



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 16-004

**Application of the BOARD OF EDUCATION OF THE KATONAH-LEWISBORO UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

### **Appearances:**

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, Daniel Petigrow, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational program recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2013-14 and 2014-15 school years was not appropriate. The parents cross-appeal from those portions of the IHO's decision which denied their request for compensatory education and to be reimbursed for their son's tuition costs at the Foundation School for the 2014-15 school year. The appeal must be sustained. The cross-appeal must be dismissed.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the

opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

The student, whose classification as a student with autism is not in dispute, exhibits cognitive, academic, communication and social skill deficits, and has a history of engaging in interfering behaviors (see Dist. Ex. 1; Joint Exs. 10; 12; 16). During the 2010-11 school year, the student was enrolled in an out-of-district public school program (Joint Ex. 1 at pp. 2-3). The student returned to the district for the 2011-12 school year, and received a program consisting of

a 12:1+1 special class and related services including speech-language therapy, occupational therapy (OT), and parent counseling and training, as well as behavior intervention support, assistive technology, and home-based special education teacher services (see Joint Exs. 2 at pp. 1, 16-18; 3 at pp. 1, 17-18). The CSE recommended a similar program for the 2012-13 school year (Joint Exs. 4 at pp. 1-2; 5 at pp. 1, 16-17).<sup>1</sup>

A behavior analyst who consulted with the district conducted a functional behavioral assessment (FBA) of the student over five days between November 10, 2011 and December 6, 2011 (Tr. pp. 869, 872; Joint Ex. 12). The resultant December 2011 FBA stated that the student required prompting to interact with peers but was able to interact with adults more spontaneously (Joint Ex. 12 at p. 1). The FBA identified patterns in antecedents, consequences, and baseline data to monitor efficacy of selected strategies (id. at pp. 2-4). The FBA also identified behaviors to be targeted for decrease and increase, as well as potential reinforcers and competing contingencies to be utilized in the development of a behavioral intervention plan (BIP) (id. at p. 5). The behavior analyst opined that the student may have learned that mild aggression was an efficient method to obtain reinforcement in some settings, and that functional communication training would reduce his tendency to engage in mild aggression (id.). The behavior analyst determined that the student's mild aggressive behaviors, which included pushing, scratching, and pinching, were motivated and maintained by avoidance from demands (id. at p. 7).

According to the student's special education teacher, at the beginning of the 2012-13 school year the student's behavior was "quite good" and he did not need as many behavioral interventions (Tr. pp. 554-55). The special education teacher stated that the student's aggressive behaviors escalated over time beginning in fall 2012 (Tr. pp. 554-55, 586-88, 599). On February 4, 2013, the student punched his teacher in the stomach and was suspended for five days by the school principal (Tr. pp. 134, 356; see Joint Ex. 24).<sup>2</sup> On February 18, 2013 the parents agreed to an IEP amendment—memorialized in an IEP dated February 20, 2013—to change the student's program to home instruction with related services "pending a placement search for a more intensive placement to meet the student's needs following increasingly physically aggressive behaviors (hitting, pinching) to staff" (Joint Ex. 6 at pp. 1-2; see Joint Ex. 25). Subsequently, the district submitted referral packets to a number of day programs and the student was accepted by two of the placements, including a Board of Cooperative Educational Services (BOCES) (Joint Exs. 25; 26; 27; 28). The parents visited these placements in March 2013 and rejected both as inappropriate for the student (Tr. pp. 140, 327, 1228-29, 1245-58, 1272; Joint Exs. 28, 42). The student remained out of school for the remainder of the 2012-13 school year (Tr. p. 1994).

By letter dated May 29, 2013, a BOCES central intake chairperson notified the district's director of special services that based upon a review of the student's IEP, supporting

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<sup>1</sup> Although the district recommended home-based behavior intervention support services for each of the school years at issue in this matter, the hearing record reflects that the parents refused, instead requesting after school instruction, to which the district acquiesced (Tr. pp. 106-07, 117-18, 125-27, 136-37; Joint Exs. 3 at p. 2; 4 at p. 2; 5 at p. 17; 6 at p. 16; 7 at p. 16; 8 at p. 19; 9 at p. 17).

<sup>2</sup> The district subsequently determined that the behavior was a manifestation of the student's disability, and expunged the suspension from the student's educational record (Tr. pp. 366, 368; Joint Ex. 25 at p. 2).

documentation, and an intake and observation by a BOCES social worker and a BOCES special education teacher, BOCES believed it could provide "a suitable and appropriate" special education program for the student, and specifically recommended a particular classroom placement in the Applied Intensive Intervention Model (AIIM) program (Joint Ex. 28 at pp. 2-3; see Dist. Ex. 7 at pp. 1-2).

Also on May 29, 2013, a CSE convened for the student's annual review and to develop the student's IEP for the 2013-14 school year (Joint Ex. 7). The May 2013 CSE utilized evaluative data from an October 19, 2011 speech-language evaluation, a November 30, 2011 psychological evaluation, a May 2, 2012 psychological addendum, and a March 26, 2012 educational evaluation (id. at pp. 3-4; see Joint Exs. 10; 13; 18; 19). The May 2013 CSE recommended an 8:1+2 special class in the BOCES AIIM program for the 2013-14 school year, as well as individual OT, individual speech-language therapy, group counseling, and parent counseling and training (Joint Ex. 7 at pp. 1-2, 16). In addition, the May 2013 IEP provided program modifications including refocusing and redirection, home-based behavior intervention support, and development of a BIP for the student (id. at p. 16). The IEP indicated that the student needed a BIP "to assist with learning functional communication rather than aggressive and non-verbal ways of communicating" (id. at p. 7). The parents rejected the recommendation made by the May 2013 CSE, and the student did not return to school during the 2013-14 school year but continued to receive home instruction from the district (Tr. pp. 1994-95).

