session per week of bilingual speech-language therapy, two 30-minute sessions per week of bilingual speech-language therapy in a group of five students, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of OT in a group of three students, one 30-minute session per week of individual PT, and four hours per week of home-based services (id. at p. 12). The June 2014 CSE subcommittee also recommended that the student attend an adapted physical education class on alternate days, use an iPad for written work, and have access to Kurzweil in school (id.). The parent did not sign the CSE subcommittee recommendation sheet (id. at p. 2).

On March 4, 2015, the CSE convened for a review of the student's program per the parent's request (Dist. Ex. 23 at p. 1). The parent expressed concerns regarding the student's safety plan, transportation, and health office services (id.). Based on available documentation, the March 2015 CSE "addressed these issues based upon documents available," and agreed to reconvene with more information on April 9, 2015 (id.). Subsequently, the district provided information to the parent and convened a CSE meeting on April 8, 2015 in attempts to address her concerns (Dist. Exs. 27; 30; 33).

On May 29, 2015, the CSE convened to consider the parent's request for individual aide services (Dist. Ex. 38 at p. 1). The parent requested placement in an out-of-district program, and noted her concerns for the student's safety and that she felt that the student was not reading or writing (id. at pp. 1-2). The May 2015 CSE reviewed data on the student's accidents and discussed

the student's safety plan and the parent's concerns related to the student's convulsions (see id. at p. 2). Ultimately, the May 2015 CSE determined that the student was accompanied by adults, had not had additional physical incidents, and that his needs were being met in the intensive district program (id. at p. 3).

On June 18, 2015, a CSE subcommittee convened for an annual review of the student's program and to develop his IEP for the 2015-16 school year (Dist. Ex. 41 at p. 1). The parent reported her concerns with respect to the student's academic progress, and requested individual full-time aide services, due to concerns about his seizure disorder (id.). The June 2015 CSE subcommittee recommended 12-month services, a 12:1+2 special class placement, shared aide services, and related services consisting of one 30-minute session per week of bilingual speech-language therapy, two 30-minute sessions per week of bilingual speech-language therapy in a group of five students, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of OT in a group of three students, one 30-minute session per week of individual PT, and four one-hour sessions per week of home-based services (id. at pp. 14-16). The June 2015 CSE subcommittee also recommended that the student attend an adapted physical education class on alternate days (id. at p. 14). Additionally, the June 2015 CSE subcommittee agreed to conduct a technology evaluation and a vision screening (id. at p. 2). The parent did not agree with the June 2015 CSE subcommittee's recommendation (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated July 1, 2015, the parent alleged that the district failed to offer the student a FAPE during the 2013-14, 2014-15, and 2015-16 school years (Parent Ex. A at p. 2). With respect to the 2013-14 school year, the parent contended that she was deprived of meaningful participation in the May 2013 CSE meeting because the evaluation reports considered at the meeting were not translated into Spanish and provided to the parent in advance (id. at p. 4). The parent further contended that the CSE "inappropriately" changed the student's class size despite his lack of progress in a smaller class setting (id.). The parent also argued that the CSE failed to recommend a 1:1 paraprofessional for both safety and academic reasons (id.). The parent contended that the district failed to evaluate the student for autism, and failed to develop a safety plan to deal with the student's seizures (id.). The parent further alleged that the May 2013 CSE failed to recommend sufficient speech-language therapy services and failed to consider speech-language therapy services to develop the student's English language skills (id. at pp. 4-5). The parent also alleged that the CSE failed to develop appropriate annual goals, that the student had already achieved some of the annual goals, and that others were too ambitious (id.). The parent alleged that the CSE failed to recommend assistive technology as part of the student's program (id. at p. 5). She also asserted that the district failed to place the student in an ABA classroom, despite the May 2013 CSE's recommendation for an ABA classroom, and that the student's home-based services were not provided by a certified teacher (id. at pp. 5, 12). The parent also alleged that the district failed to keep the student physically safe in school by failing to address his safety needs related to a seizure disorder (id.). Finally, the parent contended that the student was not provided with door-to-door transportation, despite the IEP mandate to provide it (id.). The parent contended that as a result of the lack of 1:1 support and the district's failure to provide instruction utilizing ABA methodology, the student failed to make progress during the 2013-14 school year and regressed in areas of adaptive daily living (id.).

Regarding the 2014-15 school year, the parent alleged that the June 2014 CSE was improperly composed (lacking a general education teacher, the student's related services providers, and a psychologist) and that the district predetermined the June 2014 IEP (Parent Ex. A at p. 6). The parent contended that the June 2014 CSE inappropriately removed ABA instruction from the student's program, continued inappropriate goals and repeated some verbatim from the prior IEP, failed to recommend a 1:1 paraprofessional for both safety and academic reasons, recommended insufficient speech-language therapy services by failing to include individual sessions, and failed to recommend parent counseling and training (*id.* at pp. 6-7).¹ The parent reiterated her allegation that she was deprived of meaningful participation in discussing the contents of progress and evaluation reports because the documents were not translated into the parent's native language (*id.* at p. 7). The parent also reiterated her allegation that the district failed to develop a safety plan to deal with the student's seizures (*id.*). The parent contended that the district failed to provide recommended assistive technology devices and services, failed to provide mandated door-to-door transportation, and that the student's home-based services were not provided by a certified teacher (*id.* at pp. 7, 12). The parent further alleged that the safety plan developed in April 2015 was insufficient because it did not provide for staff training, did not require that the parent be notified of any incidents by telephone, and did not provide the student with "a dedicated 1:1 aide" (*id.* at p. 8). The parent further contended that although the safety plan produced in May 2014 corrected the notification issue, it did not provide sufficient 1:1 support (*id.*). The parent asserted that as a result of the inappropriate class placement the student again did not make progress and showed regression during the 2014-15 school year (*id.* at p. 7).

With respect to the 2015-16 school year, the parent reasserted her allegations that the June 2015 CSE continued to refuse her request for a 1:1 paraprofessional for both safety and academic reasons, and failed to recommend changes to the student's program consistent with the evaluative information provided by the parent (Parent Ex. A at pp. 9-10). Specifically, the parent alleged that the CSE failed to recommend a "small ABA classroom" and failed to incorporate the parent and the evaluators' "concerns and recommendations" in the student's IEP including a smaller class size, a 1:1 aide, and ABA instruction (*id.* at p. 11).

The parent also raised several general complaints regarding all three school years at issue, including the failure to: consider "updated and accurate evaluative data;" produce accurate present levels of performance; include appropriate annual goals; recommend sufficient related services, parent counseling and training, and a 1:1 aide; develop an appropriate safety plan and keep the student physically safe; and translate all evaluation reports, IEPs, and safety plans for the parent (Parent Ex. A at pp. 10-12).

For relief, the parent requested independent speech-language and academic skills evaluations (Parent Ex. A at p. 12). The parent also requested a dedicated 1:1 aide for the student (*id.*). The parent requested to have the CSE reconvene and develop "an appropriate IEP for the student" with specified contents and place the student in an "appropriate program" (*id.* at pp. 13-14). The parent requested that the IHO order the district to provide door-to-door transportation for the student (*id.* at p. 14). Further, the parent requested an award of compensatory education

¹ The parent also contended that the student's assigned school for the 2014-15 school year did not have an ABA component (Parent Ex. A at p. 12).

consisting of 430 hours of home-based ABA, 18 hours of assistive technology consultation, and speech-language services in an amount to be determined by an independent provider (*id.*). Finally, the parent requested an award of attorney fees and expenses (*id.*).

B. Impartial Hearing Officer Decision

The parties convened for an impartial hearing which commenced on November 30, 2015 and concluded on May 20, 2016, following fourteen days of proceedings (*see* Tr. pp. 1-2745). In a decision, dated August 14, 2016, the IHO found that the district provided the student with a FAPE for the 2013-14 and 2014-15 school years, but failed to provide the student with a FAPE for the 2015-16 school year because of its failure to adequately consider the "autism recommendation" (IHO Decision at p. 29).

The IHO found that the parent's claim that the student required a 1:1 aide at all times was an opinion stated by the student's doctors and not supported by any evidence in the record (IHO Decision at p. 23). Further, the IHO found the hearing record offered no evidence that the student's safety or academic progress was "diminished in any way" by having a shared aide rather than a personal one (*id.*). With respect to a safety plan, the IHO found that the district had a safety plan in place that was implemented without the parent's signature (*id.* at p. 24). The IHO also found that, though the safety plan was written in English, there was no evidence that the parent was unaware of its contents (*id.*). Further, the IHO found that once the district received the pediatric neurologist's seizure and hydration plan there was no evidence that the district failed to properly implement it (*id.*). Finally, with respect to the student's health and safety, the IHO found that there was no "convincing evidence" that the district's safety plan had failed the student during the 2014-15 school year (*id.* at p. 25).

Turning next to the parent's allegation regarding the district's failure to provide mandated door-to-door transportation, the IHO noted that the issue was not included in the parent's due process complaint notice and, in any event, found the issue moot since the district began providing door-to-door transportation during the 2015-16 school year (IHO Decision at p. 25).

Regarding the student's placement, the IHO found that the 12:1+2 class was a "more reasonable" placement than the alternative 8:1+2 class (IHO Decision at p. 26). The IHO found that students in the alternative 8:1+2 placement were on a lower verbal and cognitive level than the student and were less sociable (*id.*) Further, the IHO found, the 12:1+2 class had a heterogeneous student profile and included students with autism and multiple disabilities (*id.*). The IHO found that the student was appropriately placed in a 12:1+2 class for all three school years (*id.*).

Regarding the student's classification, the IHO found that the student's recommended program remained largely unchanged following the CSE's receipt of a private evaluator's autism diagnosis (IHO Decision at p. 26). Further, the IHO noted, the district did not perform any updated evaluations considering the student's autism diagnosis (*id.* at p. 27). Persuaded by one of the evaluators who conducted an October 2013 developmental assessment and testified that the student needed a school that specialized in serving students with autism, the IHO determined that the district's failure to proceed with an evaluation or update the student's program to reflect a diagnosis of autism, deprived the student of a FAPE for the 2015-16 school year (*id.*).

The IHO found that the IEPs developed over the three-year period at issue failed to provide for parent counseling and training but determined that the failure was not a denial of FAPE (IHO Decision at p. 27). With respect to the parent's claim that the district failed to provide the student with assistive technology, the IHO found that assistive technology was a teaching methodology and its omission was not a denial of FAPE (id.). The IHO also noted that the parent did not explain how she calculated her request for 18 hours of compensatory assistive technology and found that the request was not supported by witness testimony (id.). Further, the IHO found, the parent's claim regarding ABA was "inappropriately raised" as "a parent has no right to dictate a teaching methodology to a school" (id. at p. 28). The IHO also found that the hearing record did not support the parent's request to increase the student's home-based ABA services from four hours per week to ten (id.).

With respect to the parent's allegations concerning the district's failure to ensure the parent's meaningful participation by translating IEPs, evaluations, and reports into Spanish, the IHO found that the IDEA only requires translation or interpretation of whatever takes place at the CSE meeting (IHO Decision at pp. 28-29). Further, the IHO found the district complied with the IDEA by having interpreters and district staff who spoke the parent's native language available at CSE meetings and that the law does not require the district to interpret anything beyond "documents and speech in English that are presented, read and spoken at the meeting" (id. at p. 29). Finally, the IHO noted that the parent had not been prejudiced "considering the circumstances" (id.).

As relief for the district's failure to offer the student a FAPE for the 2015-16 school year, the IHO ordered the district to perform an independent educational evaluation (IEE) "expeditiously" to consider the student's autism diagnosis along with the student's "existing conditions" (IHO Decision at p. 29). Further, the IHO ordered the CSE to reconvene to consider the results of the IEE (id. at p. 30). Finally, the IHO ordered that the student's 2016-17 IEP include at least four hours monthly of parent counseling and training (id.).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in finding that the district offered the student a FAPE for the 2013-14 and 2014-15 school years.

The parent alleges that the IHO erred in finding that the district had properly evaluated the student for autism and assistive technology during the 2013-14 and 2014-15 school years and further asserted that the district has never evaluated the student for assistive technology. Also, the parent asserts, the district failed to implement the assistive technology recommendations on the student's 2014-15 IEP for the majority of the school year, and the IHO erred in labelling assistive technology a "methodology" as opposed to a device and/or service. The parent asserts that the IHO erred in finding that the district acted appropriately in not recommending a 1:1 aide for the student and failing to consider whether the student's injuries impacted his need for a 1:1 aide.

Next, the parent alleged that the IHO erred in dismissing the parent's claim that the district failed to provide mandated door-to-door transportation for the student, asserting that the IHO erroneously considered whether the student required the services rather than whether the district complied with the IEP. The parent further alleged that the IHO improperly considered testimony

that the district provided more support for the student than was in his IEP, and erred in considering whether the student could walk to the bus stop rather than receive door-to-door transportation.

With respect to translation and interpretation, the parent asserts that the IHO erred in dismissing the parent's complaint. The parent asserted that the IHO's perception of the parent's abilities is irrelevant to the issue of whether the district provided translated documents when requested. Further, the parent asserted, the district proffered no evidence demonstrating that it was unable to provide the requested translations.

Regarding the student's placement, the parent alleges that the IHO erred in finding the 12:1+2 class appropriate for the student. The parent asserts that the student required a smaller ABA class with no more than eight students and that the student also required a class "where the teachers really understand autism spectrum disorder [with other peers] on the spectrum that are on a similar cognitive and functional level."

With respect to the student's safety, the parent alleges that the IHO erred in finding that the district correctly prepared and implemented a safety plan for the student during the 2013-14 and 2014-15 school years. The parent argues that since the 2014-15 and 2015-16 safety plans failed to provide a 1:1 aide for the student, they were inappropriate. The parent argues that the IHO erred in finding that the parent proffered no witness testimony supporting her request for 10 hours of home-based ABA instruction and that the student should not receive the requested services due to a lack of stamina. Finally, the parent argues that the IHO failed to issue findings on the parent's claims that the district failed to develop IEPs based on "comprehensive evaluative data," the district failed to develop present levels of performance and appropriate goals, failed to provide appropriate-speech language services, and that the student failed to make meaningful progress.

