The University of the State of New York

The State Education Department
State Review Officer
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No. 12-142

Application of the BOARD OF EDUCATION OF THE MASSAPEQUA 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:
Guercio & Guercio, LLP, attorneys for petitioner, Randy Glasser, Esq., of counsel

Lewis Johs Avallone Aviles, LLP, attorneys for respondents, Jennifer M. Frankola, 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 found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of their son's tuition at the New York Institute of Technology Vocational Independence Program (NYIT-VIP) for the 2010-11 school year. The parents cross-appeal from the IHO's determination which denied their request for compensatory education relative to the 2009-10 school year. The appeal must be dismissed. 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]). If aggrieved by a State-level decision, a party may seek judicial review in a federal or state court of competent jurisdiction (20 U.S.C. § 1415[i][2]).

III. Facts and Procedural History

The student attended a district public school and received special education programming and services from first through sixth grades (Tr. pp. 2507-09).[1] From the seventh though eleventh grades, pursuant to the CSE's recommendations, the student attended an out-of-district public school (Tr. pp. 2509, 2511-12). For the 2008-09 school year (eleventh grade), the student attended the out-of-district public school for half of the school day and a Board of Cooperative Educational Services (BOCES) program that focused on retail skills (BOCES retail program) for the other half (Tr. pp. 354-55, 380, 386-87, 405).

On April 2, 2009, the CSE convened to conduct the student's annual review and to develop an IEP for the 2009-10 school year (Dist. Ex. 3 at pp. 1, 6). Finding that the student remained eligible for special education as a student with autism, the April 2009 CSE recommended a 12:1+1 special class placement at an out-of-district "life skills" career development program (CDP-II), five times per week for three hours per day, as well as adapted physical education in a 12:1+1 special class two times per week for 40 minutes (id. at p. 1). In addition, the April 2009 CSE recommended that the student attend a vocational program offered through BOCES (see id. at p. 5). The April 2009 CSE also recommended related services of: one 30-minute session per week of small group (5:1) counseling in the school; two 40-minute sessions per week of small group (5:1) speech-language therapy in the student's special class; and two 60-minute sessions per month of individual parent counseling and training in the student's home (id. at pp. 1-2). The April 2009 CSE also recommended that the student receive job coaching services twice weekly in sessions of two hours and fifteen minutes in a small group (5:1) at the student's job site (id. at p. 1). The April 2009 CSE also recommended that the student receive special transportation and participate in alternate assessments (id. at pp. 1-2). Although the April 2009 IEP indicated that the student was ineligible for extended school year (ESY) services, the IEP also stated that, "to prevent substantial regression," the CSE recommended that the student attend "a summer program," which would consist of the assistance of a job coach at a yet to be determined job site (id. at pp. 1, 6). The April 2009 IEP also noted that, if such an arrangement at the student's job site did not "work out," the CSE submitted "a packet" to an ESY program and would "reconvene to discuss the recommendations for the summer" (id. at p. 6). The April 2009 IEP also included post-secondary goals and a coordinated set of transition activities that included instruction and functional vocational assessment activities (id. at pp. 5-6).

In a May 28, 2009 letter to the parents, the district requested consent from the parents to amend the April 2009 IEP, without a formal CSE meeting, to include an ESY program (Dist. Exs. 5; 6). On May 29, 2009 the parents provided such signed consent, resulting in an amendment to the April 2009 IEP to include an ESY program consisting of a 6:1+1special class five times per week for five hours per day (Dist. Ex. 6). Subsequently, an amended IEP dated June 2, 2009 was

[1] The hearing transcripts are consecutively paginated; however, there is a gap in numbering between the transcript of the April 11, 2011 and April 13, 2011 hearing dates (see Tr. pp. 1-789, 844-4122). The electronic copies of the transcripts in the hearing record have additional pagination problems. All citations to the hearing record in this decision are to the paper copies.

generated that included the agreed upon changes, as well as corrections of clerical errors, a copy of which was provided to the parents by letter dated June 22, 2009 (Dist. Exs. 7 at pp. 1-2, 6; 9).

According to CSE chairperson 3,[2] approximately three days after the student's ESY program and services started in July 2009, the parents telephoned her and indicated that they had identified a different summer program for the student and requested that the student's placement be changed (Tr. p. 3964; see Tr. p. 1513; Dist. Ex. 14 at p. 6). In a July 16, 2009 letter to the district, the parents requested a CSE meeting for the purposes of changing the student's "placement" for 2009-10 school year (Parent Ex. H).

On August 4, 2009, the CSE convened to review the student's IEP (Dist. Ex. 11 at pp. 1, 6; see Tr. pp. 1239-40). The August 2009 IEP sets forth that, in response to the parents' request in July 2009 that the district consider placing the student at NYIT-VIP, the district communicated with their State Education Department regional representative at the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) about the parents' request and was advised that NYIT-VIP was a post-secondary program that students attend when they graduate high school (Dist. Ex. 11 at p. 6; see Tr. pp. 1236-37). The August 2009 IEP noted that the CSE also discussed the student's current placement at the out-of-district CDP-II and the parents' position that "things ha[d] changed" and their request that other educational placements be explored (Dist. Ex. 11 at p. 6). Based on the information provided by the parents, the student's teacher, and other members of the CSE, the August 2009 CSE agreed that the student was appropriately placed in his current educational and vocational settings; however, due to the parents' concerns, the August 2009 CSE agreed to explore other placement options for the student (id.).

The student continued to attend the CDP-II and the BOCES retail program for the duration of the 2009-10 school year (see Tr. pp. 491, 2557; see also Dist. Exs. 35 at p. 1; 37; 38 at p. 1; 39; 80; 81). The CSE met on October 9, 2009 at the parents' request and updated the student's annual goals (Dist. Ex. 14 at pp. 1, 6-7). The CSE met on December 22, 2009, as required by a corrective action plan imposed by the State Education Department, to review the student's IEP and to schedule a classroom observation of the student by the district supervisor for secondary special education for the purpose of determining if the student "may be appropriate for consideration of an in-district program and in preparation for the next CSE to review" (Tr. pp. 2825-26; Dist. Exs. 17 at pp. 1, 6-7; 49).[3] The CSE met on February 2, 2010 to review the student's IEP and agreed to the parents' request for an independent neuropsychological evaluation and an independent speech-language

[2] There were multiple CSE meetings leading up to and over the course of the 2009-10 school year (see Dist. Exs. 3; 7; 11; 14; 17; 19; 21). Four different CSE chairpersons served on the various CSEs, two of whom testified at the impartial hearing. For the purposes of ease of identification, the chairperson who served on the April and June 2009 CSEs will be referred to as "chairperson 1" (see Dist. Exs. 3 at p. 6; 7 at p. 6), the chairperson who served on the August 2009 CSE and who testified at the impartial hearing as "chairperson 2" (see Tr. pp. 1228-1349; Dist. Ex. 11 at p. 6), the chairperson who served on the October and December 2009 CSEs and who testified at the impartial hearing as "chairperson 3" (see Tr. pp. 1507-1624, 1635-1821, 3922-89; Dist. Exs. 14 at p. 6; 17 at p. 6), and the chairperson who served on the February and May 2010 CSEs as "chairperson 4" (Dist. Exs. 19 at p. 6; 21 at p. 6).

[3] The hearing record indicates the parents filed a complaint with the State Education Department because the BOCES retail program did not have a copy of the student's IEP at the start of the 2009-10 school year (Dist. Exs. 17 at pp. 6-7; 49 at pp. 2-3).

evaluation (Dist. Ex. 19 at pp. 1, 6). The CSE met on May 27, 2010 for to review the students IEP and to review a recent speech-language evaluation and a central auditory processing evaluation (Dist. Ex. 21 at pp. 1, 6; see generally Dist. Exs. 40; 42). The May 2010 CSE updated the student's annual goals for the 2009-10 school year but otherwise made "no changes to [the student's] present programs or services" (id. at p. 6). Between February and May 2010, the student underwent a variety of evaluations and assessments in preparation for developing the student's IEP for the 2010-11 school year (see generally Dist. Exs. 38-43).

On June 21, 2010, the CSE convened to conduct the student's annual review; however, because the parents were not able to attend the meeting, the June 2010 CSE developed a "summer program" for the student's ESY that recommended services to commence July 12, 2010 and terminate on August 20, 2010 (Dist. Ex. 23 at pp. 1, 6; see Tr. pp. 1603-04). The June 2010 CSE recommended parent counseling and training two times per month in the student's home and 1:1 job coaching services for three weekly sessions of two hours and fifteen minutes to be provided at three retail stores (Dist. Ex. 23 at pp. 1-2). The student did not attend the program proposed in the June 2010 IEP and instead worked part-time independently at a restaurant (see Tr. pp. 714-17, 2622-23).

The CSE convened on July 30, 2010 develop the student's IEP for the 2010-11 school year (Dist. Ex. 26 at p. 1). The July 2010 IEP specified that the CSE "agreed to hand-schedule the 2010-11 school program to include [a] BOCES internship, community experiences and a reading program/academics" (id. at p. 7). The July 2010 IEP included a recommendation that the student attend a 12:1+2 special class placement 4 times per day for 41-minute periods at a district public high school (id. at p. 1). The July 2010 CSE also referenced the student's participation in a vocational program through BOCES (id. at pp. 6-7). As a support for school personnel on behalf of the student, the July 2010 CSE recommended the support of a teacher assistant (5:1) in general education classes (id. at p. 2).[4] For related services, the July 2010 CSE recommended: one 41-minute session of 1:1 counseling per week; one 41-minute session of small group (5:1) counseling per week in an integrated setting; one 41-minute session of 1:1 speech-language therapy per week in an integrated setting; two 41-minute sessions of small group (5:1) speech-language therapy per week in an integrated setting; and two 60-minute sessions of 1:1 parent counseling and training per month in the home (id. at pp. 1-2). In addition, the July 2010 CSE recommended special transportation, participation in the alternate assessments, and program modifications and accommodations, including refocusing and redirection, preferential seating, directions repeated, access to air conditioning in the primary classroom pending medical note, multi-step tasks, and access to class notes (id. at pp. 2-3). In addition, the July 2010 CSE recommended testing accommodations, including extended time (2.0), breaks as needed, test passages, questions, items and multiple choice responses read to the student, spelling requirements waived, and use of a word processor or a scribe (id. at p. 3).

[4] The district supervisor for secondary special education, who attended the July 2010 CSE meeting, testified that, consistent with a specific recommendation included in the May 2010 neuropsychological evaluation report, the July 2010 CSE determined the student should attend physical education and elective classes in a general education setting with the support of a teacher assistant and speech-language pathologist (Tr. pp. 953-54, 1452; see Dist. Ex. 43 at p. 10; see also Dist. Ex. 26 at p. 7).