A CSE convened on December 13, 2013 to review an October 2, 2013 private psychological evaluation report submitted to the CSE by the parents (Joint Ex. 8 at p. 1; see Joint Ex. 31).<sup>3</sup> The December 2013 CSE also utilized information from educational progress reports, a July 15, 2013 neurological evaluation report, an August 9, 2013 OT progress report, an August 16, 2013 speech-language progress report, and an October 2, 2013 psychosocial evaluation report (Joint Ex. 8 at p. 5; see Joint Exs. 29; 30; 32; 33; 34; 35; 38). The annual goals, program, and services recommended in the December 2013 IEP are identical to those in the May 2013 IEP; the difference between the IEPs is that some evaluative information was removed and information from the October 2013 private psychological evaluation report was added to the present levels of performance section of the IEP (compare Joint Ex. 7, with Joint Ex. 8). The December 2013 IEP contained nearly identical information regarding the student's behaviors and strategies to address them as the May 2013 IEP, some of which corresponded with the strategies suggested in the October 2013 psychological evaluation report (compare Joint Ex. 7, with Joint Ex. 8; see Joint Ex. 31). The parents continued to reject the recommendation that the student attend the BOCES AIIM program, and requested that the CSE place the student at the Foundation School, an out-of-State nonpublic school; the CSE responded that it could not consider the Foundation School because it was not State-approved (Joint Ex. 8 at p. 3). The parents requested that the district continue to provide the student with home instruction until the dispute was resolved (id.).

A CSE convened on June 6, 2014 to develop the student's program recommendation for the 2014-2015 school year (see Joint Ex. 9). The June 2014 CSE utilized evaluative data from

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<sup>3</sup> The evaluator who conducted the October 2013 evaluation participated in the CSE meeting by telephone (Tr. pp. 160-61; Joint Ex. 8 at p. 1; see Joint Ex. 31).

the November 2011 psychological evaluation, the March 2012 educational evaluation, the May 2012 psychological addendum, and the October 2013 psychological evaluation (Joint Ex. 9 at pp. 3-4; see Joint Exs. 10; 18; 19; 31). Consistent with the May and December 2013 IEPs, the June 6, 2014 IEP recommended an 8:1+2 special class in the BOCES AIIM program, as well as related services of individual OT, individual speech-language therapy, group counseling, and parent counseling and training, along with program modifications including refocusing and redirection, daily home-based behavior intervention support, and development of a BIP for the student (Joint Ex. 9 at pp. 1-2, 16-17). The parents rejected the recommendation and informed the CSE that they intended to seek reimbursement for the costs of the student's tuition at the Foundation School (id. at p. 2). The student attended the Foundation School for the 2014-15 school year (Tr. pp. 1994-95, 1999).

### **A. Due Process Complaint Notice**

By amended due process complaint notice dated July 30, 2014, the parents requested an impartial hearing and alleged that the district denied the student a free appropriate public education (FAPE) for the 2012-13, 2013-14 and 2014-15 school years (IHO Ex. 8).<sup>4</sup> The parents alleged that the district failed to develop or implement an appropriate BIP for the student for all three years (id. at pp. 7-10). In addition, the parents contended that the May 2012 IEP did not provide appropriate reading supports (id. at p. 7). The parents also asserted that the May 2013 and June 2014 IEPs were not appropriate because the recommendation for the BOCES AIIM program was not appropriate (id. at pp. 9-10). The parents next contended that the home instruction provided to the student between February 2013 and June 2014 was inappropriate and not in the least restrictive environment (id. at p. 9). Further, the parents alleged that the June 2014 IEP was not appropriate because it did not include intensive reading services or adequate speech-language services (id. at p. 8).<sup>5</sup>

For relief, the parents requested an award of compensatory education for the district's failure to offer the student an appropriate program during the 2012-13 and 2013-14 school years (IHO Ex. 8 at p. 12). Finally, the parents requested reimbursement for the costs of the student's tuition at the Foundation School for the 2014-15 school year (id. at p. 13).

### **B. Impartial Hearing Officer Decision**

After prehearing conferences on July 22, 2014 and August 4, 2014, the parties proceeded to an impartial hearing on September 16, 2014, which concluded on July 2, 2015, after 10 days of proceedings and two telephone conferences (Tr. pp. 1-2129; see IHO Exs. 1; 3).<sup>6</sup> In a

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<sup>4</sup> The parents initially requested the impartial hearing by due process complaint notice dated May 28, 2014 (IHO Ex. 6).

<sup>5</sup> The parents also asserted claims that the district retaliated against them in violation of the IDEA and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794[a]).

<sup>6</sup> Counsel for the parents withdrew from representing them after the ninth day of the proceedings for reasons not fully explained in the hearing record (Feb. 4, 2015 Tr. pp. 1-12). The parents were unsuccessful in their attempts to obtain new counsel and completed the impartial hearing pro se (Tr. pp. 1803-30).

decision dated December 28, 2015, the IHO found that the district failed to provide the student with a FAPE for the 2012-13, 2013-14, and 2014-15 school years (IHO Decision at pp. 23-26). Initially, the IHO found that by not updating the December 2011 FBA or developing a BIP, the district failed to address the student's increasingly interfering behaviors during the 2011-12 and 2012-13 school years (*id.* at pp. 23-24). The IHO further held that the district's suspension of the student in February 2013 violated the Education Law (*id.* at p. 24). In addition, the IHO found that both the district and parents were "negligent" to permit the student to receive home instruction for the remainder of the 2012-13 school year after his suspension and the entirety of the 2013-14 school year (*id.* at pp. 24-25). The IHO also held that the BOCES AIIM program was not appropriate for the student for the 2012-13 school year because BOCES staff testified that at the time of the student's father's visit in March 2013, the only opening available was in a classroom that was not appropriate for the student (*id.* at p. 25).<sup>7</sup>

With respect to the 2013-14 and 2014-15 school years, the IHO found that although the CSE recommended that the student attend the BOCES AIIM program, the "record [was] somewhat unclear as to whether [the student] was formally accepted into the AIIM program," much less the specific classroom testified to by district staff (IHO Decision at pp. 25-26). In any event, the IHO found that the AIIM program "utilized a generic behavior management program" and that the record did not support a finding that the AIIM program "was geared toward students with behavioral anomalies" or "was uniquely and explicitly geared to deal with a student . . . who had been out of school because of behaviors" (*id.*). Accordingly, the IHO held that the district's recommendations for both school years were not appropriate (*id.*).