For relief, the parent requests an independent speech-language evaluation and a neuropsychological evaluation to assess the student's autism. Also, the parent requests an order directing the CSE to convene and develop an IEP for the student. Further, the parent requests a "certified and competent" interpreter present at the CSE meeting and that all documents considered at the meeting be translated into Spanish and provided to the parent in advance of the CSE meeting. The parent also requests that the resultant IEP be translated into Spanish and that it include four hours per month of parent counseling and training in Spanish. The parent also requests that all future evaluations, reports, and IEPs be translated into Spanish. Further, the parent requests that the student receive an "appropriate autism placement" with no more than eight students or, in the alternative, a placement for the student in an out-of-district or State-approved nonpublic school. Further, the parent requests that the student receive 1:1 aide services until a proper placement is secured. Finally, the parent requests compensatory education, including 828 hours of ABA instruction, 120 hours of parent counseling and training, 18 sessions of assistive technology consultation, and additional speech services by an independent provider, if recommended in the IEE.

In an answer, the district generally responds to the parent's allegations with admissions and denials and interposes a cross-appeal asserting that the IHO erred in finding the district denied the student a FAPE for the 2015-16 school year. The district asserts that the student's classification of multiply disabled was more appropriate to meet the student's needs than the single diagnosis of autism. Further, the district argues, the program recommended by the CSE consisted of the same

methodologies recommended by the student's private evaluators. Finally, the district asserts that the program recommended by the CSE included parent counseling and training conducted in both Spanish and English. The parent responded to the district's cross-appeal with general denials and reasserted that the IHO was proper in finding that the district denied the student FAPE for the 2015-16 school year.

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]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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]; Perricelli, 2007 WL 465211, at *15). 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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—Scope of Impartial Hearing and Review

Before addressing the merits of this appeal, it is necessary to determine which claims may be properly considered. First, the parent's argument that the May 2013 CSE subcommittee was improperly composed—in that it failed to include a Spanish interpreter, the student's home-based instructor, or the occupational therapy or the physical therapy evaluators—was not initially identified in the parent's due process complaint notice (see Pet. at p. 2; Dist. Ex. A).² A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 634 Fed. Appx. 845, 849-50 [2d Cir. Dec. 30, 2015]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]). Further, although the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; M.H., 685 F.3d at 250-51; see J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]), in this instance, the allegation concerning the composition of the CSE was first raised in the parent's petition, not by the district "in support of an affirmative, substantive argument" (Pet. at p. 2; B.M., 569 Fed App'x at 59). Therefore, the district did not "open the door" to these issues and the parent's claim regarding the composition of the May 2013 CSE subcommittee must be dismissed since it was not properly raised.

Further, the IHO noted in his decision that the issue of the district's failure to provide door-to-door transportation was not raised by the parent in her due process complaint notice, citing to testimony of a district witness (IHO Decision at p. 25; Tr. p. 302). This finding is incorrect since the parent included an allegation in her due process complaint notice that the student was not provided door-to-door transportation pursuant to the May 2013 IEP, and as such, this allegation is addressed below (Dist. Ex. A at pp. 5, 7).

B. Claims Applicable to Multiple School Years

1. Transportation

The parent asserts that the IHO erred in dismissing the parent's claim that the district failed to provide door-to-door transportation as moot. Additionally, the parent argues that the IHO erred in considering evidence as to whether the student required door-to-door transportation and asserts that the district recommended door-to-door transportation in the student's IEPs but failed to provide it until the parent filed a due process complaint notice. The district, in its answer, admits that the

² The CSE chairperson of the May 2013 meeting testified at the impartial hearing that the May 2013 CSE subcommittee meeting was conducted in Spanish, obviating any need for a Spanish interpreter (Tr. p. 614). The parent testified, contrary to the district witness, that the May 2013 meeting was not held in Spanish (Tr. p. 2373).

CSE recommended door-to-door transportation "in accordance with School District policy" (Answer ¶16).

The dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4). However, a claim for compensatory education will not be rendered moot (see Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215, 219 [N.D.N.Y. 1993] [demand for compensation to correct past wrongs remains as a live controversy even if parents are satisfied with student's current placement]).

In this case, it is undisputed that all the student's IEPs at issue included provision for door-to-door transportation for the student (see Dist. Exs. 2; 11; 23; 33; 38; 41). It is also undisputed that the student did not actually receive the mandated door-to-door transportation until October 2015 (Tr. pp. 135, 279, 1245, 2482). The IHO characterized the door-to-door transportation issue as moot because the student began receiving this mandated service during the 2015-16 school year (see IHO Decision at p. 25). While the district did in fact fail to provide an IEP mandated service for the 2013-14 and 2014-15 school years, the parent has made no request for relief to remedy this violation, accordingly, there is no basis to overturn the IHO's mootness finding (see King v. Pine Plains Cent. Sch. Dist., 918 F. Supp. 772, 780 [S.D.N.Y. 1996] [claim that district failed to develop an appropriate IEP for prior school year determined to be moot because parents did not seek compensatory education]).

2. Parent Participation

The parent argues that, throughout all three school years at issue, the district failed to provide Spanish translations of the student's evaluation reports and failed to provide "language interpretation" to the parent. Further, the parent argues that the IHO erred in dismissing her claims regarding the district's alleged failure to provide language translation and interpretation. The district denies the parent's allegations and argues that all evaluations were orally translated to the parent and that Spanish language interpreters were "available and present" at every meeting.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). In addition, the district "must take whatever action is necessary to ensure that the parent understands the proceedings of the [CSE] meeting, including arranging for an interpreter for

parents [who are hearing impaired] or whose native language is other than English" (34 CFR 300.322[e]; 8 NYCRR 200.5[d][5]; see also Application of a Student with a Disability, Appeal No. 13-136). The parent testified that her native language is Spanish (Tr. p. 2353).

With respect to the translation of documents, both federal and State regulations require that a district provide parents with certain documents in their native language, ensure that consent and procedural notices are provided in the parents' native language, and provide a translator at all times during the impartial hearing process (see, e.g., 20 U.S.C. § 1415[b][4], [d][2]; 34 CFR 300.9[a]; 300.503[c], 300.504[d]; 8 NYCRR 154-1.3[b], 200.1[l][1], 200.4[a][9][ii], [b][6][xii], [g][2][ii], 200.5[a][4], [f][2]). Neither the IDEA nor federal or State regulations require that a district provide parents with a copy of the IEP in their native language (Letter to Boswell, 49 IDELR 196 [OSEP 2007] [noting that while "[t]here is no requirement in IDEA or in its accompanying regulations that all IEP documents must be translated," districts are required to provide parents with full information, in their native language, of all information relevant to activities for which consent is sought]; see 34 CFR 300.9[a], 300.320; 8 NYCRR 200.1[l][1], 200.4[d][2]).³

According to the district's director of special education, the May 2013 educational evaluation report was interpreted when it was reviewed (Tr. p. 217). Additionally, the assistant director of special education at the elementary level who chaired the May 2013 CSE subcommittee meeting testified that the May 2013 meeting was conducted in Spanish, the documents were translated into Spanish as they were reviewed, and most of the participants spoke Spanish; however, translation was provided for any English-speaking participants (Tr. pp. 610-17, 656, 715-16). Likewise, the parent testified that some of the CSE members spoke Spanish at the May 2013 CSE subcommittee meeting and that they provided a summary of each evaluation reviewed in Spanish (Tr. pp. 2371-73).

Furthermore, the student's then-current speech-language therapist testified that there was a Medicaid coordinator who translated for the parent during the June 2014 CSE subcommittee meeting, and the chairperson who conducted the meeting also spoke Spanish (Tr. p. 1708). Additionally, the parent testified that there was an interpreter present during the June 2014 CSE subcommittee meeting (Tr. p. 2411), and the list of meeting participants also indicates the presence of an interpreter during the meeting (Dist. Ex. 11 at p. 1).

According to the CSE chairperson for the March 2015, April 2015, and May 2015 CSE meetings, there were interpreters at all the meetings, two in person and one via telephone (Tr. pp. 786, 791, 811, 817).⁴ She further testified that she would conduct the meetings mostly in Spanish

³ Although not required to provide parents with a copy of an IEP in their native language, doing so would be in keeping with the spirit of the IDEA and is one way to demonstrate that the parent has been "fully informed of their child's educational program" (Letter to Boswell, 49 IDELR 196 [OSEP 2007]). Additionally, independent of the requirements of the IDEA, a district may otherwise have an responsibility to provide translated IEPs to parents (Dear Colleagues on translating documents, 116 LRP 44552 [OCR 2016] [setting forth the view of the Office of Civil Rights that districts are required to provide parents with translated IEPs under Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974 but noting that there is no comparable requirement in the IDEA or its implementing regulations]).

⁴ The attendance sheets and list of participants at the March 2015, April 2015, and May 2015 all indicate that an interpreter was present; however, the interpreter listed for the May 2015 CSE meeting participated via a telephone

and that, additionally an interpreter was present (Tr. pp. 811-12). She described that it was general practice to translate written summaries of the annual review reports into Spanish, and specified that the CSE reviewed a medical report and transportation policy which had been provided in Spanish (Tr. pp. 830-32, 854). She detailed that all information reviewed which involved a parent's obligation was translated into Spanish (Tr. p. 873). The student's then-current teacher testified that an interpreter was also present during the June 2015 CSE subcommittee meeting, and that translation was provided as information was reviewed (Tr. pp. 2115-16; Dist. Ex. 42). The assistant director of special education for the middle school, who chaired the June 2015 CSE subcommittee meeting, testified that there was an interpreter present during that meeting, and that as the documents were discussed, the interpreter discussed the contents and "reviewed its salient pieces of information" with the parent in her native language (Tr. pp. 594-95). Finally, the parent testified that an interpreter was present at the March 2015 CSE meeting and via telephone during May 2015 CSE meeting, and noted that the transportation policy was provided in Spanish during the April 2015 CSE meeting (Tr. pp. 2426-27, 2437).

The evidence in the hearing record shows that the district provided translation services to the parent at all of the CSE and CSE subcommittee meetings between May 2013 and June 2015. As for evaluations, State regulation requires that a "[s]ummary of the results of the evaluation [be] provided to the parents in their native language or mode of communication, unless it is clearly not feasible to do so" (8 NYCRR 200.4[b][6][xii]). While it is understandable that the parent would prefer to receive written translations of the evaluative information relied on by the CSEs, the parent was provided with a summary of the evaluative information in Spanish as it was reviewed during each of the meetings, which was adequate to conform to State regulation. Further, in general, the hearing record supports a finding that the parent actively participated in the CSE meetings. Under these circumstances, the parent was not denied meaningful participation in the development of the student's IEPs.⁵

C. May 2013 IEP

1. Evaluative Information and Present Levels of Performance

In her petition, the parent argues that the IHO failed to address her claims that the district did not properly evaluate the student, in that it failed to evaluate the student for autism, and the IEP did not appropriately identify the student's present levels of performance.

A review of the hearing record indicates that the May 2013 CSE subcommittee had available to it, and considered, a variety of evaluative information in addition to input from the student's parent, then-current teacher, and speech-language pathologist (Tr. pp. 612-13, 615; Dist. Exs. 1 at pp. 2-3; 2; 5-9; Parent Exs. G-H). Review of the evaluative information, as described in further detail below, indicates that the May 2013 CSE subcommittee had sufficient information by which to develop the student's May 2013 IEP (id.). Additionally, review of the May 2013 IEP shows that the student's needs identified in the evaluative information were adequately reflected

service (Parent Ex. D at p. 1; Dist. Exs. 23 at p. 1; 24; 34; 38 at p. 1).

⁵ It appears that, subsequent to the parent's due process complaint notice, the district began translating documents for the parent (see Dist. Ex. 49).

in the present levels of performance (compare Dist. Ex. 2 at pp. 1-12, with Dist. Exs. 2; 5; 6; 7; 8; 9; Parent Exs. G; H). Moreover, the evaluative information and resultant IEP did not indicate that the student might require further assessment in the area of autism (Tr. p. 615; see Dist. Exs. 2; 5; 6; 7; 8; 9; Parent Exs. G; H).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

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

The hearing record indicates that the May 2013 CSE subcommittee had available to it and considered a February 2013 OT annual review report, a February 2013 PT annual review report, a May 2013 educational evaluation report,⁶ an April 2013 psychological re-evaluation report, an April 2013 bilingual speech-language evaluation report, an April 2013 social history update, a

⁶ The educational evaluation was conducted in April 2013; however, the report is dated May 2013 (Dist. Ex. 5 at pp. 1, 5).

May 2013 medical report, and an April 2013 home-based ABA progress report (Tr. p. 615; Dist. Exs. 1 at pp. 2-3; 2; 5-9; Parent Exs. G-H).⁷

The results of the April 2013 educational evaluation are reflected throughout the May 2013 IEP present levels of performance (compare Dist. Ex. 2 at pp. 3-5, with Dist. Ex. 5). Specifically, consistent with the May 2013 educational evaluation report, the May 2013 IEP indicated that the student made progress in communication, social, behavioral and living skills but that he showed poor academic gains (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 5 at p. 1). Regarding academic progress, the May 2013 IEP indicated that the student made a "range of progress in all academic areas" specifying that his educational program was primarily delivered utilizing discrete trial and computer based programs (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 5 at p. 1). Furthermore, the IEP reported that the student was receiving direct instruction in pre-reading, handwriting, mathematics, and receptive and expressive language at pre-kindergarten and kindergarten levels but that he required high levels of repetition, reinforcement, modeling and maintenance of mastered content and skills (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 5 at p. 2). Finally, the IEP indicated that the student presented in the "significantly delayed range of attainment in all academic areas" (id.).