In an August 6, 2010 letter to the district, the parents described their understanding of the July 2010 CSE meeting and noted "concerns and considerations" for the upcoming school year (Dist. Ex. 53 at pp. 1-2). Specifically, the parents stated that the CSE "came to consensus" on certain enumerated points, including that the student had "successfully completed" the BOCES retail program, that it was suggested that the student attempt a program focusing on office work, but that the CSE discussed the fact that the student needed exposure to people (id. at p. 1). The parents indicated that, as per their understanding, the recommendations of the July 2010 CSE included "partial placement" in both a district public school (half day, five times weekly) and a BOCES business program,[5] in addition to travel training and a vocational internship (id.). As to the "educational component" of the program, the parents listed integrated co-teaching services, a 12:1+2 special class (but not the CDP-II), and a "Read 180 Program" (id.). As to the parents' "concerns and considerations," the letter requested a class profile for any proposed classroom in the district public school and set forth the parents' position with regards to the student's needs, particularly his speech-language and vocational/transition needs (id. at p. 2).

In an August 16, 2010 letter to the district, the parents identified portions of the program discussed at the July 2010 CSE meeting that they agreed with, specifically the recommended related services, and noted their concerns with the remainder of the "pieced together program" (Dist. Ex. 55 at pp. 1-2). The letter also gave notice to the district of the parents' intention to unilaterally place the student at NYIT-VIP for the 2010-11 school year (id. at p. 2).

On August 25, 2010 the district received an approval from the State Education Department for an age range variance for the student to attend a special class in the district's high school (Dist. Ex. 56 at pp. 1, 4).

In two letters dated September 3, 2010 from the district to the parents, the district informed the parents that the district board of education approved the July 2010 IEP on September 2, 2010 and enclosed a copy of the approved IEP (Parent Ex. X). The parents informed the district that clerical errors remained on the July 2010 IEP and, by letter dated September 16, 2010, the district notified the parents that the IEP had been corrected and enclosed a copy thereof, along with an IEP amendment agreement and consent form (Parent Ex. Z).

In September 2010, the student enrolled in NYIT-VIP for the 2010-11 school year (Parent Ex. QQ at pp. 1-3).

In a letter to the district dated October 7, 2010, the parents noted their continued disagreements with the recommended program and pointed out specific "inconsistencies and mistakes" that remained in the IEP and noted, among other things, that the student had begun to attend NYIT-VIP (Dist. Ex. 58). By letter dated October 13, 2010, the district sent the parents a second IEP amendment agreement and consent form and a copy of an IEP stamped "draft" and bearing an "Amendment – Agreement No Meeting" date of September 13, 2010 (Parent Ex. BB). This September 2010 draft IEP differed from both the IEP prepared in conjunction with the July

[5] The relevant BOCES business program is also referred to in the hearing record, among other things, the "business services skills" program and the "business office program" (Tr. p. 379; Dist. Ex. 1 at p. 8; see parent Ex. GGG at p. 4).

2010 CSE meeting and the IEP approved by the board of education on September 2, 2010, in that it reflected corrected clerical errors, as well as modifications and additions to the IEP's annual goals and short-term objectives in the area of the student's social/emotional and behavioral needs (compare Parent Ex. BB, with Dist. Ex. 26 and).

A. Due Process Complaint Notice

In a due process complaint notice dated October 22, 2010, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) during both the 2009-10 and 2010-11 school years on both substantive and procedural grounds (see Dist. Ex. 1 at pp. 1-2).[6]

Regarding the 2009-10 school year, the parents asserted that each of the CSEs that convened predetermined the student's program by offering a "'cookie cutter program" (Dist. Ex. 1 at pp. 3-4). In addition, the parents alleged that the CSEs lacked sufficient evaluative information and that the IEPs failed to sufficiently set forth the student's present levels of performance or academic management needs (id. at p. 4-5). The parents also asserted that the annual goals and short-term objectives developed for the student were inadequate in that they did not reflect all of the student's needs and were vague, immeasurable, and otherwise insufficient (id. at p. 4). Next, the parents asserted that CSEs failed to recommend appropriate supports to address the student's behavioral needs and should have conducted a functional behavioral assessment (FBA) and developed a behavioral intervention plan (BIP) (id. at p. 4). In addition, the parents asserted that the CSEs failed to consider assistive technology for the student (id. at p. 5). The parents further claimed that the IEPs for the 2009-10 school year failed to address the student's educational, critical thinking, social/emotional, behavioral, independent living, vocational, and transitional needs, as well as his need for consistency in the program (id. at pp. 3-5). The parents asserted that the CSEs failed to offer sufficient related services for the student and that the "job sites and job coaching component[s]" failed to meet the student's individual needs (id. at p. 3-5). The parents alleged that the CSEs failed to recommend a "transition plan" and did not address the student's needs with respect to activities of daily living (ADL) or travel training (id. at p. 5). The parents also claimed that that the ESY program proposed for the student for the 2009-10 school year was inappropriate (id.). The parents asserted that the student's IEPs failed to provide services outside of school, despite the student's "need for services across settings to promote coping in different situations" (id. at p. 4). Next, the parents alleged that the staff at the "[d]istrict's placement were not adequately trained or supervised "to address the student's needs (id. at p. 5).

Leading up to the July 2010 CSE meeting, the parents asserted that the district improperly canceled the student's appointment for a neuropsychological evaluation without notice to the parents and failed to provide copies of the evaluation to the parents (Dist. Ex. 1 at p. 6). In addition, the parents asserted that the CSE improperly convened in June 2010 CSE without the parents' attendance (id.).

[6] Both parties agree that claims regarding speech-language therapy services were dismissed by the IHO pursuant to a stipulation between the parties dated August 5, 2010 (Pet. ¶¶ 8-9; Answer ¶ 9). Accordingly, information in the due process complaint notice and elsewhere in the hearing record regarding speech-language therapy services will not be addressed in this decision, except to the extent that such services impact other issues that are addressed.

Turning to the proposed program for the student's 2010-11 school year, the parents asserted that the July 2010 CSE predetermined the student's program, failed to develop "critical assessments" of the student's behavioral needs, and failed to describe the student's present functioning and skills levels (Dist. Ex. 1 at pp. 8-9). The parents also asserted that the July 2010 CSE recommended a program, related services, and annual goals and short-term objectives, which were not adequate to address the student's academic, social/emotional, behavioral, independent living, vocational, transitional, OT, sensory, self-regulation, ADL, and organizational needs (id. at p. 7-9). Specific to the BOCES business program, the parents asserted that the program did not fit with the student's needs and talents exhibited in the retail program the years prior, as discussed at the July 2010 CSE meeting and set forth in the neuropsychological evaluation (id. at p. 8). The parents next argued that both the 12:1+2 special class and the office setting at the BOCES business program did not constitute the student's least restrictive environment (LRE) (id. at pp. 7-8). With respect to the assigned public school site, the parents asserted that the district failed to provide them with enough information about the program, including a class schedule (id. at p. 7). The parents also claimed that the proposed classroom at the assigned public school site would not meet the student's needs related to maturity, self-esteem, peer relationships, and emotional health because the staff was inadequately trained and the student would not have been appropriately grouped with the other students in light of the student's age (id. at pp. 6-7, 9).

Finally, the parents also argued that the unilateral placement of the student at NYIT-VIP for the 2010-11 school year with related services was appropriate and that equitable considerations weighed in favor of their request for relief (Dist. Ex. 1 at p. 9). The parents requested compensatory education in the form of tuition for the NYIT-VIP program to remedy the district's alleged failure to offer the student a FAPE during the 2009-10 school year (id. at p. 10). In addition, for the 2010-11 school year, the parents requested that the IHO order the district to reimburse them for the costs of the student's tuition at NYIT-VIP (id.).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on February 10, 2011 and concluded on May 8, 2012, after twenty-one days of proceedings (Tr. pp. 1-789, 844-4122). In a decision dated June 18, 2012, the IHO found that the district offered the student a FAPE for the 2009-10 school year but failed to offer the student a FAPE for the 2010-11 school year, that NYIT-VIP was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 26-58).

Specifically concerning the 2009-10 school year, although the IHO ultimately found that the district offered the student a FAPE, he found numerous flaws in the CSE's development of and the recommendations set forth in the student's April 2009 IEP (IHO Decision at pp. 27-31). The IHO found that April 2009 CSE did not consider appropriate evaluative information about the student, in that the psychological testing, though timely, did not sufficiently describe student's reading abilities and academic functioning (id. at p. 27).[7] As a result, the IHO determined that the April 2009 CSE considered insufficient information to develop appropriate academic annual goals

[7] The IHO did determine that the April 2009 CSE reviewed sufficient evaluation information regarding the student's vocational needs (IHO Decision at p. 29).

for the student and, furthermore, that the CSE failed to develop the annual goals consistent with the evaluative information it did consider (id. at pp. 27, 30-31). The IHO also found that the student "demonstrated significant inappropriate behaviors" that interfered with his ability to learn, of which the April 2009 CSE was aware, but which were not accurately described in the IEP (id. at pp. 28-29). Therefore, the IHO determined that the April 2009 CSE should have conducted an FBA of the student (id.). However, the IHO concluded that the lack of an FBA did not deny the student a FAPE because the April 2009 IEP included a variety of strategies and supports to address his interfering behaviors (id. at p. 34 n.8). Moreover, the IHO found that all of these flaws did not constitute a denial of FAPE, in part, because the parents never objected to the adequacy of the evaluative information or the student's annual goals during or subsequent to the April 2009 CSE meeting (id. at pp. 32, 34). In addition, the IHO found that, although the recommended program offered insufficient academic instruction, the April 2009 CSE's decision to continue the student in the out-of-district CDP-II and the BOCES retail program was appropriate (id. at pp. 35-37). The IHO noted that, although the parents did advocate for a change to the NYIT-VIP program, they desired the BOCES retail program and approved of the CDP-II (id. at pp. 32, 34, 37). Also, the IHO found that the student had made progress in both the BOCES retail program and the CDP-II during both the 2008-09 and 2009-10 school years (id. at pp. 32-34, 36-37).

