



The University of the State of New York

The State Education Department

State Review Officer

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No. 19-116

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Scarsdale Union Free School District

Appearances:

Gina DeCrescenzo, P.C., attorneys for petitioners, by Gina DeCrescenzo, Esq.

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, by David H. Strong, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of their son's privately obtained related services for the 2017-18, and 2018-19 school years. Respondent (the district) cross-appeals from the IHO's determination that it failed to provide a free appropriate public education (FAPE) to the student for those years. The appeal must be dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student attended the district's schools since at least the fifth grade and graduated at the end of the 2018-19 school year (IHO Ex. II at pp. 4, 5). According to evaluative information contained in the hearing record, the student demonstrated overall intellectual functioning skills in the high average to superior range (Parent Ex. G at p. 9; Dist. Exs. 35 at p. 17; 80 at p. 4). The student has received diagnoses of an autism spectrum disorder - level 1 (mild), an attention deficit hyperactivity disorder (predominately inattentive presentation, mild), other specific depressive disorder, and a developmental coordination disorder related to his fine motor skill weaknesses (Parent Ex. G at p. 5; Dist. Exs. 35 at pp. 19-21; 80 at p. 11). The student has exhibited executive functioning deficits, and processing speed difficulties for some cognitive and academic tasks (Dist. Exs. 35 at pp. 18, 20; 80 at p. 11). The student demonstrated social communication and interaction

deficits, behavioral rigidity, sensory hypersensitivities, and emotional difficulties (Parent Ex. G at p. 5; Dist. Exs. 35 at pp. 18-19; 80 at p. 6).¹

The student began kindergarten in a public school, then later transitioned to a school specifically for students with autism where he was eligible for special education as a student with a speech or language impairment, and through fifth grade received instruction in a class with an 8:1+2 ratio (eight students, two teachers, and two aides), occupational therapy (OT), speech-language therapy, and counseling services (Tr. p. 1289; Parent Ex. G at pp. 1-2; Dist. Ex. 35 at p. 6). Subsequently, he transferred into the district, repeated fifth grade in a general education class, and at some point, began receiving accommodations under section 504 of the Rehabilitation Act of 1973 (section 504) (Tr. pp. 1289-90; Parent Ex. G at p. 1; Dist. Exs. 35 at p. 6). According to the parent, in March 2015 the CSE initially determined that the student was not eligible for special education (Tr. pp. 1286-87, 1291).

At the beginning of the 2015-16 school year (ninth grade), the parent referred the student to the CSE due to concerns about his disorganization, slow processing, difficulty adapting to school, and his ability to complete work assignments, communicate, and function appropriately in social situations (Dist. Ex. 1 at p. 2). On September 24, 2015, the CSE convened and determined that the student did not meet the criteria as a student with a disability but recommended that the student receive twice weekly "local effort services" provided by a special education teacher to support executive functioning and organization skills (id. at pp. 1-2). The student attended the district's high school for the 2015-16 school year and received what were described as "local effort services" (id.).

On June 21, 2016 the CSE reconvened to discuss the student's eligibility for special education (Dist. Ex. 1 at p. 1). According to the meeting information attached to the IEP, the special education teacher who had provided support to the student during the school year stated that the student exhibited "significant executive functioning issues which impact[ed] his ability to initiate, plan, [] and follow through," and noted that writing was "especially challenging" for him (id.). Discussion at the meeting reflected that the student exhibited rigidity, inflexibility, and slow processing, and the special education teacher opined that the student required support services (id.). The CSE determined that the student was eligible for special education as a student with autism, and for the 2016-17 10-month school year (10th grade), recommended that he receive four 45-minute sessions per week of resource room (academic support) services in a group of five and one 30-minute session per week of counseling in a small group (id. at p. 6).² The CSE also recommended program accommodations consisting of preferential seating and refocusing and redirection, as well as testing accommodations consisting of an alternate location and extended (double) time for tests (id. at pp. 6-8). The June 2016 IEP included post-secondary goals, a description of the student's transition needs, and a coordinated set of transition activities (Dist. Ex.

¹ The student has been described as "moody" and "irritable," and "prone to physical aggression with some members of his immediate family, and to withdrawal and defiance with teachers/peers in certain situations" (Dist. Ex. 35 at p. 19).

² Throughout the transcript, the student's IEP resource room services are referred to as services provided in the "LRC" or learning resource center, by the "LRC teacher", who is a special education teacher and will be referred to as such in this decision (see e.g. Tr. pp. 65, 72, 77, 86, 248, 438-40, 1294).

1 at pp. 5-6, 8). By the end of the 2015-16 school year (ninth grade), the student had earned final grades, including: A- ("Gr 8 French," English, biology), B+ ("Gr 8 math"), B (honors math, honors French), and C+ (world history) (Dist. Ex. 8).³

On May 8, 2017 the CSE convened for the student's annual review and to develop the student's IEP for the 2017-18 school year (11th grade) (Dist. Ex. 2).⁴ The meeting information attached to the IEP indicated that the CSE discussed "counseling services for next year and participating in a group that has an executive functioning focus" (*id.* at p. 1). The CSE maintained the level of resource room services and modified the frequency of counseling services to once bi-weekly (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 2 at p. 7). The CSE generally maintained the previously developed post-secondary goals and identified transition needs and made modifications to some of the coordinated set of transition activities (compare Dist. Ex. 1 at pp. 5-6, 8, with Dist. Ex. 2 at pp. 5-9). By the end of the 2016-17 school year, the student had earned final grades including: A (chemistry), B+ (honors math), B (world history) and B- (English, honors French) (Dist. Ex. 8).⁵

On September 29, 2017 the CSE reconvened for a program review to review "an outside report provided by the family," and the student's then-current level of performance (Dist. Ex. 3; see Dist. Ex. 28). According to meeting information attached to the IEP, the CSE discussed the parent's observation that the private evaluation report was "similar to reports previously completed by the district" and that because the "executive functioning group" was "an intensive intervention, the committee recommended it be removed from the IEP" (Dist. Ex. 3 at p. 1). The CSE removed counseling services from the IEP and maintained the previous level of resource room services (compare Dist. Ex. 2 at p. 7, with Dist. Ex. 3 at p. 8). The CSE also maintained the previously developed post-secondary goals, identified transition needs, and coordinated set of transition activities (compare Dist. Ex. 2 at pp. 5-6, 8-9, with Dist. Ex. 3 at pp. 7, 9-10).

In a series of emails to district staff in October 2017, the parent expressed her concerns with the student's IEP, specifically, that it failed to address the student's "severe executive and adaptive functioning deficits with any interventions," and provided the district with suggested changes/comments to the IEP (Dist. Exs. 30; 31). On November 6, 2017 the CSE reconvened for a program review and, according to the meeting information, reviewed the September 2017

³ According to the course codes identified on the student's transcript, the Gr 8 French, Gr 8 math, biology, honors math, and honors French classes were either "accelerated" or "high honors/honors" level courses (Dist. Ex. 8).

⁴ The May 2017 IEP reflected the results of an educational evaluation administered to the student in February 2017 by the special education teacher (Dist. Ex. 2 at p. 2; see Dist. Ex. 68). Standardized achievement testing yielded a reading comprehension subtest score in the 89th percentile, a language subtest score in the 80th percentile, and a math subtest score in the 91st percentile (Dist. Ex. 68 at pp. 2, 7). The special education teacher reported that although the student exhibited "good expressive writing abilities and [wa]s able to communicate his ideas well," he required extra time to process assignments and revise his writing (*id.* at p. 6). In summary, the special education teacher indicated that the student's academic capabilities were above average, and the "problems [the student] face[d] [were] generally related to his executive functioning skills and capacity to independently manage his work" as well as social skill issues working in groups and asking teachers for help (*id.* at p. 7). Despite these difficulties, according to the special education teacher the student had "shown the capability of doing very well when he has the proper supports, accommodations and encouragement" (*id.*).

⁵ According to the course codes identified on the student's transcript, the chemistry, honors math, and honors French classes were either "accelerated" or "high honors/honors" level courses (Dist. Ex. 8).

neuropsychological evaluation report (Dist. Ex. 4 at p. 1; see Dist. Ex. 28). After the district psychologist reviewed the report, the CSE discussed the district's "executive functioning group"—a building level service (Dist. Ex. 4 at p. 1). Additionally, the CSE maintained the student's level of resource room services, post-secondary goals, transition needs, and coordinated set of transition activities; added one 30-minute session per month of parent counseling and training, and added an annual goal for the student to email his teachers weekly to monitor his academic progress to the IEP (compare Dist. Ex. 3 at pp. 7-10, with Dist. Ex. 4 at pp. 7-10).

In a series of emails between the parent and district staff in December 2017 and January 2018, the parent expressed her concerns about the student's need for speech-language therapy, counseling, and the services of an executive functioning coach to be provided outside of the school day, as well as the need to review the recommendations from the private neuropsychologist's final report (Parent Ex. JJ; Dist. Exs. 28; 33; 34; 35 at pp. 1-2). The CSE reconvened for a program review on January 22, 2018 (Dist. Ex. 5). According to the meeting information, the parents discussed their concerns about the monitoring of the annual goals, the content of the transition goals, the private neuropsychologist's report recommendations, and the frequency of communication with the student's teachers (Dist. Ex. 5 at p. 1). The meeting information also reflected the agreement to complete a Level 1 career assessment with the student, meet informally to review the results and discuss potential adjustments to transition goals and needs, and reconvene the CSE to discuss and update transition goals with any new information gained during that process (id.). The CSE otherwise maintained the transition plan and level of services provided in the November 2017 IEP (compare Dist. Ex. 4 at pp. 7-10, with Dist. Ex. 5 at pp. 7-10).⁶ According to a January 22, 2018 email from the parent to district staff, the parent indicated that she thought the district had the finalized neuropsychological evaluation report and that it would have been helpful to discuss the included recommendations; the parent also sent the district the finalized report, requested that the district discard all previous versions, and asked the district to be ready to discuss any disagreements that the district has with the private evaluator's recommendations at the next CSE meeting (Dist. Ex. 35 at p. 1).

On January 25, 2018 after the CSE meeting, the parent and district began working on completing a Level 1 career assessment, reviewing what had been completed thus far regarding transition-planning activities, and scheduled a transition meeting (see Dist. Exs. 36-40). On February 6, 2018, a transition meeting for the student was held and his areas of strength, areas of need, life goals, independent living skills, and courses of study were identified (Dist. Exs. 41; 42). Subsequently, the district and parent communicated about scheduling a CSE meeting to review the results of the transition assessments and develop transition goals, and re-review the private neuropsychologist's recommendations (Dist. Exs. 43-49). By letter dated March 23, 2018 to the district, the parent requested that the student undergo a "functional behavior assessment" (FBA) conducted by "appropriately qualified professionals" stating that the student had self-identified "broad behavioral problems" including "off-task/task-avoidance, non-compliance," and "unproductive . . . inattentive, shy/anxious" behaviors, whose antecedents were not well understood and for which the "school-based academic support [wa]s not [e]ffective in addressing" (Dist. Ex. 50; see Dist. Ex. 77).

⁶ The student's resource room sessions increased from 45 minutes to 50 minutes per session (compare Dist. Ex. 4 at p. 8, with Dist. Ex. 5 at p. 8).

The CSE convened on May 30, 2018 for an annual review and to develop the student's IEP for the 2018-19 school year (12th grade) (Dist. Ex. 6). The meeting information indicated that the student's teachers spoke about the progress he had made over the course of the past school year in terms of "self-management capabilities," handing assignments in on time, and overall organizational skills, although the "team" agreed that the student continued to have difficulty using a planner without prompting, sustaining engagement in goal-directed activities, and organizing his "academic life" (*id.* at p. 1). The summary reflected the parents' concerns about the student's progress regarding executive functioning skills and his need for research-based interventions, as well as speech-language therapy and cognitive behavioral therapy to address writing skills and executive functioning difficulties, respectively (*id.*). Following review of the IEP, the parents expressed concern about the successful implementation of the IEP, the appropriateness of the transition goals and activities, and the overall progress the student was making (*id.* at pp. 1-2). For the upcoming school year, the CSE generally maintained the same post-secondary goals and transition needs, and the frequency and duration of resource room services and parent counseling and training from the previous IEP (*compare* Dist. Ex. 5 at pp. 7-9, *with* Dist. Ex. 6 at pp. 8-10). The CSE added one 30-minute session per week of individual counseling services and made modifications to the student's coordinated set of transition activities (*compare* Dist. Ex. 5 at pp. 8, 10, *with* Dist. Ex. 6 at pp. 9, 11). By the end of 11th grade, the student had earned grades including: A (physics), A- (English, computer science), B+ (US history), and B (high honors precalculus) (Dist. Ex. 8).⁷ Additionally, by June 2018, the student had successfully completed the following Regents examinations and achieved the following scores: US History & Government (97), Physical Setting/Chemistry (98), Living Environment (94), Global History (97), Common Core English language arts (ELA)(99), Common Core Algebra I (93) (Dist. Ex. 9).

The district's school psychologist conducted an FBA with the student dated June 22, 2018 and identified avoiding schoolwork and leaving at the start of classes for 5-9 minutes as target behaviors (Dist. Ex. 78). At the conclusion of the assessment, the school psychologist determined that "there [wa]s no need for a formalized Behavior[al] Intervention Plan (BIP)" because the student's special education teacher and the school psychologist could "offer strategies for him to increase his independent and timely completion of work" (*id.* at p. 3). The FBA report provided a number of long-term strategies "to be used in the Resource Room Program and Counseling to reduce the likelihood of the occurrence of the target behavior" (*id.* at pp. 4-7). In an email dated July 19, 2018 the school psychologist sent the completed FBA report to the parent (Dist. Ex. 54). In an email response provided later the same day, the parent requested an independent FBA, stating that the "FBA conducted by the District [wa]s not comprehensive" (*id.*).

On August 1, 2018 the CSE reconvened for a program review and to review the results of the FBA (Dist. Ex. 7). The meeting information summary indicated that following review of the FBA results and recommendations, the CSE did not recommend development of a BIP for the student (*id.* at p. 1). The parents disagreed and requested an independent FBA, and also expressed their concerns about the scheduling of the transition planning meeting, reporting that they had completed their own transition surveys (*id.*). The CSE maintained the level of services and

⁷ According to the course codes identified on the student's transcript, the English, physics, and precalculus classes were either "accelerated" or "high honors/honors" level courses, and computer science was a college level course (Dist. Ex. 8).

measurable post-secondary goals, transition needs, and coordinated set of transition activities from the May 2018 IEP (compare Dist. Ex. 6 at pp. 8-11, with Dist. Ex. 9-12).