In reading, the May 2013 IEP indicated, in accordance with the May 2013 educational evaluation report, that the student was making poor progress in pre-reading skills, he did not recognize his name amongst similar names, and he did not consistently recognize letters (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 5 at p. 2). Furthermore, the IEP showed that the student demonstrated difficulty processing various shapes, designs, colors and complex patterns, and that he was not consistently matching identical letters (id.).

In mathematics, the May 2013 IEP indicated, in agreement with the May 2013 educational evaluation report, that the student was making poor progress, specifically describing that he could rote count to 10 and could count using 1:1 correspondence up to 10, recite days of the week and several months of the year, and could identify a circle and star (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 5 at p. 2). However, both the IEP and report indicated that the student could not match numerals or quantities, consistently identify numbers, or locate dates on a calendar (id.).

The May 2013 IEP included the results of an administration of the Assessment of Basic Language and Learning Skills – Revised (ABLLS-R), which were provided in the May 2013 educational evaluation report (compare Dist. Ex. 2 at pp. 4-5, with Dist. Ex. 5 at pp. 3-4). The May 2013 IEP indicated that the student had made gains in cooperation and reinforcer effectiveness, visual performance, receptive language, motor imitation, vocal imitation, requests, labeling, intraverbals, spontaneous vocalizations, syntax and grammar, play and leisure, social interaction, group instruction, and classroom routines (id.).

Regarding language development, the May 2013 IEP reflected the May 2013 educational evaluation report, which indicated that the student's receptive language skills were stronger than his expressive language skills; however, formalized testing showed splintered skills (compare Dist.

⁷ The assistant director of special education at the elementary level testified that the May 2013 CSE subcommittee reviewed an April 2013 home-based ABA progress report; however, this report is not included in the hearing record (Tr. pp. 609, 615; Dist. Ex. 1 at p. 3).

Ex. 2 at p. 4, with Dist. Ex. 5 at p. 2). Additionally, the IEP indicated that his vocabulary was stronger when identifying concrete objects, verbs of unambiguous appearance, and emotions identified by dramatic facial expression (id.). Furthermore, the May 2013 IEP described that the student had exhibited "encouraging progress" in expressive language skills and that the length of his utterances had steadily increased, his syntax improved, his vocabulary increased, and he was "showing greater confidence in answering questions" (id.). The IEP also described that the student regularly engaged in conversations with staff and had begun engaging in "playful teasing with peers" (id.).

In handwriting, the May 2013 IEP and the May 2013 educational evaluation report showed that the student: improved in his attention to task, strength, positioning of his pencil grip, and effort; mastered tracing and making vertical and horizontal lines; and was making progress writing crosses (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 5 at p. 2). Notably, the May 2013 IEP also indicated that the student did not trace letters or shapes independently (id.). Furthermore, the May 2013 IEP described that the student was beginning to show a preference for his left hand to write, he required guides to reduce distraction from visual stimuli on the page, and he benefitted from pressure applied to his non-writing hand to help stabilize his trunk (id.).

Activities of daily living (ADL) skills described in the May 2013 IEP, in accordance with the May 2013 educational evaluation report, indicated that the student required supervision in school hallways and the restroom due to safety issues and that the student was accompanied to the bathroom by staff (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 5 at p. 2). The IEP further reflected that the student had improved his ability to choose, attempt, and complete a variety of leisure activities (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 5 at pp. 2-3).

The May 2013 IEP, consistent with the May 2013 educational evaluation report, indicated that the student's social skills were an area of relative strength and described that he was friendly, often greeted familiar adults, and would often work cooperatively with a teacher in a 1:1 setting for 30 minutes or more (compare Dist. Ex. 2 at pp. 3-4, with Dist. Ex. 5 at p. 1). Additionally, the May 2013 IEP indicated that the student presented with inconsistent attention, poor understanding of personal space, and inconsistent academic stamina (id.). The IEP further reported that the student often sought out peers for interactive play and that, although he had improved parallel play with "some burgeoning cooperative play skills," his attempted socialization with non-disabled peers was often unsuccessful as the student became withdrawn and exhibited atypical behaviors (id.). The student's behaviors, described in both the May 2013 IEP and the May 2013 educational evaluation report, indicated improved compliance with staff directives, improvement in attending behaviors, and an increase in academic stamina, and that the student did not require a behavior intervention plan (compare Dist. Ex. 2 at p. 5, with Dist. Ex. 5 at p. 4). Furthermore, the May 2013 IEP reflected that the student continued to display significant levels of distractibility to sounds and movement, benefitted from a small class setting with minimal distractions, and required teacher supervision during transitions throughout the school day for safety purposes (compare Dist. Ex. 2 at p. 6, with Dist. Ex. 5 at p. 5).

Turning to the other evaluative information considered by the May 2013 CSE subcommittee, consistent with the April 2013 bilingual speech-language evaluation report, the May 2013 IEP indicated that the student's bilingual receptive and expressive vocabulary skills were in the very low range; and he used expanded sentences with correct structures and was able

to answer "what," "where," and "why" questions, label pictures, and tell how an object was used in Spanish (compare Dist. Ex. 2 at p. 10, with Dist. Ex. 7 at pp. 3-4). Additionally, the May 2013 IEP reflected results from the ABLLS-R, which indicated that the student's attention span improved in a 1:1 setting and decreased during group sessions; he followed directions that included body parts and actions; he identified common objects and pictures; he used four or more word utterances to request and to label an item; he initiated eye contact and returned a greeting from adults; he followed most classroom routines; and he benefitted from verbal praise (compare Dist. Ex. 2 at p. 10, with Dist. Ex. 7 at p. 4). Additional information provided in the April 2013 bilingual speech-language evaluation report indicated that the student could become distracted by his surroundings and needed refocusing back to task, and he required adult supervision to stay on task and complete his work (Dist. Ex. 7 at pp. 2-3). Recommendations included in the April 2013 bilingual speech-language evaluation report included providing the student with a highly structured, smaller classroom setting, repetition and refocusing, and reducing distracting stimuli (id. at p. 4).

Regarding the student's gross motor needs, the May 2013 IEP, consistent with the February 2013 physical therapy annual review report, indicated that the student continued to demonstrate decreased trunk and extremity strength, a wide base of support when ambulating or running, upper extremity posturing for stability, decreased balance and coordination, and difficulty with motor planning (compare Dist. Ex. 2 at p. 12, with Parent Ex. G). Furthermore, the May 2013 IEP reflected that the student was making physical gains and continued to show progress in his gross motor skills (id.). Additionally, the IEP indicated that the student required adult supervision for safety on the stairs due to gross motor, strength, and coordination deficits (id.). The February 2013 physical therapy annual review report discussed the student's difficulty navigating the school environment and decreased safety awareness (Parent Ex. G). In response, the IEP indicated that although the student ambulated around the school independently, he required "adult support nearby," and continued to need adult supervision for safety on the stairs (Dist. Ex. 2 at p. 12).

With respect to the student's fine motor needs, the May 2013 IEP, consistent with the February 2013 OT annual review report, indicated that the student presented with delays in his fine motor, graphomotor, and gross motor skills (compare Dist. Ex. 2 at p. 12, with Parent Ex. H at pp. 1-2). According to the IEP, the student worked "extremely slowly" when completing fine motor tasks, and he exhibited decreased tone in his upper extremities and difficulty crossing midline (Dist. Ex. 2 at p. 12; see Parent Ex. H at pp. 1-2). The IEP further indicated that the student was generally independent, was at times easily distracted, and that he participated in most physical activities with support when necessary (Dist. Ex. 2 at pp. 2, 12; see Parent Ex. H at pp. 1-2). Additionally, the summary of the IEP meeting reflected reports that the student exhibited difficulty scanning materials and processing patterns visually, appeared to learn more by oral means than visual, and that the student's ability to "see things" was problematic (Dist. Ex. 2 at pp. 1-2; see Parent Ex. H at pp. 1-2).

Although not reflected per se in the May 2013 IEP, the hearing record indicated that the May 2013 CSE subcommittee reviewed an April 2013 social history during the meeting, and a review of the information shows it is generally consistent with the present levels of performance in the May 2013 IEP (Tr. p. 615; Dist. Ex. 1 at p. 3; compare Dist. Ex. 2, at pp. 1-12, with Dist.

Ex. 8).⁸ The April 2013 social history reported, among other things, that the parent was concerned about the student's placement and progress, specifically that she was not happy that his class consisted primarily of students with autism who did not interact with each other, as the student was much more social than the other students in the class (Dist. Ex. 8). Additionally, the update reported that the family was seeking further assessments from an outside source to help with recommendations for an appropriate placement for middle school (id.).

Similarly, the hearing record indicated that the May 2013 CSE subcommittee reviewed a May 2013 psychological reevaluation report, and the assessment scores are reflected in the May 2013 IEP (Tr. p. 615; Dist. Exs. 1 at p. 3; compare Dist. Ex. 2 at p. 8, with Dist. Ex. 6 at pp. 2-3). While the details of the May 2013 psychological report were not specifically included in the May 2013 IEP, comparison of the evaluation report and the present levels of performance show general consensus regarding the student's strengths and needs (compare Dist. Ex. 2 at pp. 1-12, with Dist. Ex. 6). For example, the May 2013 psychological report and the IEP generally indicated that the student was a "kind and affectionate young man" who made frequent eye contact and attempted to socialize appropriately (Dist. Ex. 6 at p. 1; see Dist. Ex. 2 at p. 3). The student's performance on an administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) yielded scores which indicated that the student was functioning in the extremely low range in verbal comprehension, perceptual reasoning, and working memory (compare Dist. Ex. 2 at p. 8, with Dist. Ex. 6 at p. 2). Furthermore, the May 2013 IEP generally reflected the results of assessments of the student's adaptive behavior, which placed the student in the extremely low range across all areas (Dist. Ex. 6 at p. 3; see Dist. Ex. 2 at pp. 1-12). Results of assessments of the student's visual motor abilities reflected in the IEP indicated that his visual motor skills were in the extremely low range, and that the student worked to improve his pencil grip, his ability to trace and copy lines, and use the space provided (compare Dist. Ex. 2 at pp. 2, 4, with Dist. Ex. 6 at p. 3).

Therefore, review of the evaluative information available to and used by the May 2013 CSE subcommittee during the development of the May 2013 IEP shows that the CSE subcommittee thoroughly identified the student's skills and needs in cognitive, academic, communication, motor, and social/behavioral domains.

Finally, the parent argues in her petition that the IHO erred in finding that the district appropriately evaluated the student, and alleges that the district had an obligation to evaluate the student for autism. As noted above, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Further, courts have given considerably less weight to identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed through special education

⁸ The hearing record indicates that the May 2013 CSE subcommittee also reviewed an April 2013 medical report, and the May 2013 IEP generally reflected the diagnoses the student had received (Tr. p. 615; compare Dist. Ex. 2 at pp. 2, 12, with Dist. Ex. 9).

and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]).

As described in detail above, the evaluative information available to the May 2013 CSE subcommittee showed that the student's social skills were an area of relative strength, and although he exhibited speech-language delays, he was friendly, demonstrated turn taking skills, invited others to join his play, laughed when told jokes, recognized and commented on the feelings of others, had good relationships with peers and adults, greeted staff appropriately, sought out peers for interactive play, made eye contact, and otherwise did not exhibit features of autism such that the lack of an evaluation specific to that diagnosis denied the student a FAPE for the 2013-14 school year (Dist. Exs. 5 at p. 1; 6 at pp. 1, 4; 7). Although the parent testified that, at the time of the May 2013 CSE subcommittee meeting, the student showed characteristics that are common in students with autism (Tr. p. 2374), considering the evaluative information available to the May 2013 CSE subcommittee, the CSE subcommittee had sufficient information to identify and address the student's areas of need.⁹ Accordingly, the district was not obligated to conduct a specific evaluation in the area of autism (see C.R. v. New York City Dept. of Educ., 2016 WL 5793415, at *14 [S.D.N.Y. Sept. 30, 2016] [additional assessments need only be conducted if found necessary to fill in gaps in the initial review of existing evaluation data]; D.J. v. New York City Dep't of Educ., 2013 WL 4400689, at *4 [S.D.N.Y. August 15, 2013] [holding that a school district is not compelled "to perform every sort of test that would arguably be helpful" before creating an IEP], quoting Mackey v Bd. of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]; D.B. v New York City Dep't of Educ., 966 F. Supp. 2d 315, 331 [S.D.N.Y. 2013] [finding that where "the CSE relied on a number of sufficient evaluations, reports, and observations in assessing the Student's skill levels, the absence of one 'single measure'" did not render the IEP invalid).

2. Annual Goals

The parent asserts in the petition that the IHO failed to consider and issue a finding on the parent's allegation that the May 2013 IEP did not include appropriate goals. The parent does not elaborate on her claim by explaining in what manner the annual goals were allegedly inappropriate. The parent's memorandum of law, in turn, focuses on alleging deficiencies in the annual goals for the 2014-15 and 2015-16 school years.

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

⁹ After the May 2013 CSE subcommittee meeting, the parent obtained an August 2013 private neurodevelopment evaluation and an October 2013 private developmental assessment of the student, which reported that the student exhibited characteristics consistent with the criteria for an autism spectrum disorder (Dist. Exs. 35 at p. 4-5; 36 at pp. 4-6). The parent eventually provided these evaluations to the district in May 2015 (Dist. Exs. 35 at p. 1; 36 at p. 1). However, as these evaluation reports were not available to the May 2013 CSE subcommittee, they may not be used to assess the sufficiency of the CSE's evaluations at the time of the CSE meeting (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] ["a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]).