Turning to the parents' request for reimbursement for compensatory services, the IHO held that the parents did not establish that they privately obtained any educational services for the student during those school years (IHO Decision at p. 30). Furthermore, the IHO found that the hearing record established that the parents declined behavioral supports, made the student available for home instruction only at limited times, and dismissed the student's home-based speech-language pathologist and occupational therapist (*id.*). In addition, the IHO found that although the district failed to initially comply with the agreement to provide the student with home instruction, the district made up all of the missed services (*id.*). Finally, the IHO found that to the extent the student missed services that were not made up, it was because of the parents' actions, and denied the parents' request for compensatory education (*id.*).

With regard to the parents' request for reimbursement for the costs of the student's tuition at the Foundation School, the IHO found that although the hearing record contained testimony regarding the school's structure, there was "absolutely no testimony" showing how the Foundation School provided instruction to the student specifically designed to meet his needs (IHO Decision at pp. 32-33). Further, the IHO found the parents offered no testimony regarding the student's academic progress at the Foundation School, the math program used with the student, that the reading program was distinct from that used in the district, or that he received necessary related services (*id.* at p. 33). Next, the IHO found that the Foundation School's program for the student was inappropriate because it failed to provide the student with a BIP

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<sup>7</sup> Although not clear, the IHO may also have found that the reading services recommended for the student for the 2012-13 school year were not appropriate (IHO Decision at p. 23).

despite his "problematic behaviors" (*id.*). The IHO concluded that the hearing record lacked objective evidence to show that the Foundation School was an appropriate placement for the student and thus denied the parents' request for tuition reimbursement (*id.* at p. 34). Furthermore, the IHO held that even if the Foundation School was appropriate for the student, equitable considerations would have required "a significant, if not a total, reduction" in any award of tuition reimbursement (*id.* at pp. 38-39).

Next, the IHO denied the parents' request for the district to provide transportation to the Foundation School for the 2014-15 school year or reimbursement for the costs of transportation (IHO Decision at pp. 36-37). The IHO noted that the district offered to provide transportation and found that although the parents "may have concerns about the adequacy" of the transportation offered by the district, there was no record basis for a finding that the offered transportation was inappropriate (*id.*).<sup>8</sup>

#### **IV. Appeal for State-Level Review**

The district appeals and argues that the IHO erred in finding that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years.<sup>9</sup> In particular, the district argues that it developed appropriate IEPs for the student during the years at issue that considered all of the student's needs, including his aggressive behaviors. The district asserts that the IEPs for both school years contained sufficient detail regarding the student's interfering behaviors, and strategies to manage those behaviors, such that they were appropriate even though the CSE did not conduct an updated FBA or develop a BIP. The district also argues that the recommendation for the BOCES AIIM program was appropriate because the AIIM program was "specifically geared" toward students with behavioral issues like the student in this case and the specific classroom recommended for the student included students with similar needs and abilities. The district further contends that the IHO erred in finding that the record was unclear whether the student was formally accepted into the AIIM program for the 2013-14 and 2014-15 school years.

In an answer, the parents assert that the IHO properly determined that the district did not offer the student a FAPE, and argue that the district did not provide appropriate reading support or develop a BIP to address the student's needs. The parents argue that the student was not provided with a program in the least restrictive environment while receiving home instruction, the district was inconsistent in its provision of related services during that time, and the district improperly terminated the student's home instruction services. The parents also argue that the BOCES AIIM program was not appropriate for the student, the specific classroom recommended was too low functioning, and the proposed classroom environment would be "over stimulating" for the student. In a cross-appeal, the parents request reversal of those portions of the IHO's decision which denied their requests for compensatory education and reimbursement for the costs of the student's tuition at the Foundation School for the 2014-15 school year, as well as

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<sup>8</sup> The IHO also dismissed the parents' claims for retaliation under the IDEA and section 504 (IHO Decision at pp. 39-41).

<sup>9</sup> The district does not appeal the IHO's determination that it failed to offer the student a FAPE for the 2012-13 school year, and that determination has become final and binding on the district (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

other specified relief. The parents submit two exhibits in support of their answer and cross-appeal.

In an answer to the parents' cross-appeal, the district alleges that it made multiple attempts to schedule home instruction services for the student which were frustrated by the parents, and it provided the student with all services due under the February 2013 IEP, such that additional compensatory services are not warranted. The district also argues that the Foundation School was not appropriate to meet the student's needs. Further the district argues that the parents unreasonably failed to cooperate with the district's attempts to provide home instruction services to and locate an appropriate placement for the student. Finally, the district asserts that the SRO should not consider the additional evidence offered by the parents.<sup>10</sup>

## V. Applicable Standards

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

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

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<sup>10</sup> The district also asserts that the parents failed to timely serve a notice of intention to seek review and their answer and cross-appeal does not conform to pleading requirements set forth in State regulations. The requirement for a notice of intention to seek review serves the purpose of ensuring the timely filing of the hearing record with the Office of State Review, and "shall not be required when the board of education initiates an appeal from an impartial hearing officer's decision" (8 NYCRR 279.2[c]). To the extent the district claims that the parents' memorandum of law was not verified, the regulations governing practice before the Office of State Review require that all pleadings, not all submissions, be verified, and the regulations clearly distinguish memoranda of law from pleadings (8 NYCRR 279.7; 279.8). Additionally, while the answer does not clearly indicate that it contains a cross-appeal, the parents' request for specific relief and reversal of the IHO's decision was sufficiently pleaded. Even if the district was correct, none of the asserted defects would warrant dismissal of the pro se parents' cross-appeal.

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 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]).

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

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

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Preliminary Matter: Additional Evidence**

The district, in its answer to the parents' cross-appeal, argues that the parents' additional evidence should not be considered. In particular, the district objects to consideration of an updated version of the student's service plan from the Foundation School (Parent Ex. JJ), because there is no authentication of handwriting on the document and the parents had "ample opportunity" to submit evidence of the student's progress at the Foundation School during the impartial hearing. The district additionally argues against the inclusion of Parent Exhibit VV as a "purposeful" attempt to have evidence considered by an SRO that was presented to, but not considered by, the IHO.

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this case, the updated version of the student's service plan from the Foundation School is not necessary to render a determination and will not be considered. However, as acknowledged by the district, Parent Exhibit VV was entered into evidence by the IHO for a limited purpose and it is accordingly part of the hearing record (see Tr. pp. 2023-25). The fact that the IHO admitted the exhibit into evidence for only a limited purpose does not prevent its consideration by a State Review Officer for that same purpose.<sup>11</sup>

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<sup>11</sup> The district is cautioned that it is required to submit a true and complete copy of the hearing record and that the failure to do so in the future may constitute a basis for dismissal of the district's appeal (8 NYCRR 279.9[a], [c]; see 8 NYCRR 200.5[j][5][vi]).