A. Due Process Complaint Notice

In a due process complaint notice dated September 7, 2018, the parents generally alleged that the district failed to offer the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years (IHO Ex. II at p. 3). The parents asserted that specifically for all three school years, or for unspecified years, the CSE: (1) failed to appropriately evaluate the student; (2) ignored the recommendations contained within two different privately obtained evaluations; (3) failed to meaningfully address or remediate the student's overall deficits in adaptive functioning and daily living skills; (4) failed to offer sufficient special education or related services to address the student's needs in the area of social skills; (5) failed to offer sufficient special education or related services to address the student's needs in the area of executive functioning; (6) failed to offer sufficient interventions or support to address the student's deficits in the area of writing; (7) failed to recommend speech-language therapy in a specific modality to address the student's deficits in the area of writing; (8) failed to recommend OT to address the student's fine-motor deficits; (9) failed to offer related services using methodologies or strategies that were based on peer-reviewed research; (10) failed to create sufficient annual goals to address all of the student's needs; (11) failed to adequately assess and state the student's transition needs; (12) created inappropriate transition goals; (13) created an inappropriate transition plan, including transition support services; (14) failed to offer parent counseling and training; and (15) failed to properly implement the student's various IEPs with respect to the transition plans, meetings with academic teachers, charting behaviors, compiling a writing portfolio, accommodations, computer access, and parent counseling and training (id. at pp. 9-14).

For a proposed remedy, the parents requested that an IHO find that the student was denied a FAPE for the 2016-17, 2017-18, and 2018-19 school years, and award the student compensatory educational services in the form of OT, speech-language therapy in a specific, yet unnamed modality, counseling using cognitive behavioral therapy (CBT), parent counseling and training, and college counseling and/or educational consulting services (IHO Ex. II at pp. 14-15). The parents also requested reimbursement for their costs of providing the student with speech-language therapy and counseling using CBT (id.).⁸

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 15, 2019 and concluded on June 6, 2019 after eight days of hearings (Tr. pp. 1-1758). In a decision dated October 7, 2019, the IHO found that the district failed to offer the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years based on a repetition of annual goals, particularly those related to the student's study skills, and a failure to recommend and implement parent counseling and training (IHO Decision at pp. 72-118).

⁸ The parents withdrew their requests that the IHO order the district to: (1) amend the student's transcript to reflect successful completion of the spring 2017 health course; and (2) provide an appropriate IEP for the student, inclusive of appropriate program, placement, related services, accommodations, and supports for the student including a transition plan adequate to prepare the student for attendance at a four-year college, as well as including appropriate, measurable, and meaningful goals and objectives to address the student's needs (IHO Decision at pp. 14; Tr. pp. 1705-06, 1711-12).

The IHO denied the parents' requests for compensatory speech-language therapy, CBT counseling, social skills training, and executive functioning coaching services as well as the parents' request to be reimbursed for the costs paid for the private CBT counseling and speech-language therapy services they had obtained (id. at pp. 117-18). Finally, the IHO ordered the district to provide the parents with compensatory parent counseling and training services for one hour per month, for 36 months, and at a rate not to exceed \$200 per hour (id. at p. 118). With respect to findings that spanned all three school years, the IHO found that the lack of parent counseling and training, either as a failure to include it as a recommended service on the IEP or as a failure to establish that the parents were provided with the service, resulted in a denial of FAPE (id. at pp. 79, 84-85, 88, 93, 97, 105, 112-13). The IHO also found that certain annual goals lacked the criteria to measure progress; certain goals were repeated each year, demonstrating that the student did not make progress toward those goals, and as such, those goals were inappropriate (id. at pp. 88, 91, 92, 105, 107, 112-13).

Initially, embedded within the IHO's findings related to the specific IEPs at issue are a couple of procedural matters. First, the IHO found that the parents' claims related to the June 2016 IEP accrued when the parents received the IEP in September 2016 (IHO Decision at pp. 75-76). However, the IHO noted that the parents did not allege the lack of receipt of the IEP as an independent claim that the district did not offer the student a FAPE (id.). In addition, the IHO determined that the issue of home-based services was not raised in the parents' due process complaint notice and accordingly rejected the parents' assertion that the student required at-home services as being outside the scope of the proceeding (id. at pp. 95-96, 98, 104, 108).

With respect to the parents' claims regarding the June 2016 IEP, the IHO found that the CSE relied on sufficient current evaluative data from multiple documentary sources as well as information provided by the student's teachers, including the special education teacher, general education teacher, and the parents when it developed the June 2016 IEP (IHO Decision at p. 76). The IHO noted that the IEP contained recommendations from the privately obtained August 2015 research evaluation (id.). With respect to the annual goals contained in the June 2016 IEP, the IHO found that the IEP contained study skills goals, a writing goal, and a social/emotional goal that matched the recommendations from the August 2015 research evaluation (id. at pp. 78-79).⁹ The IHO also found that the IEP's outlined behavioral supports were appropriate (id. at pp. 79-80). Contrary to the parents' contention, the IHO found that the student did not require speech-language therapy (id. at pp. 80-81).

With respect to the post-secondary transition plan, the IHO found that the transition needs to complete post-secondary education application forms, to develop self-advocacy skills, and to complete the course work to obtain a Regents high school diploma were appropriate and complied with the law, and that the transition services to meet the student's needs for post-secondary education were based on the student's strengths, preferences and interest (IHO Decision at p. 81). The IHO also found that the social/emotional goal to communicate and interact with peers was appropriate (id.).

⁹ The IHO determined that while the testimony showed that there were methods listed to chart progress: structured observation, behavioral charts and portfolio material, the student's study skills goals were essentially repeated in every IEP subsequent to the June 2016 IEP and there was inconsistent testimony regarding the charting of progress to meet with teachers and use a planner (IHO Decision at pp. 78-79)

Finally, the IHO found that the June 2016 IEP failed to contain a provision for parent counseling and training, as required by regulations (IHO Decision at pp. 84-85). The IHO determined that the CSE's failure to recommend and provide parent counseling and training, coupled with the student's lack of progress towards the goals to use a planner, meet with teachers, and turn in writing assignments on time led to a denial of FAPE for the 2016-17 school year (id. at p. 85).

Regarding the May 2017 IEP, the IHO found that the May 8, 2017 CSE relied on sufficient current evaluative data, including information from multiple documentary sources in developing the IEP (IHO Decision at pp. 85, 91). The IHO also found that the CSE reviewed and relied on the August 2015 research evaluation report, and that while the CSE did not consider the results of the September 2017 neuropsychological evaluation, the IHO found that that evaluation did not apply to the May 2017 CSE and resultant IEP (id. at p. 85). The IHO found that the present levels of performance reflected the information and recommendations from the available evaluations (id. at pp. 85, 87). With respect to the parents' contentions regarding annual goals, the IHO found that the special education teacher failed to establish how he measured the student's progress to meet with his teachers and to record assignments in his planner, and the special education teacher provided no data to support his conclusion that the student achieved the goal of meeting with content area teachers once per week to improve self-advocacy skills (id. at p. 87). With respect to the parents' assertions regarding related services (other than parent counseling and training), the IHO found that the parents generally failed to demonstrate that the district did not consider peer-reviewed research to determine the appropriate amount of services the student required to address his deficits, in particular, for the provision of speech-language therapy (id. at p. 88). In doing so, the IHO relied on district testimony as to the research-based practices, for example, the use of note cards and active (versus passive) engagement to study, as well as the fact that the student's overall language skills were in the superior range (id. at p. 81). With respect to transition planning, the IHO noted that the student's post-secondary goal was to "attend a 4-year college and live in a community college" (id. at p. 88).¹⁰ The IHO also found that the coordinated set of transition activities included in the IEP matched the June 2016 IEP and met all the components required (id.).¹¹ The IHO further found that the IEP designated a responsible party for each of the listed transition services, and that there was evidence of progress towards the student's post-secondary goals of attending college and being competitively employed as noted in the district's Level 1 career assessment, the AIR scales (id. at p. 89).¹² The IHO found that the district's Level 1 career assessment and the AIR scales were appropriate transition assessments for this student, and that

¹⁰ The IHO misstated the independent living skills goal: the student's goal was not to "live in a community college," rather, it was "to live in a college dormitory and come home on holidays" (Dist. Ex. 2 at p. 5).

¹¹ The IHO also found that, while the IEP did not contain a transition plan apart from the coordinated set of transition activities included in the IEP, a stand-alone plan is not required under the IDEA (IHO Decision at p. 88).

¹² The CSE chairperson indicated that the AIR assessment was considered a Level 2 transition assessment, which was not typically given to college bound students but was done in this instance at the parents' request (Tr. pp. 229-30, 395).

the CSE considered the student's strengths, preferences and interests when developing the transition goals and services (id.).

With respect to the September 2017 IEP, the IHO found that the hearing record showed the CSE participants discussed the parents' concerns and the evaluative information before the CSE, and that the parents had otherwise failed to provide any contrary evidence or testimony that any procedural defect impeded their participation in the CSE meeting (IHO Decision at pp. 93, 104). More specifically, the IHO found that the CSE reviewed and considered the September 2017 neuropsychological evaluation report (id. at pp. 90-91). The IHO also found that, in accord with the evaluative information, the present levels of performance contained in the September 2017 IEP reflected the results of the September 2017 neuropsychological evaluation, as well as updated special education teacher evaluations, and school counselor input (id.).¹³ The IHO reviewed the topics discussed at the CSE meeting and the parents' concerns and found that the parents did not establish any procedural inadequacy or that they were impeded in their participation in the decision-making process (id. at p. 93). The IHO noted that while the student demonstrated some delays in social skills which were attributed to his autism diagnosis, the CSE did not feel the student required social skills annual goals or services due to the lack of noted social or emotional deficits with peers, therefore the goal to interact with peers was removed from the September IEP (id. at p. 90). The IHO also found that the CSE removed group counseling from the September IEP because the student did not participate in group counseling (id.).

Regarding the parents' assertions concerning the annual goals and the student's lack of progress toward the attainment of those goals, the IHO found that although the IEP study skills goals were changed from the May 2017 IEP and the writing goal mirrored the recommendation made in the September 2017 neuropsychological evaluation, the annual goal for the student to meet with his content teachers matched the annual goal from the June 2016 IEP for the student to meet with teachers on a regular basis and the annual goal to record assignments in a planner matched a goal from the June 2016 IEP to use a planner (id. at p. 92). The IHO found the repetition of these goals across multiple IEPs was a sign of a lack of progress (id.).

With respect to transition services, the IHO found that the September 2017 IEP included a coordinated set of transition activities with instruction directed at self-advocacy and that the student would receive counseling to address executive functioning issues (IHO Decision at p. 92). The IHO found that the transition services met all the components required (id.). The IHO also found that the parents and the district's transition coordinator met to provide the parents with the supports offered by the district so that the student was prepared for post-secondary life (id.). The IHO also noted that the student participated in a "Junior Seminar" focused on the college planning process as well as in a meeting with his parents and the dean of students (dean) to discuss the college application process, deadlines, and specific colleges to which the student wished to apply (id. at pp. 92-93).

Regarding the November 2017 IEP, the IHO found that the IEP included a coordinated set of transition activities that matched the September 2017 IEP and the recommended transition services were appropriate and complied with State regulations (IHO Decision at p. 94). Contrary

¹³ The IHO noted that the student's then-current school counselor was also the school psychologist who attended the September 2017 CSE meeting (IHO Decision at p. 90).

to the parents' assertion, the IHO found speech-language therapy was not required to support the student's writing deficits and the district explained why it did not recommend CBT, to the extent that the decision not to recommend speech-language therapy or CBT did not equate to a lack of consideration of the September 2017 neuropsychological evaluation report (id. at p. 97). With respect to the annual goals, the IHO found that the November 2017 IEP repeated the September 2017 IEP study skills goals and added an annual goal for the student to email his teachers on a weekly basis to determine his progress in class and identify if he was missing any assignments (id. at p. 96). Finally, the IHO acknowledged that the November 2017 CSE recommended one monthly 30-minute session of parent counseling and training, but determined that the district failed to produce any evidence that the service was implemented (id. at p. 97).

Turning to the January 2018 IEP, the IHO noted that the purpose of the reconvene of the CSE was to review the student's program as the parents had reported concerns regarding monitoring of the annual goals, consideration of the September 2017 neuropsychological evaluation report, and transition planning (IHO Decision at p. 97).

With respect to the parents' assertion that the CSE again failed to consider the September 2017 neuropsychological evaluation recommendations, the IHO noted that on January 22, 2018, the parent emailed the CSE a "finalized" version of the report (IHO Decision at p. 97).¹⁴ The IHO found that the CSE considered and discussed the four pages of recommendations contained in the September 2017 neuropsychological report (id.). The IHO also found that the CSE explained its rationale to the parents as to why it did not recommend speech-language therapy, counseling using CBT, and 1:1 support (id. at pp. 98-99). The IHO agreed with the CSE's assessments that given the student's high-level speech and abstract thinking, lack of hand writing and note taking deficits, as well as his ability to communicate effectively, the student's executive functioning deficits, such as task initiation, planning/prioritizing, organization, time management, and goal directed persistence would be better addressed through the LRC rather than through the provision of speech-language therapy (id. at p. 98). The IHO cited to the testimony of the private neuropsychologist indicating that while the "ideal" ratio for learning support services was 1:1, they could be provided in a group of up to 5 students (id. at pp. 99, 100).

Regarding the post-secondary transition assessment, plan, goals, and implementation, the IHO found that that the transition process was explained to the parents (IHO Decision at p. 101). The IHO also found that the parents were advised as to how students could access assessments through an account, that students participated in a Junior planning meeting and seminar, that the student would meet with staff who would advise him about potential college programs and other services such as ACCES-VR (id.).¹⁵ The IHO further found that the parents completed assessments for the level 1 career assessment and the district provided the parents with draft transition goals based on the student's input (id. at p. 102).

¹⁴ The IHO found that testimony from the private neuropsychologist established that the final version of the 2017 neuropsychological evaluation was "essentially the same" as the September 2017 version, but as a result of the request of the parents, added the recommendations for 1:1 support in school and at home and corrected inaccuracies such as aggression and depressive disorder (IHO Decision at p. 97).

¹⁵ The acronym ACCES-VR refers to Adult Career and Continuing Education Services – Vocational Rehabilitation, an office within the New York State Education Department (<http://www.acces.nysed.gov/vr>).

With respect to the parents' assertions concerning the inadequacy of behavioral supports, the lack of an FBA and BIP, the IHO found that the district conducted an FBA and determined that a BIP was not necessary (IHO Decision at p. 103).

Despite the foregoing, the IHO found the January 2018 IEP did not offer a FAPE because the CSE failed to recommend parent counseling and training, and two annual goals (to meet with content teachers, and to use a planner) were repeated from the prior year indicating a lack of progress toward those goals (IHO Decision at p. 105).