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

The May 2013 IEP contained approximately 17 annual goals, and approximately 50 short-term objectives (Dist. Ex. 2 at pp. 13-18). A review of the annual goals indicated these were designed to address the student's academic, speech-language, fine and gross motor, and ADL needs, and were commensurate with the student's present levels of performance contained in the May 2013 IEP (id. at pp. 3-18). Specifically, the May 2013 IEP contained annual goals and short-term objectives designed to improve the student's academic skills by improving his ability to match letters within a larger set, match his name in an array, count varying quantities of objects using one-to-one correspondence, match coins within a larger set, and identify numbers within a larger set (id. at pp. 13-14).¹⁰ The May 2013 IEP contained annual goals designed to improve the student's speech-language skills by improving his ability to respond appropriately to the language of others during interactions following oral directions, demonstrate appropriate attention to person or task by looking at the person on first command, recall three details from a story he just heard including character, action, and sequence with no more than one repetition, and participate verbally in structured language activities by answering "wh" questions related to on-going events (id. at pp. 15-16). The student's fine and gross motor needs were addressed by annual goals designed to: improve his core strength, balance, and coordination; improve his ability to throw, catch, bounce, dribble, hit, and kick a ball; improve his ability to grasp, manipulate, and hold specific objects to improve fine motor strength control and endurance; and improve his ability to hold a pencil, write, draw, and copy pictures to assist prewriting skills (id. at pp. 16-17). Finally, the student's ADL needs were addressed with annual goals designed to improve his ability to complete four or more chores on a list by referencing and following a sequence, obtaining the materials, and initiating and finishing each task; brushing his teeth by following a picture schedule in sequence and completing all steps independently; and dressing and undressing including using buttons and fasteners (id. at pp. 17-18). Furthermore, the May 2013 IEP specified criteria for achievement for each goal (i.e., 70, 80, 85, or 90 percent), how the student's progress would be measured (i.e., recorded observations), and a schedule of when progress would be measured (i.e., daily, weekly, every 2 or 3 weeks, quarterly, and annually) (id. at pp 13-18).

Based on the above-referenced information, the annual goals and short-term objectives contained in the May 2013 IEP comported with the present levels of performance and appropriately addressed the student's identified needs (id. at pp. 3-18).

¹⁰ The May 2013 CSE subcommittee meeting information notes reflected that the CSE discussed the student's progress towards meeting his annual goals during the 2012-13 school year and noted that the student had not met some of his goals relating to letter and number identification (Dist. Ex. 2 at p. 1).

3. Special Factors—Assistive Technology

In her petition, the parent alleges that the district did not evaluate the student for assistive technology for the 2013-14 school year or discuss assistive technology at the May 2013 CSE subcommittee meeting. The parent further argues that the IHO erred in dismissing her complaint that the district failed to evaluate the student for assistive technology.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. One of the special factors that a CSE must consider is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121).

The parent is correct in her argument that the IHO erred in his determination that assistive technology is "only a teaching methodology." Federal and State regulations describe an assistive technology device as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability" and assistive technology service as "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device" (34 CFR 300.5, 300.6; 8 NYCRR 200.1[e]; [f]). Furthermore, State regulations consider assistive technology services to be a related service defined as a "developmental, corrective, and other supportive services as are required to assist a student with a disability" (8 NYCRR 200.1[qq]).

However, the IHO was correct in his determination that the omission of assistive technology from the May 2013 IEP was "not a violation of [a] FAPE" because at the time of the May 2013 CSE subcommittee meeting, the student had not yet developed the prerequisite skills to use assistive technology (IHO Decision at p. 27). As described in more detail above, the evaluative information before the May 2013 CSE subcommittee did not indicate that the student required assistive technology to benefit educationally from his program, or to communicate with peers and adults (see Dist. Exs. 2; 5-9; Parent Exs. G-H). The May 2013 IEP meeting information indicated that the student did better using realia, that it was difficult for the student to generalize to a picture, and that the student had difficulty visually scanning and processing patterns (Dist. Ex. 2 at p. 2). The meeting information also indicated that the student appeared to learn more orally than visually, and his then-current teacher opined that the student's processing and ability to see things was problematic (id. at pp. 1-2). Furthermore, the assistant director of special education at the elementary level testified that at the time of the May 2013 CSE subcommittee meeting, the student was not yet at the point where he was "able to use assistive technology," because his prerequisite skills were "very inconsistent" (Tr. pp. 643, 732). She testified that staff worked on developing the student's prerequisite skills first, before moving to the next level and further recommendations (Tr. pp. 732-33). Additionally, she testified that the student's speech-language pathologist used an iPad and that assistive technology was used in the student's classroom, so staff would have been

"probing and working with that" (Tr. pp. 643, 732). Therefore, in this instance, the hearing record supports the IHO's finding that at the time of the May 2013 CSE subcommittee meeting, the student had not yet developed the prerequisite skills to use assistive technology, such that the lack of an assistive technology evaluation and subsequent IEP recommendation for assistive technology does not rise to the level of a denial of a FAPE (see E.F. v Newport Mesa Unified Sch. Dist., 2015 WL 3867982, at *10 [C.D. Cal. June 23, 2015] [finding a district's delay in recommending assistive technology reasonable where the student's knowledge regarding communication with such devices was still emerging]).

4. 12:1+2 Special Class and Shared Aide

The parent argues in her petition that the 12:1+2 placement recommendation was inappropriate due to the student's lack of progress and his need for intense instruction, and that the IHO erred in finding the placement appropriate. A review of the hearing record indicates that the placement recommended by the May 2013 CSE subcommittee was adequate to meet the student's identified needs (Tr. pp. 613, 615, 626; Dist. Exs. 2; 5-9; Parent Exs. G-H).

During the 2012-13 school year the student received instruction in an 8:1+2 special class with an additional aide (Tr. p. 676). Review of the hearing record shows that despite continuing to exhibit significant global deficits, during the 2012-13 school year the student showed some progress in most areas of need (see Dist. Exs. 5-7; Parent Exs. G-H). Specifically, the May 2013 educational evaluation report indicated that the student had demonstrated progress in his communication, social, behavioral, and living skills, and a "range of progress" in all academic areas (Dist. Ex. 5 at p. 1). Furthermore, the educational evaluation report indicated that the student exhibited improved parallel play, social, and motor skills, and the ability to select leisure activities (id. at pp. 1-5). Additionally, results of the April 2013 administration of the ABLLS-R, as reported in both the May 2013 educational evaluation and the May 2013 IEP, indicated that the student made progress in all areas assessed, detailing gains in cooperation and reinforce effectiveness, visual performance, receptive language, motor imitation, vocal imitation, requests, labeling, intraverbals, spontaneous vocalizations, syntax and grammar, play and leisure, social interaction, group instruction, and classroom routines (Dist. Ex. 5 at pp. 3-4).

According to CSE meeting information notes, the May 2013 CSE subcommittee reviewed the student's progress toward meeting his annual goals, and his present levels of performance in relation to academic, physical, and social/emotional needs (see Dist. Ex. 2 at pp. 1-2). The May 2013 CSE subcommittee then discussed the programs available at the district's middle school, as well as the differences between an 8:1+1 special class placement (ABA 8:1+2) and a 12:1+1 special class (ABA) placement (local program 12:1+2) (id. at p. 2).¹¹ The May 2013 CSE meeting information notes indicated that students in the 12:1+1 (local program 12:1+2) special class placement functioned at a higher level, the student profile was more engaged in instruction, and followed more of the common core curriculum (id. at p. 2).

¹¹ Although in testimony the assistant director of special education referred to the placement options as 8:1+1 and 12:1+1 special classes, "local" program recommendations refer to 8:1+2 and 12:1+2 special class placements (compare Tr. pp. 625-26, 730, with Dist. Ex. 2 at p. 2).

For the 2013-14 school year, the May 2013 CSE subcommittee recommended a 12:1+2 ABA special class (Dist. Ex. 2 at pp. 2, 18). State regulations provide that a 12:1+1 special class placement is intended for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Management needs are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). With respect to the parent's argument that the student was not ready to move into a larger classroom, the assistant director of special education who chaired the May 2013 CSE subcommittee meeting testified that the CSE subcommittee had extensive discussions regarding the differences between the special class placements and the availability of peer models in the 12:1+2 local program (Tr. pp. 625-27, 730; see Dist. Ex. 2 at p. 2). She further testified that, during the May 2013 CSE subcommittee meeting, the parent expressed her concerns about the student not having peers with whom he could interact and socialize, and that the student needed more opportunities to be verbal (Tr. pp. 626-27, 642, 660, 730). Furthermore, the April 2013 social history reported, among other things, that the parent was not happy with the student's then-current class (8:1+1) consisting primarily of students with autism who did not interact with each other, noting that the student was "much more social than the other students" in that class (Dist. Ex. 8 at p. 1; see Dist. Ex. 5 at p. 1). The assistant director testified that both ABA special classes used discrete trial instruction as well as individualized instruction, and individual programs for each of the students (Tr. pp. 630-31). She further testified that the 12:1+2 and the 8:1+2 classrooms received very similar instructional methodology; however, students in the 12:1+2 classroom functioned at a slightly higher level, had more language, and exhibited more socially typical behaviors than students in the other classroom (Tr. p. 631). Given the parent's concerns expressed at the May 2013 CSE subcommittee meeting about the lack of an appropriate social peer group in the 8:1+1 special class, and the student's progress during the 2012-13 school year, the hearing record supports finding that the May 2013 IEP recommended 12:1+2 ABA special class placement was appropriate for the student to receive educational benefit.

In addition to the supports inherent in the district's local 12:1+2 ABA special class described above, the May 2013 CSE subcommittee also recommended two hours per day of shared aide services, provided in the classroom to support the student during academic instruction and to provide refocusing and redirection (Dist. Ex. 2 at p. 19). The assistant director of special education testified that a shared aide allowed the student to work in a group, and with other people so the student would not become dependent on one person (Tr. p. 647). She further testified that the CSE subcommittee recommended a shared aide because they wanted the student to have social interactions and so he would be able to work in groups (Tr. p. 648). In addition, the hearing record shows that while the student exhibited progress in communication, social, and motor skills during the 2012-13 school year, he showed "poor gains academically," and required high levels of repetition, reinforcement, modeling, and maintenance of mastered content and skill (Dist. Exs. 2 at p. 4; 5 at pp. 1-2). To that end, the assistant director testified that the purpose of the shared aide was to "enhance staffing further," and explained that it allowed more opportunities for classroom support and for the student to work with the other staff in the classroom (Tr. p. 767). The assistant director of middle school special education services testified that the enhanced staff in the classroom support students' academic management needs (Tr. pp. 310, 323).

To further address the student's identified needs, the May 2013 CSE subcommittee recommended individual and group bilingual speech-language therapy, OT, PT, and a four hours per week of a home-based program (Dist. Ex. 2 at p. 18). Additionally, the May 2013 IEP provided the student with access to an elevator when needed, refocusing and redirection, and adapted physical education (id. at pp. 18-19).

The parent argues on appeal that the IHO erred in finding the district's "12-student class" placement appropriate, in part because the student's physicians testified that he required a class with fewer students, an "ABA autism class, with significant adult supervision," an appropriate peer group, discrete trial ABA, "constant redirection," and individual and group speech-language therapy. As described in detail above, the May 2013 CSE subcommittee recommended a program and placement that was appropriate to meet the student's needs and, in many respects, took into consideration the parents' concerns.

5. Safety Related Needs

The parent next contends that the district failed to provide the parent with a "safety plan" for the student for the 2013-14 school year (Pet. ¶ 35) and, additionally, that the student required a one-to-one aide during the 2013-14 school year due to his medical and safety needs. The parent asserts in her petition that the IHO erred in finding that the district developed a safety plan for the 2013-14 school year and acted appropriately in not assigning the student a 1:1 aide.

The parent testified at the impartial hearing that she requested a 1:1 aide at the May 2013 CSE subcommittee for the student's safety (Tr. p. 2379). Although the school didn't have a formalized safety plan in place for the 2013-14 school year, evidence in the hearing record shows that the district was aware of the student's medical and safety needs and had protections in place.

The May 2013 IEP also noted the student's required braces/orthotics for ambulation and that, although the student could "walk around the school" independently without the aid of a walker, he required adult support nearby (Dist. Ex. 2 at p. 12). Additionally, the IEP indicated that the student required adult supervision when using the stairs because of his gross motor, strength, and coordination deficits (id.). The IEP reflected reports that the student required close supervision in school hallways and the restroom due to safety issues, and that the student was accompanied to the bathroom by staff (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 5 at p. 2). In addition, the IEP provided an annual goal that addressed the student's core strength, balance, and coordination needs as identified in the February 2013 PT annual review reports (compare Dist. Ex. 2 at p. 16, with Parent Ex. G). The assistant director for special education testified at the impartial hearing that the district had safety protocols in place for the student, such as enhanced staffing in the classroom, with two paraeducators within arm's length distance to the student at all times (Tr. p. 344; Dist. Ex. 2 at p. 18). With respect to considerations for determining if a student requiring a one-to-one aide, State guidance issued in January 2012 specifically notes that a CSE must weigh factors that include, but are not limited to, the student's individual needs and the special class size recommended by the CSE (see "Guidelines for Determining a Student with a Disability's Need for

a One-to-One Aide," at pp. 1-5, Office of Special Educ. Mem. [Jan. 2012], available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>.¹²

Moreover, with respect to the student's seizures, review of the CSE subcommittee meeting information notes indicated that the school nurse attended the meeting, and that the team discussed the student's seizure diagnosis and its effects on the student (Dist. Ex. 2 at p. 2). According to the notes, the parent informed the CSE that, when the student experienced a seizure, "it [wa]s visible" (id.). The May 2013 IEP noted that there was a report of "seizure activity" in February 2011 and, upon undergoing diagnostic testing relating thereto, "[a]ll tests were negative" (id. at p. 12). The IEP also noted that the student last experienced a seizure at school in April 2013, which lasted 45 seconds, and that the student took two anti-seizure medications on a daily basis (id.). In the case of a student with needs related to seizures, it has been held that, to the extent a CSE has before it documentation of what triggered seizures and how seizures can be avoided, an IEP should include recommendations regarding how to minimize the student's risk of a seizure at school (see C.D. v. New York City Dep't of Educ., 2016 WL 3453649, at *15 [E.D.N.Y. June 20, 2016]; G.B. v. New York City Dep't of Educ., 2015 WL 7351582, at *15 [S.D.N.Y. Nov. 5, 2015]). At this point, there is no indication that the May 2013 CSE subcommittee had before it specific information about triggers or prevention of the student's seizures.¹³ Accordingly, the hearing record indicates that the May 2013 IEP contained sufficient information about the student's seizures to inform the staff who would work with the student in the highly supportive program and placement recommended in the IEP about the student's seizure disorder.