Concerning the 2010-11 school year, the IHO found that the district failed to offer the student a FAPE (IHO Decision at p. 48).[8] Specifically, the IHO found that the district denied the parents the opportunity to meaningfully participate in the July 2010 CSE meeting because there was no evidence in the hearing record showing that the BOCES business program or the parents' concern that a desk/data entry job would not work for the student was discussed in a meaningful way at the meeting (id. at pp. 40, 42-44). The IHO also found that the July 2010 CSE was not properly composed in that neither the regular education teacher nor the special education teacher, who attended the meeting, were or would be a teacher of the student and that such violation further deprived the parents the opportunity to meaningfully participate in the development of the student's IEP (id. at p. 46). As to the sufficiency of evaluative information, the IHO found that the May 2010 neuropsychological evaluation and the December 2009 educational evaluation from the student's CDP-II special education teacher solved any deficiencies with respect to psychological and academic testing that existed the year prior (id. at p. 37-38). The IHO found that the annual goals and short-term objectives in the student's July 2010 IEP were significantly improved from the previous year and that, although the student's vocational and math annual goals remained inadequate, the deficiency did not rise to the level of a denial of a FAPE (id. at pp. 39-40). The IHO also found that, because the student's interfering behaviors remained a problem and caused the student to be unable to attend his special education program at the end of the 2009-10 school year, the July 2010 CSE should have conducted an FBA (id. at pp. 38-39). The IHO found that the district's failure to conduct an FBA contributed to a finding that the district failed to offer the student a FAPE (id. at p. 39). Next, the IHO found that the recommended 12:1+2 special class, in conjunction with general education classes, was a "radical departure" from the year prior, which

[8] The IHO did not find that the district failed to offer a FAPE for the ESY portion of the 2010-11 school year (IHO Decision at p. 48 n.12). The IHO found that, although the student required academic instruction during the summer to prevent regression, which the June 2010 IEP failed to appropriately address, the parent declined to send the student to the offered summer program and there was no reason to believe that the parent would have sent the student to an academic component had one been offered (id.).

was not based on any evaluation of the student's "functioning or capabilities" (id. at p. 44). The IHO noted the lack of clarity in the hearing record regarding the program and, particularly, how the general education classes, special classes, and related services, in addition to the BOCES business program, would be delivered to the student (id. at p. 45). Furthermore, with respect to the recommendation for general education classes, the IHO found that the July 2010 recommended no academic support or access to a special education teacher (id.). The IHO rejected the district's assertion that such a recommendation was the student's LRE, finding instead that the insufficient supports in the classes would prevent the student from accessing instruction (id. at p. 46). In addition, the IHO found that the CSE did not finalize the July 2010 IEP, in that part of student's program was to be "hand scheduled" after the meeting and, therefore, the parents could not determine the appropriateness of the program prior to the start of the school year (id. at pp. 46-47). The IHO also found that the recommended BOCES business program was not appropriate for the student because: the student's functional levels and vocational interests were inconsistent with the tasks in the program; the program would lead to frustration, not progress; and the student needed exposure to people, which was more readily achieved in a retail environment (id. at p. 40-44). Additionally, the IHO found that the parents voiced a legitimate concern that the student would be significantly older than the other students in the proposed classroom at the assigned public school site (id. at p. 46).

Concerning the parents' unilateral placement of the student at NYIT-VIP, the IHO found that the program was appropriate because it followed the available evaluations and reports, it was reasonably calculated to enable the student to receive educational benefit, and the student made progress during his attendance (IHO Decision at pp. 48-56). Also, the IHO noted that the student's interfering behaviors were much improved (id. at p. 55). The IHO also found that equitable considerations weighed in favor of reimbursement because the parents consented to all evaluations, cooperated with the district, provided timely notice of their unilateral placement of the student, and, further, the tuition at NYIT-VIP was not unreasonable (id. at pp. 56-57). Consequently, the IHO ordered the district to pay the costs of the student's tuition at NYIT-VIP for the 2010-11 school year (id. at p. 58).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2010-11 school year, that NYIT-VIP was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief.[9] The district initially argues that the IHO erred in refusing to allow the district to put on

[9] Although the district attempts to point out procedural inadequacies in both the IHO's decision and the parents' pleadings, in fact, the district's petition, while identifying the "findings, conclusions and orders to which exceptions are taken" (8 NYCRR 279.4[a]), fails to set forth the reasons for such exceptions. The district sets forth additional arguments and raised additional grounds for reversal of the IHO's decision in its memorandum of law that it failed to articulate in its petition. Such arguments or issues may not be considered because a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.6; Application of a Student with a Disability, Appeal No. 08-053). In addition, the petition in this case was only 13 pages in length, which provided the district with ample opportunity and space within which to assert any additional arguments or issues (see Application of a Student with a Disability, Appeal No. 12-016).

rebuttal witnesses after the close of the parents' case. Furthermore, the district asserts that the IHO's decision only minimally cited to and disregarded much of the hearing record, in contravention of State regulations.

Regarding the IHO's determination that the district failed to offer the student a FAPE during the 2010-11 school year, initially, the district argues that the IHO sua sponte reached issues that were not raised in the parents' due process complaint notice relating to the parents opportunity to participate in the development of the student's July 2010 IEP and the appropriateness of the mathematics and vocational annual goals included in the July 2010 IEP. In addition, the district argues that the IHO erred in finding that the district deprived the parents an opportunity to meaningfully participate at the July 2010 CSE meeting. Specifically, the district contends that IHO erred in finding that a discussion of the BOCES business program had to be memorialized in the comments section of the IEP. Furthermore, the district asserts that the IHO erred in finding that the July 2010 CSE was not properly composed. The district next argues that the IHO erred in finding that the annual goals and short-term objectives in the student's July 2010 IEP were inappropriate and asserts that the student's annual goals were sufficiently related to his needs. The district next contends that the IHO erred in determining that the student required an FBA. The district also contends that the IHO erred in finding that the district failed to provide special education teacher support in the recommended general education classes and that the 12:1+2 special class placement with additional supports and services was inappropriate. Next, the district argues that the IHO erred in finding that the recommended BOCES business program was inappropriate because the program was not inconsistent with the student's vocational interests. Furthermore, the district asserts that the IHO erred in determining that the parents were legitimately concerned that the student would be the oldest student in the proposed classroom at the assigned public school site.

Next, the district contends that the IHO erred in finding NYIT-VIP to be an appropriate unilateral placement because the parents failed to establish that the program provided specially designed instruction for the student.[10] Lastly, the district contends that the IHO's finding that equitable considerations weighed in favor of reimbursement to the parents was not supported by the hearing record. Consequently, the district seeks an order reversing those portions of the IHO's decision.

In an answer and cross-appeal, the parents respond to the district's petition by denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2010-11 school year, that NYIP-VIP was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of awarding the parents the costs of the student's tuition. The parents also interpose a cross-appeal alleging that the IHO erred in finding that the district provided the student with a FAPE during the 2009-10 school year. Initially, regarding the district's procedural claims, the parents assert that IHO

[10] In its memorandum of law, the district argues more specifically that that there was no clear evidence of the student's progress at NYIT-VIP, the student's goals at NYIT-VIP were in fact goals used for all students in the program, the school was not the student's LRE, did not provide adequate supervision of the student, and did not have adequately trained teachers.

correctly refused to allow rebuttal witnesses to bolster the district's case in chief and that the IHO's decision appropriately cited to the hearing record and provided adequate legal basis throughout.

Regarding the 2009-10 school year, the parents assert that, in light of the IHO's multiple adverse findings regarding the April 2009 CSE and resulting IEP, the IHO erred in determining that such violations, in the aggregate, did not amount to a denial of a FAPE to the student. The parents also contend that the IHO failed to consider that the student required a transition plan that identified appropriate transition needs. In addition, the parents contend that the April 2009 CSE's decision to essentially repeat the student's program from the 2008-09 school year was not appropriate and led to the student's regression during the 2009-10 school year. The parents contend that, although the student received passing grades, it was impossible to fail and the student regressed and exhibited bad behaviors throughout the school year. Lastly, the parents contend that the hearing record demonstrates the need for compensatory education to remedy the district's gross failure to provide the student a FAPE during the 2009-10 school year and that compensatory education, consisting of the costs of the student's tuition at NYIT-VIP, is appropriate an appropriate remedy in light of the student's demonstrated progress in the program during the 2010-11 school year.

In an answer to the parents' cross-appeal, the district denies the allegations raised therein and asserts that the IHO correctly held that the district offered student a FAPE for 2009-10 school year. The district also argues that the parents' cross-appeal was untimely because the parents never mentioned their intention to assert a cross-appeal in their requests for extensions to serve an answer. Furthermore, the district contends that an SRO should reject certain fact assertions in the answer and cross-appeal that are not supported by citations to the 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. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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 Matters

1. Parents' Cross-Appeal

Initially, the district's assertion that the parents' cross-appeal was untimely must fail. State regulations provide that "[a] respondent who wishes to seek review of an IHO's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer" (8 NYCRR 279.4[b]). Further, State regulations provide that "[a] cross-appeal shall be deemed to be timely if it is included in an answer which is served within the time permitted by section 279.5 of this Part" (id.). There is no dispute that the parent's request for a specific extension of time contained in their letter dated July 25, 2012 to the Office of State Review, which extension was granted, was timely and properly made pursuant to 8 NYCRR 279.10(e). Further, there is no dispute that the parents' verified answer and cross-appeal was served within the confines of the extension granted by the SRO. Accordingly, the parents' cross-appeal, contained within their answer, was timely.

In addition, contrary to the district's argument, the parents' answer and cross-appeal contains sufficient citations to the hearing record and the IHO's decision to satisfy the requirements

of State regulations (8 NYCRR 279.8[b]) and, as to the accuracy of such citations, I have carefully reviewed the entire hearing record to consider those claims identified by the parties and, as such, have not relied on any incorrect record citations (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). While dismissal is not warranted in this particular case, the parent's counsel is responsible to ensure that the pleadings submitted contain accurate citations to the record, as insufficient care may be considered to be impeding the review process and risk discretionary rejection of a pleading with prejudice for failure to comply with the form requirements of State regulation.

2. IHO's Decision

In its petition, the district alleges that the IHO's decision only minimally cited to the hearing record in contravention of State regulations that provide, in relevant part, that "[t]he decision of the [IHO] shall set forth the reasons and the factual basis for the determination" and "shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity (see Application of the Dep't of Educ., Appeal No. 13-080; Application of a Student with a Disability, Appeal No. 10-086). Moreover, State regulations further require that an IHO "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to applicable law are the norm in "appropriate standard legal practice," and should be included in any IHO decision (see Application of the Dep't of Educ., Appeal No. 09-092).

