The University of the State of New York

The State Education Department
State Review Officer
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No. 18-058

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Wilson Central School District

Appearances:
Hodgson Russ LLP, attorneys for respondent, by Ryan L. Everhart, Esq.

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 denied her requests for certain independent educational evaluations (IEEs) for her daughter and a specific amount of compensatory educational services. Respondent (the district) cross-appeals from the IHO's determination that the student's pendency placement was not properly implemented. The appeal must be sustained in part. The cross-appeal must be dismissed.

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

In 2011, the parents obtained four private evaluations of the student due to concerns about her comprehension, reading, and verbal and written expression skills, as well as sensory sensitivity: an occupational therapy (OT) evaluation, a central auditory processing evaluation, a neuropsychological evaluation, and a speech-language evaluation (Parent Response to Mot. for Summ. J. Exs. 2; 4; 5; 6).

In January 2012, the CSE convened to determine the student's initial eligibility and found that she was eligible for special education as a student with an other health-impairment (Dist. Ex. 35 at p. 1).[1] The student remained eligible for special education services and generally received,

[1] The student's eligibility for special education programs and related services as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

among other things, direct and/or indirect consultant teacher services for the remainder of the 2011-12 school year (third grade) through the 2014-15 school year (sixth grade) (see Dist. Exs. 32-35). The parents obtained updates to the private neuropsychological evaluation in 2013 and 2014 (see Dist. Ex. 39; Parent Response to Mot. for Summ. J. Ex. 3).[2]

The CSE convened on March 24, 2015 for the student's annual review and to develop an IEP for the 2015-16 school year (seventh grade) (Dist. Ex. 31). The meeting minutes indicated that, at that time, the parents did not have any questions or concerns and that two teachers reported that the student was a good self-advocate (Parent Ex. A at p. 1). The CSE recommended: three 20-minute sessions per week of indirect consultant teacher services each in English and math; a classroom aide in all math, science, and social studies classes; and a daily 40-minute study hall in a 15:1 special education setting (Dist. Ex. 31 at pp. 7-8).

In February 2016, the district requested the parents' consent to perform an educational evaluation of the student, which the student's father provided (Dist. Ex. 78). The district administered a Woodcock-Johnson IV Tests of Achievement (WJ-IV) to the student on February 26, 2016 (Dist. Ex. 77).

The CSE convened on March 14, 2016 to conduct the student's annual review and to develop an IEP for the 2016-17 school year (eighth grade) (Dist. Exs. 30; 73). The CSE recommended: a daily 15:1 special class for mathematics; a daily 15:1 special education setting for "academic support;" and a classroom aide in the general education setting for English, science, and social studies classes (Dist. Ex. 30 at p. 10). The CSE also recommended one reading annual goal, testing accommodations, and supports for the student's management needs (id. at pp. 8, 9, 11). On September 14, 2016, the student's special education teacher requested modification of the reading goal and the addition of a math goal (Dist. Ex. 69). The parents waived their right to hold a CSE meeting and consented to the proposed IEP amendment without a meeting (Dist. Exs. 29; 66).

The CSE convened in November 2016 per the parent's request (Dist. Ex. 28 at p. 1). The parent and student requested that the 15:1 special education academic support class be removed from the IEP and replaced with a "traditional study hall" to which the CSE agreed (id. at pp. 6, 10). The CSE also modified the student's testing accommodations on the IEP (id. at pp. 6, 11).

In December 2016, the CSE requested parental consent to conduct an educational evaluation, which the student's father provided (Dist. Exs. 55; 56). On January 19, 2017, the district administered a WJ-IV to the student (Dist. Ex. 54).

In a letter dated May 10, 2017, the parents, through their advocates, indicated that they did not agree with the evaluations the district conducted and requested IEEs (Dist. Mot. for Summ. J. Ex. A at pp. 1-3). Specifically, the parents disagreed with the "March 26, 2016" administration of the WJ-IV and asserted that, additionally, "the [d]istrict ha[d] not evaluated [the student] in all

[2] The 2014 neuropsychological update report entered into evidence as District Exhibit 36 is missing a page; however, the entire exhibit, including the missing page, was submitted with the parent's response to the district's motion for summary judgment (see Parent Response to Mot. for Summ. J. Ex. 3).

areas of suspected disability" (id. at p. 1).[3] The parents requested IEEs in the following areas: a comprehensive reading, writing, and math evaluation; a comprehensive speech-language and central auditory processing evaluation; a comprehensive OT with sensory integration evaluation; a comprehensive assistive technology evaluation; and a visual processing evaluation (id. at pp. 1-3).

In a June 1, 2017 letter to the parents' advocates, the district responded to the parents' request for IEEs (Dist. Mot. for Summ. J. Ex. B at pp. 1-2). The district requested that the parents provide the reasons for disagreeing with the district's academic evaluation and indicated that, with respect to the other IEEs requested, "[t]he [d]istrict did not conduct evaluations in any other areas other than academics because there was no suspected need" (id. at p. 1). Nevertheless, the district offered to complete speech-language, OT, and assistive technology evaluations "in lieu of" the requested IEEs (id.). Further, in exchange for agreeing to the district conducting the evaluations, the district requested that the parents withdraw the request for a visual processing evaluation and respond to the letter by June 15, 2017 (id. at pp. 1-2).

A. The District's Due Process Complaint Notice

The district, by due process complaint notice dated June 14, 2017, asserted that the parents' request for IEEs did not meet the criteria under 8 NYCRR 200.5(g) and related law (Dist. Ex. 1 at pp. 1-2). The district asserted that its evaluations of the student were appropriate and any request for IEEs was "not within reasonable proximity" to its evaluation of the student (id.). Further, the district argued that "to the degree that [it] did not perform an evaluation in any specific area, it was because there was no demonstrated need to perform the evaluation" (id.). The district requested that an IHO find that it was not required to provide the IEEs at public expense (id.).[4]

B. Subsequent Events and the Parent's June 2017 Due Process Complaint Notice

On June 15, 2017, the CSE convened; however, the meeting was tabled due to questions about evaluations and the student's program (Dist. Exs. 44 at p. 1; 45). Additionally, the district requested the parents' consent to perform a classroom observation, educational evaluation, and psychological evaluation, which the parent did not provide (Parent Response to Mot. for Summ. J. Ex. 10 at p. 1; see Dist. Ex. 3 at p. 1).

The parent, by due process complaint notice dated June 30, 2017, made allegations indicating that the district failed to offer or provide the student a free appropriate public education (FAPE) for the 2016-17 school year (see Dist. Ex. 5).[5] First, the parent claimed that the district did not evaluate the student in all areas of suspected disability (id. at p. 2). The parent also alleged that the district failed to obtain the parent's informed consent for the district's reevaluation of the

[3] It appears that March was a typographical error and that the parents intended to object to the February 26, 2016 evaluation conducted by the district (compare Dist. Mot. for Summ. J. Ex. A at p. 1, with Dist. Ex. 77 at p. 1).

[4] The district amended its hearing request on July 10, 2017, in order to include the visual processing evaluation to the list of IEEs requested by the parents (Dist. Ex. 7 at p. 1). The district indicated that it omission of the evaluation from the list was a clerical error (id.).

[5] By interim order dated July 24, 2017, the IHO consolidated the parent's June 2017 due process complaint notice with the district's due process complaint notice (IHO Ex. 1 at p. 1).

student in February 2016 and for the district's request to evaluate the student on June 15, 2017 (id.). The parent argued that the district failed to provide the parents with prior written notices "in a timely way" for all those instances where the district proposed changes to the student's program, rejected other options, or requested the parents' consent to perform a reevaluation of the student, which the parent argued violated her due process rights (id. at pp. 2-3). Additionally, the parent argued that the CSE failed to generate measurable annual goals or provide for special education and/or related services based on the student's needs for the 2016-17 school year (id.).

With respect to implementation, the parent contended that the district failed to provide the student a 15:1 special class for math for the 2016-17 school year in accordance with the November 2016 IEP (Dist. Ex. 5 at p. 3).

For relief, the parent requested that the IEEs requested in the parents' May 10, 2017 letter be granted at public expense, that she be provided with a prior written notice for the district's June 15, 2017 request to reevaluate the student, and that the district be directed to provide "day-to-day corrective action" to make-up additional special education and/or related services for the failure to provide the 15:1 special class for math (Dist. Ex. 5 at p. 3). With respect to the student's program going forward, the parent requested that the district provide the student with a program consisting of specific services, including specialized reading instruction, speech-language therapy, OT, counseling, and assistive technology (id. at pp. 3-4). The parent also requested that the student's "pendency placement be changed for the 2017-2018 school year" to include 12-month school year services consisting of 1:1 math and 1:1 reading instruction, and, beginning in September 2017, a general education classroom with consultant teacher services for math, ELA, science, and social studies, as well as provision of daily resource room services, specially designed reading instruction, and related services of speech-language therapy, OT, and counseling (id. at p. 4).

C. Subsequent Facts and the Parent's November 2017 Due Process Complaint Notice

From August 2017 through September 2017, the parties corresponded with each other and the IHO regarding the student's placement for the pendency of the proceedings and specifically for the approaching 2017-18 school year (see Parent Exs. Q; S at pp. 1-3, 14-15; T; Dist. Ex. 16). A letter from district's counsel to the parent's advocates dated August 18, 2017, indicated that, due to the parent's cancellation of August CSE meeting dates, no IEP was in place for the student for the 2017-18 school year (Dist. Ex. 16). The letter described the district's proposal that, for the 2017-18 school year—as in the previous school year—the student be placed in a general education classroom setting and receive consultant teacher services in English, social studies, and science classes (id.). The letter also indicated that, while the student's math placement during the 2016-17 school year was a 15:1 special class, there was no ninth grade 15:1 special class for math in the district (id.). Instead, the district offered to provide consultant teacher services to the student for math (id.). In response to the district's letter, on August 24, 2017, the parent's advocates objected to the district's proposal and reiterated the parent's request for a change in pendency as outlined in the June 2017 due process complaint notice (Parent Ex. S at pp. 14-15; see Dist. Ex. 5 at p. 4).[6]

[6] The parent's exhibit S consists of a letter to the IHO requesting that the IHO "direct the District to fully implement the Student's last agreed upon IEP" (Parent Ex. S at p. 3). The letter includes five attachments designated with letters "A" through "E" (id. at pp. 4-17). For purposes of this decision, the letter and the attachments are cited by using the pagination of the entire exhibit S.