Turning next to the May 2018 IEP, developed for the 2018-19 school year, the IHO found that the annual goals focused on time management, attentional issues, writing in the student's planner, expressing emotions, and self-advocacy, and took the September 2017 neuropsychological evaluation report into account (IHO Decision at pp. 105-06). However, the IHO found that the repetition of annual goals from the prior year equated to a lack of progress (id. at pp. 106-07).

With respect to the August 2018 IEP also developed for the 2018-19 school year, the IHO recounted the recommended related services and accommodations, the student's management needs, and the student's deficits in his executive functioning skills, and found that the recommended program was reflective of the results of and recommendations contained in the September 2017 neuropsychological evaluation report (IHO Decision at p. 107).¹⁶ Regarding the annual goals, the IHO noted that the goals were repeated from the May 2018 IEP (id.). With respect to the student's progress, the IHO noted that the IEP indicated that the parents disagreed that the student had improved in his executive functioning abilities and requested that research-based interventions be tracked and monitored (id. at pp. 107-08).

With respect to the parents' assertions that the CSE failed to recommend appropriate behavioral supports or to conduct an FBA and create a BIP, the IHO noted that the purpose of the August 2018 CSE was to review an FBA (IHO Decision at p. 107). The IHO found that the CSE conducted an FBA and determined that the student did not require a BIP as the student did not exhibit a pattern of interfering behaviors, his behavior did not have "a significant impediment" or a "significant impact on his learning," and the special education teacher and school psychologist could offer strategies to increase the student's independence and timely completion of his work (id. at p. 109). The IHO noted that the parents disagreed with the FBA and requested an independent FBA (id.). The IHO then found that, once completed, the private FBA confirmed that the student was overwhelmed at times with writing; however, the IHO concluded that the CSE developed a writing goal and that the student struggled with writing because of the nature of the assignment topics rather than his ability to write, and that the student progressed more consistently during the second quarter of the 2018-19 school year (id. at pp. 109-10). Notably, the IHO determined that even if the student continued to lack skills in some areas after graduation, that fact alone would not indicate a denial of FAPE and rejected the parents' assertion that the district did not appropriately address the student's functional skills deficits (id.).

¹⁶ With no analysis given, the IHO found that the parents presented no testimony or evidence to establish any procedural inadequacy or that they were impeded in their participation in the decision-making process (IHO Decision at pp. 111-12).

Regarding transition planning, the IHO reviewed the supports provided by the district, including the transition assessments, support with writing the student's college essay, and contact between the student, the dean, and the special education teacher regarding the student's progress towards graduating and attending college (IHO Decision at pp. 110-11). While noting the evidence in the hearing record and crediting testimony of district staff, the IHO found that the parents failed to establish that the district did not provide appropriate transition support services (id. at p. 111).

With respect to the provision of parent counseling and training, the IHO agreed with the parents and found that the district offered no evidence to rebut the parent's testimony that the district never contacted them after the service was added to the January 2018 IEP (IHO Decision at p. 112).

To remedy what the IHO found to be a gross denial of FAPE for the 2016-17, 2017-18, and 2018-19 school years based on the district's failure to offer or provide parent counseling and training and the repetition of annual goals, the IHO awarded the parents one hour per month of compensatory parent counseling and training services for 36 months at a rate not to exceed \$200 per hour (IHO Decision at pp. 113-18). The IHO denied the parents' requests for compensatory OT, speech-language therapy, CBT counseling, social skills training, and executive functioning coaching services (id.). The IHO also denied the parents' requests to be reimbursed for the costs paid for the private CBT counseling and speech-language therapy services they had obtained for the student (id.).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in placing the burden of proof on the parents; in finding that the district's evaluations, specifically referencing the transition-related assessments, were adequate; in finding that the CSEs reviewed the August 2015 research evaluation and the September 2017 neuropsychological evaluation reports (alleging that the district did not provide prior written notice with a reason for not following the recommendations included in the September 2017 neuropsychological evaluation report), and in finding that the district provided an appropriate transition plan and transition services. The parents also appeal from the IHO's decision—despite her finding of a gross denial of a FAPE—which declined to award the parents reimbursement for the cost of private services provided during the 2017-18 and 2018-19 school years (see Parent Exs. K-U) and compensatory education for the 2016-17, 2017-18, and 2018-19 school years.

In its answer, the district generally responds to the parents' allegations with admissions, denials, or various combinations of the same. The district also asserts that the parents' claim regarding prior written notice was not raised in the due process complaint notice and therefore should not be considered. The district cross-appeals from the IHO's determination that it failed to offer the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years, asserting that the IHO erred in finding that the district repeated similar IEP annual goals from school year to school year, that such repetition was a sign of a lack of progress, and that the absence of parent counseling and training on the 2016-17 school year IEPs, as well as the lack of implementation of parent counseling and training in subsequent school years, resulted in a denial of a FAPE. The district also asserts that the IHO erred in finding that the alleged violations regarding the student's annual goals and parent counseling and training constituted a "gross violation." With respect to the IHO's findings regarding the student's progress and annual goals, the district asserts that the IHO

misinterpreted testimony and incorrectly found that the annual goals were repeated, as a comparison of the annual goals shows changes in the language and criteria for achievement, ignored evidence of the district's goal tracking, and focused too narrowly on the student's progress towards the goals without consideration of other factors.¹⁷ With respect to parent counseling and training, the district alleges that the IHO erroneously found that the parents had requested parent counseling and training and erred in awarding parent counseling and training as compensatory education as it is inappropriate in light of the student's graduation from high school.

In an answer to the district's cross-appeal and a reply, the parents generally respond to the district's assertions with admissions, denials, or various combinations of the same. With respect to the parents' reply, the parents respond to the district's assertion that the parents had not raised the issue of a lack of prior written notice in the due process complaint notice. The parents contend that they raised the issue that the CSE did not meaningfully consider the September 2017 neuropsychological evaluation report at the CSE meetings and that a lack of a prior written notice is one of several facts tending to show that the private evaluation, although it was in the possession of the CSE, was not given due consideration. With respect to their answer, the parents counter the district's argument that the student's grades are an indication of progress and assert that the focus of whether the student made progress should be on the student's identified executive functioning deficits. The parents also assert that contrary to the district's assertion that numerous miscellaneous IHO findings run counter to the IHO's conclusion that the district did not offer a FAPE, the district's argument did not address the IHO's specific findings related to the repetition of annual goals, progress, and parent counseling and training, and that many of the findings which the district identified are unsupported by the record. The parents also assert that the district did not identify in its cross-appeal citations to the hearing record to support its assertions. The district submits a reply to the parents' procedural defense that the district did not cite to the hearing record in its answer and cross-appeal and asserts that the cross-appeal included specific citations to the IHO decision, as well as to the transcript and documentary evidence, and is accordingly in compliance with the requirement to cite to the hearing record.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services 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.

¹⁷ In identifying specific factual findings for which it attributes IHO error, the district contends that the IHO misinterpreted the parents' witness in finding that she testified the study skills goal regarding the use of a planner was not appropriate, and misinterpreted the district's special education teacher in finding that he testified the student made gradual progress as he was discussing the student's progress towards one specific goal.

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]).¹⁸

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 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. Initial Matters

1. Scope of Review

As an initial matter, considering the extent of the analysis contained in the IHO decision, it is necessary to identify which of the parties' arguments are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "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" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Here, the substantive issues regarding the provision of a FAPE to the student raised by the parents on appeal relate to the IHO's findings that the various CSEs considered the parents' privately obtained evaluations and that the district conducted appropriate transition assessments and recommended appropriate transition services (Req. for Rev. ¶¶ 3, 4). The substantive issues raised by the district are that the IHO erred in

¹⁸ 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).

finding that the repetition of annual goals indicated that the student did not make progress and that the failure to recommend and deliver parent counseling and training resulted in a denial of FAPE (Answer ¶¶ 8, 9). Accordingly, all of the IHO's other determinations—including findings related to the statute of limitations; the scope of the impartial hearing not including any allegations as to home-based services; the failure to classify the student prior to June 2016; the student's present levels of performance; the adequacy of the district's FBA and lack of a BIP; and the lack of a recommendation for OT or speech-language therapy—have not been appealed in accordance with the regulations, and are therefore deemed abandoned (8 NYCRR 279.8[c][2], [4]).

Additionally, the district asserts that to the extent that the parents refer to an alleged failure of the district to send a prior written notice with regard to the district's alleged disagreement with the recommendations contained in the September 2017 neuropsychological evaluation report, such claim was not properly raised in their due process complaint notice and cannot be raised on appeal. In this case, the parents did not make this allegation in their due process complaint notice and the IHO did not address this issue in her decision (see IHO Decision; IHO Ex. II). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include this issue or file an amended due process complaint notice, I decline to review the issue for the first time on appeal. However, to the extent that the parents assert that the CSE did not meaningfully consider the September 2017 neuropsychological evaluation at the CSE meetings and that a lack of a prior written notice is one of several facts tending to show that the private evaluation was not considered, the issue of the consideration of private neuropsychological evaluation is discussed fully below.

2. Burden of Proof

To the extent the parents assert that the IHO shifted the burden of proof away from the district as to the provision of FAPE, a review of the IHO's decision reveals that while the IHO does in fact state that the parents did not carry their burden on several issues, the IHO first discusses and cites to district testimony and documents concerning those issues and then discusses what rebuttal evidence and testimony the parents put forth (see e.g., IHO Decision at pp. 91, 93). As I am conducting a complete review of all of the issues presented on appeal, it is not necessary to further delve into all instances where the IHO may have used language that indicates he shifted the burden of proof in this matter. However, the IHO is reminded that in New York 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).

B. Consideration of Independent Educational Evaluations

On appeal, the parents contend that the IHO erred in determining that the district's evaluations (including transition assessments) were adequate. The parents also allege that the IHO erred in finding that the June 2016 CSE and May 2017 CSE reviewed the August 2015 research

evaluation report and that the IHO further erred in finding that the September 2017 neuropsychological evaluation report was adequately considered by the CSE.

Both the IDEA and its implementing regulations require a CSE, in developing a child's IEP, to consider the most recent evaluative data of the child (see 20 U.S.C. § 1414(c)(1)(A); 34 CFR 300.324[a][1][iii]). A CSE is required to "consider" reports from privately retained experts, however, it is not required to adopt their recommendations (see, e.g., M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *12 [S.D.N.Y. Feb. 16, 2011]; Watson v. Kingston, 325 F. Supp. 2d 141, 145 (N.D.N.Y. 2004); see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583, at *6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567). "Consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v Board of Educ. of the Town of Ridgefield, 10 F.3d 87, 89-90 [2d Cir. 1993]; Mr. and Mrs. P. v. West Hartford Board of Educ., 885 F.3d 735, 753 [2d Cir. 2018]).

1. Consideration of the August 2015 Research Evaluation Report

Contrary to the parents' contentions, the hearing record supports the IHO's finding that the June 2016 CSE and May 2017 CSE adequately reviewed and considered the August 2015 research evaluation report.

Initially, the CSE reviewed the August 2015 research evaluation report at a September 2015 CSE meeting (see Dist. Ex. 1 at p. 2). The meeting information attached to the June 2016 IEP summarized the discussions from the June 2016 CSE as well as a September 24, 2015 CSE meeting (Dist. Ex. 1 at pp. 1-2). The September 2015 CSE meeting information reflected the parents' concerns regarding the student's communication and his difficulty adapting to school, functioning appropriately in social situations, and completing his work assignments (id. at p. 2). According to the meeting information, the CSE reviewed results from the August 2015 research evaluation report, which indicated that the student's cognitive abilities were in the superior range, and that he exhibited significant strengths in both verbal and nonverbal reasoning (id. at p. 2; see Dist. Ex. 80 at pp. 11, 14).¹⁹ Evaluation results reflected in the meeting information demonstrated that the student's receptive and expressive language skills were also in the superior range of functioning (id. at p. 2; see Dist. Ex. 80 at pp. 9-10, 16). At that time, the CSE determined that the student was not eligible to receive special education as a student with a disability (Dist. Ex. 1 at p. 2).

Review of the student's June 21, 2016 IEP for the 2016-17 school year revealed, consistent with the IHO's findings, that the June 2016 CSE had available documentation about the student including a verbal report from October 2013, the student's June 2015 report card and his then-current April 20, 2016 report card, a September 15, 2015 observation report, and the August 2015 research evaluation obtained by the parents (compare IHO Decision p. 76, with Dist. Exs. 1 at pp. 1, 3; 80).

¹⁹ Review of the August 2015 research evaluation report shows that it measured the student's cognitive, vocabulary, academic achievement, receptive and expressive language, and executive functioning and attention skills (Dist. Ex. 80). Additionally, the parent was administered measures of the student's adaptive behavior, sensory profile, and traits associated with an autism diagnosis (id.).

Consistent with the August 2015 research evaluation report, the June 2016 IEP present levels of performance reflected the information about the student's cognitive and language skills that was discussed during the September 2015 CSE meeting, and that the student showed relative weaknesses in reading fluency, visual scanning, and processing speed (compare Dist. Ex. 1 at pp. 2, 4, with Dist. Ex. 80 at p. 12). Also consistent with the research evaluation report, the June 2016 IEP indicated that the student had some social difficulties, in that he did not initiate and did not have the ability to sustain friendships (compare Dist. Ex. 1 at p. 4, with Dist. Ex. 80 at p. 12). Academic and social present levels of performance in the June 2016 IEP also included parental concerns specific to the student's organization and executive functioning struggles (Dist. Ex. 1 at p. 4).

With regard to the student's adaptive skills, the August 2015 research evaluation report indicated that the student had difficulty functioning adaptively in social and academic environments, and his overall adaptive functioning fell in the low range, which according to the evaluators was much lower than expected "given his exceptional cognitive and language abilities" (Dist. Ex. 80 at pp. 9-11). The evaluation report specified that the student showed weakness in the following domains: communication (expressive, receptive and written), daily living skills, interpersonal relationships, and coping skills (id.).²⁰ While the present levels of performance in the June 2016 IEP did not include information about the student's daily living skills, the IEP did include information and interventions consistent with the research evaluation report with regard to the student's social skills, executive functioning, interpersonal relationships, writing, and coping skills (compare Dist. Ex. 1 at pp. 1, 3, 6-7, with Dist. Ex. 80 at p. 11).