## **B. 2013-14 School Year**

The district asserts that, contrary to the IHO's finding, it developed an appropriate IEP for the 2013-14 school year and considered all of the student's needs, including his "aggressive behaviors." The parents allege that the IEP for the 2013-14 school year was not "adequately constructed" to meet the student's educational needs, especially with respect to the student's behavioral issues.

On May 29, 2013, the CSE convened for the student's annual review and to develop an IEP for the 2013-14 school year (Joint Ex. 7 at p. 1). The May 2013 CSE utilized evaluative data from the following reports: an October 19, 2011 speech-language evaluation, a November 30, 2011 psychological evaluation, a May 2, 2012 psychological addendum, and a March 26, 2012 educational evaluation (*id.* at pp. 3-4; *see* Joint Exs. 10; 13; 18; 19). The May 2013 CSE recommended an 8:1+2 special class in the BOCES AIIM program for the 2013-14 school year, as well as individual OT three times per week for 30 minutes; individual speech-language therapy three times per week for 30 minutes; group counseling one time per week for 30 minutes; and parent counseling and training two times per month for 30 minutes (Joint Ex. 7 at pp. 1, 16). In addition, the May 2013 IEP recommended program modifications including refocusing and redirection, and development of a BIP for the student (*id.* at p. 16).

### **1. Consideration of Special Factors—Interfering Behaviors**

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; *see* 8 NYCRR 200.4[d][3][i]; *see also* *R.E.*, 694 F.3d at 190-91; *A.C.*, 553 F.3d 165 at 172).

To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]). In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a [BIP] must be documented in the IEP" (*id.*). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]).

The Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP adequately addresses the student's problem behaviors (id.). Similarly, the district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the May 2013 IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d at 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

Initially, the hearing record shows that the district last conducted an FBA of the student in December 2011 (Joint Ex. 12), and although the student's special education teacher during the 2011-12 and 2012-13 school years testified that behavioral interventions were developed for the student as a result of the FBA, she did not receive "a full BIP" resulting from the FBA (Tr. pp. 439-46, 572). Given that the student's behavioral needs intensified during the 2012-13 school year such that in February 2013 he was placed on home instruction due to aggression, the hearing record supports the IHO's finding that the district's failure to conduct a new FBA and develop a BIP during the 2012-13 school year constituted procedural violations of State regulations. However, at the time of the May 2013 CSE meeting the student had been out of school and receiving home instruction services for approximately three months, such that conducting an FBA in the home environment would have provided little guidance regarding the student's behaviors in a school setting, and had diminished utility in developing a BIP to address those behaviors in a school setting, the type of setting the CSE intended to and ultimately recommended for the student to attend (Joint Exs. 6 at pp. 1-2; 7 at pp. 1-2, 16, 19; 25). Nonetheless, as discussed below, the May 2013 IEP adequately identified the student's behavioral needs and provided strategies and special education services to address the student's interfering behaviors that in the recent past had been observed while he attended a special class program in the district, such that the procedural violation arising from the failure to develop a BIP did not rise to the level of a denial of a FAPE (R.E., 694 F.3d at 190, 193; A.C., 553 F.3d at 172).<sup>12</sup>

The May 2013 IEP reported that the student demonstrated increasing incidents of "very serious problem behaviors" including serious maladaptive and socially offensive behaviors, disruptive, inattentive, uncooperative and aggressive behavior which interfered with his learning, as well as physically aggressive behaviors such as pinching and hitting staff, and escape behaviors when academic demands increased (Joint Ex. 7 at pp. 1, 6-7). The May 2013 IEP stated that in November 2011, the student was unable to be assessed due to behavior issues such as crying and grabbing the teacher's arm, was highly distractible, and required verbal and hand over hand assistance (id. at p. 5; Joint Ex. 18 at p. 1). In April 2012, the student reportedly was able to play alongside his peers and take turns with verbal cues, responded well to positive

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<sup>12</sup> This should not be taken as an excusal of the district's failure to comply with State regulations by conducting an updated FBA and developing a BIP for the student when his behaviors intensified.

reinforcement and clear limit setting, and participated in group counseling to address his social skills (*id.* at p. 6). Further, the student's OT sessions in April 2012 focused on sensory strategies to promote on task behaviors (*id.*). The May 2013 IEP additionally stated that in April 2012, the student was more attentive to testing, and although he still required cues to stay on task, he was compliant and completed all tasks presented to him (*id.* at p. 5). The May 2013 IEP indicated that in April 2012 behavior management strategies utilized in the classroom included use of a token economy and differential reinforcement of other behaviors (DRO) (*id.* at pp. 5-6).<sup>13</sup> In addition, the May 2013 IEP noted that the student occasionally exhibited aggression in the form of pinching; however, the aggression occurred in isolation and not during a "tantrum," and the student was easily redirected (*id.* at p. 6). The May 2013 IEP stated that the student was motivated by social attention, desirable activities, and food, became more aggressive when demands were placed on him, and needed structure, predictable routines, and pre-setting for transitions (*id.* at p. 7). The May 2013 IEP also indicated that tangible items (e.g., games and toys), edibles (e.g., cookies and chips), and social opportunities were used as reinforcers (*id.* at p. 5). The May 2013 IEP noted that although a behavior modification system was used to increase the student's appropriate behaviors and communication skills, he responded inconsistently to behavior management which impacted his learning and communication skills; however, opportunities for "choice" activities and visits to the sensory room were effective in reducing his frustration (*id.* at pp. 4, 7; *see* Tr. p. 305). The May 2013 IEP present levels of performance stated that the student's behaviors affected his communication skills, and that he benefitted from a "high rate of positive reinforcement, repetition of target skills until mastery, frequent review of mastered skills, and a direct, structured teaching style" (Joint Ex. 7 at p. 5). The May 2013 IEP reflected that the student required intensive and frequent reinforcement for appropriate behaviors, that he responded well to repetitive teaching procedures in conjunction with behavior management techniques, and that he benefitted from clear and concrete positive reinforcement and boundary setting to increase the incidence of appropriate behaviors and correct responses (*id.*). The May 2013 IEP also noted that the student's physical aggression towards staff had recently escalated, and that the student required a behavior intervention plan to assist in learning functional communication skills instead of using aggression and nonverbal communication (*id.* at p. 7). According to the May 2013 IEP "[o]pportunities for choice activities and frequent use of [the] sensory room continued to help alleviate sensory needs and reduce some frustration," specifically noting that the student required a sensory diet that allowed for frequent visits to a sensory room (*id.* at pp. 1, 4, 5, 7).