According to a letter dated August 31, 2017, from the parent's advocate to the IHO, the student attended high school orientation on August 29, 2017, and was supplied a schedule with an attached note indicating that "[t]he applied algebra class is very, very close to what [the student] had last year" and consisted of "only 16 students" with "both a general education teacher and a special education teacher" and, further, that, while the schedule provided for the student's placement "in academic support," she could instead be placed in a "study hall comprised of 10th – 12th grade[]" students (Parent Ex. S at pp. 2, 17-18).[7] The schedule also included a handwritten notation indicating that the schedule was "tentative until a CSE meeting" took place (id. at p. 17). In a letter from the district to the IHO, dated September 5, 2017, the district indicated that the schedule attached to the parent's August 31, 2017 letter had represented an agreement between the superintendent and the student's mother (Parent Ex. Q at p. 1). However, the district indicated that "given that the Parents' advocates ha[d] repudiated the agreement on the student's schedule," the district would provide the student with a placement that "closely . . . approximate[d] the Students' most recent IEP" with the likelihood of variations given the student's transition from middle school to high school (id. at p. 2). In a letter dated September 22, 2017, the parent's advocates asserted that the November 2016 IEP represented the last agreed upon IEP and that the parent did not agree to any approximation of the pendency placement (Parent Ex. T at pp. 1-2). The parent requested that the district provide her with information to demonstrate it was implementing pendency by providing the student with a 15:1 special class for math during the 2017-18 school year (id. at p. 2).

In a second due process complaint notice dated November 30, 2017, the parent asserted that she did not agree with the change of pendency proposed by the district and requested that the district be directed to implement pendency as reflected in the November 2016 IEP (Nov. 2017 Due Process Compl. Notice at p. 2).[8] Specifically, the parent alleged that the district was not providing the 15:1 special class for math as reflected on the November 2016 IEP (id. at pp. 2-3). The parent also objected to the district placing the student in a 15:1 academic support class with a special education teacher, which was not listed on the November 2016 IEP (id. at p. 3). Further, the parent asserted that the district failed to implement supports for the student's documented academic and management needs, as described on the November 2016 IEP (id.).[9] The parent requested that the district be directed to immediately implement the November 2016 IEP (id.). The parent repeated her previous request that the district be directed to provide "day-to-day corrective action" to make-up for the special education services the student did not receive and provide the student with a specific educational program going forward (id.).[10]

[7] In an interim decision dated September 1, 2017, the IHO denied the district's motion for summary judgment on the issue of the IEEs.

[8] By interim order dated December 8, 2017, the IHO consolidated the parent's November 2017 due process complaint notice with the previously consolidated matters pending before him (IHO Ex. 1 at p. 2).

[9] The parent listed each of the supports for the student's academic and management needs that she alleged the district had failed to provide to the student (Nov. 2017 Due Process Compl. Notice at p. 3).

[10] The parent filed another due process complaint notice on March 9, 2018 (see Tr. p. 842; Mar. 2018 Due Process Compl. Notice). The IHO did not consolidate the March 2018 due process complaint notice with the three 2017 due process complaint notices in the hearing record or otherwise render a decision thereon within the context of this proceeding; therefore, the March 2018 due process complaint will not be further reviewed in this appeal.

D. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on October 5, 2017, which concluded on March 23, 2018, after five days of proceedings (see Tr. pp. 1-1044). By decision dated May 8, 2018, the IHO addressed the claims raised in the district's and the parent's consolidated due process complaint notices (see IHO Decision at pp. 1-15).

The IHO found that there had been "no showing" the parent's allegations regarding the district's provision of informed consent and prior written notices "had any impact on the parents or the [s]tudent" (IHO Decision at pp. 9-10). The IHO noted that the parent did provide consent prior to the district's February 2016 reevaluation of the student and that the district offered the parent an opportunity to consent in its June 2017 attempt to reevaluate the student, "which satisfied the requirement to make reasonable efforts to obtain parental consent" (id. at p. 10). Therefore, the IHO concluded that the parent's claims in this regard were without merit (id.).

As for the parent's claim directed at the student's annual goals, the IHO found that the goals created by the CSE were measurable and the district was not required to report the rate of accuracy in the progress reports (IHO Decision at pp. 11-12).

Turning to the student's IEPs, the IHO ruled that the parent's due process complaint notices did not include clear "allegations relating to the [s]tudent's IEPs for the 2016-17 school year" and that the parent agreed to those IEPs (IHO Decision at p. 12). Therefore, the IHO found that any claims pertaining to these IEPs were outside of the scope of the impartial hearing (id.). However, the IHO determined that, even if these allegations were raised, they were without merit (id.). Specifically, the IHO pointed out that the parent did not call as a witness the private neuropsychologist who evaluated the student (and who recommended, among other things, counseling for the student), and that there was nothing in the record to suggest that the student needed counseling as she was "doing well enough in school to thrive without counseling" (id. at p. 13). Further, as to the parent's request for specialized reading instruction, the IHO noted that the IEP included a reading goal and that evaluation results indicated that the student's reading levels were in the average range in all areas (id. at pp. 13-14).

The IHO then addressed the district's failure to implement the student's IEP during the 2016-17 school year (IHO Decision at pp. 10-11). The IHO found that the district did not provide the 15:1 special class in math for the 2016-17 school year in that the hearing record showed that the student received primary instruction from a regular education teacher (though a special education teacher was in the class) and did not clearly indicate that such instruction constituted "specialized instruction" (id. at p. 10). Despite the district's assertion that the difference was "not substantial" and that the student did not suffer any harm, the IHO indicated that a failure to implement claim does not require a showing of demonstrable harm and then noted that the student failed her final exam in the math class, although she did receive a passing grade for the class (id. at pp. 10-11). Ultimately, the IHO determined that the district failed to implement the 15:1 special class for math (id. at p. 12).

With respect to the implementation of the student's stay-put placement during the 2017-18 school year, the IHO found that there was no dispute that the student's pendency placement should have included a 15:1 special class for math and that the district, instead, provided a class led by a general education teacher with a special education teacher in the classroom and with some students who were not eligible to receive special education under the IDEA (IHO Decision at pp. 5-6). The

IHO determined that this "effectively amount[ed] to a revision to the IEP, which provide[d] for specially designed math instruction" (id.). The IHO rejected the district's argument that the placement provided approximated the student's pendency placement, finding that the hearing record did not show that it was "impossible" for the district to provide the 15:1 math special class (id. at pp. 6-7). Accordingly, the IHO agreed with the parent that the district did not provide the student with her pendency placement (id. at p. 7). Further, the IHO acknowledged the parent's argument that the district changed the student's pendency placement by providing a classroom aide in two of the student's classes, having materials read to the student, and placing the student in an academic support class, but determined that there was nothing in the IEP that "specifically forbid" the student from receiving such supports (id. at pp. 5-6).

The IHO next considered the parent's requested IEEs (IHO Decision at pp. 7-9). The IHO found that the district had an opportunity to evaluate the student prior to the parent's IEE request and this evaluation consisted of one assessment, a measure of the student's achievement in reading, writing, and mathematics (id. at p. 8). However, the IHO found that, although the parent could disagree with the district's decision not to conduct specific evaluations, the parent's claims for additional testing were "on the whole, not convincing" (id.). The IHO noted that the parent did not call any witnesses to demonstrate that the district's assessment of the student's math and reading weaknesses were "somehow inaccurate or unreliable" (id.). Regarding the parent's claim that OT and assistive technology evaluations were required, the IHO found that "there [was] nothing in the record to suggest that the [s]tudent, at present, need[ed] any such evaluations, and no persuasive witnesses were called to support the parents' claims" (id.). Additionally, the IHO noted that the district did offer to conduct OT and assistive technology evaluations after the parent requested IEEs (id.). However, the IHO determined that the parent's claim regarding the student's need for a speech-language evaluation was "more persuasive" because—despite information in the hearing record that the student had received diagnoses of "a receptive and expressive language disorder" and a "Communication Disorder NOS"—there was "nothing the record to indicate the [s]tudent ha[d] recently been tested in regard to [her] speech language issues" (id. at pp. 8-9). The IHO ordered that the district fund a private assessment of the student for her "speech and language processing issues" (id. at p. 9). However, the IHO denied the parent's request for a central auditory processing evaluation because "the record [was] unclear on how a central auditory processing evaluation differs from a speech language evaluation" (id.).

As for relief, the IHO found that the student was not entitled to day-to-day corrective action for the missed math services as requested by the parent because the record indicated that the student did receive some help in math during the 2016-17 school year and during the pendency of the litigation (IHO Decision at pp. 14-15). Therefore, the IHO found that requested amount of compensatory education should be reduced (id. at p. 15). Based on his experience as an IHO, he determined that an appropriate award was 75 hours of 1:1 tutoring in math by a special education teacher (id.).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in failing to grant the parent additional relief.[11] Initially, the parent requests the SRO review the conduct of the impartial hearing stating

[11] The parent includes additional evidence with her request for review and requests that an SRO review it in on appeal.

various allegations about the scheduling and timing of the impartial hearing and the IHO's decision. Additionally, the parent asserts that language in the IHO's decision reflects that he shifted the burden of proof to the parent.