At the conclusion of the August 2015 research evaluation, the evaluators recommended that the student receive "extra time on tests, as well as extensions on papers and homework assignments if needed," because he required more time to process and organize information as he tended to work at a slow pace (Dist. Ex. 80 at p. 12). The evaluators stressed the importance of the student's participation in transition skills programs/workshops to "develop the skills necessary for him to function independently out in the community," and provided a number of specific agency websites as resources (id.). The evaluators recommended that the student receive social skills group intervention that used a direct teaching, cognitive-behavioral approach and role play, and the report named a specific provider at an autism center whose social skills group also included a transition skills component (id.).²¹ To address the student's difficulty organizing his daily

²⁰ According to the August 2015 research evaluation report, administration of the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4) to the student yielded core, receptive, and expressive language scores in the superior range of functioning (Dist. Ex. 80 at pp. 5, 16). The student's mother completed the Vineland – II Adaptive Behavior Scale, which yielded adaptive receptive and expressive communication subdomain scale scores in the low range and indicated that the student had difficulty with tasks such as following instructions, listening to an informational talk for 15 minutes or longer, and describing his experiences in detail; although the parent reported that the student was able to "express himself coherently and rarely [made] grammatical or semantical errors" (id. at pp. 9-11, 16).

²¹ The research evaluation report indicated the direct-teaching approach addressed many of the skills the student still needed to develop such as initiating/maintaining/terminating social interactions (including navigating group interactions), perspective taking, friendship making skills (e.g., identifying potential friends, the "steps" to making a friend, maintaining friendships, and good sportsmanship), conversational skills (e.g., small talk, identifying and staying on topic, talking on other people's topics, turn-taking, etc.), and social communication (e.g., to improve pragmatics, ability to communicate feelings and needs more effectively and appropriately, and improve coping skills (Dist. Ex. 80 at pp. 12-13).

schedule and initiating and completing school assignments, the evaluators recommended that he use aids such as a calendar, checklists, and electronic reminders, in order to learn to organize his time more efficiently (id. at p. 13). The evaluators provided recommendations to address the student's slow reading rate, including that the parents encourage him to practice reading under time limitations in order to simulate testing situations, and using a timer when reading academic material to monitor his progress and set goals for improvement (id.). As the student tended to become anxious when he was required to decide or choose between several options, the evaluators recommended that the parents and the student's teachers provide him with a structured environment that had a set routine (id.). Additionally, the student often became overwhelmed when faced with extensive assignments that required a lot of work, which sometimes prevented him from completing assignments; therefore, teachers and parents were encouraged to help the student break down assignments into steps and determine sub-goals (id.). Finally, as the student appeared to benefit from praise and encouragement, the evaluators recommended that his parents and teachers provide him with positive reinforcements when he was meeting expectations and fulfilling his goals (id.).

Review of the June 2016 IEP shows that it included special education management needs and annual goals consistent with the August 2015 research evaluation report recommendations as well as parental concerns (compare Dist. Ex. 1 at pp. 4-8, with Dist. Ex. 80 at pp. 12-13). Specifically, the IEP management needs included encouraging the student to meet with his academic teachers on a regular basis to cover course expectations and content area material; incorporating the entire writing process into writing assignments; breaking down long-term assignments into manageable parts with frequent deadlines, and providing executive functioning strategies to help the student with planning, initiating and following through (compare Dist. Ex. 1 at p. 4, with Dist. Ex. 80 at pp. 12-13). The IEP annual goals addressed the student's study skill needs by requiring him to use a planner—electronic or paper—to keep track of assignments, assessments, and appointments with teachers (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 80 at p. 13). Another study skills goal required the student to meet with his academic teachers on a regular basis (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 80 at p. 13). For writing, the IEP included an annual goal that when given a writing assignment, the student would use the entire writing process from outlining to the final piece (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 80 at p. 13). Regarding the student's social needs, the IEP included an annual goal for the student to communicate and interact in a positive manner with peers in order to initiate and sustain relationships (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 80 at p. 12).

To support the student and address his needs, the June 2016 CSE recommended four 45-minute sessions per week of resource room (academic support) in a group of five, one 30-minute session per week of counseling with a psychologist in a small group, preferential seating, and refocusing and redirection (Dist. Ex. 1 at p. 6; see Dist. Ex. 80 at pp. 12-13). Testing accommodations of extended time (times two) and alternate location for tests aligned with the recommendation in the August 2015 research evaluation report (compare Dist. Ex. 1 at p. 8, with Dist. Ex. 80 at p. 12). Therefore, the hearing record shows—contrary to the parents' assertion on appeal—that the June 2016 CSE which developed the student's IEP for the 2016-17 school year had available and incorporated information and recommendations consistent with the August 2015 research evaluation.

Analogous with the parents' arguments related to the June 2016 CSE, the parents assert that the IHO erred in finding that the May 2017 CSE considered the August 2015 research evaluation report.

The CSE convened on May 8, 2017 for the student's annual review (Dist. Ex. 2 at p. 1). According to the meeting information attached to the IEP, the CSE discussed the student's history of "classification," the services he had received, and the college board concerns related to extended time (id.). The CSE reviewed the student's testing history and discussed how standardized test results did not always reflect the deficits related to his autism diagnosis (id.). The CSE also reviewed the student's executive functioning problems that were at the core of his academic struggles and in particular his planning, time management, processing, and ability to complete tasks in a timely fashion (id.). Discussion also occurred regarding counseling services for the 2017-18 school year and the student's participation in a group that focused on executive functioning (id.). The CSE reviewed the student's schedule for the upcoming school year as well as his IEP and education report (id.). During a follow-up meeting with the parent, the IEP goals were discussed and the history of the student's services in the district were reviewed (id.).

Review of the May 2017 IEP shows that the August 2015 research evaluation continued to be listed among the evaluations and reports considered by the CSE to determine the student's present levels of performance (Dist. Ex. 2 at p. 2). In addition, the May 2017 IEP identified the following evaluative information: a July 15, 2015 psychological evaluation report, a February 2, 2017 educational report, and the student's May 4, 2017 report card (id. at pp. 2-3). Consistent with results of the August 2015 research evaluation and the recommendations included in the report as discussed above, the May 2017 IEP indicated that the student had problems independently managing his work, understanding what's expected on assignments, planning for long term assignments, and creating manageable deadlines (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 80 at pp. 2-3, 13). According to the IEP, the student very quickly became overwhelmed with assignments, deadlines, and assigned projects, needing them to be broken down into pieces with a daily check-in (Dist. Ex. 2 at p. 4; see Dist. Ex. 80 at p. 13). Socially, the May 2017 IEP indicated that the student had some difficulty working in groups and seeking out teachers for help (Dist. Ex. 2 at p. 4). He could appear disinterested, distracted or unresponsive due to processing issues related to his disability (id.; see Dist. Ex. 80 at pp. 6-7). Both the August 2015 research evaluation report and the May 2017 IEP indicated that the student required additional time to complete longer classroom assignments like essays and projects (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 80 at p. 12). The IEP also noted the student had severe executive functioning difficulties that caused him to miss deadlines and stop doing his work, which impacted his ability to access the general education curriculum (Dist. Ex. 2 at p. 5).

To address the student's needs and consistent with the August 2015 research evaluation report, the May 2017 CSE recommended that the student receive four 45-minute sessions per week of resource room, and one bi-weekly 30-minute session of counseling with a psychologist (compare Dist. Ex. 2 at p. 7, with Dist. Ex. 80 at pp. 12-13). Additional recommendations included preferential seating and refocusing and redirection (Dist. Ex. 2 at p. 7). Testing accommodations of extended time (times two) and alternate location for tests aligned with the recommendation in the August 2015 research evaluation report for the student to receive extra time on tests (Dist. Exs. 2 at p. 8; 80 at p. 12). Therefore, review of the May 2017 IEP shows that the information and recommendations were consistent with those included in the August 2015 research evaluation report.

The parents assert that the district is required to provide evidence that the CSE actually reviewed the August 2015 research evaluation report at the CSE meetings and faults the IHO decision for only citing to provisions of the IEP that the IHO believed were consistent with the evaluation report (Req. for Rev. ¶3). With respect to this issue, the parents cite to Second Circuit precedence which they believe stands for the proposition that the district has to prove what evaluative data the CSE relied on in making its recommendations (see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir, 2016]). The parent's reliance on L.O. in this matter misses the mark as the evaluative information relied on by both the June 2016 CSE and the May 2017 CSE was identified in either the meeting information attached to the IEP, or in the present levels of performance (Dist. Exs. 1 at pp. 1-2; 2 at pp. 1, 2). In L.O., the Second Circuit found that the failure to memorialize what evaluative information the CSE relied on left the reviewing authorities "to speculate . . . as to how the CSE reached the terms of the child's IEP (i.e., which, if any, evaluative materials the CSE actually considered)" (L.O., 822 F. 3d at 109-110). Here, the IEPs identified the evaluative information relied on by the CSEs and as discussed above, the description of the student's needs as identified in the June 2016 IEP and the May 2017 IEP is consistent with the evaluative information available to and relied on by the CSEs, and in particular the August 2015 research evaluation report.

2. Consideration of September 2017 Neuropsychological Evaluation Report

The parents contend that the IHO erred in finding that the September 2017 neuropsychological evaluation report was adequately considered by the CSE and in particular assert that the various CSE's did not follow the recommendations contained in the report.

During summer 2017, the parents obtained a neuropsychological evaluation of the student, and the evaluator prepared a report dated September 18, 2017 (Dist. Ex. 28 at pp. 8-29). On September 27, 2017 the parent emailed the report to the district's CSE chairperson and the CSE convened for a program review on September 29, 2017 to review the results and provide the student's family with more information about his current levels of performance (Tr. pp. 184-86; Dist. Exs. 3 at p. 1; 28 at p. 1).²² According to the meeting information attached to the September 2017 IEP, the parent indicated that the report was similar to reports previously completed by the district (Dist. Ex. 3 at p. 1). The summary reflected the parent's concerns about the student's academic difficulties in the area of humanities, and a statement by the parent that the school year was "going well" (id.). The CSE discussed removing the recommendation for "the executive functioning group" from the student's IEP and recommended that the special education teacher be the "provider" of the student's "advocacy goal" (id.). The student's teachers reported that the student had been doing well "so far," in that he made gains in organizing and planning work, and he submitted a well written assignment (id.). Further discussion centered around the student having access to Google classroom and emailing his teachers to ensure he was on track with

²² CSE chairperson testified that the purpose of the September 2017 CSE meeting was to review the September 2017 neuropsychological evaluation report that the parents had provided (Tr. pp. 184-85; Dist. Ex. 28). The CSE chairperson further testified that the CSE reviewed the evaluation, and that the school psychologist who attended the CSE meeting also reviewed the evaluation prior to the meeting (Tr. pp. 185-86).

assignments (*id.*). The meeting information indicated that all CSE members agreed with the IEP, with the understanding that the student's work completion would be monitored closely (*id.*).

Review of the September 2017 IEP shows that it included cognitive, reading, and written language assessment results from the September 2017 neuropsychological report (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 28 at pp. 8-9, 13, 19).²³ The IEP present levels of performance reflected information consistent with the neuropsychological report, including that the "[o]utside testing" the parents submitted showed that the student's "overall level of intellectual functioning was in the high average range"; however, "areas of relative weakness were noted in processing speed and working memory" (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 28 at pp. 22-23). The IEP also reflected the neuropsychological evaluation findings that the student's fine motor skills were of concern, and that he exhibited mild difficulties concerning his attitude toward school, his relations with his parents, and his self-reliance (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 28 at p. 23). Consistent with the neuropsychological evaluation results, the IEP indicated that the student's parents endorsed social withdrawal, the presence of behaviors unusual for an adolescent the student's age, as well as some defiance, and significant deficits in social skills and adaptive functioning (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 28 at p. 23).

Consistent with the recommendations included in the neuropsychological report, the September 2017 IEP provided annual goals for the student to improve executive functioning and written language skills such as meeting with content area teachers to improve self-advocacy skills, breaking down large assignments/projects into manageable deadlines, recording all assignments in a planner, completing all extended homework/classroom assignments within the allocated due dates, and creating multi-paragraph outlines based on content area writing assignments (compare Dist. Ex. 3 at p. 7, with Dist. Ex. 28 at pp. 26-28). The CSE also recommended that the student receive four 45-minute sessions per week of resource room services for academic support, testing accommodations such as extended time and alternate location, and preferential seating, as well as refocusing and redirection, supports and services provided to address the student's needs that were consistent with the neuropsychological evaluation recommendations (compare Dist. Ex. 3 at pp. 7, 9, with Dist. Ex. 28 at pp. 26-28).²⁴

In October 2017, the student's mother and CSE chairperson corresponded regarding the program developed at the September 2017 CSE meeting and the parent's concerns with it (Dist. Exs. 30; 31). In particular, the parent expressed her concerns that she believed the IEP was too similar to the student's IEP from the prior school year and did not think the IEP adequately addressed the student's executive functioning and adaptive skills deficits (Dist. Ex. 30 at p. 1). In addition, while the CSE chairperson opined that the student's program incorporated the recommendations from the September 2017 neuropsychological evaluation report, the parent indicated that she did not believe that the proposed interventions "reflect[ed] the recommendations of the neuropsych report at all" (Dist. Ex. 30 at pp. 2, 3). In a more detailed email, the student's

²³ The September 2017 IEP also referred to assessment results from a February 2017 educational report, and the August 2015 research evaluation report (see Dist. Ex. 3 at pp. 3-4).

²⁴ Although the evaluator recommended that the student receive "[p]sychotherapeutic support," the September 2017 CSE did not recommend counseling services provided by the school psychologist because the student did not engage in the process and according to district staff, the parents felt counseling in school was not effective for the student (Tr. pp. 188-89, 247, 266-67; see Dist. Ex. 3 at p. 8).

mother acknowledged that "[m]any elements previously included in the IEP . . . are aligned with the findings of the current neuropsych report"; however, the parents believed that there were details in the IEP that they were not in agreement with and that the program was not going to be sufficient (Dist. Ex. 31 at p. 1). The parent went on to detail specific items included in the September 2017 IEP that she disagreed with; for example the parent indicated that she did not say that the neuropsychological report was similar to previous district reports, but instead said that the student's profile closely matched his profile from previous evaluations, "specifically in terms of the extreme divide between [the student's] adaptive behavior/executive functioning and his intellect" (*id.* at pp. 1-4). Specifically, with the respect to the consideration of the September 2017 neuropsychological evaluation report, the parent asserted that "[t]he report was hardly discussed at all"; that the recommendations were not reviewed; and that she did not recall any other CSE member referring to the report (*id.* at p. 2). In response to the parents' concerns, the CSE chairperson offered to schedule a meeting to discuss the specific changes to the student's program that the parent had requested (*id.* at p. 6).