Here, in a section of the IHO's decision labeled "Background" the IHO demonstrated a more than adequate familiarity with the hearing record and included numerous citations to hearing transcripts and multiple parent and district exhibits (IHO decision at pp. 3-13). In a section of the decision titled "Legal Framework and Standard" the IHO set forth an adequate legal standard that provided an appropriate basis for his determinations (id. at pp. 21-26). In a section of the decision labeled "Findings of Fact and Decision" the IHO continued to identify appropriate legal standards and continued to identify relevant portions of the hearing transcripts and exhibits in support of his factual and legal conclusions (id. at pp. 26-57). Accordingly, review of the IHO's decision reveals that it conforms to State regulations regarding citations to the hearing record and is in accordance with appropriate standard legal practice. To the extent that the district's argument can be understood to contend that the IHO made inaccurate factual findings, as set forth above, that is not a nonconformity with State regulations regarding the form of an IHO decision, it is an allegation of error for which the IDEA and State law call for both administrative appeal and judicial review as described in the procedures section above, and my examination of the entire hearing record has mitigated any harm alleged (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

3. Rebuttal Witnesses

Next, the district contends that the IHO erred in refusing to allow it to call rebuttal witnesses after the close of the parents' case. An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 C.F.R. § 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO has the discretion to limit or exclude evidence or testimony of witnesses that he or she deems to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]-[e]), it is

also an IHO's responsibility to ensure that there is an adequate record upon which to permit meaningful review (Application of a Student with a Disability, Appeal No. 11-002).

In the instant case, during the district's direct examination of one of its witnesses (the district supervisor of secondary special education), the IHO struck testimony and prevented the district from examining the witness concerning an observation of the student she had conducted at NYIT-VIP because the district had not "advise[d] anyone" that the witness was going to testify about the parents' unilateral placement (Tr. pp. 961-62). The IHO asked "[w]hy wouldn't this witness appear after they are done as a rebuttal witness?" (Tr. p. 962). After the close of the parents' case, the district brought several witnesses to the hearing in rebuttal (Tr. pp. 3922-4060, 4092-4110). Although the IHO allowed the district's supervisor of secondary special education to testify about the observation of the student she conducted at NYIT-VIP and one other witness to testify about other matters, in a series of rulings, he limited the scope of the questioning in an effort control the duration of the impartial hearing (id.; see Tr. pp. 3927-28, 3933, 3936, 3949, 3952, 3957-58, 3962-63, 3966-67, 4008, 4029, 4034-37, 4050). The IHO offered the parties an opportunity to argue the question of the scope of rebuttal testimony and a brief on the issue from each party was entered into the hearing record (Tr. pp. 4050-51, 4112-13; IHO Ex. 2). After examining the written arguments, the IHO adhered to his previous rulings and allowed the district to bring a third rebuttal witness, a "behaviorist" from the student's out-of-district public school ("behaviorist"), to testify about services she provided to the student (Tr. pp. 4064-67, 4073, 4079, 4092-94). After examining the hearing record and in light of the broad discretion an IHO has in conducting an impartial hearing, I find that the IHO appropriately limited the scope of the rebuttal witnesses in a manner that resulted in the development of an adequate hearing record while exercising appropriate discretion to curtail the 21-day proceeding.

B. August 2009 IEP

With respect to the student's special education program and related services for the 2009-10 school year, the IHO concluded that, despite the existence of certain procedural violations, the district offered the student a FAPE. The district has not appealed, in the first instance, the IHO's particular adverse determinations relevant to the 2009-10 school year. The parents have cross-appealed the IHO's ultimate determination that the procedural violations did not result in a denial of a FAPE, as well as his failure to reach certain issues raised in their due process complaint notice.

Initially, clarification must be made as to which CSE recommendations are properly examined relative to the 2009-10 school year. Prior to and throughout the 2009-10 school year, on seven occasions, the CSE convened or, upon parental consent, amended the student's IEP without a CSE meeting (see generally Dist. Exs. 3; 7; 11; 14; 17; 19; 21). The IHO relied on the April 2009 IEP in making his determinations regarding the district's offer of a FAPE (see IHO Decision at p. 30; see generally Dist. Ex. 3). While there are some differences between the various versions of the student's IEPs for the 2009-10 school year, the CSE process had not concluded and it is most logical to examine, at least as a starting point, the final version that the district was obligated to implement when the student began attending the disputed portion of the recommended program; to wit, the August 2009 IEP (see generally Dist. Ex. 11; see also McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP

to be "the operative IEP"]; see also Application of the Bd. of Educ., Appeal No. 13-087; Application of the Dep't of Educ., Appeal No. 12-215).[11]

1. Evaluative Information and Present Levels of Performance

The IHO found that the January 2007 psychological report provided insufficient information about the student's academic needs and, in particular, the student's reading deficits (IHO Decision at p. 27; see generally Dist. Ex. 30). Furthermore, the IHO concluded that the characterization of the student's social/emotional needs on the IEP was "inadequate and not descriptive of his needs in this area" (IHO Decision at p. 28). The parents contend that the IHO should have found that this inadequacy constituted a violation that contributed to the district's failure to offer the student a FAPE.

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

[11] In any event, the evidence in the hearing record shows no substantive changes from the April 2009 IEP to the August 2009 IEP relative to the 10-month portion of the student's school year (compare Dist. Ex. 3, with Dist. Ex. 11). The CSE chairperson 2 testified that the August 2009 CSE reviewed the student's present levels of academic achievement, functional performance, and social, physical, and management needs and that all participants agreed on the student's present levels and needs and, therefore, made no changes to the information included in the April 2009 IEP (Tr. pp. 1240-42). In addition, the CSE chairperson 2 testified that annual goals were reviewed and "it seemed like" all members were in agreement (Tr. pp. 1243). He testified that the August 2009 CSE discussed the parents' request for a different school placement for the 2009-10 school year; however, ultimately, the August 2009 CSE agreed that the student was appropriately placed in his current educational and vocational settings (Tr. p. 1240, 1243-44; see Dist. Ex. 11 at p. 6).

Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). On the basis of its review, a CSE must "identify what additional data, if any, are needed to determine," among other things, "the present levels of academic achievement" of a student (20 U.S.C. § 1414[c][1][B]). Any additional assessments need only be conducted if found necessary to fill in gaps in the initial review of existing evaluation data (20 U.S.C. § 1414[c][2]; see also D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-30 [S.D.N.Y. 2013]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]).

The CSE chairperson 2 testified that the August 2009 CSE reviewed the student's present levels of academic achievement, functional performance, and social, physical, and management needs and that all participants agreed thereon and, therefore, made no changes to the information included in the April 2009 IEP (Tr. pp. 1240-42). The August 2009 IEP specifies that its content was based upon parent and teacher verbal reports (see Dist. Ex. 11 at p. 7). In turn, the April 2009 IEP indicates that the content was based on the student's previous December 2008 IEP, as well as parent and teacher verbal reports (see Dist. Ex. 3 at p. 6). Additionally, over the course of the 2009-10 school year, the subsequent CSEs added some additional information regarding the student's needs to the IEPs (Dist. Exs. 14 at p. 3; 17 at pp. 3-4; 19 at p. 3; 21 at pp. 3-4).

Furthermore, the content of the August 2009 IEP reveals formal cognitive testing results from a January 2007 psychological report (Dist. Exs. 11 at p. 3; 30 at p. 1). Speech-language testing results from March 2008 and February 2009, as well as earlier results, were also included in the August 2009 IEP and reflected that the student's standardized test performance, specific to understanding paragraphs and formulating sentences, remained significantly delayed (Dist. Ex. 11 at pp. 3-4).[12] The subsequent February 2010 IEP added results from administration of the Wechsler Adult Intelligence Scale-III (WAIS-III), reported in a December 2009 psychological evaluation, which revealed a full scale IQ of 67 (compare Dist. Ex. 19 at p. 3, with 35 at p. 2). In addition, consistent with a February 2010 speech and language re-evaluation, the May 2010 IEP added test results from administration of the Test of Auditory Processing Skills-3, which showed that the

[12] Other than the January 2007 psychological report, the evaluations reporting these standardized test scores were not included in the hearing record.

student exhibited significant delays in auditory processing skills (compare Dist. Ex. 21 at pp. 3-4, with Dist. Ex. 38 at p. 1).

In regard to the student's present levels of performance, the August 2009 IEP includes a description of the student's academic achievement, functional performance, learning characteristics, social development, and physical development (Dist. Exs. 11 at pp. 3-4, 6). The student's special education teacher from the CDP-II, who attended both the April and August 2009 CSE meetings, testified regarding the accuracy of the present levels of performance included in the IEP (Tr. pp. 44-54; see Dist. Exs. 3 at p. 6; 11 at p. 6). Since the teacher attended the CSE meetings and testified regarding the information in the student's IEP, rather than adding to or editing the content thereof, I find that the testimony is properly relied upon in order to evaluate the accuracy of the student's present levels of performance (see R.E., 694 F.3d at 185-88).[13] The evidence in the hearing record shows that the teacher informed the CSE of the student's current skill levels and continuing needs and, as a result, the CSE had sufficient information relative to the student's present levels of performance at the time of the CSE meeting to develop an IEP that accurately reflected the student's special education needs.

The CDP-II special education teacher testified that, for the 2009-10 school year, in regard to reading, the student's word recognition was at a high third grade level (3.8) and reading comprehension was at a beginning second grade level (Tr. pp. 31, 34-35).[14] In addition, the teacher testified that she felt the student had more reading comprehension ability than demonstrated through formal testing because of his functional use of vocabulary, excellent observations and inferences, and his ability to make projections as to what would happen (Tr. p. 35). Consistent with the teacher's testimony, the description of the student's academic achievement and functional performance included in the August 2009 IEP highlights the student's functional strengths, offering an informative contrast to the student's deficient cognitive and language standardized testing scores (Dist. Ex. 11 at pp. 3-4). Specific to reading, the August 2009 IEP indicates the student made "significant" progress (id. at p. 3). Consistent with the teacher's testimony, the August 2009 IEP indicates that the student's spelling was addressed through "environmental spelling packets," specific to the student's level, which he completed in an "excellent manner" (Tr. p. 48; Dist. Ex. 11 at p. 3).

[13] The majority of the evidence and testimony in the hearing record relating to the student's 2009-10 school year relates, not to the development of the IEP, but rather to its implementation. However, the Second Circuit has explained that under the "snapshot" rule, this evidence may not be considered to the extent that it constitutes "retrospective testimony" regarding services that the district failed to list in the IEP (R.E., 694 F.3d at 185-88 [explaining that the adequacy of an IEP must be examined prospectively as of the time of the parents' placement decision and that "retrospective testimony" regarding services not listed in the IEP may not be considered, but rejecting a rigid "four-corners rule" that would prevent consideration of evidence explicating the written terms of the IEP]; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *2 [2d Cir. Jan. 8, 2014]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-77 [S.D.N.Y. 2012]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *6 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *10 [W.D.N.Y. Sept. 26, 2012], adopted at, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]).