With respect to the parent's procedural challenges, the parent alleges that the IHO erred by finding there was no impact resulting from the district's failure to provide the parent prior written notice or obtain the parent's informed consent for revaluations of the student. The parent contends that she was denied her right to notice and her right to ask for evaluations because of the district's failure.

Next, the parent asserts that the IHO erred by not finding additional reasons to conclude that the district failed to implement the student's pendency placement as reflected in the November 2016 IEP. Specifically, the parent alleges that the district provided the student with a 15:1 special education academic study hall, aide support, and the accommodation of having texts read aloud to her that were not included in the November 2016 IEP.

As for the relief related to the implementation failure, the parent asserts the IHO erred by only granting 75 hours of compensatory education in math. The parent requests that the student be awarded 119.88 hours of compensatory education for the district's failure to provide the 15:1 special class in math.

Regarding the requested IEEs, the parent alleges that the IHO shifted the burden of proof to the parent to demonstrate that the requested evaluations were necessary and appropriate.[12] The parent contends that there is ample information from the prior evaluations to support a conclusion that further testing is warranted. The parent contends that the record supports granting all of the IEEs she requested, including the comprehensive vision processing evaluation, which the parent asserts the IHO did not address. Specifically, in regard to the assistive technology evaluation, the parent argues that the district did not assess the student's needs, the CSE did not consider the need for assistive technology as there was no discussion of the student's needs in that area, and the district failed to provide any reason as to why it would not fund the requested evaluation. Further, the parent argues that the IHO erred by granting a speech-language evaluation but not a central auditory processing evaluation, as she requested. Specifically, the parent contends that, if the IHO did not understand the differences between a speech-language evaluation and a central auditory process evaluation, then he should have researched the information or requested more information from the witnesses. The parent requests that all of the previously requested IEEs be granted at the public expense.

The district, in an answer and cross-appeal, generally denies the parent's allegations. Initially, the district argues that the parent's request for review is improper and incomplete and should be rejected by the SRO. The district also objects to consideration of the parent's additional evidence. As for a cross-appeal, the district asserts that the IHO erred in finding that the district failed to implement the student's pendency placement. The district asserts that, given the student's

[12] In articulating the issue before him, the IHO indicated that "the [d]istrict also contended that the [s]tudent also needed to be assessed in speech and language, central auditory processing, occupational therapy, sensory integration, and assistive technology" (IHO Decision at p. 7). The parent specifically objects to this characterization on appeal; however, it appears that the IHO may have made a typographical error and intended to state the parent's contention, not the district's. In any event, it does not appear that the IHO's decision contributed to his final determinations in the matter.

transition from the middle school to the high school, it properly provided the student ICT services as an educational program that approximated as closely as possible the mandated math instruction in a 15:1 special class. The district asserts that the IHO's award of 75 hours of compensatory education in the area of math should be annulled.

The parent answers the district's cross-appeal and argues that the IHO's determination that the district failed to implement the student's pendency placement should be upheld. The parent requests that an SRO "continue the order for specially designed 1:1 instruction" to "make up for the denial of [a] FAPE" for the 2016-17 school year. For the failure of the district to implement the student's pendency during the 2017-18 school year, the parent requests an additional 75 hours of specially designed instruction.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[13]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should

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

have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

The district asserts that the parent's request for review must be dismissed for failing to comply with the form requirements for pleadings (8 NYCRR 279.7[a]; 279.8[a][4]). Specifically, the district asserts that the parent did not properly sign the pleading and the affidavit of verification was not properly endorsed by the notary.

State regulations provide that "[a]ll pleadings and papers submitted to a[n] [SRO] in connection with an appeal must be endorsed with the name, mailing address, and telephone number of the party submitting the same or, if a party is represented by counsel, with the name, mailing address, and telephone number of the party's attorney" (8 NYCRR 279.7[a]). All pleadings must be signed by an attorney, or by a party if the party is not represented by an attorney (8 NYCRR 279.8[a][4]). Additionally, all pleadings shall be verified by a party (8 NYCRR 279.7[b]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

The parent hand-signed the affidavit of verification annexed to the request for review; however, she typed her name upon but failed to hand-sign the request for review (see Req. for Rev. at p. 10; Parent Aff. of Verification). Further, although the notary public dated and stamped the verification with her name, license number, the words "Notary Public State of New York," her official number, the name of the county in which she originally qualified, and the date upon which her commission expires, she failed to sign the document (see Exec. Law § 137). In this instance, the failure of the notary public to properly discharge her duty to endorse the affidavit of verification will not be held against the parent as a matter within my discretion. Aside from the typewritten name on the request for review and the notary's error, the parent fully complied with all other aspects of Part 279, which governs how a request for review should be submitted. Upon review and notwithstanding the accuracy of the district's contentions relative to the form of the parent's request for review and affidavit of verification, I decline, as a matter within my discretion, to dismiss the request for review on these grounds given that the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that the district suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 17-

101; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058).

2. Additional Evidence

The parent attached a series of emails and two privately-obtained evaluation reports with her request for review. The first evaluation report was from a central auditory processing evaluation dated October 2017, and the second report was from a visual evaluation dated in March 2018. The district objects to the consideration of this additional evidence.

Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

I decline to review the new evaluation reports presented with the request for review. Both reports are dated prior to the last impartial hearing date and the parent has not provided sufficient reason as to why these evaluation reports were not made available to the IHO or district during the proceedings. Nevertheless, as discussed below, the parent should present these evaluation reports to the CSE and the CSE should consider the results and recommendations. Further, as discussed below, the parent shall be entitled to a central auditory processing IEE at district expense. If the parties agree, the district could reimburse the parent for the cost of the October 2017 central auditory processing evaluation already obtained by the parent in lieu of funding a new IEE in this area. The emails submitted with the request for review were dated following the last hearing date and are necessary in order to review the parent's allegations about the conduct of the impartial hearing and the timeliness of the IHO's decision.

3. Conduct of the Impartial Hearing and Timeliness of the IHO Decision

The parent asserts that the IHO's conduct in scheduling the hearing dates was improper and that the IHO failed to timely render his decision. State regulations provide that when a school district files a due process complaint notice, the impartial hearing or prehearing conference "shall commence within the first 14 days" after the IHO is appointed (8 NYCRR 200.5[j][3][iii][a]). When a parent files a due process complaint notice, the impartial hearing or prehearing conference must commence within 14 days of the IHO receipt of the parties' written waiver of the resolution meeting, or the parties' written notice that mediation or a resolution meeting failed to result in agreement, or the expiration of the 30-day resolution period, unless the parties agree in writing to continue mediation at the end of the resolution period (8 NYCRR 200.5[j][3][iii][b][1]-[4]).

The IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). However, extensions may only be granted consistent with regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). Absent a

compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). Pursuant to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]).

By way of summary regarding the overall progress of the impartial hearing, as described above, the district requested an impartial hearing by due process complaint notice dated June 14, 2017 (Dist. Ex. 1 at p. 1). The IHO was appointed on June 20, 2017 (Dist. Ex. 2 at p. 1). The parent requested an impartial hearing by due process complaint notice dated June 30, 2017, which was consolidated with the district's due process complaint notice (Dist. Ex. 5 at p. 1; IHO Ex. 1 at p. 1). According to correspondence from the parent, prehearing conferences occurred on June 30 and July 7, 2017 (see Parent Exs. H at p. 1; N at p. 2).[14] The district amended its due process complaint notice on July 10, 2017 (Dist. Ex. 7). On July 26 and August 8, 2017, the parent's advocates informed the district's attorney (by email and letter, respectively) that the parent was not waiving the resolution meeting (Parent Ex. R at p. 2; Dist. Ex. 10 at p. 1).

On August 21, 2017, the district's attorney indicated that "almost all" of the district's witnesses were unavailable for scheduled August 31, 2017 and September 1, 2017 hearing dates and requested the hearing dates be rescheduled (Parent Ex. L at p. 1). The parent objected to rescheduling the hearing dates in a letter dated August 24, 2017 (Parent Ex. N at p. 3). The first three days of the hearing occurred on October 5, November 30, and December 1, 2017 (Tr. pp. 1, 224, 476).[15] According to emails between the parties and the IHO, hearing dates were scheduled for January 4 and February 1, 2018, but that both dates were cancelled: the first by the parent and the second by the IHO (Req. for Rev. Ex. 3 at p. 4). The IHO proposed February 23, 2018 as a hearing date but the district was not available; the parent objected to the delay until March 2018 (id. at pp. 1, 5).[16] The impartial hearing continued on March 9 and March 23, 2018 (Tr. pp. 695, 856).

[14] The hearing record does not contain a transcript or summary of the prehearing conference; however, the parent's July 13, 2017, letter provided a description of the conference (see Parent Ex. H). The parent asserts that, at the prehearing conference, the district indicated that it wished to amend its due process complaint notice and would be filing a motion for summary judgment (id. at p. 1). The IHO provided the parent with time to respond to the motion for summary judgement and the initial hearing dates were set for August 31, 2017, and September 1, 2017 (id. at pp. 1-2). Further, in the letter the parent objected to delay of the start of the impartial hearing and objected to the IHO considering summary judgment (id. at p. 2). The district responded to this letter on July 14, 2017, indicating that the hearing dates were appropriate and mutually agreed upon by the parties (Parent Ex. I at p. 1). The IHO is reminded that, as a part of the impartial hearing, a copy of a transcript or written summary of the prehearing conference should have been entered into the hearing record (see 8 NYCRR 200.5[j][3][v], [xi]).

[15] The parent submitted a second due process complaint notice, dated November 30, 2017, which was consolidated with the prior due process complaint notices (see IHO Ex. 1 at p. 2; Nov. 2017 Due Process Compl. Notice).