On November 6, 2017 the CSE reconvened for a program review at the family's request to further review the September 2017 neuropsychological evaluation report (Tr. pp. 189-90; Dist. Ex. 4 at p. 1). According to the CSE chairperson and the November 2017 IEP meeting information, the school psychologist who attended the November 2017 CSE meeting reviewed the evaluation results, including the overall scores and cognitive profile, and discussed the recommendations (Tr. p. 191; *see* Dist. Exs. 4 at p. 1; 32 at pp. 1-2). The November 2017 IEP continued to reflect the information from the neuropsychological evaluation report contained in the September 2017 IEP (*compare* Dist. Ex. 3 at p. 5, *with* Dist. Ex. 4 at p. 5; *see* Dist. Ex. 28 at pp. 22-23).²⁵ The November 2017 IEP maintained the same annual goals, resource room services, accommodations, and testing accommodations from the September 2017 IEP (*compare* Dist. Ex. 3 at pp. 7-9, *with* Dist. Ex. 4 at pp. 7-9).

In a December 1, 2017 email, and a December 5, 2017 follow-up email, the student's mother informed the CSE chairperson that she believed the student needed extra support as soon as possible (Dist. Ex. 33). In particular, the parent expressed her hope that recommendations included in the September 2017 neuropsychological evaluation report for counseling, speech-language therapy, and executive functioning training could be managed during the school day, but that due to the student's busy schedule he could not fit in needed supports in areas of executive functioning, communication/self-advocacy, and building necessary skills for independent functioning (*id.*). The parent requested that the district provide related services in these areas outside of school (*id.* at p. 2). The CSE chairperson responded to the parent explaining that speech-language therapy and counseling were not recommended in the student's IEP and indicated a preference to wait to see if the executive functioning group being provided to the student would be of benefit (*id.* at p. 1).

In another email exchange in December 2017, the CSE chairperson responded specifically to the parent's expressed belief that the CSE did not consider the September 2017 neuropsychological evaluation report and recommendations (Dist. Ex. 34 at pp. 1-2). The CSE

²⁵ The November 2017 CSE recommended adding one 30-minute session per month of parent counseling and training to the IEP (Tr. p. 191; Dist. Ex. 4 at pp. 1, 9). In response to the parents' concerns about the student's level of independence, the CSE added a goal to the IEP for the student to email his teachers weekly to monitor his academic progress and identify any missing assignments (Tr. pp. 191-92; Dist. Ex. 4 at pp. 1, 8).

chairperson explained that all of the members of the September 2017 CSE reviewed the report and indicated that both the September and November 2017 CSE meetings began with a review of the report (id. at p. 1). The CSE chairperson further scheduled another CSE meeting for January 22, 2018 to go over the parents' concerns regarding the student's IEP (id. at p. 2).

The CSE next reconvened on January 22, 2018 for a program review (Dist. Ex. 5 at p. 1). The district's director of special education (director)—who served as the chairperson of the January 2018 CSE meeting—testified that the main purpose of the meeting was to review the September 2017 neuropsychological evaluation report (Tr. p. 1009). According to the meeting information, the CSE reviewed recommendations, and the resultant IEP included executive functioning and academic achievement assessment results from the neuropsychological evaluation report (compare Dist. Ex. 5 at pp. 1, 3-4, with Dist. Ex. 28 at pp. 13, 15, 18-19).

The director testified that while reviewing the September 2017 neuropsychological evaluation report recommendations during the January 2018 CSE meeting, he became aware there was more than one version of the report (Tr. pp. 1009-10, 1017; see Dist. Ex. 35 at p. 1). The CSE obtained copies of the "latest version" of the report from the parent and "used that to move forward" (Tr. p. 1010; see Dist. Ex. 35). The revised report specified that two of the recommendations should occur on a 1:1 basis, which was not included in the initial version of the report (Tr. pp. 1011; compare Dist. Ex. 28 at pp. 26-27, with Dist. Ex. 35 at pp. 21-22).²⁶

The director testified that the January 2018 CSE reviewed the recommendations in the September 2017 neuropsychological evaluation report and through the discussions, determined that the educational recommendations were accomplished by the annual goals, program modifications, testing accommodations and the LRC services contained in the January 2018 IEP (compare Tr. pp. 1016-51, with Dist. Ex. 5 at pp. 5-11; see Dist. Ex. 35 at pp. 21-24). Specific to the recommendations to provide interventions to improve the student's time management, organizational, and study skills, and tutoring/learning support programming on a 1:1 basis, the CSE determined that those skill needs "were covered and focused on [in the] LRC," which gave the student "the opportunity to work on those things" and that it did not "make sense" for the service to be provided on a 1:1 basis given the student's "generally good academic performance and ability to engage in his classes" (Tr. pp. 1017, 1051-55; see Dist. Ex. 35 at pp. 21-22). Regarding the neuropsychological evaluator's recommendation for psychotherapeutic support, the director testified that the CSE discussed that the student was provided counseling on previous IEPs and had been "reluctant to engage in it" (Tr. pp. 1043-44). He further indicated that during the CSE's discussion, the parent "was unsure that [the student] would be willing to engage in [counseling], and didn't think that it would necessarily be helpful," therefore, the CSE declined to recommend counseling services at that time (Tr. p. 1044).

In response to an email from the CSE chairperson, on January 29, 2018 the parent replied that although the CSE had begun to review the neuropsychological evaluation recommendations at the January 2018 CSE meeting, the review was not complete and therefore "any agreement about how to implement the recommendations, even the ones we did read through was inconclusive" (Dist. Ex. 37 at p. 2). By email dated February 11, 2018, the CSE chairperson emailed the parent

²⁶ The revised neuropsychological evaluation report indicated that interventions to improve the student's time management, organizational and study skills and tutor/learning support services should be provided on a 1:1 basis (compare Dist. Ex. 28 at pp. 26-27, with Dist. Ex. 35 at pp. 21-22).

the "[t]opics for [d]iscussion" for the CSE meeting scheduled for the following day, which included a "[r]e-review of [r]ecommendations by [the neuropsychological evaluator]" (Dist. Ex. 43 at pp. 1, 3; see Dist. Ex. 35 at p. 3). In an email dated February 11, 2018, the parent informed the CSE chairperson that she did not think the CSE meeting should proceed due to concerns about the transition planning process (Dist. Ex. 44 at p. 1). By email dated February 12, 2018, the CSE chairperson postponed the meeting (id.).²⁷ In an email to the CSE chairperson dated April 11, 2018 the parent indicated that she wanted to "just move forward with a CSE meeting" to, among other things, "[f]inish reviewing the neuropsych recommendations" (Dist. Ex. 48).

On May 30, 2018, the CSE convened for the student's annual review and to develop the student's IEP for the 2018-19 school year (Dist. Ex. 6 at p. 1). The meeting information attached to the IEP indicated that the student's special education teacher commented on the student's progress over the course of the 2017-18 school year, noting that he had improved his self-management capabilities, including that he had far fewer instances of handing assignments in late and his overall organization skills had improved (id.). The parent disagreed that the student's executive functioning abilities had improved and attributed his academic performance to increased oversight and the inclusion of the "extended due dates" accommodation (id.). According to the meeting information, the CSE agreed that the student continued to have problems generalizing certain skills like writing in his planner without prompting, engaging in sustained goal-directed activities, and exhibiting the ability to organize, schedule, and systemize his academic life (id.).

The May 2018 IEP meeting information indicated that the CSE reviewed the "[p]rivate testing" and recommendations, and the special education teacher testified that the CSE reviewed all of the IEP annual goals, which were based upon the September 2017 neuropsychological evaluation report recommendations (Tr. pp. 957-60, 967-68; Dist. Ex. 6 at p. 1). Additionally, the summary reflected that the CSE discussed the parent's request that the student receive speech-language therapy to improve writing skills and counseling using a cognitive behavioral therapy approach to improve executive functioning skills (Dist. Ex. 6 at p. 1). Similar to the recommendations included in the September 2017 neuropsychological evaluation report, for the 2018-19 school year, the May 2018 CSE recommended that the student receive four 50-minute sessions per week of resource room for academic support in a group of 5:1, and one 30-minute session per week of individual counseling with a psychologist in a separate location (compare Dist. Ex. 6 at p. 9, with Dist. Ex. 28 at pp. 26-29 and Dist. Ex. 35 at pp. 21-24). The May 2018 CSE also recommended that the student receive modifications including preferential seating in view of the teacher, refocusing and redirection, access to a computer for written assignments, use of a calculator during class work when not assessing calculation skills, and extended due dates for longer assignments or projects, as well as testing accommodations of extended time, alternate location for tests, and use of a calculator and computer (compare Dist. Ex. 6 at pp. 9-11, with Dist. Ex. 28 at pp. 26-29 and Dist. Ex. 35 at pp. 21-24).

As demonstrated in the hearing record, the CSEs at issue for the 2016-17, 2017-18, and 2018-19 school years reviewed the August 2015 research evaluation and the September 2017 neuropsychological evaluation reports at the relevant CSE meetings (see L.O., 822 F.3d 95 at 110-11). While the CSEs did not adopt every recommendation arising from those evaluations, as

²⁷ The hearing record contains subsequent email correspondence between the CSE chairperson and the parent regarding rescheduling the CSE meeting to March 20, 2018 to discuss the student's transition planning, which the parent declined to attend (see Dist. Exs. 45-47).

discussed above, many of the recommendations were reflected in the student's programming (T.S., 10 F.3d at 89-90; Mr. P. and Mrs. P., 885 F.3d 735, 753; see M.H., 2011 WL 609880, at *12; Watson, 325 F. Supp. 2d at 145; Pascoe., 1998 WL 684583, at *6; Tucker, 873 F.2d at 56).

C. Annual Goals and Progress

The district cross-appeals from the IHO's findings that the annual goals related to the student's study skills and executive functioning needs were repeated in every IEP, which indicated a lack of progress and resulted in a denial of a FAPE. Specifically, the district asserts that the IHO erred in overlooking the student's progress not only on his annual goals, but also as reflected in course grades, scores on State examinations, class participation, and involvement with social and extracurricular activities. The parents counter that the student's grades are not a reflection of the effectiveness of the student's special education program, as the student's main areas of deficits were in planning, time management, processing, ability to complete tasks in a timely fashion, and writing.

Initially, the student's progress towards his annual goals cannot be assessed in a vacuum outside of his progress in the general education curriculum. An IEP must include a written statement of measurable annual goals, including academic and functional goals, designed to (1) meet the student's needs that result from the student's disability so as to enable the student to be involved in and make progress in the general education curriculum; and (2) meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414 [d][1][A][i][II]; 34 CFR 300.320 [a][2][i]; 8 NYCRR 200.4 [d][2][iii] [emphasis added]). Additionally, a student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. Jun. 24, 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [Dec. 2010]). Furthermore, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how a subsequent IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]). However, the carryover of annual goals from a student's IEP in the prior school year to the next school year's IEP has been found to be appropriate "[w]here a student's needs and objectives remain substantially the same; [i]t is especially sensible that [an IEP] would reflect continuity with [a student's] needs and objectives as of [previous years.]" (P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 413-15 [S.D.N.Y. 2017] quoting L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *11 [S.D.N.Y. Sept. 27, 2016]; see J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at * 12 [S.D.N.Y. Feb. 7, 2018] [a subsequent IEP during the same school year is not inappropriate "simply because it did not change significantly" compared to its predecessor IEP] appeal dismissed Aug. 16, 2018).

With the above framework in mind, I next turn to the IHO's specific findings as to the annual goals and the student's progress towards meeting his annual goals, i.e. that certain goals related to the student meeting with his teachers and using a planner were essentially repeated in

every IEP, which the IHO found indicated a lack of progress (IHO Decision at pp. 79, 87-88, 91-92, 106-07).

Following the student's initial eligibility determination in June 2016, the CSE developed four annual goals in the areas of study skills, writing, and social/emotional skills to address his identified needs (Dist. Ex. 1 at pp. 1, 4, 6). The study skills goals were designed to improve the student's ability to utilize a planner (electronic or paper) to keep track of assignments, assessments, and appointments with teachers with 80 percent success over 10 weeks, to be monitored through structured observations of targeted behavior, and that the student meet with his academic teachers on a regular basis with 80 percent success over four weeks, to be monitored through behavior charting (*id.* at p. 6). The writing annual goal required the student to utilize the entire writing process from outlining to the final piece with 80 percent success over four weeks, to be monitored through portfolio materials (*id.*). Finally, the social/emotional annual goal was designed to improve the student's ability to communicate and interact in a positive manner with peers, and to initiate and sustain relationships with 75 percent success over four weeks, to be monitored through behavior charting (*id.*).

Review of the 2016-17 annual goals progress report prepared after the fourth marking period indicated that during the course of the year, the student progressed gradually toward his goals to use a planner and meet with his teachers on a regular basis, but did not achieve those goals (Dist. Ex. 70 at p. 1).²⁸ Rather, teacher comments for the fourth marking period indicated that the student was still very inconsistent with using his planner and during the upcoming school year, should continue to work on that skill as well as his self-advocacy skills and ability to meet regularly with his teachers (*id.*). With regard to the annual goal concerning the student's use of the entire writing process, the student progressed gradually for the first two marking periods, progressed satisfactorily for the third marking period, and achieved the goal for the fourth marking period (*id.* at p. 2). Teacher comments for the fourth marking period noted that the student was a proficient writer but must be monitored to ensure he completed the entire process and that he should continue to work on his writing skills next year with an emphasis on outlining and revising his work (*id.*). Regarding the annual goal addressing the student's need to develop positive communication and interaction with peers in order to initiate and sustain relationships, over the course of the school year the student progressed gradually for the first two marking periods and achieved the annual goal by the third marking period (*id.*). Teacher comments for the fourth marking period noted that the student was well liked, and a very kind person who treated his peers and teachers with respect (*id.*).

²⁸ The 2016-17 school year IEP annual goals progress report contained definitions of an annual goal ("What the student will be expected to be able to do by the end of the year in which the IEP is in effect"), evaluation criteria ("How well and over what period of time the student must demonstrate performance in order to consider the annual goal to have them met"), procedures to evaluate goal ("The method that will be used to measure progress and determine if the student has met the annual goal"), and evaluation schedule ("The dates or intervals of time by which evaluation procedures will be used to measure the student's progress") (Dist. Ex. 70 at p. 1). The same report included a rubric that explained goal progress report marks (*id.*). For example, a mark of "A" meant "Achieved - The student has achieved the goal"; A mark of "NA" meant "Not Achieved - The student has not achieved the goal"; a mark of "PG" meant "Progressing Gradually - The student is making less than anticipated progress but may still achieve the goal"; and a mark of "PS" meant "Progressing Satisfactorily - The student is making satisfactory progress and is expected to achieve the goal" (*id.*).