[14] The hearing record reflects the student's word recognition skills were only at the first grade level in January 2007 (Dist. Ex. 30 at p. 3).

Also consistent with testimony from the student's CDP-II special education teacher, the August 2009 IEP indicated that the student's functional math skills were addressed through developing the student's banking skills (i.e. writing checks, keeping a checkbook ledger), and other daily living skills involving shopping, and cooking/baking (Tr. pp. 35-36; Dist. Ex. 11 at p. 3). The teacher testified the student displayed more capability than expected based on his standardized math score, as he performed more sophisticated, complex, and multi-step tasks (Tr. pp. 35-36).

In regard to the student's social development, the August 2009 IEP indicated that the student displayed excellent social skills and that he continued to make gains of a "global nature" (Dist. Ex. 11 at p. 4). Consistent with testimony by the student's CDP-II special education teacher, the August 2009 IEP noted that it was important for the student to please those in his educational and vocational environments (Tr. pp. 50, 73; Dist. Ex. 11 at p. 4). In addition, consistent with the testimony of the student's CDP-II social worker who attended the April 2009 CSE meeting, the IEP reported that student's impulse control was improving (Tr. p. 873; Dist. Ex. 11 at p. 4).[15] Both the student's CDP-II special education teacher and social worker testified and the August 2009 IEP indicated that the student responded positively to the verbal reminder to "do the right thing" (Tr. p. 93, 865; Dist. Ex. 11 at p. 4).

Based on the foregoing, and focusing on the description of the student's levels and needs in reading and in the social/emotional area, as emphasized by the IHO and in accordance with the parties' pleadings, the evidence in the hearing record does not support a conclusion that the student was inadequately evaluated or that the August 2009 IEP failed to adequately describe the student's needs. Nonetheless, to the extent that the IHO found the evaluative information reviewed by the April or August 2009 CSEs insufficient, review of the effect of such a finding on a determination that the district did or did not offer the student a FAPE is discussed further below.

2. Annual Goals

The parents contend that the IHO should have found that the CSEs' failure to develop appropriate annual goals for the student constituted a violation that contributed to the district's failure to offer the student a FAPE.

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

[15] The student's CDP-II social worker testified that he provided the student with his counseling services for four school years beginning in the 2006-07 school year (Tr. p. 850).

Review of the August 2009 IEP reveals that it contained specific and measurable annual goals to address the student's needs, described in the present levels of performance, in the areas of reading, writing, speech-language, social/emotional and behavioral, basic cognitive/daily living skills, and career/vocational/transition (Dist. Ex. 11 at pp. 3-4, 7-12).

The IHO determined that, despite the student's significant delays in mathematics, the IEP did not include an annual goal to address this skill (IHO Decision at p. 30). The IHO relied on the January 2007 psychological report to determine that the student's mathematics skills were on a fourth to fifth grade level (see id.; see also Dist. Ex. 30 at p. 3). The IHO contrasted the student's functioning grade level with his chronological age and, on this basis, determined that the student required a mathematics goal (see IHO Decision at p. 30). This reasoning is not supported by the hearing record. The January 2007 psychological report also indicated that the student "was able to solve basic problems requiring knowledge of additional, subtraction, and multiplication" and that, while not legible to the evaluator, the student's work on the test was completed independently, quickly, and correctly (Dist. Ex. 30 at pp. 3-4). Moreover, as described above, the student's CDP-II special education teacher testified that the student displayed more capability than expected based on his standardized math score (see Tr. pp. 35-36). Although the August 2009 IEP indicates that a focal point for the student at the time involved functional mathematics skills, the IEP includes no specific annual goal targeting the student's needs in mathematics (Dist. Ex. 11 at pp. 3, 7-12). However, the August 2009 IEP recommended that the student use a calculator to assist him in mathematics (id. at p. 3). Relatedly, in regard to the student's basic cognitive/daily living skills needs, the August 2009 IEP included an annual goal and associated short-term objectives that targeted meal preparation, requiring the student to follow a recipe using five to ten-ingredients (id. at p. 11). In addition, the August 2009 IEP included a transition plan that proposed, among other things, a coordinated set of transition activities that targeted the student's acquisition of daily living skills, including the student's participation in budgeting, maintaining a checking/savings account, and purchasing retail items (Dist. Ex. 11 at pp. 5-6). Not relevant to analysis of the August 2009 IEP, the evidence shows that shortly after the commencement of the 2009-10 school year, the October 2009 CSE added an annual goal to the student's IEP that indicated the student would "accurately write a check and maintain the balance sheet," which is targeted to address exactly that sort of functional mathematics skill identified as a focus in the student's present levels of performance (see Dist. Ex. 14 at pp. 3, 11-12).

Turning to reading, the IHO determined that the lack of evaluative information resulted in only one reading goal addressing comprehension and, despite identification of a deficit in word recognition, no annual goal directed to such area of need (IHO Decision at p. 31). Initially, as noted above, the student's CDP-II teacher offered information about the student's abilities in reading, providing more information about the student's needs in reading than the IHO gathered from the hearing record (see Tr. p. 35). The reading comprehension annual goal states, "[t]he student will answer five to ten comprehension questions from factual materials (e.g., newspapers, maps, brochures) and content area textbooks (e.g., social studies, science) that demonstrate understanding of what has been read which includes distinguishing between relevant and non-relevant material that is real life or vocationally based" with 90 percent success over 10 weeks (Dist. Ex. 11 at p. 7). The student's CDP-II special education teacher opined that the student required reading comprehension to enable him to survive in the world (Tr. pp. 85; Dist. Ex. 11 at p. 7). The special education teacher testified that the student displayed the ability to comprehend

what he read (e.g., articles of interest in National Geographic, Action magazine) and that she used high interest materials with the student and environmental spelling packets based on her familiarity with language based reading instruction focusing on comprehension that the student would encounter in his "real" and vocational aspects of life (Tr. pp. 28, 124-26). Therefore, the hearing record shows that the reading comprehension goal in the August 2009 IEP was appropriately targeted to address the student's needs described above. Furthermore, the May 2010 CSE added an annual goal that the student would decode three unfamiliar target words, thereby, curing in some respect, for the remainder of the 2009-10 school year, one of the deficiencies identified by the IHO (Dist. Ex. 21 at p. 7).

Finally, the IHO concluded that, in contrast to the specific description of the student's vocational needs available to the CSEs, the one vocational annual goal included in the IEP was overly broad and provided almost no guidance to evaluate progress (IHO Decision at p. 31). Contrary to the IHO's finding that only one annual goal addressed the student's vocational needs, multiple goals, beyond those labeled as "career/vocational/transition" goals, addressed the student's needs (Dist. Ex. 11 at pp. 7-12). The annual goals specific to the student's vocational needs targeted his participation in occupational education appropriate for his interests, skills, and vocational needs, as well as his attention focus and on-task behavior at job sites (id. at pp. 11-12). An example of an annual goal that also targeted the student's vocational/transition needs, though not labeled as such, is the writing goal in the August 2009 IEP, which specified that the student would compose a report, the subject matter of which would be "real life based" (see Dist. Ex. 11 at p. 8). The student's CDP-II special education teacher testified that the writing goal targeted "one of the most critical" skills for the student because he would need to fill out job applications and answer questions directly and concisely and write something down (Tr. at pp. 87-88). Furthermore, the annual goals were supplemented by the actual transition plan included in the IEP (Dist. Ex. 11 at pp. 5-6).

In light of the above, the evidence in the hearing record supports the IHO's final determination that the annual goals and short-term objectives in the student's August 2009 IEP (or April 2009 IEP) did not result in a failure to provide the student a FAPE. Although "[c]ourts have been reluctant to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress" (see P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], aff'd 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]; nonetheless, to the extent that the IHO found that the annual goals were deficient in some respects, the effect of such a finding on a determination that the district did or did not offer the student a FAPE is discussed further below.

3. Special Factors – Interfering Behaviors

The IHO determined that "[t]here [wa]s no question that [the student's] behaviors interfered with learning" (IHO Decision at p. 28). Turning to the parents' cross-appeal of the IHO's finding that, although an FBA was required but not conducted, the failure did not deny the student a FAPE, the evidence in the hearing record shows that the August 2009 CSE properly considered special factors relating to the student's behavioral needs, that an FBA was not required, and that the IEP appropriately addressed the student's social/emotional and behavioral needs.

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 E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]. 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, the "student's need for a [BIP] must be documented in the IEP" (id.).[16] 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]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). State regulations require that an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 394 Fed. App'x at 722). 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

[16] While the student's need for a BIP must be documented in the IEP and, prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22 [emphasis added]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 202 Fed. App'x 519, 522, 2006 WL 3102463 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by indicating that an FBA and BIP will be developed after a student is enrolled at the proposed district public school placement]).

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 address the student's problem behaviors" (id.).

Review of the hearing record reflects the student did not need an FBA at the time of the August 2009 IEP. According to the student's CDP-II special education teacher, who attended both the April and August 2009 CSE meetings, an FBA was not developed for the student because, despite that he exhibited "adolescent moodiness" characterized by looking glum or flailing his arms, which usually occurred when something had affected or distracted him in his environment, "[h]e had several excellent compensational devices that he could utilize and were available to him" (Tr. pp. 92-93, 119-20; see Dist. Exs. 3 at p. 6; 11 at p. 6). For example, the teacher testified that the student was able to appropriately ask for a few minutes to take a break and relax prior to joining the group upon returning to the CDP-II from the BOCES program (Tr. p. 92). She also testified that the student was responsive to the teacher's use of the catch phrase provided for the student by his counselor, "do the right thing," whereupon, he would come into compliance, join the class, display appropriate behavior, and participate in the program (Tr. pp. 93, see Tr. pp. 120-21). The teacher testified that, if the student was having a difficult day emotionally, whereby he might not want to go to a job site or he preferred to sit down and rest, he did not exhibit unmanageable behaviors (Tr. p. 120). The teacher described the student as "very polite," able to discuss a situation with his job coach, and he was usually able to work out what was troublesome to him (id.).

Also in attendance at the April 2009 CSE meeting was a behavior consultant employed by the district in which the student attended the CDP-II (Dist. Ex. 3 at p. 6; see Tr. pp. 4092, 4094). The behavior consultant testified that she worked with the student and his teachers and providers on a number of occasions during the 2008-09 school year, such as by giving the staff strategies to deal with the student's customer-relations behaviors, and that student responded well to such strategies (Tr. pp. 4097-4101). She further testified an FBA was not necessary and that, had the student not responded well to the strategies implemented during the 2008-09 school year, an FBA would have been conducted at that point (Tr. pp. 4109-11).