[16] According to email correspondence between the parties and the IHO, the parents were only available for the impartial hearing during business hours on Thursdays and Fridays (Req. for Rev. Ex. 3 at p. 2). The parents'

At the last hearing date, it was agreed that the parties' closing briefs would be due two weeks after the date the transcript was received (Tr. pp. 1039-41). The parent's closing brief was dated April 5, 2018 (IHO Ex. 3 at p. 51) and the district's closing brief was dated April 9, 2018 (IHO Ex. 4 at p. 30).[17] After the IHO granted the district's request for an extension of the timelines on April 2, 2018, the parent objected "to continued delay in these proceedings" and indicated that the IHO granted the request without giving the parent "an opportunity to respond" (Req. for Rev. Ex. 3 at pp. 16, 19, 43). The parent also asserted that the student would be harmed by the extension since she had been exhibiting "increase[d] anxiety, and panic attacks," which the parent stated "was all school related" (id. at p. 43). According to the IHO's documentation of the extension, the new decision due date was April 30, 2018 (IHO Ex. 2 at p. 9). Subsequently, on May 1, 2018, the IHO "ask[ed]" the parties "for one additional week to complete the decision" "due to the extensive submissions in this case" (Req. for Rev. Ex. 2 at p. 3).[18] The parent objected, citing extensive delays and harm to the student (id.). The IHO apologized and indicated that no further extensions would be granted (id. at p. 4). The IHO issued his decision on May 8, 2018 (IHO Decision at p. 15).

The hearing record reflects that the IHO issued documented extensions to the 45-day timeline on several occasions (see IHO Ex. 2 at pp. 1-10). With the exception of the first extension—which the IHO indicated was as the district's request—the IHO states that both "parties sought to extend the decisional timelines" (id.). For the first eight extensions, the IHO indicated that the reason given for the request "was witness availability" (id. at pp. 1-8). For the last two extensions, the IHO states that the reason "was extensive testimony and issues, and briefs" (id. at pp. 9-10). The IHO also indicates in each extension that he "reviewed the factors in 8 NYCRR Sect. 200.5(j)(5)(ii)" and, further, that there was no showing of "any impact on the child's educational interest or well-being in connection to this application or order," "any financial or other consequences to the parties," or "prejudice to the District" (id. at pp. 1-10).

As the parent argues, the IHO did not document her objections to the extensions. Further, the IHO failed to set a "record close date." Based on all of the foregoing evidence in the hearing record, the IHO failed to render a timely decision in compliance with State regulations. Even so, there is no evidence to suggest that the parent or student suffered any prejudice as a result of this delay. However, the parent argues that the delay resulted in the student's continuation in the pendency placement, which caused the student anxiety. In particular, the parent points to evidence that, in October 2017, the student went to the emergency room, where she was diagnosed with having a panic attack (Parent Ex. W at p. 1), and subsequently, the parent obtained a letter from a licensed psychologist which described the student's anxiety and difficulty with panic attacks (see generally Parent Ex. X). Other than the parent's conclusory representation that the student's

advocate indicated that the parents and the IHO were available in evenings and weekends, but the district's witnesses were not available outside of business hours (id.).

[17] According to the parent's additional evidence, the transcript was received on March 27, 2018 (Req. for Rev. Ex. 2 at p. 1).

[18] On more than one occasion, it appears that the IHO contacted the parties by email to inform them that the timelines were expiring and requesting that they "please make the appropriate application" (Req. for Rev. Exs. 2 at p. 3; 3 at pp. 5-7, 10, 16-17, 45).

anxiety related to the pendency placement, without more, this is insufficient to support a finding that the relatively brief delay in the administrative proceedings resulted in a denial of a FAPE to the student.

While the untimeliness of the IHO's decision in this instance did not result in a denial of a FAPE, the IHO is nevertheless reminded that a student may be prejudiced by delays in decision issuance and that he must comply with the applicable timelines for rendering a decision.[19]

The parent also asserts that the IHO erred by failing to make a determination about the student's pendency placement until his final decision. Considering the focus on maintaining the status quo during the proceeding and the time-sensitive nature of a pendency determination, an IHO may and should promptly address a parent's pendency claims, whenever raised ("Questions Relating to Impartial Hearing Procedures Pursuant to Sections 200.1, 200.5, and 200.16 of the Regulations of the Commissioner of Education, as Amended Effective February 1, 2014," at p. 7 [Office of Special Educ. Rev. Sept. 2016] [noting that, if there is a dispute regarding a student's pendency placement, it is incumbent upon the IHO "to render a written decision regarding pendency as soon as possible and prior to determining any other issue relating to the evaluation, identification or placement of a student or the provision of a free and appropriate public education"] [emphasis added], available at http://www.p12.nysed.gov/specialed/dueprocess/documents/qa-procedures-sep-2016.pdf).

However, it does not appear that there was a dispute that the November 2016 IEP set forth the student's pendency placement (see Parent Ex. Q at p. 2; T at pp. 1-2). That the district was not implementing the student's pendency placement constitutes a separate issue, discussed below (see Letter to Goldstein, 60 IDELR 200 [OSEP 2012] [indicating that a district may not wait for a formal order from a hearing officer before implementing a student's stay-put placement where the stay put placement is uncontested]).

4. Burden of Proof

Finally, the parent asserts that language in the IHO's decision shows that the IHO improperly shifted the burden of proof to the parent.

As noted above, under State law, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

[19] Although the parent did not raise the issue of the IHO's failure to properly maintain the record, the IHO is reminded to comply with all regulations governing how a hearing record should be developed and maintained. State regulation provides that an IHO "shall attach to the decision a list identifying each exhibit admitted into evidence," identifying "each exhibit by date, number of pages and exhibit number or letter," and to "include an identification of all other items the [IHO] has entered into the record" (8 NYCRR 200.5[j][5][v]). The IHO failed to attach an exhibit list with his decision and failed to indicate either in the decision or on the record all of the additional items that were in the record, such as the parent's November 2017 due process complaint notice.

An examination of the IHO decision reveals that the IHO weighed the evidence presented at the impartial hearing and resolved the disputed issues, finding merit to some of the parent's claims (IHO Decision at pp. 5-14). Although the parent disagrees with some of the conclusions reached by the IHO, such disagreement does not demonstrate that the IHO failed to correctly apply the burden of proof in his analysis.

With respect to the specific language identified by the parent as representing the IHO's misapplication of the burden of proof, in examining the parent's entitlement to IEEs at district expense, the IHO stated that "there [wa]s nothing in the record to suggest that the Student . . . need[ed] any such evaluations, and no persuasive witnesses were called to support the parents' claims in this regard" (IHO Decision at p. 8). The parent also objects to the IHO's denial of a central auditory processing evaluation based on his representation that "the record is unclear on how" such an evaluation "differs from a speech and language evaluation" (id.at p. 9).

Both of the examples cited by the parent represent less than optimal language because one possible reading is that the IHO believed that the parent should have presented evidence that was ultimately missing from the record. Another reading is that the available evidence in the record led the IHO to draw conclusions against the parent's position and there was no contrary evidence rebutting those conclusions. However, even assuming the IHO misallocated the burden of proof to the parent, the error would not require reversal insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer v. Weast, 546 U.S. 49, 58 [2005]; M.H., 685 F.3d at 225 n.3). Furthermore, I have conducted an impartial and independent review of the entire hearing record and, as discussed below, largely concur with the IHO's determinations (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

5. Scope of Review

Before addressing the merits, it is necessary to examine which issues are before me in this appeal. The IHO found that the annual goals in the November 2016 IEP were appropriate (IHO Decision at pp. 11-12). Additionally, the IHO determined that, even assuming the parent's due process complaint notices raised additional issues relating to the student's IEPs for the 2016-17 school year (which he determined they did not), the evidence showed that the student did not need counseling or specialized reading instruction (id. at pp. 12-14). Further, the IHO awarded the parent a speech-language IEE at district expense (id. at p. 9). Neither party has appealed these determinations and, accordingly, they have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see 8 NYCRR 279.8[c][4] ["Any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]).

B. Prior Written Notice

The parent argues that the district failed to provide prior written notices in conjunction with the district's requests to reevaluate the student in February 2016, December 2016, or June 2017. The parent asserts that the IHO erred in finding no impact on the student as a result (see IHO Decision at p. 10).

State and federal regulations require that a district provide parents of a student with a disability with prior written notice "a reasonable time before the school district proposes to or

refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a [FAPE] to the student" (34 CFR 300.503[a]; 8 NYCRR 200.1[oo]; 200.5[a][1). Further, pursuant to State and federal regulation prior written notice must include a description of the action proposed or refused by the district; an explanation of why the district proposed or refused the action; a description of the other options that the CSE considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action; and a description of the other factors relevant to the CSE's proposal or refusal (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]).

Pertinent to the parent argument, prior to evaluating a student and at the same time that it requests parent consent, a district must provide the parent with prior written notice that "describes any evaluation procedures [the district] proposes to conduct" (20 U.S.C. §§ 1414[b][1]; 34 CFR 300.300[a][1][i]; 8 NYCRR 200.5[a][2], [5][i]). Additionally, school districts "must make reasonable efforts to obtain written informed consent of the parent," which is required prior to conducting an initial evaluation or reevaluation" (8 NYCRR 200.5[b][1]; see 34 CFR 300.300[c][1][i]; see also 34 CFR 300.9; 8 NYCRR 200.1[*l*]).