Next, regarding the 2017-18 school year, review of the May 2017 IEP revealed the CSE included annual goals that continued to address the student's on-going areas of need specific to study skills, writing, and social/emotional skills (Dist. Exs. 2 at pp. 3-4, 6; 70 at pp. 1-2). In the May 2017 IEP, the study skills annual goals from the 2016-17 school year that the student had not achieved were broken down into individual specific skills the student needed to acquire (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 2 at p. 6; see Dist. Ex. 70 at p. 1). Specifically, the annual goals required the student to meet with one of his content area teachers at least once per week in order to improve self-advocacy skills with 80 percent success; break down large assignments or projects into smaller parts with manageable deadlines with 80 percent success; record all assignments in a planner each day with requisite due dates and applicable notes regarding the assignment with 90 percent success; and complete all extended homework and classroom assignments within his allocated due dates with 90 percent success (Dist. Ex. 2 at p. 6).²⁹ Consistent with teacher comments in the 2016-17 IEP annual goals progress report that the student must be monitored to ensure he completed the entire writing process with an emphasis on outlining and revising his work, the student's May 2017 IEP writing annual goal required him to create a multi-paragraph outline based on a content area writing assignment that included an introduction with a thesis statement, topic sentences, and supporting details or evidence with 80 percent success (Dist. Exs. 2 at p. 6; 70 at p. 2). The May 2017 IEP also included an annual goal to address the student's social/emotional needs related to his executive functioning deficits and counseling services, requiring him to identify when he has missed a deadline or has fallen behind with schoolwork and discuss the reasons and feelings associated with those incidents with 80 percent success (Dist. Ex. 2 at pp. 4, 6-7).

According to the meeting information attached to the September 2017 IEP, the CSE reconvened to discuss, in part, that the provider of the student's IEP annual goal related to advocacy skills should be changed from the school psychologist to the special education teacher (Dist. Ex. 3 at p. 1). The CSE also discussed the student's then-current performance; his teachers reported the student was doing well so far that school year, made gains in organization and planning of work, and submitted a well written assignment (id.). Further discussion centered around the student having access to Google classroom and emailing his teachers to ensure he was on track with assignments (id.). The meeting information indicated that all participants agreed with the IEP—with the understanding that the student's work completion would be monitored closely—and therefore there was no indication that any of the student's annual goals from the May 2017 IEP needed to be changed or modified (compare Dist. Ex. 2 at p. 6 and Dist. Ex. 3 at pp. 7-8).

The November 2017 CSE meeting information indicated that in response to parental concerns and with the parents' agreement, the CSE added an annual goal to the student's IEP that required him to write a weekly email to his teachers to determine his progress in class and identify if he was missing assignments with 80 percent success (Dist. Ex. 4 at pp. 1, 8). The remainder of the annual goals in the November 2017 IEP were continued from the September 2017 IEP (compare Dist. Ex. 3 at pp. 7-8, with Dist. Ex. 4 at pp. 7-8). The meeting information attached to the January 2018 IEP reflects that the CSE discussed the parents' concerns about the "frequent monitoring of annual goals," and the teachers' reports that the student was making progress and was "more open about advocating for help and identifying when he has missed an assignment or

²⁹ The study skills annual goals in the May 2017 IEP were set to be measured over 10 weeks through structured observations of targeted behavior with quarterly progress reporting (Dist. Ex. 2 at p. 6).

require[d] an extended due date" (Dist. Ex. 5 at p. 1). The January 2018 CSE did not make changes to the student's annual goals (compare Dist. Ex. 4 at pp. 7-8, with Dist. Ex. 5 at pp. 7-8).

Turning to the student's progress toward his 2017-18 IEP annual goals, the meeting information attached to the May 2018 IEP reflected the special education teacher's comment that the student had improved his self-management capabilities, had fewer instances of handing in assignments late, and that his overall organization skills had improved (Dist. Ex. 6 at p. 1). The hearing record included a 2017-18 school year IEP annual goal progress report that was consistent with the format and rubric described above for the 2016-17 school year, with the addition of a "[p]rogressing [i]nconsistently ("PI") designation (compare Dist. Ex. 70, with Dist. Ex. 71). The 2017-18 progress report reflected that during the school year the student had progressed and ultimately achieved the annual goal related to his ability to meet with one of his content area teachers once per week to improve advocacy skills, and the goal to break down large assignments/projects into smaller parts with manageable deadlines (Dist. Ex. 71 at p. 1). Regarding the annual goals for the student to use a planner each day, complete all extended homework and classroom assignments within due dates, identify when he had missed a deadline and discuss the reasons/feelings associated with those incidents, and write a weekly email to his teachers to determine his progress in class/identify missing assignments, the report reflected that the student's progress was generally inconsistent throughout the year, and he did not achieve those goals by the end of the fourth marking period (id. at pp. 1-2). Although the student generally exhibited gradual progression toward his annual goal to create multi-paragraph outlines, he had not achieved that goal by the end of the school year (id. at p. 2).

Finally, regarding the annual goals developed for the 2018-19 school year, the meeting information attached to the May 2018 IEP indicated that the CSE agreed the student continued to have problems generalizing certain skills like writing in his planner without prompting and engaging in sustained goal-directed activities, and that he continued "to lack orderliness or the ability to organize, schedule, and systemize his academic life" (Dist. Ex. 6 at p. 1). In the area of study skills, the May 2018 CSE developed annual goals designed to improve the student's ability to review his workload and discuss time management and planning for assignments or assessments; review strategies to avoid attentional failures; record all assignments in a planner each day and make note of when he should meet with his teachers/seek additional help; and reduce attentional loads when necessary by restructuring complex tasks into separate independent steps (id. at p. 8). The CSE maintained the annual goal requiring the student to email his teachers every week to determine his progress in class and identify any missing assignments, and the writing annual goal from the prior school year (compare Dist. Ex. 5 at p. 8, with Dist. Ex. 6 at p. 9). The CSE also developed a reading annual goal to improve the student's ability to track information given a reading selection, and a social/emotional annual goal to increase his awareness and explore ways to identify emotions and functional ways to express emotions (compare Dist. Ex. 5 at pp. 7-8, with Dist. Ex. 6 at pp. 8-9). All of the student's 2018-19 annual goals reflected a 100 percent

over 10 weeks criteria for mastery (Dist. Ex. 6 at pp. 8-9).^{30, 31}

The hearing record included IEP annual goal progress reports for the first two marking periods of the 2018-19 school year that were consistent with the format and rubric described above for the 2016-17 and 2017-18 school years (compare Dist. Ex. 72 and Dist. Ex. 104, with Dist. Ex. 70, and Dist. Ex. 71). By the end of the second marking period, the student had achieved the reading and writing annual goals, and the goal that he review strategies to avoid attentional failures (Dist. Ex. 104 at pp. 1-2). Teacher comments related to these goals indicated that the student's ability to track information given a reading selection was "excellent," he worked on an extended writing assignment in "which he was successful completing the entire writing process independently," and he had reviewed "metacognitive strategies to avoid attentional failures," thus achieving the goal (id. at pp. 1-3).

According to the 2018-19 IEP annual goals second marking period progress report, the student had been making progress toward the remaining annual goals (Dist. Ex. 104). For example, the student progressed satisfactorily during both the first and second marking periods toward his goals to review his workload and discuss time management/assignment planning and reduce attentional loads by restructuring complex tasks (id. at pp. 1-2). Teacher comments included that during the second marking period, the student reviewed his workload and discussed time management throughout the period and restructured several large assignments (id.). The student's ability to record assignments in his planner and seek help, and to email his teachers weekly improved from progressing inconsistently to progressing satisfactorily (id. at pp. 2-3). Teacher comments related to those goals indicated that the student recorded 57 percent of assignments in the planner during the first marking period, which improved to 89 percent during the second marking period (id. at p. 2). Additionally, the student emailed his teachers eight times during the second marking period "which was an improvement from the first quarter" (id. at p. 3).³²

Based on the above and, contrary to the IHO's findings, the evidence in the hearing record

³⁰ The student's special education teacher testified that the parent was "adamant" that "the goals had no utility" unless they were "written at 100 percent level of achievement," but that after several discussions and despite his opinion that it "was not the wisest move to make," the special education teacher "acceded to [the parent's] request" (Tr. p. 961; see Dist. Ex. 6 at pp. 8-9). The position that goals have no utility unless written at 100 percent achievement is misplaced. To be clear, the achievement of an annual goal "is not the controlling issue; rather, it is [a student's] progress toward achieving the[] [goal]" (C.S. v. Yorktown Cent. Sch. Dist., 2018 WL 1627262, at *21 [S.D.N.Y. Mar. 30, 2018]; see also Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *31, *36 [N.D.N.Y. Sept. 29, 2009] [noting the student's progress despite not meeting some goals and explaining that the CSE was obligated to provide the student the opportunity to make meaningful progress in the least restrictive environment]).

³¹ The CSE reconvened in August 2018 but did not make changes to the IEP annual goals (compare Dist. Ex. 6 at pp. 8-9, with Dist. Ex. 7 at pp. 9-10).

³² Regarding the annual goal designed to increase the student's awareness and expression of emotions, the 2018-19 IEP annual goals progress report indicated that during first marking period counseling sessions, when he attended, the student was progressing gradually and "active and engaged," but that despite reminders, the student's attendance at counseling was "inconsistent" (Dist. Ex. 104 at p. 3). During the second marking period, the report indicated that the student's attendance at sessions had decreased further, and only when the counselor sought out the student (id.). Sessions during this time had focused on the student's time management and executive functioning skills (id.).

shows that for the 2016-17, 2017-18 and 2018-19 school years, the CSEs developed and modified the student's annual goals consistent with his progress towards achieving those goals and according to discussions held during the meetings, such that the district did not deny the student a FAPE on this basis (Dist. Exs. 1 at p. 6; 2 at p. 6; 3 at pp. 7-8; 4 at pp. 7-8; 5 at pp. 7-8; 6 at pp. 8-9; 7 at pp. 9-10; 70-72; 104).

Assuming however for the sake of argument, that the hearing record had shown the student did not make progress toward his IEP annual goals, it otherwise reflects that the student received educational benefits and achieved academic success during the 2016-17, 2017-18, and 2018-19 school years (Dist. Exs. 8; 10-12; 102; 106). Specifically, during the 2016-17 school year the student earned 7.0 credits and achieved the following final grades: English (B-), world history (B), chemistry (A), honors math (B+) and honors French (B-) (Dist. Ex. 8).³³ During the 2017-18 school year, the student earned 7.25 credits and achieved final grades of: English (A-), US history (B+), physics (A), high honors precalculus (B), and computer science (A-) (Dist. Ex. 8).³⁴ During the first semester of the 2018-19 school year, the student had achieved the following grades: English (A-), public policy (A-), physics (A), and calculus BC (A-) (Dist. Exs. 102; 106).³⁵ The dean testified that students need 22 credits to graduate from high school with a Regents diploma; by the end of the 2017-18 school year the student had acquired 23 credits (Tr. pp. 29-30; Dist. Ex. 8).

The dean also testified that in order to obtain a Regents diploma, students needed to pass five Regents examinations with scores of 65 or higher (Tr. pp. 29-31). Documentary evidence reflects that the student passed six Regents examinations with the following scores: US history and government (97), chemistry (98), living environment (94), global history (97), common core English language arts (ELA) (99), and common core algebra I (93) (Dist. Ex. 9). The student also earned the highest possible score of "5" on the advanced placement computer science examination (Tr. pp. 33-34; Dist. Ex. 9). As of June 2019, the student had met the New York State requirements for a Regents diploma (Tr. p. 1676; Dist. Ex. 106).

D. Transition Assessment and Services

On appeal the parents allege that the IHO erred in determining that the district's "transition-related evaluations" were adequate and that the student's IEPs contained appropriate transition programming.

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]).

³³ According to the course codes identified on student's transcript, chemistry was an accelerated class (Dist. Ex. 8).

³⁴ According to the course codes identified on the student's transcript, English and physics were accelerated classes, and computer science was a college level class (Dist. Ex. 8).

³⁵ According to the 2018-19 report card, English was an accelerated class, and both calculus BC and physics were college level classes (compare Dist. Ex. 8, with Dist. Ex. 102).

Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).³⁶

An IEP must also include the transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]). In this regard, State regulations require that an IEP include a statement of a student's needs as they relate to transition from school to post-school activities (8 NYCRR 200.4[d][2][ix][a]),³⁷ as well as the transition service needs of the student that focuses on the student's course of study, such as participation in advanced placement courses or a vocational education program (8 NYCRR 200.4[d][2][ix][c]). The regulations also require that a student's IEP include needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, when appropriate, the acquisition of daily living skills and a functional vocational evaluation (8 NYCRR 200.4[d][2][ix][d]), as well as a statement of responsibilities of the school district (or participating agencies) for the provision of services and activities that "promote movement" from school to post-school.

Specific to the student's needs related to his ability to transition to post-secondary life, the August 2015 research evaluation report indicated that he experienced difficulty functioning adaptively in social and academic environments, and his overall adaptive functioning fell in the low range (Dist. Ex. 80 at p. 11).³⁸ He also showed weaknesses in communication (expressive, receptive, written) skills, daily living skills, interpersonal relationships, and coping skill domains (*id.*). Although strengths were seen in his play and leisure time habits the student's adaptive functioning was much lower than would be expected, given his cognitive and language abilities (*id.*). With regard to recommendations specific to the student's lower than expected adaptive skills, the evaluators indicated that it was "very important for [the student] to participate in transition skills programs and/or workshops in order to develop the skills necessary for him to function independently out in the community" (*id.* at p. 12). In the report the evaluators included a list of websites for community-based resources and literature but did not recommend that the student undergo additional transition-related assessments (*see* Dist. Ex. 80 at pp. 12-13).

The June 2016 IEP set forth some of the student's cognitive and academic achievement test scores and a description indicating that his "overall cognitive abilities [were] in the superior range," that he demonstrated "exceptional intellectual functioning" and that his "receptive and expressive language skills [were] superior" (Dist. Ex. 1 at pp. 3-4). The IEP also indicated that

³⁶ In addition, State regulations require districts to conduct vocational assessments of students age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]).

³⁷ These are supposed to be listed in the present levels of performance section of a student's IEP (*see* 8 NYCRR 200.4[d][2][ix][a]).