Therefore based on the evidence found in the hearing record, the May 2013 CSE subcommittee was aware of the student's medical and safety needs, and recommended adult support and supervision sufficient to address those needs in the IEP, such that the student did not require a "safety plan" or a 1:1 aide to receive a FAPE (Dist. Ex. 2 at pp. 2, 18; see Tr. p. 344).

6. Related Services—Speech-Language Therapy

¹² Though not applicable during the time periods at issue in this matter, State regulations regarding the recommendation of supplementary school personnel have been amended and now require consideration of a number of factors, including: the student's management needs, goals for reducing the need for 1:1 support, the specific support the 1:1 aide would provide, other supports or accommodations, the portion of the day for which the student needs 1:1 support, staffing ratios, how the support of a 1:1 may enable the student to be educated with nondisabled peers, any potential harmful effect of having a 1:1 aide, and training and support that will be provided to the aide to help the aide understand and address the student's needs (8 NYCRR 200.4[d][3][vii]).

¹³ The hearing record includes a letter from the student's physicians dated November 20, 2013 (Parent Ex. P). The student's doctor testified that she wrote the letter based on the parent's reports that the student was unsupervised at school and experienced seizures and falls at school (Tr. p. 1373). The student's doctor also testified that she delivered the letter to the parent (Tr. p. 1374) and the parent testified she "would normally give it to the teacher" (Tr. pp. 2391-92). As this letter was not available to the May 2013 CSE subcommittee, it should not be used to assess the CSE's recommendations at the time it was made (see C.L.K., 2013 WL 6818376, at *13). Further, the parent did not request that the CSE reconvene to consider this information and, as the document is based on a report from the parent, rather than direct observation of the student, it does not appear that it would have provided any additional information to the CSE that could not have been provided by the parent, or the student's teachers (see Tr. p. 1373).

The parent alleges that the IHO failed to consider and issue a finding concerning the parent's claim that the district failed to provide appropriate speech-language services for the student.

Contrary to the parent's contention that the student required more intensive speech-language therapy and specifically in relation to the parent's assertion that the student needs individual therapy to develop his English language skills,¹⁴ the hearing record indicates that the recommended speech-language therapy was appropriate to meet the student's speech-language needs. The May 2013 IEP recommended bilingual speech-language therapy once per week individually and twice per week in a small group (5:1) (Dist. Ex. 2 at p. 18). Furthermore, the May 2013 IEP indicated that the group therapy sessions could be provided throughout the school, which allowed the speech-language pathologist to support the student in any setting (*id.*). Finally, the May 2013 IEP included four annual goals and corresponding short-term objectives designed to improve the student's ability to: respond appropriately to the language of others during interactions following oral directions; demonstrate appropriate attention to a person or task by looking at the person on first command; recall three details from a story he just heard including character, action, and sequence with no more than one repetition; and participate verbally in structured language activities by answering "wh" questions related to on-going events (*id.* at pp. 15-16).

The hearing record shows that the student received bilingual speech-language therapy to develop his language skills while utilizing his strengths in both Spanish and English. According to testimony provided by the assistant director for special education, bilingual speech-language therapy utilizes the student's knowledge of Spanish to help him develop English language skills (Tr. p. 775). She further testified that the goal of bilingual speech-language therapy was to work with the student in both English and Spanish, using whatever foundation the student might have to help him develop English language skills (Tr. p. 644). To that end, the April 2013 bilingual speech-language evaluation report and the May 2013 IEP described some of the student's strengths in Spanish that might be used to support his language development in English; for example, the student used expanded sentences with correct structures, followed simple directions, answered basic questions, labeled pictures, and told how an object is used in Spanish (Dist. Exs. 2 at p. 11; 7 at pp. 2-4). Therefore, a review of the hearing record shows that the district's recommended speech-language therapy addressed the student's language needs.

D. 2013-14 School Year Implementation

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; *see* 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimus failure to implement all elements of the IEP and, instead, the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District

¹⁴ To the extent that the parent asserts on appeal that the student was not receiving sufficient speech-language therapy for learning English, State regulations provide for English as a second language instruction for students who are English language learners (8 NYCRR 154-1.2[d][1][iii]) and the parent did not assert in her due process complaint notice that the student was not receiving such instruction or that it was necessary for the student to receive a FAPE (Parent Ex. A).

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

Moreover, an implementation claim is a narrow inquiry into the actual delivery of the program and services recommended in the student's IEP, rather than the appropriateness of the recommended program and services or the student's progress thereunder. It has been held that an implementation claim must be closely examined to ensure that it involves nothing more than implementation of services already spelled out in an IEP (Polera v. Bd. of Educ., 288 F.3d 478, 489 [2d Cir. 2002] [reviewing the relevant claim and noting that the district's alleged failure to provide services was "inextricably tied to the content of the IEPs and therefore . . . much more than a failure of implementation"]; Donus v. Garden City Union Free Sch. Dist., 987 F. Supp. 2d 218, 231 [E.D.N.Y. 2013]; see also Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 682 [S.D.N.Y. 2011]).

1. ABA Methodology

In her petition, parent argues that the student's classroom for the 2013-14 school year was not an ABA placement, despite the May 2013 IEP recommendation. In the portion of the May 2013 IEP that set forth recommended programs and services, the IEP reflected a recommendation for a "Special Class ("ABA Classes") (Dist. Ex. 2 at p. 18). The IEP does not reflect that the CSE subcommittee discussed the student's need for a particular methodology in order to receive educational benefit. In any event, the hearing record shows that the 12:1+2 special class placement that the student attended during the 2013-14 school year used ABA and discrete trial teaching methods (Tr. pp. 103, 255, 966-68, 1130, 1668, 1736; Dist. Ex. 2 at p. 18). Additionally, the hearing record shows that the student received four hours per week of ABA instruction in a home-based program (see Tr. pp. 141, 946, 1130, 2232, 2242, 2247, 2252-53; Dist. Ex. 2 at p. 18).

Specifically, the hearing record shows that the student attended a 12:1+2 "life skills" special class during the 2013-14 school year (Tr. pp. 100, 200, 315). According to the district director of special education, a "life skills" class used a "data-driven methodology that is consistent with tactics of applied behavioral analysis" (Tr. p. 103). Furthermore, the student's special education teacher for the 2013-14 school year testified that "all of the life skills classes are, in essence, ABA classes" (Tr. pp. 1655, 1669, 1736). During her training to use the Rethink program, the student's teacher learned how to collect and enter data, and also conduct the discrete trials used

with students (Tr. p. 1660). According to the teacher, during the 2013-14 school year the district implemented the Rethink program described in the hearing record as an online data platform used for all ABA programs and home-based programs, that allowed for data to be directly entered into the system and for any staff working with the student to review the data (Tr. pp. 966-68; 1668). The district behavioral consultant further described that Rethink used ABA to assist staff in creating programming across academic, transition, ADL, speech-language, and motor domains (Tr. p. 1130). The director of special education described the Rethink program as a data collection program that monitored the student's progress toward IEP goals, discrete trial goals, behavior intervention plans and curriculum targets (Tr. p. 255).¹⁵ Thus, the evidence in the hearing record reflects that ABA instruction was implemented in the student's 12:1+2 special class and, further, that the IEP did not prohibit the district from utilizing other methodologies in the classroom. Therefore, even though the district did not utilize ABA instruction to the extent that the parent may have desired, it did not result in a failure to implement substantial or significant provisions of the IEP.

2. School Safety

The parent also alleges that the district failed to ensure the student's safety and monitor and/or prevent the student's seizures during the 2013-14 school year. Specifically, the parent testified that the student's teacher failed to ensure that the student stayed hydrated, which was necessary in order to avoid triggering a seizure, consistent with a hydration prescription that the parent testified she provided to the teacher at the beginning of the 2013-14 school year (Tr. pp. 2388; Parent Ex. QQ). In addition, the parent asserts that the student had seizures during the school day that went unnoticed and came home with unexplained physical injuries (Tr. pp. 2396, 2399-2400). Finally, the parent asserts that, on several occasions when she visited the student's class, she observed that the student was not supervised (Tr. pp. 2393-94).

To the extent that the parent asserts that the district failed to failed to keep the student physically safe in his school based program, such a claim is more akin to a claim for negligence and will not be addressed herein (see Y.A. v. New York City Dept. of Educ., 2016 WL 5811843, at *10 [S.D.N.Y. Sept. 21, 2016]). Moreover, to the extent that there is overlap between these claims (i.e., common law liability and the district's statutory obligation to implement an appropriately designed IEP), the evidence in this case reveals no failure on the part of the district to implement the student's services in conformity with the May 2013 IEP. As discussed above, the May 2013 CSE subcommittee provided the student with three adults in the classroom, two of whom the assistant director for special education testified were at "arms-length distance" of the student "at all times" (Tr. p. 344; Dist. Ex. 2). Accordingly, the parent's claim that the district failed to implement the May 2013 IEP is without merit.

¹⁵ The parent asserts that the IHO erred by declining to draw an adverse inference based upon the district's alleged failure to produce the raw data that was entered into the Rethink program. This data was requested by the parent through a subpoena, signed by the IHO (Parent Ex. NN). On the March 18, 2016 hearing date, the district presented the parents with data charts and the district's attorney explained that the charts represented the records maintained by the district and that there were no backup pieces of paper (Tr. pp. 1831-32). As there is no indication that the district voluntarily withheld subpoenaed documents from the parent, there is no basis for finding an adverse inference in this instance.

Nevertheless, the hearing record indicates that, in addition to the supports delineated in the May 2013 IEP, the district director of special education testified about additional precautions in place above and beyond what the IEP required. Specifically, she testified that the student transitioned to classes earlier than his peers to "make sure he was safe," the student's classroom was near the security desk and the assistant director's office, and the school nurses kept updated files and consulted with the student's neurologist regarding the student's seizure plan (Tr. p. 344). Further, according to the assistant director, there was a seizure management plan in effect for the 2013-14 school year and that all the "individuals on [the student's] schedule" would be required to see the student's safety plan and be aware of his needs (Tr. pp. 344-45).

The hearing record shows that, contrary to the parent's assertions, the district met the student's safety needs during the 2013-14 school year.

3. Progress

The parent asserts in her petition that the IHO erred in failing to consider and issue a finding on the parent's allegation that the student failed to make meaningful progress.

The parent attempts to allege that the district's failure to implement was apparent by virtue of the fact that the student failed to make progress during the 2013-14 school year. However, progress, although an important factor in determining whether the student is receiving educational benefit, is not dispositive of all claims brought under the IDEA (see M.S. v. Bd. of Educ. of the City Sch. Dist. of the City of Yonkers, 231 F.3d 96, 103-04 [2d Cir. 2000], abrogated in part on other grounds, Schaffer v. Weast, 546 U.S. 49 [2005]). The goal of the IDEA is to provide opportunities for students with disabilities to access special education and related services that are designed to meet their needs and enable them to access the general education curriculum to the extent possible (20 U.S.C. §§ 1400[d]; 1414[d][1][A]). The IDEA provides no guarantee of any specific amount of progress, so long as the district offers a program that is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192).

However, to the extent that the student's progress during the 2013-14 school year is relevant to the educational plan developed for the student's 2014-15 school year, the student's progress is discussed below along with the evaluative information available to the June 2014 CSE subcommittee and the student's present levels of performance.

E. June 2014 IEP

1. Evaluative Information and Present Levels of Performance

The parent maintains her arguments related to the sufficiency of the evaluative information utilized by the district and the student's present levels of performance, which are set forth above in greater detail related to the May 2013 IEP. On June 4, 2014 the CSE subcommittee convened for the student's annual review (Dist. Ex. 11 at p. 1). Meeting information indicated that the subcommittee based its recommendations "on the latest progress reports, teacher reports, classroom functioning, parent information, and committee discussion" (id. at p. 2). Evaluative information available at the time of the CSE subcommittee meeting included a January 2014 OT

progress report, a February 2014 PT progress report, a May 2014 speech-language annual review report, and a May 2014 educational evaluation report (Dist. Exs. 12; 15-17).