The hearing record includes a prior written notice, which appears to relate to the district's proposed reevaluation of the student in December 2016 and its request for the parents' consent to conduct an educational evaluation (see Dist. Ex. 55; 56).[20] The hearing record does not contain any prior written notices relating to the district's February 2016 and June 2017 requests for the parents' consent to reevaluate the student (see Dist. Ex. 78; Parent Response to Mot. For Summ. J. Ex. 10).[21]

The district should have provided the parent with prior written notice each time it requested to reevaluate the student; however, the parent has not asserted any substantive harm related to the district's failure to comply with the regulations except to the extent that she asserts that she was denied her right to ask for evaluations; however, the parent does not elaborate on this conclusory assertion and it is unclear how the lack of prior written notices impacted the parent's ability to request evaluations. Additionally, there is no indication in the hearing record that the failure to provide prior written notice interfered with the parent's ability to participate in the development of the student's educational program. The district's failure to provide prior written notices do not rise to the level of a denial of FAPE as they did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Nonetheless, going forward, the district should provide the parent with prior written notice in compliance with State and federal regulations (see 34 CFR 300.503; 8 NYCRR 200.5[a]). Moreover, the district is reminded that it is required to provide the parent with

[20] The prior written notice includes a handwritten notation that the document represents a "copy of what was sent on 11/20/16 and again on 12/6/16" (Dist. Ex. 55 at p. 1).

[21] The parent provided consent for the reevaluations in February and December 2016 (Dist. Exs. 56; 78). The parent did not consent to the June 2017 request to reevaluate the student (see Parent Response to Mot. For Summ. J. Ex. 10).

prior written notice at the same time it requests parental consent to evaluate the student (8 NYCRR 200.5[a][2]).

C. Implementation of the November 2016 IEP during the 2016-17 School Year

The IHO found that the district failed to implement the IEP as it did not provide the student with a 15:1 special class for math (IHO Decision at pp. 10-12). It does not appear that either party directly objects to the IHO's determination. The district, instead focuses its cross-appeal on the IHO's determinations pertaining to implementation of the student's pendency placement, discussed below. However, as the IHO awarded compensatory education without specifying the period of time the award was intended to remedy and the district does request reversal of the IHO's entire award of compensatory education, the IHO's substantive determination relating to implementation of the November 2016 IEP during the student's 2016-17 school year shall be examined.

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

Here, the district failed to implement the student's IEPs as it did not provide the student with a recommended 15:1 special class in math during the 2016-17 school year (see Dist. Ex. 28 at p. 10; 29 at p. 10; 30 at p. 10). State regulation provides that a "[s]pecial class means a class consisting of students with disabilities who have been grouped together because of similar individual needs for the purpose of being provided specially designed instruction" (8 NYCRR 200.1[uu]). A 15:1 special class is intended to address the needs of students "whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]). State guidance provides that "[a] certified special education teacher must be assigned to provide specially designed instruction to a special class" ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 18, Office of Special Educ. Mem. [Nov. 2013], available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf). As to whether a special class can be located in a general education class, the guidance further notes

that "[b]ecause special class is defined in regulations to mean an instructional group consisting of students with disabilities who have been grouped together in a self-contained setting, integrated co-teaching services was added to the continuum of services to identify the special education program for students with disabilities recommended to receive their specially designed instruction by both a general and special education teacher in the general classroom"("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 17). By way of comparison, ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" in a classroom staffed "minimally" by a "special education teacher and a general education teacher" (8 NYCRR 200.6[g]). ICT services provide for the delivery of primary instruction to all of the students attending such a setting ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 14-15).

The district provided the student with services more closely resembling ICT services in that the class had both a regular education teacher and special education teacher (Tr. pp. 98-100, 274-76, 287, 325-28, 703). According to the school counselor, the class the student received "was a joint class" taught by a special education teacher and a regular education teacher (Tr. pp. 99-100). The student's eighth grade special education teacher testified that the regular education teacher provided primary instruction and that she "did the support and modifications for the [students], when needed" (Tr. p. 274). The regular education teacher of the student's eighth grade math class characterized the class as "not self-contained," consisting instead of "a slower paced" class with "more teachers per student" (Tr. p. 703). The special education teacher indicated that there were approximately five students in the class "[b]ut the numbers fluctuated (Tr. p. 275). According to the counselor's and the regular education teacher's "recollection[s]," all of the students in the class were eligible for special education under the IDEA (Tr. pp. 100, 703); however, the eighth grade special education teacher stated that "it fluctuated" in that "[s]ometimes there was one student without [an IEP] depending on when committee meetings were [held]" and, to her recollection, one student had a 504 plan (Tr. pp. 275-76).

Here, given the testimony indicating that the regular education teacher provided the direct instruction to the student in her eighth grade math class, as well as testimony indicating that the class may have been composed of students other than special education students, the district's failure to provide the special class as required by the student's IEP and as defined by State regulation was a material deviation from the IEP and thus constitutes a denial of a FAPE. The services provided to the student represented a different option on the continuum of special education services than that recommended by the CSE. However, the extent to which a compensatory award is appropriate for this timeframe is discussed below.

D. Implementation of the Pendency Placement

Relatedly, the district cross-appeals the IHO's decision that it failed to implement the 15:1 special class for math as part of the student's pendency placement, arguing that the student received an inclusive, co-teaching class, which was "functionally the same" placement. The parent asserts that the IHO erred by not finding additional bases for determining that the district failed to implement the student's pendency, including by providing the student with a 15:1 special class academic study hall, classroom aides, and texts read aloud, which were not supports included in the November 2016 IEP.

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

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

The November 2016 IEP recommended a 15:1 special class in math, and classroom aide services in the general education setting for English, science, and social studies (Dist. Ex. 28 at p. 10). The testing accommodations included: extended time; the listening section of tests repeated; language in directions simplified; additional examples provided for directions upon request; test passages, questions, items, and multiple-choice responses read to the student upon request; and use of a calculator (id. at p. 11).

The hearing record shows that the student did not receive math instruction in 15:1 special class during the 2017-18 school year (Tr. pp. 228-29; see Parent Ex. S at pp. 16-17). Rather, she received math instruction in an "applied algebra" class from a regular education teacher, while a special education teacher circulated the classroom, clarified questions, and otherwise helped the students (Tr. pp. 228-29, 399, 560-61).[22] Both the regular education and the special education teachers of the student's ninth grade math class testified that the class functioned with the regular education teacher providing direct instruction to the students, while the special education teacher

[22] The parties refer the student's 2017-18 math class as "applied algebra," "consultant teacher," and "co-teaching" somewhat interchangeably (see Answer with Cross Appeal ¶20; Tr. p. 399).

provided support (Tr. pp. 229, 561-62). The district director of special education characterized the class as "a consultant teacher class" and the ninth grade special education teacher of the math class characterized it as a co-taught class (Tr. pp. 399, 586-87). Further, the class profile indicated that there were 17 students in the class; however, the special education teacher testified that only 15 attended consistently (Tr. p. 564; Parent Ex. V; Dist. Ex. 80).[23] All of the students in the class either had an IEP or a 504 plan (Tr. p. 228). According to the ninth grade special education teacher, the class included "12 special education students and five other students" (Tr. p. 561).

Given the description of a special class in State regulation (8 NYCRR 200.1[uu]; 200.6[h][4]) and the in State guidance (Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 17-18), set forth above, the provision of direct instruction by a regular education teacher and the inclusion of students not eligible for special education removed the class the student attended from the definition of a special class.

The district not does allege that it provided the student with a 15:1 special class for math during the pendency of the proceedings. Rather, the district argues that, as the student was transitioning from the middle school to the high school, the district did not have the same class settings available (see Tr. pp. 400, 563-64, 629-30). The district asserts that, since the 15:1 special class was not available for math, the district could provide a placement that approximated, as closely as possible, the student's pendency placement.

As noted above, the district is obligated to maintain the student's then-current educational placement during the pendency of the proceedings (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]). Whether a student's educational placement has been maintained under the meaning of the pendency provision depends on whether the educational program is "substantially and materially the same" as the student's educational program for the prior school year (Letter to Fisher, 21 IDELR 992 [OSEP 1994]; see Application of a Student with a Disability, Appeal No. 16-020). Student-to-staff ratio is also a relevant factor in determining whether a student's program has changed (M.K. v. Roselle Bd. of Educ., 2006 WL 3193915, at *14-*15 [D.N.J. Oct. 31, 2006]; Henry v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 60-61 [D.N.H. 1999]; Application of a Child with a Disability, Appeal No. 05-028). State regulations define a change in program as "a change in any one of the components" of an IEP, which include the size of the special class in which a student is recommended to receive services (8 NYCRR 200.1[g]; 200.4[d][2][a], [b][2]). Furthermore, at least one district court has held that, absent direct evidence of similarity in the hearing record, a 6:1+1 special class with the additional service of a 2:1 shared aide was not sufficiently similar to a 6:1+3 special class to constitute a comparable program (G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *7-*8 [S.D.N.Y. Jan. 31, 2012]).[24]

[23] In a correspondence to the parents, the district provided a copy of the student's proposed schedule for the 2017-18 school year and a note regarding the applied algebra class (Parent Ex. S at pp. 16-17). The district indicated that the applied algebra class was "very, very close" to what the student had last year, there were only 16 students in the class, and a general education teacher and a special education in the classroom (id. at p. 17).