³⁸ At the time of the evaluation the student was 14 years, 9 months old (Dist. Ex. 80 at p. 1).

the student exhibited relative weaknesses in reading fluency, visual scanning, processing speed, and deficits in executive functioning (*id.* at p. 4). In consideration of the student's present levels of performance, the June 2016 CSE identified that the student's transition needs were to complete post-secondary education application forms and develop self-advocacy skills (*id.* at pp. 5-6). The IEP indicated that the recommended course of study was to "[c]omplete the necessary coursework required for graduation with a Regents high school diploma" (*id.* at p. 6). The student's post-secondary goals were to attend a four-year college, live in a college dormitory, and be competitively employed in his chosen field of study (*id.* at p. 5).³⁹ The June 2016 IEP included a coordinated set of transition activities to facilitate the student's movement from school to post-school activities (*id.* at p. 8). In the area of instruction, the IEP indicated that the student would receive strategies to advocate for learning needs in an education setting, review of the high school course syllabi for class preferences, and with a focus on courses to reach a Regents diploma (*id.*). Related services and community experiences included that the student would participate in counseling or training to develop appropriate social skills in community settings, and that he would have the opportunity to gain information about community services and activities (*id.*). To develop employment and other post-school adult living objectives, the IEP provided that the student would have the opportunity to meet with the district's transition coordinator to discuss options (*id.*). In the areas of acquisition of daily living skills and participation in a functional vocational assessment, the CSE determined that, considering the student's present levels of performance, services and activities in those areas were not needed at that time (*id.*).⁴⁰

Regarding the transition activities available at the district, the dean testified that she was responsible for the academic, social/emotional, and post high-school planning for students in grades nine through twelve (Tr. pp. 29, 56). She testified that tenth grade students take a "sophomore seminar program" once per week for five to six weeks during the third quarter of the school year, which is a small group that provides discussion about "values and ideas and things about what [students] might like after high school," including career and college majors (Tr. p. 43). As part of that program, students complete an on-line personality inventory through the Naviance website, and receive information relating to their interests and ideas about what they might be interested in later (Tr. pp. 43-44). The dean stated that the web based Naviance program was used in tenth grade for purposes of career planning, in eleventh grade for college planning and college searching, and in twelfth grade for the district to send out students' transcripts and letters of recommendation (Tr. p. 44). The hearing record showed that the student participated in the sophomore seminar and completed the career interest inventory through Naviance on February 6,

³⁹ At the time of the June 2016 CSE meeting, the student was 15 years, 7 months old, and had not identified a specific 4-year college or particular major area of concentration (Dist. Ex. 1 at pp. 1, 5).

⁴⁰ State guidance provides that "[a] functional vocational assessment is an assessment to determine a student's strengths, abilities and needs in an actual or simulated work setting or in real work sample experiences ("Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 51 [Dec. 2010]). The CSE chairperson testified that a functional vocational assessment is used for students who may need support within a job site to determine the level of need that they have, and is "typically" administered to students who were working toward a career development occupational skills credential or who participated in alternate assessment and had significant developmental or cognitive impairment (Tr. pp. 238-39). She opined that a functional vocational assessment was not appropriate for the student, because his goal was to attend college and it would be more appropriate for him to work on identifying the supports that would benefit him there (Tr. pp. 239-40).

2017 (Tr. pp. 44-45; Dist. Ex. 41 at pp. 11-15).

Review of the May 2017 IEP shows that it maintained the same transition needs and post-secondary goals from the June 2016 IEP (compare Dist. Ex. 1 at pp. 5-6, with Dist. Ex. 2 at pp. 5-6). Regarding transition activities, in the area of instruction, the May 2017 IEP indicated that the student would advocate for his testing and classroom accommodations in the general education classroom; his related services consisted of counseling to address his executive functioning issues; and his community experiences provided that the student would begin to research potential colleges and/or majors of interest (Dist. Ex. 2 at p. 8). The May 2017 CSE continued to offer the student the opportunity to meet with the district's transition coordinator to discuss post-school options, and determine that the student did not require the acquisition of daily living skills or a functional vocational assessment at that time (compare Dist. Ex. 1 at p. 8, with Dist. Ex. 2 at pp. 8-9).

The CSE reconvened in September 2017 (11th grade) and did not make changes to the student's transition needs, post-secondary goals, or transition activities from the May 2017 IEP (compare Dist. Ex. 2 at pp. 5-6, 8-9, with Dist. Ex. 3 at pp. 7, 9-10). On October 13, 2017 the parent emailed the CSE chairperson a detailed description of her disagreement with—among other portions of the September 2017 IEP—the sections relating to transition needs and transition activities (Dist. Ex. 31 at pp. 1, 3-4). In a letter to the parent dated the same day, the CSE chairperson advised that in early December, the district's deans would begin their "Junior Parent Meeting" and the "Junior Seminars"; offering the parent the opportunity to schedule a meeting with the district's transition coordinator, to provide information about the presence of other supports that may be available to the student as he prepared for post-secondary life (id. at p. 6). The CSE chairperson also offered to schedule a meeting with the parent to discuss the changes to the IEP she had mentioned in her email (id.).

The CSE reconvened in November 2017 with the district's transition coordinator in attendance, who according to the CSE chairperson, stated that she would get in contact with the student and his family to set up a transition meeting, which was subsequently held that month (Tr. pp. 192-93; Dist. Exs. 4 at p. 1). The CSE chairperson further testified that the CSE reconvened in January 2018, at which time the transition coordinator reported that, at the November 2017 transition meeting, she had provided the parents with an application to ACCES-VR, a "State agency" that provides post-secondary supports to students transitioning from high school to post-secondary life, and discussed identifying schools that provide supports in college (Tr. pp. 200-201, 385).⁴¹ The meeting information attached to the January 2018 IEP indicated that during the meeting the parent expressed concerns that the transition goals did not reflect the student's "needs and voice" and that the CSE agreed that the student, his teacher, and the family would complete a Level 1 career assessment (Dist. Ex. 5 at p. 1).⁴² The summary also indicated that the CSE chairperson, case manager, transition coordinator, the family, and the student would meet to review the assessments and discuss potential adjustments to the transition goals and needs; following that

⁴¹ The CSE chairperson testified that to her knowledge, the parents did not complete the ACCES-VR application (Tr. pp. 385-86).

⁴² The CSE chairperson testified that a Level 1 career assessment was "really just a way to get an understanding of a student's areas of interests, areas of non-interest, areas of strengths, areas of development (Tr. p. 203; see Dist. Ex. 36 at pp. 2-6).

the CSE would reconvene to discuss and update transition goals with any new information gained from the Level 1 career assessment and meeting with the student (Dist. Ex. 5 at p. 1; see Tr. pp. 201-03). The November 2017 and January 2018 CSEs did not make changes to the student's transition needs, post-secondary goals, or transition activities from the September 2017 IEP (compare Dist. Ex. 3 at pp. 7, 9-10, with Dist. Ex. 4 at pp. 7, 10, and Dist. Ex. 5 at pp. 7, 10).

By letter dated January 24, 2018, sent to the parents by email the next day, the CSE chairperson wrote that she was following up from the recent CSE meeting, and reiterated that the student was "currently a Junior and on track to graduate with a Regents Diploma in June of 2019 and pursue a college degree in a standard field of study" (Dist. Ex. 36 at pp. 1, 7). She continued that "[i]n these cases, a Level 1 transition assessment would not be indicated," however, in an effort to address concerns, the CSE chairperson sent the parents the Level 1 career assessment form for them to complete in preparation for the upcoming transition meeting (id.). In the letter, the CSE chairperson indicated that district staff would work with the student to complete the student portion of the Level 1 career assessment, and, once the parents' portion of the Level 1 career assessment was completed, meet to discuss the results and develop goals that included the student's perspective on his post-secondary goals and needs (id. at p. 7). The letter also recapped the parents' current concerns and how the district proposed to address them, including describing how the supports provided for in the student's IEP aligned with the recommendations from the January 2018 CSE meeting, such as the 5:1 learning resource class to improve his time management, organization, study skills, writing skills, and using text to answer questions (id.). Other IEP supports provided to the student included double time, access to Google classroom for notes, use of a computer for written assignments, a calculator, and a "special alert" regarding the frequency of communication between the student and his teachers (id.). According to the letter, a learning specialist worked with the student to develop his executive functioning skills, and the district had offered "a rotating one on one session with the building level executive functioning group," which the parents declined (id.). The CSE chairperson stated that "next steps" were for her to arrange a transition meeting with the student, his family, the special education teacher, the transition coordinator, and herself to review the Level 1 career assessment results and generate goals based upon the student's input (id. at p. 8). After the transition meeting was completed, the CSE chairperson indicated that the CSE would reconvene to share the transition information and develop transition goals (id.).

In emails to the CSE chairperson dated January 29 and January 30, 2018, the parent posed questions about the district's "Transition Assessment Protocol," which she indicated she would like to have a clearer understanding of prior to having the transition meeting (Dist. Ex. 37 at pp. 1-3). In response, the CSE chairperson indicated that typically "college bound" students work with the deans to transition to post-secondary, they use Naviance that includes "a number of assessments," and they participate in "Junior planning meetings and Seminar" (id. at p. 1). The CSE chairperson confirmed that the student had already completed the Naviance career assessment and the transition coordinator had been asked to meet with the student to provide additional advice about potential college programs and other services such as ACCES-VR (id.).⁴³

In an email dated February 1, 2018, the CSE chairperson sent to the parents, copies of the

⁴³ In the email the CSE chairperson noted that due to the student's performance and desire to attend a "typical college program" and the district staffs' opinion that he was "fully capable of achieving that goal" the need for the transition coordinator or State services was not indicated (Dist. Ex. 37 at p. 1).

portion of the Level 1 career assessment completed by the special education teacher and the student, and on February 4, 2018, the parent sent her completed portion of the Level 1 career assessment to the CSE chairperson (Dist. Exs. 38 at p. 1; 39 at p. 1). The CSE chairperson compiled the results and developed a worksheet that she sent to the parent prior to the transition meeting held on February 6, 2018 (Dist. Exs. 40; 41 at pp. 1-3). According to the CSE chairperson, at the transition meeting attended by the parents, the transition coordinator, the special education teacher, the school psychologist, and the dean, she "directly interviewed [the student] about where he [saw] himself for his future" (Tr. p. 208; see Dist. Ex. 5 at p. 1). She stated that the student reported that he wanted to attend a college that would support him, live either in a dorm or at home, that he was not sure of a particular career at that point, and that he needed to continue to complete his assigned work and have a good GPA and SAT scores (Tr. pp. 209-11; see Dist. Exs. 41 at pp. 4-7; 42 at p. 2).

On February 10, 2018, the CSE chairperson prepared and emailed the parent a summary of the transition meeting (Dist. Ex. 42). Over the next two days, the CSE chairperson and the parent corresponded by email regarding the parent's concerns about the Level 1 career assessment and the Naviance assessment, the conversation held at the transition meeting about the student's future goals, and the parent's opinion that the CSE meeting scheduled for February 12, 2018 should not be held without transition goals developed by the student (Dist. Ex. 43; 44). On February 12, 2018, the CSE chairperson emailed the parent and canceled the CSE meeting, indicating that, prior to rescheduling, the team would draft transition goals that she would share prior to the rescheduled program review, which would be based on the transition meeting and results of the transition assessments (Dist. Ex. 44 at p. 1).

In an email dated March 1, 2018, the CSE chairperson sent the parents the student's draft transition goals and transition activities and notified her that a program review to discuss the goals was scheduled for March 20, 2018 (Dist. Ex. 45). In an email dated March 13, 2018 to the CSE chairperson, the parent indicated that the parents would not be attending the March 20, 2018 meeting, as she had "already explained in [] previous emails the barriers that prevent this meeting from being appropriate or effective," which she opined had not been remediated (Dist. Ex. 46).

In a letter response to the parents from the director of special education and the CSE chairperson dated March 15, 2018, the district acknowledged the parents' recent email indicating their belief that a program review meeting would not be productive and their refusal to attend (Dist. Ex. 47 at p. 2). The letter indicated that the program review had been scheduled to review the completed transition assessments and draft transition goals that were of concern to the family at the last meeting (id.). District staff informed the parents that their decision to not attend the scheduled meeting meant that the current IEP would remain in effect until the committee met again (id.). Furthermore, the letter indicated that recent emails to the student's special education teacher and the dean indicated that the parents would be more comfortable having ongoing conversations about transition planning with those district staff on a sub-committee level, which the director of special education and the CSE chairperson had no objection (id.). The letter added however, that any changes to the current program and services would need to be considered by a full committee (id.).

The CSE chairperson testified that the post-secondary goals the student identified during the February 2018 transition meeting were consistent with the post-secondary goals included in the January 22, 2018 IEP—which remained in effect for the remainder of the 2017-18 school

year—and were appropriate for the student (compare Tr. pp. 208-22, with Dist. Ex. 5 at p. 7; see Dist. Ex. 6 at p. 1). In addition to the individualized transition assessment and planning activities through the CSE described above, the hearing record shows that, during the 2017-18 school year, the student also participated in a junior seminar, which the dean described as small groups of students who met during one class period per week for five to six weeks to discuss the "entire college planning process" (Tr. pp. 45-46, 53).⁴⁴

Turning to the district's planning efforts for the 2018-19 school year, on May 30, 2018 the CSE convened for an annual review and to develop an IEP for the student's senior year (Dist. Ex. 6). The meeting information summary attached to the May 2018 IEP reflected district staffs' perspective that the student's goals, accommodations, modifications and transition materials were appropriate and consistent with his needs, and the parents' expressed concerns about the successful implementation of the IEP, the appropriateness of the transition goals and activities, and the overall progress that the student was making (Dist. Ex. 6 at p. 1). The May 2018 IEP student transition needs and post-secondary goals remained consistent with those included in the January 2018 IEP (compare Dist. Ex. 5 at p. 7, with Dist. Ex. 6 at p. 8). Regarding the student's coordinated set of transition activities, the CSE determined that in the area of instruction the student would participate in the post-secondary application process, advocate for learning needs in an education setting, and communicate to his teachers the instructional support needed to further develop self-advocacy skills (Dist. Ex. 6 at p. 11). With regard to related services, the IEP transition activities indicated that the student required counseling services to address self-advocacy concerns (id.). In the area of community experiences, the IEP indicated that the student would visit college campuses and the Office of Disabilities to learn about the support services the college offered (id.). The May 2018 IEP transition activities in the areas of employment, post-school adult living objectives, and acquisition of daily living skills remained consistent with those from January 2018; indicating that the student would have the opportunity to meet with the district transition coordinator to discuss some post-school options and that considering the student's current level of performance, acquisition of daily living skills was not needed at that time (compare Dist. Ex. 5 at p. 10, with Dist. Ex. 6 at p. 11). The IEP indicated that the student had participated in a Level 1 career assessment that year and would be encouraged to participate in other interest inventories and meet with his dean to discuss post-secondary options and supports (id.). The dean also testified that in June 2018, she met individually with the student and one or both of the parents to develop a list of colleges and "talk about next steps for college planning," including the process, timelines, deadlines, and specific schools that may be of interest to the student (Tr. pp. 46-47; Dist. Ex. 27; see Dist. Ex. 19).