Information from the May 2014 educational evaluation report, reflected in the June 2014 IEP, indicated that the student received "most of his education working in a small group; working one-to-one with the teacher or an assistant or utilizing computer based instruction" (compare Dist. Ex. 11 at p. 6, with Dist. Ex. 12 at p. 1). The June 2014 IEP meeting information reflected that the teacher reported that she was concerned about the student's visual ability to progress academically without 1:1 supervision and that, according to standardized testing, the student's academic skills and ability to apply those skills were in the very low range as compared to peers (Dist. Ex. 11 at p. 2; Dist. Ex. 12 at pp. 5). However, the IEP also indicated that "[t]esting does not give a complete picture of [the student's] intellectual abilities" (Dist. Ex. 11 at p. 2). In the area of reading, both the IEP and the educational evaluation report reflected that although the student's letter recognition and decoding skills were not strong enough for independent reading, his reading comprehension skills were improving as he listened to stories (compare Dist. Ex. 11 at p. 6, with Dist. Ex. 12 at p. 3). In mathematics, the student demonstrated the ability to count to 10 without the use of manipulatives and, with "intense prompting," added and subtracted using manipulatives (compare Dist. Ex. 11 at p. 6, with Dist. Ex. 12 at p. 4). Both the IEP and the educational evaluation report indicated that the student required assistance to form letters, and exhibited difficulty applying enough pressure with a pencil during writing activities and spacing his marks on paper (compare Dist. Ex. 11 at p. 6, with Dist. Ex. 12 at p. 4, and Dist. Ex. 15 at pp. 1-2). The special education teacher's recommendation for the student to use an iPad with a stylus to facilitate writing was included in both the IEP and the educational evaluation report (compare Dist. Ex. 11 at p. 6, with Dist. Ex. 12 at p. 6). Academic needs identified in the IEP included that the student required refocusing and redirection to stay on task, and that he needed to improve his basic reading skills and increase his stamina (Dist. Ex. 11 at p. 6). The IEP also indicated that the student's worksheets and materials should be enlarged (id.).

Socially, according to the May 2014 educational evaluation report and the June 2014 IEP, the student exhibited positive relationships with peers and adults, was friendly and demonstrated a good sense of humor, and showed compassion toward classmates (compare Dist. Ex. 11 at p. 6, with Dist. Ex. 12 at p. 1). According to the IEP, the student volunteered for classroom jobs, liked "order" and, although shy at times, was a "really good" role model and leader in the classroom (Dist. Ex. 11 at p. 6). Both the educational evaluation report and the IEP reflected that, on occasion, the student displayed some "noncompliant" behavior when he did not want to engage in a particular task or activity, which at times, appeared to be due to fatigue (compare Dist. Ex. 11 at p. 7, with Dist. Ex. 12 at p. 1). The IEP indicated that the student needed refocusing and redirection to stay on task and positive behavioral interventions, but was easily redirected, and that there was no need for a formal "management plan" at that time (Dist. Ex. 11 at pp. 6-7; see Dist. Ex. 12 at pp. 1, 3).

Regarding the student's gross and fine motor needs, the June 2014 IEP reflected information included in the January 2014 PT and February 2014 OT progress reports that indicated the student needed close supervision during transitions from class to class, using the bathroom, and going up and down stairs due to weaknesses in his balance and visual attention (compare Dist. Ex. 11 at p. 7, with Dist. Ex. 15 at p. 2, and Dist. Ex. 16 at p. 2). The IEP indicated that the student

needed to continue to work on improving fine and gross motor strength, and, although he could become fatigued, the student was able to get back to work after a short break (Dist. Ex. 11 at p. 7).

With respect to speech-language skills, the IEP and the May 2014 speech-language annual review report both indicated that the student was working on improving attention and recalling details from a brief story and answering questions (compare Dist. Ex. 11 at p. 2, with Dist. Ex. 17 at p. 1). Both documents indicated that the student was making progress toward his speech-language goals with moderate support including repetition, visual supports, and scaffolding of complex ideas (compare Dist. Ex. 11 at p. 6, with Dist. Ex. 17 at p. 1). Additionally, the IEP identified the student's listening comprehension and oral expression skills as areas of strength (Dist. Exs. 11 at p. 6; 12 at pp. 4-5; see Dist. Ex. 17 at p. 1).

As discussed above, the June 2014 CSE subcommittee had timely and sufficient evaluative information regarding the student's then-current skills and needs in the areas of academics, social/emotional abilities, gross and fine motor skills, and speech-language skills, which was incorporated into the June 2014 IEP. Moreover, the description of the student's language and social skills in the evaluative information and resultant IEP discussed above did not indicate that the student might require further assessment in order to receive a FAPE.

2. Annual Goals

With respect to the parent's contention that the annual goals were inappropriate, review of the June 2014 IEP shows that it contained approximately 13 annual goals with approximately 38 corresponding short-term objectives (Dist. Ex. 11 at pp. 8-11). A review of the annual goals indicated they were designed to address the student's academic (i.e. match letters, identify numbers, and match coins), speech and language (i.e., respond to "wh" questions, retell a story, and comprehend verbally presented information), fine and gross motor (i.e., improve core strength; jump on one foot; throw, catch, bounce, dribble, hit, and kick a ball; grasp, manipulate, and hold objects; and hold a pencil, draw, and copy pictures), and ADL (i.e., complete chores, and get dressed/undressed using fasteners) skills (id.). Furthermore, the June 2014 IEP specified the criteria for achievement for each goal (i.e., 85 percent, 90 percent), how student progress would be measured (i.e., recorded observations), and a schedule of when progress would be measured (i.e., weekly, quarterly) (id.). The IEP reflected that the parents would receive written reports on the student's progress toward meeting the annual goals four times per year (id. at p. 11).

Comparison of the May 2013 and June 2014 IEPs reveals that many of the annual goals from the May 2013 IEP were carried over but the short-term objectives were modified (compare Dist. Ex. 2 at pp. 13-18, with Dist. Ex. 11 at pp. 8-15). Additionally, some new goals were added to the IEP (). For example, a reading goal in both IEPs provided that the student would match letters by placing identical letters together within a larger set but the short-term objectives associated with this goal in the May 2014 IEP provided that the student would, in intermediate steps, achieve this goal through letter T, whereas the July 2014 IEP short-term objectives included more letters within each intermediate step and anticipated achievement of the goal through letter Z (compare Dist. Ex. 2 at p. 13, with Dist. Ex. 11 at p. 8). To the extent the parent argues that the similar goals in the June 2014 IEP reflected the student's lack of progress, as noted below, the student exhibited progress during the 2014-15 school year even if he did not achieve all of his annual goals (see *L.K. v Dep't of Educ.*, 2011 WL 127063, at *9 [E.D.N.Y. Jan. 13, 2011] [finding

that the carried over goals did not reflect a lack of progress]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *31, *36 [N.D.N.Y. Sept. 29, 2009] [noting the student's progress despite not meeting some goals]). Based on the information above, the annual goals and short-term objectives contained in the June 2014 IEP appropriately addressed the student's identified needs.

3. 12:1+2 Special Class and Shared Aide

The parent argues that the 12:1+2 special class placement recommended in the June 2014 IEP was inappropriate because the student had failed to make progress during the 2013-14 school year, while he was in a similar placement; however, review of the evaluative information before the June 2014 CSE subcommittee revealed a student who was engaged and making progress.

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

The May 2014 educational evaluation report indicated that according to standardized testing, the student's academic skills and ability to apply those skills were in the very low range, although testing did not present "a complete picture of [the student's] innate abilities" in that he had made "slow but encouraging progress in several domains this year" (Dist. Ex. 12 at p. 5). The student's then-current special education teacher testified that that the student made progress, and "progressed at the level of his ability" (Tr. pp. 1676-77). Specifically, in reading, the May 2014 educational evaluation report reflected that the student's reading comprehension skills were improving as he listened to stories, and he made progress in the Learning A-Z Reading Program (Dist. Ex. 12 at p. 3). In mathematics, with "intense prompting" the student demonstrated the ability to add and subtract using manipulatives, a skill not observed the year before (*id.* at p. 4; see Dist. Ex. 5 at p. 2). Socially, in April 2013, the student was demonstrating "burgeoning cooperative play skills," and in May 2014, the educational evaluation report indicated that the student exhibited the ability to make humorous comments and check to see if the listener was

"falling for his jokes," was friendly toward classmates and teachers, and was caring and compassionate about others' concerns (Dist. Ex. 12; see Dist. Ex. 5 at p. 1). Additionally, the May 2014 speech-language annual review report indicated that the student was "progressing very well" with his attending goal, and was "very successful" at answering "wh" questions about ongoing events (Dist. Ex. 17 at p. 1).¹⁶

In conjunction with the 12:1+2 special class, to further address the student's identified needs, the June 2014 CSE subcommittee recommended one individual bilingual speech-language therapy session per week, two group bilingual speech-language therapy sessions per week, individual and group sessions of OT, one individual session of PT, and four hours per week of a home-based program (Dist. Ex. 11 at p. 12). Furthermore, the June 2014 IEP recommended refocusing and redirection, a shared aide as needed daily during instructional time, an iPad for written communication and assignments, and access to Kurzweil in all academic classes as needed (id.). Finally, as support for school personnel on behalf of the student, the June 2014 IEP provided assistive technology consultation once every two weeks for one hour (id.). As the hearing record shows the student was progressing commensurate with his abilities, the evidence in the hearing record as detailed above demonstrates that the June 2014 CSE subcommittee's recommended program and 12:1+2 special class placement were reasonably calculated to provide the student with an educational benefit.

4. Safety Related Needs

Turning to the student's safety-related needs at the time of the June 2014 CSE, the hearing record shows that the student required support throughout the day during instructional time and for medical and safety reasons; however, it does not support the parent's request for a one-to-one aide. The June 2014 IEP reported that the student had several seizures during the 2013-14 school year, and that his physical and medical issues and diagnoses impacted his education (Dist. Ex. 11 at p. 6). The IEP further described that the student required close adult supervision during transitions from class to class, while using the bathroom, and while going up and down stairs due to weaknesses with his balance and visual attention (id. at p. 7).

For the 2014-15 school year, the CSE subcommittee recommended that the student receive daily shared aide services as needed during instructional time (Dist. Ex. 11 at p. 13). Additionally, as discussed previously, review of the hearing record indicated that the 12:1+2 special class placement provided three adults in the classroom at all times (Tr. p. 99).¹⁷ The director of special education testified that the 12:1+2 life skills classroom was staffed with an additional paraeducator so that the student-staff ratio is lower, and there would always be three adults in the class working with students individually or in small groups (id.). Furthermore, the assistant director of special

¹⁶ Although not available to the June 2014 CSE, the June 2014 addendum to the May 2014 educational evaluation report reflected scores from the administration of the ABLLS-R, which indicated that the student had improved in the areas of visual performance, receptive language, intraverbals, grammar and syntax, social interactions, group instruction, generalized instruction and math (Dist. Ex. 13). The addendum reported that the student had made significant progress in some domains, and noted that repetition and continued practice were essential for retaining learned skills and concepts (id. at p. 5).

¹⁷ The director of special education testified that the June 2014 CSE recommended a 12:1+1 (local program 12:1+2) placement for the student (Tr. pp. 57, 295; Dist. Ex. 11 at p. 12).

education for the middle school testified that the programmatic support of the 12:1+2 classroom provided two paraeducators within arm's length of students at all times to support their management needs (Tr. pp. 322, 344). The student's special education teacher who participated in the June 2014 CSE subcommittee meeting testified that support specific to transitions was not included on the June 2014 IEP because "there was staff available already to do that in the classroom," and there was always somebody with the student for transitions outside of the classroom (Tr. p. 1735; Dist. Ex. 11 at p. 1). Considering the above information contained in the hearing record, while the student required supervision and support throughout the school day and during transitions, the supports available in the 12:1+2 special class and shared aide services throughout the school day were appropriate to meet the student's management and safety needs.

However, particularly given the increase in the student's seizures, as reflected in the CSE meeting information notes, the IEP should have included additional information about the impact of the student's physical and medical issues and diagnoses on the student's ability to receive educational benefit. Nonetheless, even if this omission constituted a procedural violation of the IDEA, the hearing record shows that, while not reflected in the IEP, the district developed a seizure management plan, approved by the student's neurologist on September 9, 2014 and signed by the parent on September 10, 2014, which set forth information regarding the student's seizure disorder as well as proper care for the student during and after a seizure event (Dist. Ex. 18). It listed the student's emergency contacts and the student's medications (*id.* at pp. 1-2, 5). Further, the seizure management plan listed which seizure reactions required monitoring and how to respond (*id.* at p. 5). Finally, the seizure management plan described the student's reactions to seizures and how other illnesses affected the student's seizure threshold (*id.* at p. 4). Accordingly, given the subsequent development of the seizure management plan, the evidence shows that the failure to include details about the student's seizures or other health and medical needs in the IEP did not impede the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause 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]).

5. ABA Methodology

The parent argues in the petition that the June 2014 CSE subcommittee removed ABA instruction from the student's IEP and that the IHO erred in dismissing the parent's claim.

Generally, the precise teaching methodology to be used by a teacher is a matter to be left to the teacher's discretion, absent evidence that a specific methodology is necessary for a student to receive a FAPE (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014] [noting the "broad methodological latitude" conferred by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [the district is imbued with "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; *see also* S.B. v. New York City Dep't of Educ., 2016 WL 1271690, at *5 [S.D.N.Y. Mar. 30, 2016] ["as a matter of law, an IEP is not required to specify a particular methodology"]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014] [finding in favor of a district where

the hearing record did not "demonstrate[] that [the student] would not be responsive to a different methodology").

With respect to the parent's contention that the student required an intensive discrete trial ABA program, nothing in the evaluative information available to the June 2014 CSE subcommittee indicated the student could only learn using ABA; rather, the evidence shows that the student received instruction—and as described above, made progress commensurate with his abilities—in small group settings, and by using computer-based programs (see Dist. Exs. 12-17). Therefore, the hearing record does not show that the student required ABA instruction on the June 2014 IEP in order to receive a FAPE.¹⁸

6. Related Services—Speech-Language Therapy

Contrary to the parent's contention that the student required more intensive speech-language therapy, for reasons similar to those set forth above, the hearing record demonstrates that the recommended speech-language therapy was appropriate to support the student's speech-language needs. The June 2014 CSE subcommittee continued the type, frequency, and duration of speech-language therapy services that were recommended in the May 2013 IEP (compare Dist. Ex. 2 at p. 18, with Dist. Ex. 11 at p. 12). Specifically, the June 2014 CSE subcommittee recommended that the student receive bilingual speech-language therapy once per week individually and twice per week in a small group (5:1) (Dist. Ex. 11 at p. 12). Additionally, the speech-language therapy sessions could be provided throughout the school which allowed the speech-language pathologist to support the student in any setting (id.). The May 2014 speech-language annual review report indicated that the student had made progress toward his speech-language goals with moderate support (Dist. Ex. 17 at p. 1). The annual review report indicated that: the student was progressing "very well" toward his attending goal; when provided with visual support, he responded well on tasks requiring him to provide details after listening to a brief story; and he was successful answering "wh" questions (id.). The May 2014 speech-language annual review report also described that the student's group sessions were conducted across school settings (i.e. music class, technology class, and physical education class), and indicated that the student made steady progress in the group setting, although he continued to require "more focused targeted assistance" (id.). The evidence in the hearing record shows that the recommended speech-language therapy for the 2014-15 school year was sufficient for the student to make progress.