[24] Although G.R. involved the comparable services provision of the IDEA, regarding transfers of students between school districts (20 U.S.C. § 1414[d][2][C][i][I]; 34 CFR 300.323[e]; 8 NYCRR 200.4[e][8][i]), the court in G.R. was addressing a stay-put placement issue (2012 WL 310947, at *4-*7). The United States Department of Education has stated that "'comparable' services means services that are 'similar' or 'equivalent' to those that were

Here, as discussed above with respect to the 2016-17 school year, the class provided to the student represented a different option on the special education continuum and, as such, was not substantially similar to the required 15:1 special class. The district has not pointed to a sufficient legal basis to permit it to deliver a placement different from that required by the stay put provisions of the IDEA. The IHO specifically distinguished the authority cited by the district (IHO Decision at p. 6), and, on appeal, the district has not engaged with the IHO's specific analysis in this regard. Moreover, the authority cited by the district for the proposition that it was entitled to implement an approximation of the student's pendency placement require a showing of "impossibility" with respect to the implementation of the particular stay put placement, which the district has not established in the present case by simply pointing to the mere fact that the student has transitioned from middle school the high school, without more (see Michael C. v. Radnor Tp. Sch. Dist., 202 F.3d 642, 649, [3d Cir 2000] [applying where it is impossible for the student's new school district to keep the student in his or her previous school as required by the "stay put" provision where that school is in another state Tindell v. Evansville-Vanderburgh School Corp., 2010 WL 557058, at *4 [S.D. Ind. Feb. 10, 2010] [applying where "'rigid adherence' to the exact educational program becomes 'an impossibility,'" such as where the student's high school closed, the student graduated from high school, the graduation was in dispute, and the district offered no other alternatives to the college internship program proposed by the parent]; see also]; Knight v. Dist. of Columbia, 877 F2d 1025, 1029 [D.C. Cir. 1989] [declining to hold "that a public placement is inherently dissimilar to a private placement for the purpose of satisfying the school district's obligation to provide a 'similar' placement, on an interim basis, when a child's prior placement is no longer available and a new and 'appropriate' placement has not yet been finally determined"]; Letter to Campbell, 213 IDELR 265 [OSEP 1989] [applying where a a student with a disability moves to a new school district within the same state and implementation of the old IEP is not possible]). Given the above determination that the district also failed to provide the student with a 15:1 special class during the 2016-17 school year (eighth grade), the district's argument that the transition to the high school meant that a 15:1 special class was unavailable is disingenuous, at best.

The district's argument indirectly amounts to an assertion that the student was not harmed by the implementation failure. Such a harm analysis pertains not to whether there was a material deviation from the IEP, but to what relief, if any, may be appropriate in light of such deviation, as discussed further below.

In addition to the failure to provide the 15:1 special class, the parent also asserts that the district violated the student's pendency placement by providing the student with a 15:1 academic study hall in a special education setting, additional classroom aides, and having texts read aloud to the student. First, the evidence in the hearing record shows that the district provided the parent with an opportunity to remove the student from the 15:1 special education academic support class and place the student in a study hall with 10th to 12th graders (see Parent Ex. S at p. 17). Additionally, the student was recommended for classroom aides in science, English, and social studies in the November 2016 IEP; however, there was also an aide in the student's finance class (Tr. pp. 598, 616; Dist. Ex. 28 at p. 10). The student's IEPs for the 2016-17 school year, as written, did not contemplate the additional classroom aide in finance class or the additional testing accommodation of having texts read aloud to the student. However, unlike the substantially

described in the child's IEP" (IEPs for Children Who Transfer Public Agencies in the Same State, 71 Fed. Reg. 46681 [Aug. 14, 2006]), and courts have held that compliance with the pendency mandate requires the provision of comparable services (see M.K., 2006 WL 3193915, at *11, citing Concerned Parents, 629 F.2d at 754).

dissimilar ICT services provided to the student as replacement for the required 15:1 special class, these supports—in excess of the supports and services required by the student's IEPs—do not amount to material modifications to the stay-put placement such that they represent an implementation failure. Moreover, the district likely would have eliminated the supports to which the parent objected if requested.

E. Compensatory Education

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E. Lyme Bd. of Educ., 790 F.3d at 456; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Student W. v. Puyallup Sch. Dist., No. 3, 31 F.3d 1489, 1497 [9th Cir. 1994]).

An appropriate compensatory education award should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30. 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Here, with respect to the district's failure to implement the 15:1 special class in math during the 2016-17 school year, any award of compensatory education must take into consideration the services the student received and the progress she made in the district math class, despite the district's failure to implement the 15:1 special class for math. As described above, the student received services that resembled ICT services. With respect to her progress, the March 2017 third quarter report card indicated that, for math, the student's received grades for the three quarters of 94, 88, and 87, respectively (Dist. Ex. 20). A letter to the parents dated April 28, 2017 indicated that the student was declared ineligible for extra-curricular activities for one week because she received failing reports from her science and math teachers (Parent Ex. E at p. 1). Nevertheless, the June 20, 2017 IEP annual goal progress report indicated that the student achieved her math

annual goal (Parent Ex. F at p. 3). Although the student failed her final exam in math, her report card indicated that she received an 81 for the fourth quarter of the 2016-17 school year and a final average of 83 for the course (Dist. Ex. 19). Overall, the evidence in the hearing record shows that the student received educational benefit in her math class during the 2016-17 school year and, as such, no compensatory education award is required in order to put the student in the position she would have been but for the denial of a FAPE (see Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013]Link to West km citing references [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]).

Unlike the consideration of an equitable remedy for the denial of a FAPE for the 2016-17 school year, the services the student actually received in the district placement and the progress she made do not affect the compensatory education relief relative to the district's failure to implement the student's pendency placement. The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme Bd. of Educ., 790 F.3d at 456 [awarding full reimbursement for unimplemented pendency services because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [awarding services that the district failed to implement under pendency as compensatory services where the district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

With that said, the special class does not translate to a compensatory remedy as seamlessly as services (see Application of a Student with a Disability, Appeal No. 17-075). However, the district has not articulated a specific objection to the form of compensatory education awarded by the IHO (objecting, instead, to the need for an award as a whole). Accordingly, the student is awarded compensatory services in the form of 1:1 instruction, as contemplated by the IHO, from the date of the district's due process complaint notice (June 14, 2017) through the date of this decision. For purposes of calculating an award, because the 10-month school year contains 180 days (see Educ. Law § 3604[7]; 8 NYCRR 175.5[a], [c]), the student is awarded 120 hours (the equivalent of one 40-minute session per day) for the entire 2017-18 school year. The parties are directed to confer and determine the location in which these services should be provided to the student (at home or at school), so as to ensure the award does not impede the student's participation in her educational program going forward (see, e.g., M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017]). If the parties cannot otherwise agree, services shall be provided to the student at the school by a special education teacher upon the conclusion of the regular school day for 40 minutes per day.

F. Independent Educational Evaluations

Turning next the parent's challenges to the IHO's decision regarding IEEs, 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 (see 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 (see 8 NYCRR 200.4[b][4]; see also 34 CFR 300.303[b][1]-[2]). Pursuant to State regulation, a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability (see 8 NYCRR 200.4[b][4]). The reevaluation "shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). 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]).

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B., 2012 WL 234392, at *5 [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Informal guidance from the United States Department of Education's Office of Special Education Programs indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area (Letter to Baus, 65 IDELR 81 [OSEP 2015]) If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

1. Comprehensive Reading, Writing and Math Evaluation

The parent asserts that the IHO erred in finding that, based on the district's administration of the WJ-IV to the student, there was no need for further evaluation in the area of academics.[25]

Although the student's past academic achievement is not in dispute on appeal, discussion thereof provides context for resolving the parties dispute regarding the appropriateness of the district's evaluation of the student and the parent's request for a comprehensive reading, writing, and math IEE. In May 2014, the parents privately obtained an updated neuropsychological evaluation (Parent Response to Mot. for Summ. J. Ex. 3). Results of the May 2014 neuropsychological evaluation indicated that the student demonstrated cognitive strengths and above average skills in the areas of fine motor speed and dexterity, visual memory, cognitive flexibility and conceptual thinking, and average skills in language functions and visuospatial skills (id. at p. 8). The student exhibited adequately developed listening, speaking, reading, writing, and math skills; however, the evaluator qualified the student's average range academic test scores by noting the presence of "significant test-taking behaviors" including the need for repetition of oral information, long response times, and poor self-monitoring of her written output (id. at pp. 6, 8-9). The student exhibited "extremely" weak skills in sustained auditory attention, and in her ability to repeat simple auditory information (id. at p. 8). The evaluator noted that emotional and behavioral concerns had diminished when compared to test results from the prior year, and the previous diagnosis of adjustment disorder was no longer supported (id. at p. 9). During the 2014-15 school year (sixth grade), the student achieved a year end grade point average of 90.91 (Dist. Ex. 17).

The hearing record shows that the seventh grade special education teacher who administered the February 2016 WJ-IV had worked with the student since the beginning of the 2015-16 school year as her consultant teacher (Tr. pp. 125-27, 137; see Dist. Ex. 77). The special education teacher described the student's academic and social skills as "a little shaky" at the beginning of seventh grade, but she noted tremendous improvement in mathematics and social skills by the end of the year (Tr. pp. 127-28). The seventh grade special education teacher recalled that the student exhibited processing delays but that she was a good worker who preferred to work independently and who would self-advocate (Tr. pp. 129-30). The teacher stated that she assessed the student all year long though tests, quizzes, written work, and observations, and she did not make decisions based on one tool (Tr. p. 173).

The seventh grade special education teacher testified that she reviewed the results of the February 2016 WJ-IV at the March 2016 CSE meeting and everyone on the CSE received a copy of the WJ-IV score report (Tr. pp. 184, 187-88).[26] Results from the February 2016 WJ-IV

[25] Part of the parent's challenge to the IHO's determination that there was no need for further evaluation is that the district's administrations of the WJ-IV to the student "indicated a regression of scores" and a "loss of skills," which the IHO ignored (Req. for Rev. ¶10). However, the parent does not develop this issue further, or point to any evidence in the hearing record to support her argument that a comparison of the student's WJ-IV test scores, in and of themselves, reflect "regression" or lack of progress. The evidence does not show that testing results were improperly obtained such that one of the administrations of the WJ-IV was defective or that an academic IEE at public expense is necessary. At most, the scoring differences may be a potential topic for discussion at a CSE meeting if the parent so chooses.