The May 2013 IEP included five annual goals and eight corresponding short-term objectives directly addressing the student's behaviors and social/emotional skills (Joint Ex. 7 at pp. 11-12). Specifically, one annual goal required the student to verbally identify feelings when provided with a "fill in statement," a skill to be used during regular classroom activities with faded prompting (*id.* at p. 11). Another annual goal required the student to identify effective methods to cope with emotional stress or difficult situations rather than use "self-destructive methods" such as withdrawal, tantrums, or acting-out behaviors (*id.* at p. 12). Other annual goals were designed to improve the student's awareness of others, ability to appropriately initiate play

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<sup>13</sup> The May 2013 IEP described DRO as rewarding the student if an undesired behavior did not occur during a designated time period (Joint Ex. 7 at p. 6).

activities and interactions with others, and display an awareness of social cues and respond appropriately (id. at pp. 11-12).

The May 2013 IEP also identified supplementary services/program modifications including refocusing and redirection throughout the day due to the student's difficulty with attention and need for prompts to stay on task in all subject areas (Joint Ex. 7 at p. 16). In addition, the May 2013 IEP recommended a BIP for when the student exhibited increased impulsivity; and stated that the student's behavior management plan included "a high rate of reinforcement, frequent use of verbal praise, the use of a token economy and opportunities to exchange tokens for preferred items and activities" (id.).

The district director of special services testified that the May 2013 CSE recommended the BOCES AIIM program because "[i]t seemed to have all of the elements that we felt [the student] really benefitted from while he was [in the district elementary school he attended for the 2011-12 and 2012-13 school years]. It also seemed to have the behavioral supports that [the student] needed" (Tr. pp. 145-46). The principal of the BOCES AIIM program participated in the May 2013 CSE meeting by telephone, and described AIIM as an "intensive language-based communication program for students with and without autism," that used an applied behavioral analysis (ABA)/verbal behavior methodology (Tr. pp. 782-83, 786). The BOCES principal testified that "[t]hroughout the day we are a behavior management program, so data is taken consistently every time the students engage in a problem behavior, we analyze the behavior and we look at the antecedent, the behavior and the consequence," and especially the function of the behavior so staff could determine a consequence (Tr. pp. 783-84). The AIIM program worked with a consultant and his team who trained BOCES staff in behavioral methodologies (Tr. pp. 785-86). According to the BOCES principal, the consultant was "published," "evidence-based," and "consistently involved with the [AIIM] program," making observations of the students and staff, and conducting workshops (id.). The BOCES principal testified that, similar to the student, the students in the BOCES AIIM program exhibited problem behaviors when task demands were placed on them, when they were expected to transition, and when they requested something that they could not have (Tr. p. 793). The BOCES principal concluded that it appeared "from his packet" that the student in this case had similar educational and behavioral needs (Tr. pp. 793-94; see Joint Ex. 26). Finally, the BOCES principal opined that the student was an "appropriate fit" for the class into which he had been accepted (Tr. p. 840).

In addition to the supports inherent in the BOCES AIIM program, the May 2013 IEP recommended that the student receive three sessions per week of individual speech-language therapy, three sessions per week of individual OT, and one session per week of small group counseling in the classroom (Joint Ex. 7 at p. 16).<sup>14</sup> The May 2013 CSE further recommended that the student receive 120 minutes of in-home behavior intervention support daily (id.).<sup>15</sup>

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<sup>14</sup> The May 2013 IEP included annual goals and short-term objectives to address—among other areas—the student's needs regarding communication, motor, and social/emotional skills (Joint Ex. 7 at pp. 9-15).

<sup>15</sup> The IEP also offered the parents two monthly sessions of parent counseling and training (Joint Ex. 7 at p. 15).

So long as an IEP sufficiently identifies the student's behavioral impairments, and includes strategies for managing them, the failure to develop a BIP does not rise to the level of a denial of a FAPE (see T.M., 752 F.3d at 169 ). Accordingly, the May 2013 CSE's failure to comply with State regulations regarding the development of a BIP did not result in a denial of a FAPE for the 2013-14 school year, as the May 2013 IEP otherwise identified and addressed the student's problem behaviors with appropriate supports and strategies as described above (see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 730-31 [2d Cir. May 8, 2015]; T.M., 752 F.3d at 169; C.F., 746 F.3d at 80; F.L., 553 Fed. App'x at 6-7; M.W., 725 F.3d at 140-41; R.E., 694 F.3d at 190; A.C., 553 F.3d at 172-73).

## **2. BOCES AIIM 8:1+2 Special Class Placement**

The May 2013 CSE recommended placement in the BOCES AIIM 8:1+2 special class (Tr. pp. 705, 731; Dist. Ex. 7 at pp. 1-2, 16-17, 19; Joint Ex. 28).<sup>16</sup> The May 2013 IEP indicated that teaching strategies used in the AIIM program were "especially designed to address the unique learning styles of children with [a]utism [s]pectrum [d]isorders," and employed two researched-based approaches, namely, ABA and "Structured Teaching" (Joint Ex. 7 at p. 6). According to the IEP, students in the AIIM program were taught in both individual and group settings based upon their assessed needs and IEP objectives (id.). The IEP also reflected that in the AIIM program, language and communication was emphasized throughout the day in the classroom, and students had the opportunity to develop communication skills in group, individual, and naturally occurring settings that were "carefully planned" by instructional staff (id. at pp. 6-7). In the AIIM program, classrooms were organized with designated areas set apart for play, work, and transition activities, with new skills taught during individual one-to-one sessions scheduled throughout the day (id. at p. 7). The IEP further indicated that "[i]nstructional performance data [wa]s recorded daily to determine student progress and to inform decisions about the effectiveness of instructional procedures" (id. at p. 7).