Furthermore, even if the student required an FBA, the evidence in the hearing record shows that the August 2009 IEP appropriately addressed the student's social/emotional and behavioral needs. The August 2009 IEP contains behavior management services and accommodations, including weekly group counseling to improve impulse control, continued medication to assist with specific behavioral issues, a structured environment, frequent meaningful reinforcement, and behavioral goals in the areas of attention and impulsive physical behaviors (Dist. Ex. 11 at p. 1, 4, 5, 10). In addition, over the course of the 2009-10 school year, the CSEs added additional annual goals targeted to the student's social/emotional and behavioral skills, particularly with respect to communications and interactions with peers and acceptable behaviors in community settings (Dist. Exs. 14 at pp. 10-12; 17 at p. 4). In light of the foregoing, the evidence in the hearing record shows that the district's failure to conduct an FBA did not rise to the level of a denial of a FAPE, in light of the student's control over his behaviors and the supports in the August 2009 and subsequent IEPs to address behaviors the student did exhibit (see R.E., 694 F.3d at 190). Nonetheless, to the extent that the IHO found that the district should have conducted an FBA, the cumulative effect of such a finding on a determination that the district did or did not offer the student a FAPE is discussed further below.

4. Transition Services

The parents cross-appeal the IHO's failure to consider their claim that the student required a transition plan. Review of the IHO's decision reveals that the IHO did not address the transition plan itself but, relatedly, did determine that the "vocational testing of the student was comprehensive and accurately described the student's functioning in this area" and, as discussed above, that the one annual goal relating to the student's vocational needs was overly broad (IHO Decision at p. 29). Upon review of the hearing record, the weight of the evidence supports a finding that the August 2009 IEP included a sufficient transition plan based upon timely and comprehensive assessments, as well as the student's preferences, strengths, and needs (see Dist. Exs. 11 at pp. 5-6).

The IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34][A]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). 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 related to training, education, employment, and, if appropriate, independent living skills, as well as 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]; 8 NYCRR 200.4[d][2][ix]). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 34 CFR 300.43[a][2]; 8 NYCRR 200.1[fff]). Furthermore, it has been noted that "the failure to provide a transition plan is a procedural flaw" (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013]).

The hearing record includes a June 2005 level one assessment-transition planning teacher assessment, a January 2008 level two comprehensive vocational assessment for students with significant disabilities (CVAS), and a June 2008 level three situational evaluation and evaluation summary report (Dist. Exs. 29 at pp. 1-3; 31 at pp. 1-20; 32 at pp. 1-7). The August 2009 IEP indicated that the student would be provided with an opportunity to participate in performance reviews specific to current job sites and would be provided with quarterly reports concerning his vocational component (Dist. Ex. 11 at p. 6).

The August 2009 IEP included an appropriate set of transition activities based upon the aforementioned transition assessments, statements reflecting the transition service needs of the student; 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; as well as a statement of the responsibilities of the school district and, when applicable, participating agencies for the provision of such transition services (Dist. Ex. 11 at pp. 5-6). In addition, the coordinated set of transition activities was

consistent with the parents' testimony as to what the student needed in order to become an independent adult (Tr. pp. 2552, 2566-68; Dist. Ex. 11 at pp. 5-6).

Furthermore, in both the recommended CDP-II and the BOCES retail program constituted vocational/transitional focused placements, in additional to the related service of a job coach (see Dist. Ex. 11 at p. 1). In fact, the student's August 2009 IEP was largely focused on the student's vocational/transitional needs. In addition, as discussed above, the August 2009 IEP included annual goals and short-term objectives that targeted the student's participation in occupational education appropriate for his interests, skills, and vocational needs, as well as attention focus and on-task behavior at job sites (id. at pp. 11-12). Other annual goals and short-term objectives, specific to academics, communication, and social/emotional and behavioral areas of need also targeted skills relevant to vocational and daily living skills (id. at pp. 7-10). Thus, the evidence in the hearing record supports the conclusion that the transition plan included in the August 2009 IEP provided sufficient detail in regard to the student's transition from school to post-school activities and, the IEP, as a whole, focused on the student's vocational/transitional needs.

5. 12:1+1 Special Class in CDP-II and BOCES Retail Program

With respect to the both the recommendation for placement in the 12:1+1 special class in the out-of-district CDP-II and the BOCES retail program, the IHO determined that the program "was appropriate and likely to result in the student making progress" (IHO Decision at pp. 33-34). The parents contend that the IHO erred in this respect and that the April 2009 CSE's decision to essentially repeat the student's program from the 2008-09 school year was not appropriate and led to the student's regression during the 2009-10 school year.

Initially, I note that the parent cites the student's lack of progress during the 2009-10 school year as evidence that the program was not appropriate for the student. Since, in developing the student's IEP, the August 2009 CSE could not have known the student's progress or lack thereof in the upcoming school year, I find that this argument relies on improper retrospective evidence (see R.E., 694 F.3d at 185-88). However, the student's progress under a similar program during the 2008-09 school year is a factor to consider in analyzing whether the student would have gained an educational benefit from attendance in the 12:1+1 special class in the CDP-II and the BOCES retail program during the 2009-10 school year (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67, 2013 WL 3155869 [2d Cir. June 24, 2013] [finding an IEP appropriate in light of the student's progress during the previous school years]; see also Adrianne

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, *14-*16 [S.D.N.Y. Sept. 29, 2008]).[17]

As to the 2008-09 school year, however, the hearing record shows that the parents acknowledged that the student made progress (see Tr. pp. 2538-40; Dist. Ex. 48; Answer ¶ 43). The parents identify no other grounds for reversing the IHO's decision on this point. In light of the above, I find no reason to disturb the IHO's decision.

6. Cumulative Violations

A review of the cumulative effect of the particular violations identified by the IHO constitutes the crux of the parents' cross-appeal in this case. That is, because the IHO made various findings adverse to the district relative to the 2009-10 school year, which the district did not appeal, it is at least arguable that the IHO's findings are final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). As such, regardless of the analysis set forth above (which was, in any event, necessary in order to adequately examine the cumulative effect), the parents appeal targets the IHO's conclusion that, despite the various identified violations, the district did not deny the student a FAPE.

To the extent the district's violations identified by the IHO constitute procedural violations, a finding that the district denied the student a FAPE is appropriate 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]). As noted above, in view of the IHO's analysis and the parents' cross-appeal, I find it appropriate, in light of the growing amount of Second Circuit jurisprudence addressing this specific point, to consider the cumulative impact of the identified deficiencies in order to determine whether or not the district offered the student a FAPE (T.M. v. Cornwall Cent. Sch. Dist., 2014 WL 1303156 [2d Cir. Apr. 2, 2014]; R.E., 694 F.3d at 191 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also M.L., 12014 WL 1301957, at *10; R.B. v. New York City Dep't of Educ., 2014 WL 1618383, at *10 [S.D.N.Y. Mar. 26, 2014]).

[17] The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153–54 [10th Cir.2008]; Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]; Schroll v. Bd. of Educ. Champaign Cmty. Unit Sch. Dist. #4, 2007 WL 2681207, at *3 [C.D. Ill. Aug. 10, 2007]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

Initially, I decline to adopt the IHO's reasoning that the identified procedural violations did not rise to the level of a denial of FAPE, largely, based on the parents' failure to object to the various failures during the course of the development of the student's IEPs (IHO Decision at p. 32; see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *18 n.14 [E.D.N.Y. Mar. 31, 2014] [noting "the mere fact that the [p]arents did not formally object to the IEP at the CSE meeting does not factor into the . . . analysis."]). However, the evidence in the hearing record nevertheless supports the IHO's ultimate conclusion.

The deficiencies identified by the IHO in the student's recommended special education program for the 2009-10 school year related to the sufficiency of the evaluative information, the appropriateness of the annual goals, and the lack of an FBA in light of the student's behaviors. As the analysis of these issues set forth above details individual effects, briefly, the hearing record supports the following. Any failure on the part of the CSE to review sufficient evaluative information was mitigated in light of evidence of the student's teacher's participation in the CSE meeting, as well as the subsequent amendments to the IEP based on new evaluative information about the student. Any flaws in the annual goals did not rise to the level of a denial of a FAPE, when viewed in conjunction with the student's needs and the vocational/transitional focus of the IEP, including the focus on functional mathematics, and in light of the subsequent amendments to the IEP, which could be deemed in some respects curative (see P.K., 819 F. Supp. 2d 90, 109). Furthermore, the lack of an FBA was mitigated by the strategies and supports included in the August 2009 IEP and based on information about the student's progress relative to controlling his behaviors (R.E., 694 F.3d at 190).

Under the circumstances of this case, the violations identified by the IHO, neither alone nor in combination, resulted in a denial of a FAPE. As such, because I find that the district offered the student a FAPE for the 2009-10 school year, there is no reason to disturb the IHO's determination to deny the parents' request for compensatory education.

C. July 2010 IEP

1. Annual Goals

Initially, the district argues that the IHO sua sponte ruled on the adequacy of the student's math and vocational goals in the April 2009 IEP. Contrary to the district's assertion, a review of the parents due process complaint notice shows that they asserted, relative to the 2010-11 school year, that the "goals and objectives did not reflect all of [the student's] unique educational, social, emotional, behavioral, vocational and transitional needs" (Dist. Ex. 1 at p. 8) and, therefore, the issue was sufficiently raised (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]).

Turning to the merits, the IHO determined that, although the annual goals included in the July 2010 IEP were significantly improved relative to the IEPs associated with the student's 2009-10 school year, the inadequacies in the mathematics and vocational goals remained (IHO Decision at p. 39). However, the IHO concluded that these deficiencies did not rise to the level of a denial of a FAPE (id. at p. 40). The district argues that the IHO's determinations with respect to the inadequacies in the mathematics and vocational goals were not supported by the hearing record. The legal standards applicable to evaluating the appropriateness of the annual goals are set forth

above. In light of such standards, a review of the evidence in the hearing record shows that the annual goals were appropriately aligned with the student's needs.

The July 2010 IEP contained a mathematics goal and associated short term objectives involving two-step word problems related to vocational/real life (Dist. Ex. 26 at p. 11). The mathematics goal and associated short term objectives were consistent with information included in the May 2010 neuropsychological report indicating the student had difficulties with multi-step numerical operations and that the student's mathematics skills were good when he used a calculator (Dist. Ex. 43 at p. 2). Also consistent with the neuropsychological report and with the student's needs described above, including the transitional and vocational focus of the student's educational program, the July 2010 IEP indicated money skills were a priority for the student; that real life math skills such as tasks related to banking, shopping, cooking, travel, and job training were stressed; and that he would continue using a calculator to assist him in math (Dist. Ex. 26 at p. 4).