According to the meeting information attached to the August 1, 2018 IEP, on that day, the CSE reconvened, at which time the parents expressed their concerns about scheduling a transition planning meeting and further reported that they had completed their own transition surveys to better understand the student's needs (Dist. Ex. 7 at p. 1). The CSE chairperson testified that during the meeting, the special education teacher reported that he had developed his own transition assessments, which he offered to work on with the student over the summer or in September (Tr. pp. 222-23). Review of the August 2018 IEP revealed that the August 2018 CSE continued the student's transition needs, post-secondary goals, and coordinated set of transition activities from

⁴⁴ The dean further testified that in December 2017, a parent meeting was held that "introduce[d] the parents to the college process" (Tr. pp. 46, 53).

the May 2018 IEP (compare Dist. Ex. 6 at pp. 8, 11, with Dist. Ex. 7 at pp. 9, 12). In a September 4, 2018 email to the CSE chairperson, the parent requested that district staff refrain from administering "any assessments" to the student at that time (Dist. Ex. 56 at p. 1).

In an email to the CSE chairperson dated October 27, 2018, the parent requested that the district "administer transition assessments now to get a sense of [the student's] progress" and inform her of what assessments would be administered, when that would occur, and who would administer the assessments (Dist. Ex. 57). Subsequently, the parent and the CSE chairperson corresponded by email regarding the specific assessment to be administered and agreed that the AIR Self Determination Assessment (AIR assessment) would be conducted (Dist. Exs. 58-62). By December 14, 2018, the parents, the student, and some of the student's teachers had completed the AIR assessment, and the CSE chairperson emailed a "result sheet" to the parents on that day, indicating that the information would be reviewed at an upcoming program review scheduled for December 21, 2018 (Dist. Ex. 62 at p. 1).⁴⁵

In addition to the transition assessment that occurred in fall 2018, the dean testified that in late September or early October 2018 she met with the student and the parents and discussed the specific schools that the student would be applying to and corresponding paperwork (Tr. p. 48). Documentary evidence dated December 21, 2018 contained a list of schools that the student applied to and the acceptances and denials for admission the student received up to that point (Dist. Ex. 26).

On appeal the parents specifically object to the IHO's finding that the student did not have daily living skill deficits to be addressed via transition planning, and that the district had the burden to show that its transition plan addressed the student's "significant problems with self-advocacy and social skills." To the extent that the parents' refer to the August 2015 research evaluation, that report does indicate, based on parent reporting on the Vineland - II, that the student's daily living skills were in the low to moderately-low range, noting that the student did not help with household chores, did not clean up after himself, had some difficulty in "everyday tasks" such as making phone calls and carrying/storing money safely (Dist. Ex. 80 at pp. 10, 17). However, a review of the student's IEPs for the school years in question do not reflect that the student experienced needs related to daily living skills in the school setting, and the parents have not raised the sufficiency of the IEP present levels of performance as an issue on appeal (see Dist. Exs. 1 at pp. 3-4; 2 at pp. 2-4; 3 at pp. 3-6; 4 at pp. 3-6; 5 at pp. 3-6; 6 at pp. 3-7; 7 at pp. 3-8).⁴⁶

Regarding the student's social skill needs, review of the IEPs indicated that the June 2016 IEP provided the student with counseling services to address the annual goal of communicating

⁴⁵ The CSE chairperson testified that the December 21, 2018 program review meeting did not take place because the parents cancelled the meeting (Tr. pp. 237-38; see Dist. Ex. 63 at p. 1).

⁴⁶ There seems to be a discrepancy between how the district viewed activities of daily living and how they were viewed by the parent. For example, according to the CSE chairperson, daily living skills referred to activities such as hygiene, dressing, traveling independently, and cooking and that the student's daily living skills were never raised as a concern to her (Tr. p. 240). According to the evaluator who evaluated the student using the Adaptive Behavior Assessment System-Third Edition—an assessment measuring independent living skills—in March 2019, the student's main deficit was in the area of self-direction (Tr. pp. 1152-53). She testified that "[w]hen [the student] is helped to organize himself, he can pull off a lot of things very successfully. The problem right now, he is not self-directed, he is not self-organizing (Tr. 1155).

and interacting in a positive manner with peers to sustain relationships, a service that was modified in May 2017 to focus on addressing the student's executive functioning deficits (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 2 at pp. 6-7). During the 2017-18 school year, the CSE did not recommend annual goals or counseling services for social skills for the student (Dist. Exs. 3 at p. 8; 4 at p. 8; 5 at p. 8). However, according to the CSE chairperson, at the September 2017 CSE meeting it was agreed to remove counseling services because "social skills as a deficit was not raised as a major concern, nor did any of the documentation reviewed state that it was a major concern" and she recalled discussion that the student "at that point really did not engage" in the counseling services (Tr. pp. 252-53, 266-67; see Dist. Ex. 3). The special education teacher testified that as of September 2017, the student no longer needed the annual goal to communicate and interact with peers in a positive manner to sustain relationships, because he did not see any evidence of the student engaging in interactions with his peers that were not positive or good (Tr. pp. 623-25). The special education teacher stated that he had observed the student interacting with peers "lots of times" and that the student socialized appropriately (Tr. p. 581). He stated that the student had a very good sense of humor, he was always kind, got along with other students, and offered them help (Tr. pp. 581-82). According to the special education teacher and the student's social studies teacher during the 2017-18 school year, the student had friends in school, interacted with them appropriately outside of the classroom, and participated successfully in the class plays (Tr. pp. 582, 722-23, 981-82, 987-88, 1005). For the 2018-19 school year, the CSE recommended that the student receive counseling to increase his awareness and explore ways to identify emotions and functional ways to express emotions (Dist. Exs. 6 at p. 9; 7 at p. 10). Additionally, as referred to above, the IEPs and special education services for the years in question did acknowledge and address the student's need to improve his self-advocacy skills (Dist. Exs. 1 at pp. 6, 8; 2 at pp. 5-8; 3 at pp. 1, 7, 10; 4 at pp. 1, 7, 10; 5 at pp. 1, 7, 10; 6 at pp. 8, 11; 7 at pp. 9, 12).

Therefore, the evidence in the hearing record does not support the parents' position on appeal that the student's IEPs failed to include appropriate transition plans to address his daily living, self-advocacy, and social skill deficits and viewing the IEPs as a whole, the parents' concerns regarding those deficits were sufficiently addressed (see L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *15 [S.D.N.Y. Sept. 27, 2016][identifying that when the IEP is viewed as a whole, a "vague and generic" post-secondary transition plan did not deprive the student a FAPE, especially where deficiencies in post-secondary goals were mitigated by the inclusion "elsewhere in the IEP of goals . . . aimed at improving particular skills that would ultimately help [the student] achieve the . . . outcomes described in the transition plan"])). Additionally, as discussed above, the hearing record reflects that the district demonstrated it was responsive to the parents' various requests and concerns about the student's transition assessments and services, even if the CSEs' determinations did not comply with the parents' preferences. Review of the hearing record reflects that the student's overarching post-secondary goal throughout high school was to graduate with a Regents diploma, which as of the last day of hearing in early June 2019 he was on track to receive, having met all of the New York State requirements (Tr. pp. 1675-76; Dist. Exs. 1 at p. 6; 2 at p. 6; 3 at p. 7; 4 at p. 7; 5 at p. 7; 6 at p. 8; 7 at p. 9).⁴⁷ Based upon the evidence in the hearing record, I see no reason to disturb the IHO's findings that the transition assessments, post-

⁴⁷ The CSE chairperson testified that post-secondary goals are not measured in the same way as a benchmark "IEP goal" (Tr. p. 300). Rather, the guidance counselor and dean measure whether a student made adequate progress toward post-secondary goals by assessing a student's credit acquisition, "appropriate sequencing," and passage of Regents examinations per the New York State regulations (Tr. pp. 300-01).

secondary goals, and coordinated set of transition activities for the 2016-17, 2017-18, and 2018-19 school years did not deny the student a FAPE.

E. Parent Counseling and Training

The IHO found that the combination of the district's failure to recommend parent counseling and training until the November 2017 IEP and, after parent counseling and training was recommended, to demonstrate that it offered the service to the parents, was a gross violation of the IDEA that resulted in a denial of a FAPE for all three school years at issue (IHO Decision at pp. 79, 84-85, 88, 93, 97, 105, 111-113). As a result of the IHO's finding of a denial of FAPE based on lack of parent counseling and training, the IHO ordered the district to provide compensatory parent counseling and training, in 36 monthly, one-hour sessions, at a rate not to exceed \$200 per hour (*id.* at p. 118).

Initially, while the district appeals from the IHO's findings that the lack of parent counseling and training constituted a denial of a FAPE, the district does not appeal from the IHO's determinations that the district did not recommend or offer parent counseling and training. Rather, the district alleges that the IHO erred in finding that the parents requested parent counseling and training, and in awarding parent counseling and training as compensatory education in light of the student's graduation from high school and without finding that the lack of parent counseling and training hindered the student's ability to benefit from his educational program or the parents from being able to support the district's implementation of the student's IEPs.

As a factual matter, the district is correct in that the parent's email correspondence cited by the IHO did not reference parent counseling and training (IHO Decision at p. 112; Dist. Ex. 33 at p. 1). However, in an earlier email exchange in October 2017, the CSE chairperson suggested that parent counseling and training could help with the concerns raised by the parent regarding the student's independent living skills and emotional struggles (Dist. Ex. 30 at p. 4). Additionally, notwithstanding the factual error, the district's argument that the parents did not request parent counseling and training fails as regardless of whether the parents requested it or not, the district was required to offer it. 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).

Nevertheless, even if the district's failure to recommend or deliver parent counseling and training during the 2016-17, 2017-18, and 2018-19 school years amounted to a denial of FAPE, as determined by the IHO, in consideration of the purpose of parent counseling and training and the student's graduation from high school with a Regents diploma, compensatory parent counseling and training is not warranted.⁴⁸

The Second Circuit has held that compensatory educational services may only be awarded to a student who is no longer eligible for special education by reason of age or graduation where the district has committed a gross violation of the IDEA, which resulted in the "denial of, or

⁴⁸ Because New York requires parent counseling and training without regard to whether an IEP specifically recommends it, an IEP's failure to provide for parent counseling and training will not ordinarily result in a denial of a FAPE (*F.L.*, 553 Fed. App'x at 7; *M.W. v. New York City Dep't of Educ.*, 725 F.3d 131, at 141 [2d Cir. 2013]).

exclusion from, educational services for a substantial period of time" (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French, 476 Fed. App'x at 471; Somoza, 538 F.3d at 109 n.2, 113 n.6; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; Garro v. State of Conn., 23 F.3d 734, 737 [2d Cir. 1994], citing Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989], aff'g prior holding in Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]).

The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]. Accordingly, an award of compensatory education 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"]; 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. of Fayette County 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"]).

In addition, given the fact that graduation and receipt of a high school diploma are generally considered to be evidence of educational benefit (Pascoe v. Washington Cent. Sch. Dist., 1998 WL 684583, at *4, *6 [S.D.N.Y. Sept. 29, 1998]; see also Rowley, 458 U.S. at 207 n.28; Walczak, 142 F.3d at 130), the receipt of which terminates a student's entitlement to a FAPE (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; 200.4[i]), when taken together with the Second Circuit's standard requiring a gross violation of the IDEA during the student's period of eligibility (see Garro v. State of Conn., 23 F.3d 734, 737 [2d Cir. 1994]; Mrs. C., 916 F.2d at 75), it is a rare case where a student will graduate with a high school diploma and yet still qualify for an award of compensatory educational services (see, e.g., Application of the Bd. of Educ., Appeal No. 18-081; Application of the Bd. of Educ., Appeal No. 17-081; Application of a Student with a Disability, Appeal No. 16-079; Application of a Student with a Disability, Appeal No. 13-215; Application of a Student with a Disability, Appeal No. 13-110; Application of a Student with a Disability, Appeal No. 11-159).

In this matter, the parents have not asserted that the district improperly graduated the student (see IHO Ex. II), and the hearing record reflects that the student graduated with a Regents diploma and gained admission to several colleges and universities (Tr. pp. 49, 847, 935; 1333-36).⁴⁹ Instead, the parents assert that although the student graduated, achieved good grades during the three school years at issue, and was accepted into several colleges, the student failed to demonstrate adequate progress toward several of his annual goals, notably those goals which addressed the student's time management, organization, and executive functioning. However, having found that the programs offered by the district were appropriate in the areas discussed above related to the student's progress, annual goals, and transition assessments and services, the only remaining area of contention is the lack of parent counseling and training for the school years at issue and the IHO's award of 36 hours of parent counseling and training as compensation for the district's failure to recommend or implement that service.

With respect to this issue, parent counseling and training is intended as a service to support a student's education "by ensuring that the parents are equipped with the skills and knowledge necessary to continue and implement the student's IEP at home" (M.W. v. New York City Dep't of Educ., 725 F.3d 131, at 141 [2d Cir. 2013]). State regulation requires that districts provide parents of students with autism and students placed in certain special classes with "parent counseling and training . . . for the purpose of enabling parents to perform appropriate follow-up intervention activities at home" (8 NYCRR 200.6 [h][8]; 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]). Accordingly, for a student who is no longer eligible for special education, and will not have an IEP, it is unclear what the purpose of providing parent counseling and training as a compensatory service would entail. In addition, the parents do not articulate how the lack of parent counseling and training affected the student's ability to obtain an educational benefit during the school years at issue to the extent that another service might be awarded to compensate the student.

As the remedy sought, parent counseling and training, is meant to assist parents of school aged children with disabilities by supporting the implementation of those students' IEPs, and the student in this instance has graduated and is attending college, and the district is no longer legally required to create an IEP for the student by reason of graduation, parent counseling and training is not an appropriate form of compensatory education.

VII. Conclusion

In summary, the evidence in the hearing record does not support the parents' assertion that the IHO erred in finding a denial of FAPE based on the district's failure to consider the privately obtained evaluative information or based on the transition assessments conducted by or transition plans developed by the district. The hearing record does support the district's position that the IHO erred in finding the student's annual goals indicated a lack of progress as the annual goals were modified from year to year and the student's educational history, as a whole, showed that the

⁴⁹ The final hearing day was June 6, 2019, just prior to the student's graduation date (Tr. pp. 1528-1732). The record was not supplemented with a copy of the student's diploma or final transcript; however, there is no dispute that the student graduated from high school.

student was making progress. Further, while the hearing record provides no basis to depart from the IHO's finding that the district did not implement parent counseling and training, compensatory parent counseling and training is not an appropriate remedy under the circumstances presented.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO decision dated October 7, 2019, is modified, by reversing those portions which found that the district did not offer the student a FAPE based on the repetition of goals and lack of progress and which ordered that the district provide the parent 36 hours of parent counseling and training.

**Dated: Albany, New York
February 3, 2020**

**STEVEN KROLAK
STATE REVIEW OFFICER**