The May 2013 IEP reflected that in addition to classroom based instruction, the BOCES AIIM program incorporated community-based instruction to help students develop skills necessary for participation in the community, and opportunities for interaction with typically developing peers during lunch and school assemblies (Joint Ex. 7 at p. 2; see Tr. pp. 781-82). Finally, the May 2013 IEP stated that parents were an integral part of the BOCES program, parent training was available, and that parent involvement and participation was ongoing through the use of communication logs, parent meetings, ongoing conferences, parent support groups, and open school nights (id.).

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<sup>16</sup> As noted above, the IHO stated that the "record [was] somewhat unclear as to whether [the student] was formally accepted into the AIIM program for the 2013-14 and 2014-15 school years" (IHO Decision at pp. 25-26). The hearing record shows that the student was accepted into the BOCES AIIM program for the 2013-14 school year by letter dated May 29, 2013 (Tr. p. 789; Joint Ex. 28 at pp. 2-3). The BOCES principal testified that because the student was accepted into the AIIM program for the 2013-14 school year and because his "basic profile" had not changed, there was no need to conduct an additional intake or send another acceptance letter for the 2014-15 school year; and she believed the BOCES program continued to be appropriate for the student (Tr. pp. 801-02, 840; see Tr. pp. 832-35).

The BOCES school social worker who conducted the parent visit and intake interview testified that BOCES staff worked with students who displayed aggression "all the time" (Tr. p. 701). The social worker stated that the BOCES staff determined that the student was a "good fit," as he displayed similar functioning levels and behaviors to the other students in the program, and that the program could meet his needs (Tr. pp. 704, 711). Finally, the social worker testified that the BOCES program utilized ABA, and that some of the staff was "SKIP" trained (Tr. pp. 768-69).<sup>17</sup>

The psychologist who conducted the October 2013 private evaluation of the student visited the BOCES program on April 9, 2014 (Tr. pp. 825-26, 1729; Parent Ex. UU). In an undated letter to the parents, the psychologist stated that one classroom was composed primarily of children with autism who were able to use some functional communication, and that the children in the class exhibited similar abilities to the student in this case (Parent Ex. UU at p. 1). In addition, the psychologist testified that some of the students in the class had visual schedules on their desks, a strategy which could be beneficial to the student in this case (Tr. pp. 1768-69). The psychologist informed the parents that based on her observation, the BOCES program into which the student had been accepted, "could potentially" be an appropriate placement for him (Tr. p. 1782; Parent Ex. UU at p. 2).<sup>18</sup>

In light of the foregoing evidence, the hearing record supports the district's recommendation for an 8:1+2 special class placement in the BOCES AIIM program. The recommended program, together with annual goals and short-term objectives, related services, and strategies to address the student's behavioral needs, offered the student adequate individualized support and was reasonably calculated to enable the student to receive educational benefits for the 2013-14 and 2014-15 school years. While I can sympathize with the parents, who desire an ideal program for their son, it does not follow that the district has failed to meet the more modest standard required of it by the IDEA, because 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). The IDEA 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, 873 F.2d at 567 [citations omitted]).

### **3. December 2013 IEP**

As noted above, the CSE reconvened in December 2013 to consider the October 2013 private psychological evaluation report (Joint Ex. 8 at pp. 1-2). Then-current information the

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<sup>17</sup> It appears that the witness was referring to "Strategies for Crisis Intervention and Prevention" (see Guidelines for SCIP-R, Office of Mental Retardation and Developmental Disabilities [Feb. 1998], available at [https://www.opwdd.ny.gov/sites/default/files/documents/guidelines\\_for\\_scip-r\\_1998\\_0.pdf](https://www.opwdd.ny.gov/sites/default/files/documents/guidelines_for_scip-r_1998_0.pdf)). These strategies are described in the hearing record as techniques used to diffuse situations and try to prevent a child from hurting himself or somebody else (Tr. pp. 768-69).

<sup>18</sup> The student's father testified that when he visited the BOCES AIIM program in March 2013, he was shown a classroom comprised of lower-functioning students; however, the hearing record establishes that for the 2013-14 school year, the student was accepted into a classroom comprised of students who would have constituted an appropriate functional group for the student (Tr. pp. 702, 724-25, 1250-1254; Joint Ex. 28 at p. 2).

evaluator provided about the student's functioning reflected on the IEP indicated that his adaptive behavior composite score was in the low range, and he exhibited a tendency to become frustrated and not participate in tasks that were too demanding (Joint Ex. 8 at p. 1).<sup>19</sup> Information from the private psychological evaluation report reflected in the IEP indicated that visual structure/organization and visual cues could be very helpful in maintaining the student's attention and understanding of what was expected of him, by providing him indicators of activity endpoints that would enable him to see what and how much he had to do (*id.* at p. 8). Additional suggestions from the private evaluator included in the IEP were use of a daily schedule to show the student the sequence of the day to prepare for transitions, and picture schedules that visually demonstrated each step needed to complete a task (*id.*). The evaluator indicated and the IEP reflected that the student should be provided with positive structured opportunities to socialize with peers and adults (*id.*).

The October 2013 psychological report also indicated, as reflected in the IEP, that the student's attention was variable during testing, and that he did best when language demands were minimal (Joint Ex. 8 at p. 2; Joint Ex. 31 at p. 3). The evaluator further stated that the student was cooperative, polite and well behaved during the assessment, and did not exhibit aggressive or disruptive behavior (Joint Ex. 31 at pp. 4-5).

The BOCES principal participated in the December 2013 CSE meeting by telephone, and indicated that instruction in the AIIM program was "differentiated for each student" (Joint Ex. 8 at pp. 1-2). According to the meeting information attached to the IEP, students in the AIIM program were learning to interact with peers and adults, and some needed prompting, guidance, and modeling (*id.* at p. 2). The December 2013 IEP also reflected the BOCES principal's statement that students' reading skills were assessed when beginning the program and that an organized sequence comprised their daily lessons, with an emphasis on reading fluency (Joint Ex. 8 at p. 2). The December 2013 CSE continued to recommend the 8:1+2 special class in the BOCES AIIM program (*id.* at pp. 19-20, 22).