[26] The February 2016 WJ-IV report is a print out of subtest and cluster area scores with no behavioral observations

indicated that the student's academic skills were in the average range in the area of reading (broad reading standard score 98, letter-word identification standard score 92, passage comprehension standard score 99, word reading fluency standard score 104), the average to advanced range in the area of mathematics (broad mathematics standard score 110, calculation standard score 119, applied problems standard score 101, math facts fluency standard score 107), and the average range in written language (written language standard score 101, spelling standard score 95, writing samples standard score 109) (Dist. Ex. 77 at p. 1).[27] At the conclusion of the 2015-16 school year, student's seventh grade report card reflected a year end grade point average of 89.83 (Dist. Ex. 18).[28]

Turning to the parent's May 2017 request for a comprehensive reading, writing, and math IEE, review of the hearing record supports the IHO's determination that, at the time the parent made her request for an IEE at public expense the student's weaknesses were "explored" through the testing conducted by the district. Given the student's overall academic strengths, the district's educational evaluation of the student was sufficient to assess her strengths and deficits. To the extent the parent argues on appeal that the district's subsequent evaluation of the student demonstrated "a regression of scores on the [WJ-IV] indicating a loss of skills," the parent did not disagree with the district's subsequent January 2017 administration of the WJ-IV and may not rely on after-the-fact information to argue the inappropriateness of the earlier February 2016 evaluation particularly given the parent's position that she was unaware of the January 2017 evaluation report until the June 2017 CSE meeting, after her request for IEEs.[29] Regarding the student's academic functioning, the student's middle school counselor for sixth, seventh, and eighth grade stated that the student was organized, did her work, had grades that were "solidly in the honor roll range," and that he had "[v]ery little" academic concerns about her (Tr. pp. 67-69). Specific to the 2016-17 school year (eighth grade) the school counselor testified that the student "did very well" and "maintained high levels of grades" (Tr. p. 69). As far as educational concerns, the school counselor indicated that the student had auditory processing issues and exhibited difficulty with test-taking (Tr. pp. 69, 78-79). The school counselor testified that the parent made a request to the CSE in fall 2016 to have an academic support class removed from the student's schedule because the parent was satisfied with the student's progress, she believed the student could independently complete

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or narrative interpretation the scores; while there is no specific requirement in law or regulation that dictates how such reports are to be written, this is not common practice (see Dist. Ex. 77).

[27] The February 2016 WJ-IV results were also consistent with Woodcock-Johnson-III-NU ACH Test results from March 2014 and March 2015 that were included on the March 2016 IEP, with all scores in the average range (compare Dist. Ex. 30 at p. 3, with Dist. Ex. 77).

[28] The 2016-17 report card generally reflects lower scores on the final exams than the student achieved during each quarter of the school year (Dist. Ex. 18).

[29] In the interim between the district's February 2016 administration of the WJ-IV and the parent's May 2017 request for IEEs, the district conducted another educational evaluation of the student using the WJ-IV in January 2017 (Dist. Ex. 54). Under some circumstances, the intervening evaluation might make the parent's disagreement with the earlier evaluation moot (see T.P. v. Bryan Cnty. Sch. Dist., 792 F.3d 1284, 1292-94 [11th Cir. 2015]; Application of a Student with a Disability, Appeal No. 15-069); however, in this instance, while it is unclear from the hearing record when exactly the parent received the results of the January 2017 evaluation for which they provided consent, they did not seek an IEE at public expense from the district until May 2017.

her work, and because the student did not want to be monitored so closely (Tr. pp. 72-73; Dist. Ex. 28 at pp. 6, 10). Changes were also made to testing accommodations on the November 2016 IEP at the parent's request (i.e. removed tests administered in location with minimal distractions and directions read to student; added clarification per student request to have test passages, questions, items, and multiple-choice responses read to student) because the parent indicated to the school counselor that the student did not feel comfortable utilizing those accommodations (Tr. pp. 77-78; Dist. Ex. 28 at pp. 6, 11).

The student's eighth grade special education teacher for the 2016-17 school year testified that she was the student's case manager, taught the student's math class with the general education teacher, and for part of the year was the teacher in the student's academic support class (Tr. pp. 269, 272-73, 275). The eighth grade special education teacher stated that the student at times did not use the special education services offered to her and appeared to be more comfortable getting assistance from the general education teacher, and opined that the student did not "want anything to do with the special education label" (Tr. pp. 276-77, 289). According to the eighth grade special education teacher, even though the student did not use the "services," she "did very well" and was a "very hard worker" (Tr. pp. 277-78).[30] During a mid-year transition planning meeting, the topic of declassifying the student was raised, which the special education teacher would have supported because the student was "successful," "implementing the compensatory strategies she needed," and "doing quite well" despite not using the modifications and services offered to her (Tr. pp. 300-03). The student's eighth grade general education math teacher described the student as a "normal, average student" with "no red flags" (Tr. pp. 703-04). She stated that the student worked independently and there was no reason to modify any work for the student because she was doing fine (Tr. pp. 709-10).

The eighth grade special education teacher testified that she administered the WJ-IV in January 2017 to see how well the student was doing (Tr. pp. 305-06). Results from the January 2017 WJ-IV indicated that the student's academic skills were in the low average to average range in the area of reading (broad reading standard score 92, letter-word identification standard score 92, passage comprehension standard score 83, word reading fluency standard score 100), the low to average range in the area of mathematics (broad mathematics standard score 90, calculation standard score 74, applied problems standard score 100, math facts fluency standard score 101), and the average to superior range in written language (written language standard score 111, spelling standard score 94, writing samples standard score 129) (Dist. Ex. 54 at p. 1). The eighth grade special education teacher opined that, according to the test results, the student was doing well and that her scores were generally in the average range, with a strength noted in written language and a weakness in math calculation (Tr. pp. 306-09). She further testified that the WJ-IV results were "just one piece," because a lot of factors could influence testing (i.e. how the student felt that day, the time of day), and that WJ-IV was "one tool" that was part of a whole

[30] The eighth grade special education teacher testified that there was one instance where she offered that the student could retake a test she had difficulty with, but that the student did not take her offer (Tr. pp. 277-78). She further testified that there was "one very short period of time," possibly having to do with the student's absences, that the student was ineligible for extracurricular activities for one week, but that the student "made up whatever she had to do and she was okay" (Tr. pp. 278, 282).

evaluation which included the student's performance on classroom tests and her functioning throughout the school day, to determine what the student needed (Tr. pp. 305-06, 309). [31]

In conjunction with the student's overall average range performance on the district's administrations of the WJ-IV, the hearing record provided other measures of the student's performance that are consistent with those test results (compare Dist. Ex. 54 and Dist. Ex. 77, with Parent Ex. F and Dist. Ex. 19). The student's report card for the 2016-17 school year reflects quarterly grade point averages ranging from 90.12 to 94.99, with a final year end grade point average of 89.91 (Dist. Ex. 19). While the report card also shows that the student's performance on final examinations was considerably lower than her classroom performance, as discussed above, the district was aware of the student's difficulty with test taking tests and recommended various testing accommodations which the student did not regularly access (Tr. pp. 69, 77-78, 276-78, 288-90, 294; Dist. Exs. 19; 28 at pp. 6, 11). Additionally, the June 2017 IEP annual goal progress report reflects that the student achieved her reading and math annual goals (Parent Ex. F).

As discussed above, the district evaluated the student's reading, writing and math abilities through the WJ-IV in February 2016 and January 2017, resulting in scores generally in the average range (see Dist. Exs. 54; 77). The student earned passing grades each school year despite her reluctance to utilize the special education supports and testing accommodations offered to her, and her eighth grade teachers did not report and concerns about academic needs that went unassessed or unaddressed (see Tr. pp. 67-69, 277-78, 200-03, 703-04, 709-10; Dist. Exs. 17-19). Additionally, during the 2016-17 school year the parent and student requested removal of the 15:1 support class from the student's IEP because the student was able to work independently (Tr. pp. 72-73; Dist. Ex. 28 at p. 6). In light of the above, the hearing record supports the IHO's determination that at the time the parents requested an IEEs at public expense the student did not require a comprehensive reading, writing, and mathematics IEE due to an inappropriate district evaluation.

2. OT, Assistive Technology and Visual Processing Evaluations

The parent appeals from the IHO's determinations denying the requested OT and assistive technology IEEs. The parent also asserts that the IHO erred when he did not address the request for a "vision and visual processing" evaluation. The district contends that at all times it has reasonably and properly evaluated the student, and that there was no suspected need that would require OT, assistive technology, or visual processing evaluations.

Occupational therapy is defined as "the functional evaluation of the student and the planning and use of a program of purposeful activities to develop or maintain adaptive skills, designed to achieve maximal physical and mental functioning of the student in his or her daily life tasks" (8 NYCRR 200.1[gg]). Assistive technology is defined 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 student with a disability.

[31] It is unclear from the hearing record when the parents received the January 2017 WJ-IV results and/or whether the June 2017 CSE reviewed the results; however, this does not render the January 2017 administration of the WJ-IV or the corresponding evaluation report inappropriate.