As to vocational goals, the July 2010 IEP included approximately seven annual goals and 16 short term objectives that specifically addressed the student's vocational needs (Dist. Ex. 26 at pp. 6-7, 16-18). In addition to addressing vocational training, the annual goals and short term objectives incorporated the student's vocational needs for filling out job applications, maintenance of appropriate behavior at job sites and with supervisors, communication skills at work with supervisors and other employees, independent work performance, work-related reading and follow through discussion with job coach and subsequent task performance, and seeking assistance when needed (Dist. Ex. 26 at pp. 16-18). Therefore, to the extent that the IHO found one of the vocational goals to be vague, when read together, the annual goals included in the July 2010 IEP were sufficient to address the student's needs, including his vocational and transitional needs.

2. Special Factors – Interfering Behaviors

The IHO concluded that, for the reasons enumerated relative to the 2009-10 school year, the district should have performed an FBA to determine the causes of the student's inappropriate behaviors, which he observed "not only had not subsided but which had again resulted in [the student] being unable to attend his special education program at the end of the 2009[-]10 school year" (IHO Decision at p. 38).

The July 2010 IEP specified that the CSE considered a May 2010 neuropsychological evaluation and a June 2010 teacher progress report, in addition to parent and staff verbal reports (Dist. Ex. 26 at p. 7). Relative to the student's behaviors, review of the May 2010 neuropsychological evaluation report indicates the student had been involved in at least two romantic relationships in school and experienced frustrations and distressing emotions when breakups occurred (Dist. Ex. 43 at pp. 1, 4). The report also indicated that, according to information reported to the evaluator by the parent, the student had "little or no difficulties in school" but did have some difficulties at home (id. at p. 2). The May 2010 neuropsychological evaluation report indicated that recent home and school difficulties at that time centered on the student's emotionality after a breakup with a girlfriend (id.). The report stated that the student's "issues surrounding this breakup have improved since school has been out because he no longer has to see this ex girlfriend" (id.).

In describing the student's progress in the vocational realm, the June 2010 teacher progress report indicated, among other things, that at times the student's emotions could distract him (Dist. Ex. 47 at p. 2). Although it is unclear if the July 2010 CSE had the opportunity to review it, the hearing record also includes a June 2010 parent progress report completed by the student's job coach for the 2009-10 school year, which details, consistent with the testimony of the job coach, the student's struggles towards the end of the school year (see Tr. pp. 698-700; Dist. Ex. 46).

The district supervisor for secondary special education testified that the July 2010 CSE discussed that the student had experienced "a relationship issue" (Tr. p. 985). Review of the July 2010 IEP reveals that the CSE included information regarding the student's behavioral difficulties (see Dist. Ex. 26 at pp. 4-6). Specifically the July 2010 IEP states that "increases in certain behaviors have interfered with mastery of [his IEP] goals, as well as overall participation in class" (id.). The IEP also noted that the student's "[p]rogress was very inconsistent depending on his emotional state" and that his "emotions greatly affect[ed] his behavior for the day" (id. at pp. 4-5). Therefore, the July 2010 IEP proposed that the student continue to receive counseling to "improve self-control of his behavior and emotions when needed and redirect his impulsiveness" (id. at p. 6). In addition to the small group counseling the student had previously received, the July 2010 IEP added individual counseling to the student's IEP mandate (id. at p. 1).

Therefore, the evidence in the hearing record indicates that, while the July 2010 CSE had reason to believe that the student was exhibiting behaviors that impeded his learning, it is not clear the extent to which such behaviors were occurring for a sustained period of time, as opposed to a more isolated occurrence following the student's emotional reaction to the end of a romantic relationship. In any event, as set forth above, review of the July 2010 IEP reveals that the CSE not only identified the student's problem behaviors but recommended additional supports and accommodations to address those particular behaviors.

3. General Education Classes, 12:1+2 Special Classes, and BOCES Program

Turning to the IHO's determination that the student's placement for the 2010-11 school year was not finalized in the July 2010 IEP, that part of the student's schedule would be "hand scheduled," and that the parent could not determine the appropriateness of the program prior to the start of the school year, a review of the evidence in the hearing record supports the IHO's determination.[18]

The July 2010 CSE meeting was "co-chaired" by the district's assistant superintendent for student support services and the district's supervisor of special education (Tr. pp. 1437, 2018, 2191;

[18] The district contends that the IHO should not have addressed parental participation because it was outside of the scope of the impartial hearing (see IHO Decision at pp.46-48). On the contrary, review of the parents' due process complaint notice shows that the parents alleged that the district predetermined the student's program and that the parents were not provided with enough information about the program because, among other things, they were not provided with a class schedule or guidelines or procedures about how the program would function (Dist. Ex. 1 at pp. 6-9). Under the circumstances of this case, such allegations can be reasonably read to have raised the issue of parental participation (20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.507[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]). However, as the examination of this issue overlaps with the analysis of the recommended placement, I do not find it necessary to separately address the issue of parental participation and, to the extent relevant, it is discussed herein.

see Dist. Ex. 26 at p. 7). Attendees also included a district special education teacher, a district regular education teacher, the student's speech-language therapist from the CDP-II, a school psychologist from the BOCES retail program, as well as the parents and their advocate (Dist. Ex. 26 at p. 7). During the meeting, the participants reviewed the May 2010 private neuropsychological evaluation report (Tr. pp. 951-54; Dist. Exs. 26 at p. 7; 43). The district supervisor of special education testified that, at the meeting, "the original proposal" was for the student to participate in the district's careers/community/connections 2 (CCC-2) program, which addressed "all the ADL skills" but that "[u]nfortunately that wasn't what came to fruition, so at the meeting, [the CSE] tried to think out of the box" (Tr. pp. 1496). She also testified that, as a result of the discussions at the July 2010 CSE meeting, and the recommendation that the student should interact more with typically developing peers from the May 2010 neuropsychological evaluation, that "we were looking at a whole different type of program" (Tr. p. 953-54, 1385; Dist. Ex. 43 at p. 10). The CSE discussed "hand scheduling" the student's program to include general education elective classes for the student, as well as continuing the student's vocational program at the BOCES retail program (Tr. pp. 953-54, 2080).

The July 2010 IEP includes some of this information in that it provides for a "5:1 TA in [g]eneral [e]ducation [c]lasses" and contains the notation that the CSE "agreed to hand-schedule" the student's 2010-11 school year school program "to include BOCES internship, community experiences and a reading program/academics" (Dist. Ex. 26 at pp. 2, 7). The hearing record shows that the district contemplated that the student would attend the 12:1+2 special class at the district's careers/community/connections 2 (CCC-2) program, which consisted of a total of four periods, consistent with the frequency for the special class set forth on the July 2010 IEP (Tr. pp. 2232, 2252).[19] Testimony also shows that the "vocational training program offered through BOCES" described in the July 2010 IEP was the BOCES business program and that this program would take five periods of a nine period school day (Tr. pp. 2021, 2049-50; 2238, 2252-54; Dist. Ex. 26 at p. 6). Thus, both of those programs together would consume the entire nine period school day and there is no indication in the July 2010 IEP or elsewhere in the hearing record that an extended school day program was considered for the student. This leaves open the question of how the "hand scheduled" general education portions of the IEP can be reconciled with the rest of the program (Dist. Ex. 26 at pp. 2, 3, 7).

A program schedule developed by the district after the July 2010 CSE meeting shows only one period in a 12-1+2 special class ("CCC English"), not the four daily periods that are listed in IEP (Dist Exs. 26 at p. 1; 75). The schedule also includes the BOCES business program ("business service skills 1"), scheduled for the first five periods of each school day, as well as three general education electives (phys ed, health, and sports marketing or transportation services, depending on the semester) each day (Dist. Ex. 75).

At the impartial hearing, the student's mother indicated her impression as to which general education classes the student would attend, stating that "[w]ell, we weren't really sure because I

[19] The district's assistant superintendent for student support services testified that along with travel training and other ADL's the CCC-2 program would cover five periods during each school day (Tr. pp. 2256). The CCC-2 program is described in the hearing record as consisting of a daily math class, English class and a vocational program (Tr. p. 1888).

didn't get a schedule … [t]hey were going to hand schedule. It wasn't even definite. Nothing was concrete. Everything was being planned as I spoke." (Tr. p. 2643). She also testified that, at the conclusion of the July CSE meeting, she did not have an understanding of the particulars of the recommended program and did not "know how they were going to fit everything in one day" (Tr. pp. 2640, 2657). Documentary evidence, consisting of correspondence between the parents and the district shortly after the July 2010 CSE meeting, further supports the parents' characterization of the inconclusive nature of the July 2010 CSE meeting (Dist. Ex. 53).

This lack of clarity on the student's July 2010 IEP constitutes a procedural inadequacy that significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). In R.E., the Second Circuit held that:

> In order for this system to function properly, parents must have sufficient information about the IEP to make an informed decision as to its adequacy prior to making a placement decision. At the time the parents must choose whether to accept the school district recommendation or to place the child elsewhere, they have only the IEP to rely on, and therefore the adequacy of the IEP itself creates considerable reliance interests for the parents.

(R.E., 694 F3d at 186).

Events after the July 2010 CSE meeting do not show that the district ever corrected these fundamental problems in the IEP. Evidence in the hearing record shows that each of the student's IEPs developed after the start of the 2010-11 school year contained the same programmatic features described above (see Parent Exs. X; BB; DD). The district's assistant superintendent for student support services testified that district staff continued to work on the program after the July 2010 CSE meeting but that he directed them to stop after the parents formally rejected the July 2010 IEP by letter dated August 16, 2010 (Tr. pp. 2031, 2175; Dist Ex. 55). There are multiple references in the hearing record to the effect that the exact nature of the program was not finalized at the July 2010 CSE meeting, that the program remained "in flux" or "proposed" thereafter, and that it was expected that after the program was finalized, the CSE would meet again to re-write the IEP (Tr. pp. 1456-57, 1464, 2021, 2059-60, 2113, 2117-18, 2161, 2171-74, 2232, 2255). The district assistant superintendent explained that the four periods in a 12:1+2 special class were included on the IEP as "placeholders" and that they would have been changed or removed after the IEP was re-written and the CSE reconvened (Tr. pp. 2030, 2232, 2255-58). This is an attempt to rehabilitate the IEP with retrospective testimony offered at the impartial hearing, which is impermissible under R.E. After the parents sent their August 16, 2010 letter notifying the district of their intention to unilaterally place the student, the assistant superintendent directed district staff to stop working on the program but to have something "preliminarily set," and, ultimately, the district board of education approved an IEP for the student's 2010-11 school year (Tr. pp. 2031, 2175, 2206-07; Dist. Ex. 57).