As described above, the narrative of problem behaviors and behavior management strategies utilized by the school were well-defined in the May and December 2013 IEPs, and the evidence contained in the hearing record supports a finding that the IEP adequately addressed the student's behavior with appropriate supports and strategies (see E.H., 611 Fed. App'x at 730-31; T.M., 752 F.3d at 169; C.F., 746 F.3d at 80; F.L., 553 Fed. App'x at 6-7; M.W., 725 F.3d at 140-41; R.E., 694 F.3d at 190; A.C., 553 F.3d at 172-73).

## **C. 2014-15 School Year**

### **1. June 2014 IEP**

The June 2014 CSE continued to recommend a BIP and social/emotional annual goals for the student as well as the 8:1+2 special class BOCES AIIM program as the student's placement

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<sup>19</sup> At the December 2013 CSE meeting, the CSE chairperson discussed that the private psychological evaluation report stated that the student did not exhibit aggressive behaviors; however, district records included information that contradicted that statement (Joint Ex. 8 at pp. 2-3).

for the 12-month 2014-15 school year (Joint Ex. 9 at pp. 8, 11-13, 16-19). According to the meeting information summary attached to the June 2014 IEP, the BOCES principal provided an overview of the 8:1+2 special class BOCES AIIM program the CSE had previously recommended (*id.* at p. 1). She indicated that individual instruction was available for some students depending on need, and that students working at similar academic levels may also work in small groups as appropriate (*id.* at p. 2).<sup>20</sup>

As noted above, in the absence of an updated FBA and a BIP, the IEP must adequately identify the problem behavior and prescribe ways to manage it. The June 2014 IEP, including the description of the student's behaviors, identification of strategies to address the behaviors, and placement recommendation, was nearly identical to the above-discussed 2013-14 IEPs and therefore provided adequate information about how to address the student's behavior needs, regardless of the absence of an updated FBA and BIP. Similarly, for the reasons set forth above the BOCES AIIM program continued to be appropriate to meet the student's needs for the 2014-15 school year.

## **2. Reading Services**

Although not clearly raised in their cross-appeal, the parents asserted in their due process complaint notice that the June 2014 IEP failed to provide the student with adequate reading supports (IHO Ex. 8 at p. 8). As discussed below, and contrary to the parents' assertion, the hearing record does not indicate that the student required services from a reading specialist.

The parents expressed concern in the past about the student's progress in reading and had asked the district to provide the student with the services of a reading specialist (Tr. pp. 98, 121; Joint Exs. 4 at p. 2; 5 at p. 2). The district determined that direct services from a reading specialist were not necessary to address the student's needs as he presented with a number of cognitive, social, and learning issues that interfered with his ability to receive instruction (Tr. p. 124). As an alternative, the district recommended that the elementary reading teacher consult with the student's classroom teacher once per month (Tr. p. 124; Joint Ex. 5 at p. 17).

During the 2011-12 and 2012-13 school years, the student received instruction in the Edmark reading program, which according to the student's special education teacher, was "sight word based," did not include phonics, and was "geared toward" special education students (Tr. pp. 388, 394, 398-99, 421). The special education teacher testified that because the student was able to memorize material read to him, and the "multi-sensory program" was not working for him, the Edmark program was an appropriate program to use (Tr. pp. 421-22, 612-13).<sup>21</sup>

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<sup>20</sup> During the June 2014 CSE meeting the student's father indicated that an unnamed BOCES AIIM staff member approached him during the March 2013 intake and commented that the program was not appropriate for the student (Joint Ex. 9 at p. 1). The BOCES principal indicated that she was not aware of that comment, and continued to believe the program was appropriate for the student (*id.* at pp. 1-2; *see* Tr. pp. 167, 174).

<sup>21</sup> In addition, it is worth noting that the Foundation School staff also determined that the Edmark program was appropriate for the student (Tr. pp. 1602-03).

The district school psychologist opined that it was "highly unlikely" that the student would be able to learn to read (Tr. p. 634). The psychologist stated that the tests he used to evaluate the student in May 2012 were "highly correlated" with reading achievement, and that based on his "extremely low" performance, the student's reading achievement would likely be very low as well (Tr. pp. 634-35). In addition, he stated that the student's "level of engagement," or ability to focus and attend was similarly poor, and that he would have difficulty acquiring academic skills, such as reading (Tr. p. 635). Finally, the school psychologist cited research which indicated that students who are not fluent readers by third grade are unlikely to attain that skill (Tr. pp. 635-36). However, the school psychologist also asserted that despite the improbability of the student attaining reading skills, it did not mean the district should not make an effort to teach the student to read (Tr. p. 647).

The hearing record indicates that information available to the May 2013, December 2013, and June 2014 CSEs reflected that the student's cognitive and adaptive abilities were significantly impaired (Joint Exs. 7 at pp. 3-4; 8 at pp. 5-7; 9 at pp. 3-4; 18; 31 at pp. 2-6). The student's reading skills reflected in the May 2013 IEP indicated that he successfully sequenced three pictures and identified what was first, next, and last (Joint Ex. 7 at p. 4). According to the May 2013 IEP, the student read using a whole word, memorization, and multisensory approaches (id.). The IEP further indicated that the staff used stories for listening comprehension tasks, and after listening to a story the student showed the ability to answer questions by pointing to pictures while dictating a prompted response (id.). The IEP also noted that the student inconsistently identified letters and sounds (id.). At the time of the December 2013 CSE meeting, the student's home-based special education teacher reported that the student verbally identified 14 out of 26 capital letters, matched 10 functional sight words independently, and followed along by pointing to words in a story as the book was being read (Joint Ex. 38). The special education teacher also reported that activities involving matching words to pictures were difficult for the student to complete (id. at p. 3). Home-based special education teacher reports from May 2014 indicated that at that time, the student worked on naming letters left to right, labeling lower and uppercase letters, identifying letter sounds, improving comprehension using picture cues, and sequencing letters of his name (Dist. Ex. 17 at pp. 6, 7, 9-11).