Such term does not include a medical device that is surgically implanted, or the replacement of such a device" (8 NYCRR 200.1[e]).[32] The State provides guidance to CSEs for which students should be considered for assistive technology, specifically stating that "[c]onsideration of the need for assistive technology must be based on the student's unique needs and not on his/her disability classification or the severity of disability. Effective consideration of assistive technology for a student with a disability should be student-focused and purposeful" (see "Assistive Technology for Students with Disabilities", at p. 2, Office of Special Educ. Mem. [Apr. 2017], available at http://www.p12.nysed.gov/specialed/documents/assistive-technology-for-students-with-disabilities.pdf).[33]

The parent asserts that the following statements from the July 2011 (end of second grade) OT evaluation report provided reasons for the student's current need for additional testing: the student had some visual motor and visual perceptual skill deficits; was at risk for future difficulty based on her low frustration tolerance, emotional reactivity, and difficulty with situational coping; and that she would benefit for OT services to strengthen her perceptual and visual motor skills (Parent Response to Mot. for Summ. J. Ex. 4 at pp. 2, 5). However, based on a review of the hearing record, district staff who were familiar with the student during her middle school years did not observe or express concerns regarding sensory issues, visual processing issues, or a need for OT or assistive technology (Tr. pp. 87, 139-40, 163-64, 377-78, 403-04, 661-64, 722-23). Several district staff testified during the impartial hearing, including the student's seventh and eighth grade teachers, school counselor, middle school principal, and special education director, and their descriptions of the student reflected their opinion that she was a "normal," "average," "quite successful" student who exhibited "no red flags," was "organized," did "very well," maintained good grades, was becoming more independent and able to advocate for herself, did not want the modifications offered to her, did not have problems completing assignments, and that the potential for declassification was discussed at a transition meeting (Tr. pp. 69, 127, 130, 277-78, 290, 300-03, 339-40, 703-04, 709-10, 717, 838).

Specifically, the student's seventh grade special education teacher stated that she did not observe anything that would have suggested that the student had vision processing needs (other than wearing glasses), or that she needed OT services (Tr. pp. 145-46). The seventh grade special education teacher stated that she checked "yes" for an assistive technology device on the March 2016 IEP, indicating that the student could use a calculator in school, but otherwise did not observe

[32] "The goal of assistive technology is to facilitate success and independence for students with disabilities while they work toward their academic, social, communication, occupational, and recreational goals. By addressing the students' unique needs, assistive technology can reduce barriers to learning; assist students in progressing in their educational program; provide equitable access to the State's learning standards; and provide students with independence as they participate and progress along with their peers while in school and during post-school living, learning and working. Additionally, assistive technology supports increased social and environmental access, completion of everyday tasks and can enhance an individual's overall quality of life." (see "Assistive Technology for Students with Disabilities," introductory memorandum, Office of Special Educ. Mem. [Apr. 2017], available at http://www.p12.nysed.gov/specialed/documents/assistive-technology-for-students-with-disabilities.pdf).

[33] The guidelines also provide some questions for determining whether a student requires assistive technology. Two questions listed are pertinent in this case, "Does the student need assistive technology devices and services to ensure equitable access to the general curriculum and/or to participate in nonacademic and extracurricular activities?" and "What assistive technology services would help the student participate in the general curriculum and/or classes?" (see "Assistive Technology for Students with Disabilities," at pp. 2-3).

anything to suggest the student required any other kind of assistive technology (Tr. pp. 146, 183; Dist. Ex. 30 at pp. 8-11).

The student's eighth grade math and science teachers stated that the student worked independently; there was no reason to modify her work because she always did fine; test modifications were available, but student did not request them; the student declined assistance offered and did not ask for help; the teachers did not notice student struggling at all; she appeared to understand what she was independently reading; and it appeared that she felt comfortable in class with the work provided (Tr. pp. 709-711, 718-22, 743, 750, 783). The eighth grade special education teacher testified that she never observed anything to suggest that the student had needs in the areas of sensory integration and visual processing, or need for assistive technology beyond the use of a calculator (Tr. pp. 377-78). [34]

According to the director of special education, the parents participated in the March 2016 CSE meeting and did not raise any concerns about or request evaluations in the areas of OT, assistive technology, or visual processing (Tr. pp. 649-50, 661-64). In addition, at the November 2016 CSE meeting, the parent requested removing the 15:1 academic support special class and some testing accommodations from the student's IEP because the student was doing well and she did not want these services (Tr. pp. 283, 288-89, 294, 299-303, 391-92, 910, 984). According to the November 2016 IEP present levels of performance—which are not in dispute—the student demonstrated age appropriate fine and gross motor skills, including "very neat, legible writing" skills, exhibited no physical development needs other than wearing glasses, and otherwise did not suggest that the student had needs in the areas of OT, assistive technology, or visual processing (Dist. Ex. 28 at pp. 4-8). As stated previously, the student's 2016-17 year end grade point average was 89.91, she passed all her classes, and met her IEP annual goals (Parent Ex. F; Dist. Ex. 19).

Although the parent cites to the 2011 OT evaluation report to support the request for an OT IEE, that evaluation of the student's needs is seven years old and there is nothing in the hearing record to support the assertion that an evaluation is currently needed in this area, as none the student's teachers indicated that the student had any OT or sensory needs and she exhibited successful academic performance. Contrary to the parent's assertion, a review of the evidence in the hearing record also does not support the parent's request for an assistive technology IEE at public expense. Rather, the hearing record shows that the student appropriately accessed the general curriculum without assistive technology beyond the use of a calculator.

Finally, the parent is correct that the IHO did not address her request for an IEE at public expense related to the student's vision. However, as with OT and assistive technology, there no evidence in the hearing record that lends any to support the parent's notion that the student had vision or visual processing deficits that the CSE was required to evaluate and, therefore, that IEE request is denied.[35]

[34] The November 2016 IEP also recommended that the student have access to a calculator (Dist. Ex. 28 at pp. 8-11).

[35] The parents obtained a private vision evaluation in March 2018 (Req. for Rev Ex. 5). This evaluation report was submitted with the request for review but was not available to the parties at the time of the impartial hearing. I decline to review this document as it was not part of the impartial hearing record; however, encourage the parents to present this evaluation report to the CSE for consideration.

Based on the foregoing, and given the student's relatively strong academic performance, there was no reason for the district to suspect a disability in the areas of OT, sensory processing, visual processing, or a need for assistive technology.

3. Central Auditory Processing Evaluation

The parent asserts on appeal that the IHO erred in finding the hearing record was unclear how a central auditory processing evaluation differed from a speech-language evaluation, and, as a result, in denying her request for an independent central auditory processing evaluation. Review of the hearing record demonstrates that the student has auditory processing difficulties, but they have not been assessed since 2011 when the parent obtained a private evaluation (see e.g. Tr. pp. 94, 165, 179, 365-66, 419, 422, 429-30, 433, 436, 447, 458, 463, 521-23; see Parent Response to Mot. for Summ. J. Ex. 2).

According to the hearing record, the student received a diagnosis of an auditory processing disorder in September 2011 and a communication disorder with an auditory processing weakness in May 2014 (Parent's Response to Mot. for Summ. J. Exs. 3 at pp. 1, 9; 5 at pp. 1-2). The present levels of performance on the November 2016 IEP described the student's auditory processing weaknesses; noting her need for "a great deal of think time to process task directions and give a response," her difficulty with short-term auditory memory, and that she benefitted from visual prompts and having lengthy auditory information broken down into smaller units or repeated (Dist. Ex. 28 at p. 4). The IEP reflected the student's report that information was more difficult to understand when it was read to her, and teacher reports that the student struggled to attend to relevant speech sounds for an appropriate length of time-especially in noisy environments, and that due to auditory attention and processing weaknesses, it took the student longer to comprehend what she read (id.). According to the IEP, the student's difficulty with writing correlated to the auditory processing deficits that affected her phonological awareness skills (her ability to identify sounds in words, the number of sounds in words and similarities among words), and she required extended time to formulate her thoughts and work through the writing process (id. at p. 5). Due to her auditory processing difficulties, the student exhibited difficulty communicating in that she struggled to process what was said and think of an appropriate response (id. at p. 7).

District witnesses also testified that the student had difficulty with auditory processing but asserted that the IEP addressed those needs (Tr. pp. 78, 128-29, 313, 404). Generally, the November 2016 IEP indicated that due to auditory processing and auditory attention weaknesses, the student required extended time on all assignments and assessments so that she may process and interpret information accurately (Dist. Ex. 28 at p. 6). According to the IEP the student also required a learning environment free from auditory and visual distractions, seating in close proximity to the instructor, and monitoring for understanding in all classes (id. at pp. 6, 8). When given directions, the IEP indicated that the student required direct eye contact and repetition, and that she benefitted from orally repeating multistep directions to ensure understanding, and directions provided one at a time, with time in between directions to allow for processing (id.). As previously discussed, the IEP provided testing accommodations including extended time, repetition of listening sections, simplified language in directions and additional examples, and test items read to the student (id. at p. 11). On balance, the student's deficits in auditory processing have been, relatively speaking, among her most significant areas of need and I would expect the district—when it is defending its evaluation of the student as appropriate at an impartial hearing—to explain why no reevaluation of the student in this area was necessary since 2011 when it

apparently relied upon the parent's privately obtained evaluation, especially when such needs continued to feature prominently in the student's IEP.

Although the district was aware of and provided some management strategies and accommodations for the student's known auditory processing difficulties, it was incumbent on the district to establish how it assessed those needs and why an update to the 2011 central auditory processing evaluation was not required in this instance. Based on a review of the hearing record, the district did neither. Therefore, the parent's request for an independent central auditory processing evaluation at public expense is granted.[36]

VII. Conclusion

Based on the foregoing, I will grant the parent's request for an independent central auditory processing evaluation. The IHO's determination that the district failed to implement the student's pendency placement is affirmed. However, the student is granted 120 hours of 1:1 compensatory education in math for the failure to implement the pendency placement. The remainder of the IHO's findings are affirmed.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated May 8, 2018 is modified to require the district to fund the parent's request for an independent central auditory processing evaluation; and

IT IS FURTHER ORDERED that the IHO's decision dated May 8, 2018 is modified to require the district to provide the student with 120 hours of 1:1 instruction by a special education teacher in math consistent with the body of this decision.

Dated: **Albany, New York**
July 16, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER

[36] As previously noted, the parent obtained a private central auditory processing evaluation of the student in October 2017. If the parent wishes to use the October 2017 evaluation as the IEE, she should provide a copy of the report to the district and the district is directed to reimburse the parent for that evaluation; otherwise, the district is directed to pay for a new independent central auditory processing evaluation.