F. 2014-15 School Year Implementation

1. Assistive Technology

The parent argues in the petition that the district failed to implement the assistive technology component of the student's June 2014 IEP for "the majority" of the 2014-15 school year. The June 2014 CSE subcommittee recommended that the student receive an iPad to assist him with written communication and assignments due to undeveloped graphomotor control, to be available throughout the school day both at home and at school (Dist Ex. 11 at p. 12). The hearing

¹⁸ Even if it was a violation by the district to not have ABA instruction written in the student's June 2014 IEP, no compensatory relief would be warranted since the evidence in the hearing record shows that the student did, in fact, receive instruction using ABA methods during the 2014-15 school year (see Tr. pp. 1736-37).

record shows that the student had an iPad available in school at the beginning of the 2014-15 school year, that he received instruction on using the iPad, and that he used an iPad in school throughout the year (Tr. pp. 270, 297, 592). The hearing record also reflects that the student did not receive an "individualized" iPad to take home until an unspecified time later in the 2014-15 school year (see Tr. pp. 269-70, 529, 1730, 2416). The district, pursuant to the IEP it developed, was required to provide the student with an iPad at home at the onset of the 2014-15 school year and it failed to do so. However, given the student's access to the device in his school program and the fact that he ultimately received the device for use at home, the hearing record does not support a finding that the failure was sufficiently "substantial" or "material" to support a finding that the delay resulted in a denial of a FAPE to the student for the 2014-15 school year (A.P., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822).¹⁹

2. School Safety

Similar to the student's safety related needs during the 2013-14 school year, the parent points to her testimony that the student was not always accompanied by an adult in the classroom, he received injuries at school, and experienced seizures that went unnoticed by school staff (Tr. p. 2419-20). As with the 2013-14 school year, rather than stating that the district failed to implement the student's IEP, portions of the parent's concerns are more akin to allegations of negligence (see Y.A., 2016 WL 5811843, at *10) or as challenges to the IEP, which are addressed above. Otherwise, the evidence in the hearing record shows that the IEP was implemented. For example, the student's teacher for the 2013-14 and 2014-15 school years testified that someone was always supervising the student during transitions and that someone was holding his arm on the stairs or walking right in front of him to ensure his safety (Tr. p. 1728). There is nothing in the hearing record to indicate that the district substantially departed from the June 2014 IEP during the 2014-15 school year.

3. Progress

Similar to the parent's assertions about the student's progress during the 2013-14 school year, the narrow scope of an implementation inquiry does not encompass an allegation that a student has not progressed under an IEP; rather, implementation is limited to examining whether the mandates of an IEP were provided to a student (see Polera, 288 F.3d at 489). However, to the extent that the student's progress during the 2014-15 school year is relevant to the educational plan developed for the student's 2015-16 school year, it is discussed below along with the evaluative information available to the June 2015 CSE subcommittee and the student's present levels of performance (see H.C., 528 Fed. App'x at 66-67 [A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed]). Similar to the manner in which I addressed the student's progress during the 2013-14 school year, to the extent that the student's progress during the 2014-15 school year is relevant to the educational plan developed for the student's 2015-16 school year, the student's progress is discussed below along with the evaluative information available to the June 2015 CSE subcommittee and the student's present levels of performance (see H.C., 528 Fed. App'x 64, 66-67

¹⁹ Assuming, for the sake of argument, that this violation did rise to the level of a denial of FAPE, no relief would be warranted, since the hearing record shows that the student received an iPad for home use during the 2015-16 school year (Tr. p. 2492).

[2d Cir. June 24, 2013] [A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed]).

G. June 2015 IEP

1. Evaluative Information and Present Levels of Performance

The district asserts in its cross-appeal that the IHO erred in determining that the June 2015 CSE subcommittee failed to consider the results of the private August 2013 neurodevelopmental evaluation and October 2013 developmental assessment and "proceed with an evaluation . . . for autism for the 2015-16 school year." Review of the private evaluation reports shows that they provided information generally consistent with the material the June 2015 CSE subcommittee had regarding the student, therefore the district was not required to conduct "its own up-to-date evaluation for autism" to offer the student a FAPE.

It is well settled that a CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" 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 (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]).

On June 18, 2015, the CSE subcommittee convened for the student's annual review (Dist. Ex. 41 at p. 1). Meeting information showed that the subcommittee based its recommendations "on the latest progress reports, teacher reports, classroom functioning, parent information, and committee discussion" (id. at p. 2). Evaluative information reviewed during the process of developing the IEP included a May 2013 private psychological evaluation report, an August 2013 private neurodevelopmental evaluation report, an October 2013 private developmental assessment report, a February 2015 educational annual review report, a February 2015 speech-language update report, a February 2015 OT annual review report, and an April 2015 safety plan (Tr. pp. 357-58, 560-62, 2455-56; Dist. Exs. 39 at pp. 2-3; 41 at p. 3; see Tr. p. 295; Dist. Exs. 6; 21A; 25-26; 35; 36; 55).

The August 2013 neurodevelopmental evaluation reflected reports that the student exhibited poor attention and good eye contact, responded to his name, and could communicate (Dist. Ex. 36 at pp. 2-3; see Dist. Exs. 6 at pp. 3-4; 26 at p. 2). The student also exhibited upper extremity weakness, scribbled, and had difficulty writing his own name (Dist. Ex. 36 at p. 2; see Dist. Ex. 25 at pp. 1-2). Reportedly, the student liked to be with other people, was "social at times," and he liked and imitated other children (Dist. Ex. 36 at pp. 2-3; see Dist. Ex. 21A at p. 1).

The evaluator reported that the student's cognitive skills were significantly below average and he exhibited significant receptive and expressive language weaknesses (Dist. Ex. 36 at pp. 4-6; see Dist. Exs. 6 at pp. 2-3; 26 at p. 3). According to the evaluator, the student's pre-academic skills were "poor" in that he did not recognize any numbers or letters on that date (Dist. Ex. 36 at p. 5; see Dist. Ex. 21A at p. 2). The report indicated that the student's fine and gross motor skills were at a two to three-year-old level, and that the student demonstrated difficulty copying shapes, jumping, and balancing (Dist. Ex. 36 at p. 5; see Dist. Ex. 25 at pp. 1-2). The evaluator reported

that the student exhibited impaired social interaction and communication skills, as well as restrictive and stereotyped patterns of behavior, which led to the conclusion that the student "met all criteria for an autism spectrum disorder," and that his "symptoms" were "in the mild to moderate" range (Dist. Ex. 36 at pp. 4-6).²⁰ However, because the student was "more cooperative and related" when tested, the evaluator believed further testing was necessary before diagnosing the student (*id.* at p. 6).

The October 2013 developmental assessment evaluator reported that, based on her impressions, the student was "significantly delayed" and met the criteria for an autism diagnosis (Dist. Ex. 35 at p. 4-5). Specifically, while the student showed relative strengths in communicative and reciprocal social skills including responding to his name, sharing enjoyment in an activity, and responding to efforts to establish joint attention, the evaluator concluded that in general, "one of the greatest weaknesses" the student demonstrated was responding to and initiating conversation with the clinician (*id.*; *see* Dist. Exs. 21A at p. 1; 26 at pp. 2-3). The report also indicated that the student exhibited weaknesses in communication skills; for example, the use of single words and short phrases, speech "abnormalities," and the lack of fully participating in "purely social verbal interchanges" (*id.* at p. 4; *see* Dist. Ex. 26 at p. 3). The evaluator concluded that the student met the criteria for a diagnosis of autism (*id.* at p. 5).

Therefore, review of the hearing record shows that the June 2015 CSE subcommittee had information about the student's skills and needs that was generally consistent with the results of the August 2013 neurodevelopmental evaluation and the October 2013 developmental assessment, which, as described in detail below, was incorporated into the June 2015 present levels of performance (Tr. pp. 357-58; *compare* Dist. Ex. 35 *and* Dist. Ex. 36, *with* Dist. Exs. 6; 21A; 25; 26; 41 at pp. 5-9). Notably, the hearing record shows that the June 2015 CSE subcommittee had available to it, and considered, more updated information about the student's present levels of performance, than the August 2013 neurodevelopmental evaluation and the October 2013 developmental assessment provided (Dist. Exs. 21A, 25, 26, 41 at pp. 1-9; 46). To the extent that the IHO determined that the district was required to complete an updated evaluation for autism, I note that the private evaluations were conducted within two years of the June 2015 CSE subcommittee meeting, and the hearing record shows that the district completed updated testing of the student's skills using the ABLLS-R and collected data about the student's performance using the "Re-think Autism program" (Tr. p. 255; Dist. Exs. 35 at p. 1; 36 at p. 1; 41 at pp. 2, 7; 46; *see* *J.S. v. New York City Dep't of Educ.*, 104 F. Supp. 3d 392, 404 [S.D.N.Y. 2015], *aff'd*, 648 Fed. App'x 96 [2d Cir. May 4, 2016]).²¹

²⁰ According to the evaluation report, the parent reported that the student exhibited atypical screeching sounds and "flapping," although neither behavior was observed the day of the neuropsychological testing (Dist. Ex. 36 at pp. 1-2, 5).

²¹ The district behavioral consultant testified that the ABLLS-R is a research-based criterion referenced test that is used as the primary evaluation tool for students who have significant impairments for whom standardized testing is not relevant (Tr. p. 997). She further testified that the student's skills are measured against previous administrations of the ABLLS, and the ABA and home-based programs are tied to the ABLLS (Tr. pp. 966, 997-98). As previously discussed, the Rethink program was described as a data collection program that monitored the student's progress toward IEP goals, discrete trial goals, behavior intervention plans, and curriculum targets (Tr. p. 255).

The June 2015 IEP present levels of performance reflected information from the May 2013 psychological evaluation report, including that the student's cognitive abilities were in the extremely low range (compare Dist. Ex. 6 at pp. 2-3, with Dist. Ex. 41 at p. 5). Although the IEP indicated that the student's adaptive behavior assessment scores showed that the student presented with "many skills," he continued to require significant support in the areas of functional academics and self-direction skills, and his overall adaptive skills—commensurate with his cognitive abilities—were in the extremely low range (compare Dist. Ex. 6 at pp. 2-4, with Dist. Ex. 41 at p. 5).

Academically, a review of the June 2015 IEP shows that it incorporated information from the February 2015 educational evaluation report (compare Dist. Ex. 21A, with Dist. Ex. 41 at p. 7). Specifically, the IEP meeting information summary indicated that the student was making inconsistent progress, that he needed prompting, and that the teacher was concerned about the student's vision and visual discrimination skills (compare Dist. Ex. 21A at p. 2, with Dist. Ex. 41 at p. 2).

Per the February 2015 educational evaluation report and the June 2015 IEP, the student continued to make progress, with assistance, in the "Learning A-Z Reading Program" (compare Dist. Ex. 21A at p. 2, with Dist. Ex. 41 at p. 7). Specifically, while the student's letter recognition and decoding skills were not developed enough for independent reading, his reading comprehension skills were improving (id.). The IEP indicated that the student was on level "A" of the program, which corresponded to a "Grade K" level (Dist. Ex. 41 at p. 7). The student's quiz performance was higher on questions involving main idea, vocabulary, and comparing/contrasting; and was lower on questions related to making inferences and drawing conclusions (id.). Although the student did not satisfy any new criteria in the reading domain of the ABLLS-R, the June 2015 IEP indicated that the student showed comprehension of texts he had listened to by answering questions and providing details when working in small groups and during whole class discussions (compare Dist. Ex. 21A at p. 2, with Dist. Ex. 41 at p. 7). In class, the student continued to work on letter matching, letter recognition, and name recognition (id.). The IEP indicated that the student used the "Rethink Program" to master the first target of matching letters "a – e," that he had mastered recognition of his first name and was working on recognizing his last name (Dist. Ex. 41 at p. 7).

In writing, the June 2015 IEP reflected the February 2015 educational evaluation report results, which showed the student had not satisfied any new criteria in the writing domain of the ABLLS-R as he struggled to hold a pencil, accurately form letters, and orient himself to the appropriate space on the paper (compare Dist. Ex. 21A at p. 3, with Dist. Ex. 41 at p. 7). The student worked in class with the occupational therapist to improve graphomotor skills, and a technology consultant to optimize the use of the iPad for writing activities (id.). The IEP stated that the student used an iPad at home and school to produce written work (Dist. Ex. 41 at p. 7).

Regarding mathematics skills, both the June 2015 IEP and the February 2015 educational evaluation report showed that the student rote counted to 20, counted objects to 20 with prompting, named numbers on a number line up to 10 using certain criteria, receptively identified examples of "more," added items using manipulatives up to 10 with prompting, and receptively identified the word "add" under certain criteria (compare Dist. Ex. 21A at p. 3, with Dist. Ex. 41 at p. 7). According to the IEP meeting information summary, the student exhibited progress in the areas of

rote counting, using a number line, identifying examples of the word "more," and comprehending the meaning of "add more" when given a visual prompt (Dist. Ex. 41 at p. 2). Additionally, the IEP indicated that the student was learning to identify coins using the "Rethink Program," and numbers 1-6; count numbers using one-to-one correspondence with verbal prompting, match shapes, and complete subtraction problems with manipulatives (compare Dist. Ex. 21A at p. 3, with Dist. Ex. 41 at p. 7).