The May 2013 and June 2014 IEPs included annual goals to improve the student's ability to match 15 words to their corresponding pictures, identify 10 functional sight words, and name 10 letters and corresponding sounds (Joint Exs. 7 at pp. 8-9; 9 at p. 9).<sup>22</sup> At the December 2013 CSE meeting, the BOCES principal indicated that the AIIM program used the Scientific Research Assessment (SRA) reading program, which entailed assessing pre- and post-test reading abilities, and using an organized sequence of daily lessons with an emphasis on reading fluency (Tr. pp. 782-84, 799; Joint Ex. 8 at p. 2).<sup>23</sup> She further indicated that AIIM staff was trained in the "Reading Mastery program" and that reading instruction was integrated throughout the day (Joint Ex. 8 at p. 2). The BOCES principal testified that she discussed why she believed

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<sup>22</sup> The June 2014 CSE meeting information summary attached to the IEP indicated that the CSE reviewed the student's goals from the prior school year, and discussed their appropriateness in light of the student's current level of functioning (Joint Ex. 9 at p. 1).

<sup>23</sup> The BOCES principal further testified that the SRA program is a "functional," "multisensory" reading program that can be used with children at a prereading level (see Tr. p. 800).

the SRA reading program would be beneficial to the student at the December 2013 CSE meeting (Tr. pp. 799-800).

Based on the above, while I sympathize with the parents' concerns regarding the student's slow progress with respect to learning to read, the hearing record does not reflect that the student required intensive reading services beyond those provided by the district to receive educational benefits, and, in addition, supports a finding that his progress was commensurate with his abilities.

#### **D. Request for Compensatory Education**

The parents, in their verified answer and cross-appeal, request that the portion of the IHO's decision denying the parents an award of compensatory education be overturned. The district, in its answer to the parents' cross-appeal, asserts that the district fully made up any home services owed the student. Further, the district argues, if there were any services that the student did not receive, it was because of the parents' actions.

The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

Subsequent to the February 2013 suspension of the student, his IEP was amended by an agreement signed by the parents on February 18, 2013, to change his program to home instruction until a more appropriate program was found (Tr. pp. 357-58; see Joint Exs. 25; 26). The February 2013 amendment stated that the student would receive home instruction for two hours per day, speech-language therapy five times per week for 30 minutes, parent counseling

and training twice per month for one hour, counseling once per week for 30 minutes, and OT three times per week for 30 minutes (Tr. pp. 136-37; Joint Exs. 6 at pp. 1, 15-16; 25 at p. 1).

According to a May 7, 2013 letter from the parents to the district director of special services, the student had not received any of the related services of OT or speech-language therapy in the home as of the date of the letter (Joint Ex. 43). According to the May 15, 2013 response to the parents from the district, the parents refused the offered related services because "they could not be provided in the time frames" the parents proposed (Tr. pp. 355, 1278; Joint Ex. 44). The district director of special services testified that there was difficulty scheduling a mutually agreeable time for the related services to be provided after the student was suspended for the remainder of the 2012-13 school year, but that the district subsequently calculated the amount of services from the date the student was suspended until the date that the BOCES program was recommended, in order to determine the appropriate amount of makeup services (Tr. pp. 147-49; Joint Ex. 7 at p. 2; see Dist. Ex. 24A).

After the student was suspended, he continued to receive special education home instruction for two hours per day (Tr. pp. 136-37, 1157, 1235, 1269, 1258-60, 1343-47). The student was provided OT in the home from July 2013 until January 2014 (Tr. pp. 1352-55; Dist. Ex. 7), special education services from July 2013 through June 2014 (see Dist. Exs. 8-18), and speech-language services from July 2013 until October 2014 (Dist. Ex. 6A). The parents and the district representative confirmed that the student was provided make up services during summer 2014 (Tr. pp. 368-69, 1371-72, 1865-67; Dist. Ex. 24A). According to billing records and session notes provided by the district, the services the student received in the home between July 2013 and July 2014 totaled 49.5 hours of speech-language therapy, 27 hours of OT, and 413.5 hours of special education (see Dist. Exs. 6A; 7-18).

The parents testified that the student received special education, OT, and speech-language therapy in the home during the 2013-14 school year (Tr. pp. 1235-37). However, the parents also stated that the parents terminated services by the speech-language therapist in October 2013, when the therapist alleged the student pushed the therapist (Tr. pp. 148, 1237-40, 1262, 1326-27, 1358; Dist. Ex. 3). The parents asserted that speech-language therapy was discontinued because the therapist was "unable to manage" the student (Tr. pp. 1260-62, 1325-27). However, the parents acknowledged that although the speech therapist was available to return to provide services to the student, the parents refused to permit her to return (Tr. pp. 345, 1326-27; Joint Ex. 8 at p. 3). According to the parent, the occupational therapist informed him that the OT services ended in January 2013 because it was the "end of the contract" (Tr. pp. 1353-54).

In this case, because the district offered the student a FAPE for the 2013-14 and 2014-15 school years, and made up any outstanding services owed to the student for the period he was recommended to receive home instruction during the 2012-13 school year, there is no basis appearing in the hearing record on which to premise an award of compensatory services. As found by the IHO, to the extent the student did not receive all of the services the district was prepared to provide, it was the parents' actions that caused any such deprivation, precluding an award of compensatory services (IHO Decision at p. 30; see French v. New York State Educ. Dep't, 476 Fed. App'x 468, 471-72 [2d Cir. Nov. 3, 2011]). Furthermore, in addition to offering

the student a FAPE for the 2013-14 school year, after the parents rejected the recommendation for the BOCES AIIM program the district continued to provide home instruction to the student, which the hearing record reflects included instruction in the areas of academics (math and reading), social skills, language skills, and activities of daily living/motor skills (Dist. Exs. 8-18).<sup>24</sup>

## **VII. Conclusion**

Having determined that the evidence in the hearing record demonstrates that the district offered the student a FAPE for the 2013-14 and 2014-15 school years, there is no need to consider whether the student's unilateral placement at the Foundation School was appropriate or whether equitable considerations support the parents' request for relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated:**            **Albany, New York**  
                         **May 9, 2016**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**

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<sup>24</sup> Contrary to the IHO's determination, the hearing record reflects that the parents privately obtained speech-language therapy and OT for the student during the 2013-14 school year (Tr. pp. 1356-57, 1691-92, 1990; Joint Ex. 8 at p. 2; Parent Ex. RR). However, because the district offered the student a FAPE for the 2013-14 school year there is no basis appearing in the hearing record to award reimbursement for these privately-obtained services (see French, 476 Fed. App'x at 472).