The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6). The district's attempts to justify its failure to adhere to this requirement are unpersuasive. The

program set forth in July 2010 IEP cannot be reasonably discerned and, as such, the parents did not have an adequate opportunity to make an informed decision as to its appropriateness prior to making a placement decision (R.E., 694 F3d at 186). On this basis, the evidence in the hearing record supports the IHO's conclusion that the district failed to offer the student a FAPE for the 2010-11 school year.

D. Unilateral Parental Placement

Having found that the district failed to offer the student a FAPE during the 2010-11 school year, I turn to the appropriateness of the parents' unilateral placement of the student at the NYIT-VIP. The district challenges the placement on the ground that the parents failed to show that the school provided specially designed instruction appropriate to the needs of the student. Contrary to the district's position, the evidence in the hearing record supports the IHO's determination that NYIT-VIP constituted an appropriate placement for the student for the 2010-11 school year.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement . . . .'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]).). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the

> child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65; see also C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826,835-36 [2d Cir. 2014]).

State regulation defines specially designed instruction as "adapting, as appropriate, to the needs of an eligible student . . . the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]). In this instance, although much of the testimony included in the hearing record described NYIT-VIP in general terms applicable for all students enrolled in the program, such as the description of programmatic goals developed for the "entire class," overall, the hearing record reflects that NYIT VIP addressed the student's individual needs by offering individualized instruction and accommodations, such as by modifying the student's instruction according to his organizational, independent living, academic, and vocational needs (see Tr. pp. 3078, 3261, 3601, 3603, 3605-06, 3694, 3699, 3859, 3861, 3892; Parent Ex. JJJ at pp. 2-3).

According to the testimony by the dean, NYIT-VIP was a "comprehensive transition [and] post-secondary program" (CTP) which aimed to" transition students into the world of work and independent living or to transition [students] into a degree-bearing program and ultimately the world of work" (Tr. pp. 2287, 2295, 2361). The hearing record indicates the NYIT-VIP structure was comprised of departments (academic, vocational, independent living, social counseling, and residence life) that met regularly and, at those meetings, the staff rotated in terms of their discussion of each individual student (Tr. pp. 2956-57, 3027-29). Further the hearing record shows that, if a student was struggling, the staff at NYIT- VIP would break assignments down into smaller segments across all areas of the curriculum (Tr. pp. 3013, 3027).

The hearing record shows that NYIT-VIP was a residential placement and, according to testimony by the parent, the students "ha[d] to sleep" at the school, something that the parents and the student wanted (Tr. pp. 2566-67). In line with this, the dean testified that students lived in a residence hall dedicated for NYIT-VIP students during the fall and spring semesters and were supported by trained resident advisors (RAs) (Tr. pp. 2340, 2431). The dean indicated that students' independent living skills were addressed through the general curriculum and through the students' interaction with the RAs and their independent living skills counselor (Tr. pp. 2336-37). The hearing record indicates the student met with his independent living counselor regularly in the

residence hall about the student's management of his room, as well as to help him schedule when he would attend to personal hygiene needs such as taking a shower and doing laundry (Tr. pp. 3006-07, 3039-42, 3592). As needed, NYIT-VIP students focused on visual schedules and calendars, as well as visual prompts to address time management (Tr. pp. 3043-44). In terms of cleaning and hygiene, the students were required to have "some base level of hygiene," but received reminders from the RAs and direct verbal feedback from all staff if they need to bathe and/or wash their clothing and instruction in skills related to cleaning (Tr. pp. 2237-38).[20]

The hearing record reflects that every student in the NYIT-VIP had an academic counselor, a budget and banking advisor, a vocational counselor/job coach, a social counselor, and, if necessary, an independent living skills coach (Tr. pp. 2284-85, 2382, 2449-50, 2452 2958-59). In addition, each student's team had a licensed nurse practitioner assigned to it, as well as the support of a residence advisor and support for transportation (Tr. p. 2383). The dean of NYIT-VIP testified that, for the 2010-11 school year, the age range of the students in the program ranged between 18 (minimum age for admission) to 27 years old (Tr. p. 2427).[21] The dean indicated the NYIT-VIP "is not a remedial program" in regard to reading and mathematics (Tr. p. 2484). The dean noted that, instead, NYIT-VIP used technology to deal with a student's reading or mathematics difficulties (Tr. pp. 2483-85). The dean testified that the mathematics portion of the NYIT-VIP curriculum consisted of consumer math, rather than higher level math courses (Tr. p. 2485). In addition, for the first semester at NYIT-VIP, students attended a vocational exploration class, a health class, and "some sort of advanced communications class" (Tr. p. 2497). During the second semester, students attended a vocational placement two days per week for approximately two hours (Tr. pp. 2497-98).[22] The hearing record includes specific testimony regarding particular freshman classes offered at NYIT-VIP, including: the health class, which addressed issues of concern to the student, such as relationships; the banking and budgeting and independent banking components of the mathematics course, which utilized a functional approach to mathematics skill; the classroom based travel training, the second semester of which involved travel trips outside of the classroom; the advanced communication course led by the NYIT-VIP social counselors, in which students participated in role playing and engaged in different types of communication situations; the vocational placement, in which the students "shadow[ed]" someone and, by the spring semester,

[20] Although there is little evidence in the hearing record showing that the student required a residential placement in order to receive educational benefit, the hearing record does indicate that the residential component of NYIT-VIP addressed the student's ADL and social needs. In light of this and given that the district did not assert in its petition that the unilateral placement was overly restrictive for the student, discussion of this point is not necessary to a determination regarding the appropriateness of the unilateral placement. Moreover, while the restrictiveness of a unilateral parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement, parents are not held as strictly to the standard of placement in the LRE as school districts (C.L., 744 F.3d at 836-37; Frank G., 459 F.3d at 364; Rafferty, 315 F.3d at 26-27; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]; Schreiber v. East Ramapo Cent. Sch. Dist., 700 F.Supp.2d 529, 552 [S.D.N.Y. 2010]; W.S., 454 F. Supp. 2d at 138; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]).

[21] The dean of NYIT-VIP testified that he did not "know specifically" the disabilities of each and every student enrolled in the VIP, but that he had a "good general sense" of the students (Tr. p. 2427).

[22] The hearing record reflects that students' vocational placement experiences increased each year that they attended NYIT-VIP (Tr. pp. 2289-92).

went to community-based placements two mornings per week; the college skills class, which addressed transition to college life, as well as organization and study skills; the computer course; and the contemporary culture course (Tr. pp. 2950-51, 2962-23, 2966-68, 2975-77, 2983-84, 2986-94, 2998-3003, 3005-06; see also Parent Exs. RR; SS at p. 2). In regard to exposure to the general population, the director indicated that, as part of residence hall life, students participated in community outings during evenings and weekends, with feedback about any difficulties a student may be having provided by the RA (Tr. pp. 2974-75).

Specific to the student, the hearing record shows that a banking advisor for 2010-11 worked with the student on various banking skills, such as making purchases with a bank debit card at an automated teller machine (ATM) (Tr. pp. 3796-3800). The student went to a local bank independently with other students (Tr. p. 3838). The hearing record shows that, similar to his experiences during the 2009-10 school year, the student experienced relationship/communication difficulties with a girlfriend, who also attended NYIT-VIP, and that the student worked with the social counselors at NYIT-VIP to better communicate with his girlfriend (Tr. pp. 3044-45). In addressing the student's display of hand wringing, perseveration on answers, and agitation when stressed or anxious, the NYIT-VIP director of academics and program evaluation (director) testified that instructors and staff encouraged the student to focus on facts instead of emotion and anxiety and to speak with his social counselor (Tr. pp. 3022-24, 3026). According to the director (who taught the social psychology and college skills classes that the student attended during at least part of the 2010-11 school year) the student displayed "great difficulty" with handwriting, as well as generating a written assignment on his own using the computer instead of handwriting (Tr. pp. 2995, 3051). He indicated that, although the student continued to display significant difficulty with writing assignments, in an effort to compensate for his difficulties in this area, the student was provided with support and spelling correction and introduced to voice recognition software to dictate written assignments (Tr. pp. 2995-98). In addition, the hearing record shows that the student's academic advisor adapted her process of working with him by adding a daily meeting to his schedule and by providing checklists to help him with his organizational skills (Tr. p. 3014).

Accordingly, the evidence in the hearing record supports a determination that NYIT-VIP was an appropriate placement and was reasonably calculated to enable the child to receive educational benefits (Gagliardo, 489 F.3d at 112). Additionally, while the district does not raise a challenge to the unilateral placement on this basis in its petition, I nonetheless acknowledge that the hearing record shows that the student made progress at NYIT-VIP during the 2010-11 school year based on evidence of the student's passing grades, the student's progress towards the majority of goals and objectives specific to each of his courses, as well as testimony by the staff at NYIT-VIP regarding the student's gains (see Parent Exs. SS at p. 2-25; UU; JJJ at p. 2-24; see also Tr. p. 2962, 3021, 3590-93, 3608-10, 3622-24, 3709-10, 3712, 3714-15, 3770-71, 3794, 3796, 3800-07, 3848, 3863, 3867-68, 3872-76).

E. Equitable Considerations

Having determined that NYIT-VIP was an appropriate unilateral placement for the student for the 2010-11 school year, the next issue to consider is whether equitable considerations support the parents' request for reimbursement of the student's tuition costs.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist., 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The district contends that there was no support in the hearing record for the IHO's finding that the equities supported tuition reimbursement. However, the district does not identify which findings lacked support or make a counter-argument that the equities favored the district. In any event, the IHO cited to applicable law in setting forth the standard to be employed in balancing equitable considerations and cited to four different exhibits in support of his findings that the parents consented to evaluations, attended multiple CSE meetings, and provided timely notice of their disagreement with the CSE's recommended program for the 2010-11 school year, and I decline to disturb that finding based upon the argument or the evidence before me (see IHO Decision at pp. 56-56; Dist. Exs. 27, 28, 53, 55).

VII. Conclusion

Based on the above, I find that the district offered the student a FAPE for the 2009-10 school year. However, the evidence in the hearing record supports the conclusion that the district failed to offer the student a FAPE for the 2010-11 school year, NYIT-VIP constituted an appropriate unilateral placement, and equitable considerations weighed in favor of the parents' request for reimbursement.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 28, 2014

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JUSTYN P. BATES
STATE REVIEW OFFICER