Socially, the June 2015 IEP, consistent with the February 2015 educational evaluation report, indicated that the student had "matured into a friendly and outgoing young man" who had taken more of an interest in his classmates, had been interacting with them more frequently, and who enjoyed joking with both students and staff (compare Dist. Ex. 21A at p. 1, with Dist. Ex. 41 at pp. 7-8). According to the IEP, the student was curious, asked questions about content, and advocated for himself (Dist. Ex. 41 at p. 8).

In speech-language skills, the June 2015 IEP reflected the student's performance during a February 2015 speech-language reevaluation (compare Dist. Ex. 26, with Dist. Ex. 41 at p. 6). On a measure of the ability to understand basic concepts, the student receptively identified 34 percent of the concepts correctly, demonstrating relative strengths and weaknesses with various concepts (id.). Receptive and expressive language assessments yielded scores in the very low range (id.). The IEP noted that speech-language therapy sessions had focused on improving the student's auditory processing and comprehension skills, and that he had exhibited "steady progress" evidenced by results obtained during therapy sessions and in the classroom (compare Dist. Ex. 26 at p. 3, with Dist. Ex. 41 at pp. 2, 6-7). According to the IEP, the student answered "wh" questions after listening to a story and during group discussions (Dist. Ex. 41 at p. 7). Clinical observation and informal assessment of the student's language skills reflected in the IEP indicated that the student used language for a variety of social communicative and pragmatic purposes such as requesting, protesting, informing, and responding (compare Dist. Ex. 26 at p. 2, with Dist. Ex. 41 at p. 6). The student made adequate eye contact, consistently initiated and reciprocated greetings, initiated interactions with peers and adults, took turns during games, provided biographical information such as his name when asked, and answered basic questions (id.).

Regarding the student's motor and sensory skills, the June 2015 IEP reflected information from the February 2015 OT annual review report that described the student's deficits in the areas of sensory processing, fine and gross motor skills, visual perception, visual motor integration and bilateral coordination skills (compare Dist. Ex. 25 at p. 1, with Dist. Ex. 41 at p. 8). The IEP also noted that because many tasks were difficult for him, the student needed incentives to motivate him to do his best (id.). Both the OT annual review report and the IEP described in detail the student's skills related to dressing/using clothing fasteners, as well as fine motor skills for grasping small items and graphomotor tasks (compare Dist. Ex. 25 at p. 2, with Dist. Ex. 41 at p. 8). The IEP included information about the student's visual motor deficits, which affected his visual attention, fixation/tracking, perceptual skills, and eye-hand coordination, noting that OT sessions focused on increasing his visual tracking abilities (id.). According to the IEP, the student demonstrated poor sensory processing skills, postural control, and body awareness that affected his performance throughout the school day (id.). The student's decreased body awareness affected his ability to motor plan efficiently, his dynamic sitting and standing balance, which, combined with his decreased sensory processing skills, impeded his ability to safely navigate stairs and the school without close supervision (id.). Regarding the student's gross motor skills, the IEP reported

that he exhibited difficulty with high level coordination activities, especially those requiring bilateral coordination, balance, and endurance (Dist. Ex. 41 at pp. 8-9).

As discussed above, the June 2015 CSE subcommittee had timely and sufficient evaluative information regarding the student's then-current skills and needs in the areas of academics, social/emotional abilities, speech-language skills, and gross and fine motor skills, which was incorporated into the June 2015 IEP.

2. Annual Goals

With respect to the annual goals, the June 2015 IEP contained approximately 14 annual goals with approximately 34 short-term objectives (Dist. Ex. 41 at pp. 10-13). Review of the annual goals indicated they were designed to address the student's academic (i.e., identify the main topic and retell key details from grade level text; name upper and lower case letters; identify and answer questions about the meaning of words and phrases in grade level text; write numerals and represent a number of objects with a written numeral; and identify and assign value to coins and bills up to \$20), speech-language (i.e., express conclusions and make inferences from written text read aloud; demonstrate comprehension of verbally presented information by responding to "wh" questions with faded prompts; tell or retell a story with appropriate facts and details using grammatically correct sentences), fine and gross motor (i.e., complete exercises which require core strength, balance and coordination; jump on one foot; throw, catch, bounce, dribble, hit and kick a ball for 5 repetitions; grasp, manipulate and hold specific objects; complete tasks requiring the ability to hold a pencil, write, draw and copy pictures), and ADL (dress and undress using buttons and fasteners) skills (Dist. Ex. 41 at pp. 10-13).

Furthermore, the June 2015 IEP specified the criteria for achievement for each goal (i.e., 90 percent, 80 percent with moderate assistance), how student progress would be measured (i.e., recorded observations, structured observations of targeted behavior, observation checklists, work samples), and the schedule of when progress would be measured (i.e., weekly, quarterly) (Dist. Ex. 41 at pp. 10-13). The IEP reflected that the parents would receive written reports on the student's progress toward meeting the annual goals four times per year (id. at p. 14). Further, the annual goals included in the June 2015 IEP were not identical to those in the student's IEPs for earlier school years as the parent alleges (compare Dist. Ex. 11 at pp. 8-15, with Dist. Ex. 41 at pp. 10-13). Based on the information above, the annual goals and short-term objectives contained in the June 2015 IEP appropriately addressed the student's identified needs.

3. 12:1+2 Special Class and Shared Aide

The parent argues that the 12:1+2 special class placement recommended in the June 2015 IEP was inappropriate because the student had failed to make progress during the 2014-15 school year while he was in a similar placement. However, review of the present levels of performance and evaluative information discussed in detail above indicate that, even though the student continued to exhibit significant delays across all domains, he made some progress and received educational benefit from the program provided during the 2014-15 school year.

Specifically, per the February 2015 educational evaluation report, with assistance the student continued to make progress in the "Learning A-Z Reading Program," describing that, while

the student's letter recognition and decoding skills were not developed enough for independent reading, his reading comprehension skills were improving (Dist. Ex. 21A at p. 2). Additionally, the June 2015 IEP indicated that the student used the "Rethink Program" to master the first target of matching letters "a – e," that he had mastered recognition of his first name, and was working on recognizing his last name (Dist. Ex. 41 at p. 7).²² The student's then-current special education teacher testified that an administration of the ABLLS showed that the student had made some progress, albeit inconsistent, in expressive and receptive language skills (Tr. pp. 2108, 2123).

The February 2015 speech-language reevaluation report indicated that therapy sessions had focused on improving the student's auditory processing and comprehension skills, and that he had exhibited "steady progress," evidenced by results obtained during therapy sessions and in the classroom (Dist. Ex. 26 at p. 3). The speech-language reevaluation report also reflected that the student made adequate eye contact, consistently initiated and reciprocated greetings, initiated interactions with peers and adults, took turns during games, provided biographical information such as his name when asked, and answered basic questions (*id.* at p. 2). The June 2015 speech-language end of year summary indicated that regarding the annual goal to improve telling and retelling a story with facts, details, and appropriate grammar, the student responded accurately when given a phonemic cue and/or visual reference (Dist. Ex. 55 at p. 2). The report also contained results of data obtained during therapy sessions which, indicated "steady progress" toward the annual goal for demonstrating comprehension of information from verbally presented sentences and paragraphs by responding to "wh" questions (*id.* at p. 1).

Socially, the February 2015 educational evaluation report indicated that the student had "matured into a friendly and outgoing young man" who had taken more of an interest in his classmates, had been interacting with them more frequently, and who enjoyed joking with both students and staff (Dist. Ex. 21A at p. 1). Additionally, the June 2015 IEP described the student as curious, and indicated that he asked questions about content, and advocated for himself (Dist. Ex. 41 at p. 8).

In conjunction with the 12:1+2 special class, to further address the student's identified needs, the June 2015 CSE subcommittee recommended one individual bilingual speech-language therapy session per week, two group bilingual speech-language therapy sessions per week, individual and group sessions of OT, one individual session of PT, and four hours per week of a home-based program (Dist. Ex. 41 at p. 14). Furthermore, the June 2015 IEP provided the student with a shared aide to provide daily support for academics, refocusing, and redirection throughout the day across school settings, and to address management needs including the need for supervision, breaks, hydration, and implementation of safety measures (*id.* at pp. 9, 14; *see* Tr. pp. 322, 344). Additionally, the IEP provided the student with access to water per his physician's recommendation, a safety plan, an iPad for written communication and assignments, and access to

²² Although not available to the June 2015 CSE, progress data from the Rethink program collected from September 2014 through November 2015 showed the student's progress across 16 goals (Dist. Ex. 47). Of the nine goals initiated in September 2014, the student demonstrated "partial progress" toward one goal, "progress" toward one goal, and "substantial progress" toward five goals (*id.*). The district behavioral consultant testified that, according to this data, the student "makes slow progress, but he does make progress" (Tr. pp. 969, 989). Data regarding the remaining two goals initiated in September 2014 indicated that the student exhibited "inconsistent" and "limited" progress (Dist. Ex. 47 at pp. 3, 10). The remainder of the goals were initiated in October 2015 (*id.* at pp. 3-7).

Kurzweil in all academic classes as needed (*id.* at pp. 14-15). Program accommodations recommended in the IEP included refocusing and redirection, pre-teaching and re-teaching of material, tasks broken down into smaller steps, assistance during transitions, special seating arrangements, verification of comprehension, and simplified language for directions and instruction (*id.*). Finally, as support for school personnel on behalf of the student, the June 2015 IEP recommended assistive technology consultation once every two weeks for one hour (*id.* at p. 15).

In light of the aforementioned, the hearing record shows that the June 2015 CSE subcommittee's program recommendation and 12:1+2 special class placement was reasonably calculated to enable to student to receive educational benefit, and provided adequate support to meet his identified needs. Furthermore, as detailed above, while the hearing record indicates the student required support for his academic, attention, motor, and safety needs, it also shows that the June 2015 IEP provided adequate supports to the student and the 1:1 aide service sought by the parent was not required to provide the student with a FAPE.

4. Safety Related Needs

Turning to the student's safety-related needs at the time of the June 2014 CSE, the hearing record shows that the district developed a safety plan for the student at the April 2015 CSE meeting, then updated the plan, which was later signed by district staff in September 2015 for the 2015-16 school year (*see* Parent Ex. V; Dist. Exs. 30-31). The safety plan set forth the student's diagnoses, supportive adults, and specific concerns, such as needing support for navigating stairs and restricted activities (*see* Dist. Ex. 31). The safety plan noted that the student had an "assigned" aide for the entire school day (*id.* at pp. 1-2). The safety plan also delineated when the student would have 1:1 support and how to handle school emergency situations (*id.* at p. 2). The safety plan also detailed seizure management and basic first aid (*id.* at pp. 3-4).

The June 2015 IEP meeting information summary indicate that a safety plan was developed and implemented during the 2014-15 school year, the student was provided with access to water to ensure hydration, and that there were no documented seizure episodes during the school year (Dist. Ex. 41 at p. 2). For the 2015-16 school year, the June 2015 CSE subcommittee recommended a 12:1+2 special class placement, with shared aide services to provide support in the classroom for academics, refocusing and redirection, and management needs (Tr. p. 295; Dist. Ex. 41 at p. 14). The shared aide services were to be provided throughout the school day and throughout the school building (Dist. Ex. 41 at p. 14).

As discussed in the above analysis of the student's safety based needs for the 2014-15 school year, while the student required supervision and support throughout the school day and during transitions, the hearing record shows that the September 2015 safety plan, in conjunction with the supports available in the 12:1+2 special class and shared aide services, were appropriate to meet the student's management and safety needs.

5. ABA Methodology

To the extent the parent's contention that the student required an intensive discrete trial ABA program is at issue for the 2015-16 school year, for reasons set forth above, the program

recommendations made by the June 2015 CSE subcommittee were reasonably calculated to enable the student to receive educational benefit. Moreover, there was nothing in the evaluative information available to and considered by the June 2015 CSE subcommittee that indicated the student could only learn using ABA instructional methods, such that it was required to be included in his IEP in order to receive a FAPE.

6. Related Services—Speech-Language Therapy

Contrary to the parent's contention that the student required intensive speech-language therapy, specifically individual therapy, the hearing record indicates that the recommended speech-language therapy in the June 2015 IEP was appropriate to support the student's speech-language needs.

The student's progress demonstrated in speech-language therapy during the 2014-15 school year is described above (Dist. Ex. 26; 55). The June 2015 CSE subcommittee recommended a continuation of the type, frequency, and duration of services (compare Dist. Ex. 11 at p. 11, with Dist. Ex. 41 at p. 14). Furthermore, the student's then-current speech-language pathologist opined that although his skills varied at times, she felt he was more proficient in English than in Spanish in an academic setting (Tr. p. 1420). She further testified that the student "always spoke in English" and would respond in English even if he was asked a question in Spanish (Tr. p. 1424). Moreover, she administered the February 2015 speech reevaluation to the student in English based on her clinical judgement gained from observing and working with him (Tr. p. 1426). Finally, the speech-language pathologist testified that she recommended continuation of one individual and two group sessions per week for the 2015-16 school year, for continuity of services and to generalize skills that he learned in an individual session to a variety of settings; opining that the only way he could generalize learned skills would be with peers (Tr. p. 1434). Therefore, the evidence in the hearing record shows that the recommended speech-language therapy for the 2015-16 school year was sufficient to address the student's speech-language needs.

VII. Conclusion

In summary, the evidence in the hearing record establishes that the district offered the student a FAPE for the 2013-14, 2014-15 and 2015-16 school years.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated August 14, 2016, is modified by reversing those portions of the decision which found that the district denied the student a FAPE for the 2015-16 school year.

Dated: Albany, New York
November 23, 2016

SARAH L. HARRINGTON
STATE REVIEW OFFICER