The University of the State of New York

The State Education Department
State Review Officer
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No. 13-222

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

Appearances:
Law Office of Peter D. Hoffman, PC, attorneys for petitioners, Catherine Laney, Esq., of counsel

Kehl, Katzive & Simon, LLP, attorneys for respondent, Andrea Green, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for compensatory additional services for the 2011-12 school year and their request to be reimbursed for their son's tuition costs at the Eagle Hill School (Eagle Hill) for the 2012-13 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The medical history of the student in this case is significant for serious medical conditions related to premature birth (see Tr. pp. 2509-11, 2772; Dist. Ex. 16 at p. 8; 28 at pp. 2-3; 29 at p. 4). The student has diagnoses of attention deficit hyperactive disorder (ADHD), asthma, reactive airway disease, growth hormone deficiency, and Duane syndrome (Tr. pp. 2460, 2516, 2521; Dist. Exs. 16 at pp. 1, 8; 28 at p. 2; 29 at p. 4).[1] The student has exhibited deficits with regard to reading, writing, spelling, and mathematics, as well as weaknesses in executive processing, phonological processing, retrieval of verbal material, and retention of auditory/sequential material in short-term

[1] The hearing record indicates that Duane syndrome impacts ocular movements causing one eye to be stationary and prevents peripheral vision in the respective eye (Tr. p. 2516; Dist. Ex. 28 at p. 2).

working memory (see Dist. Exs. 25 at p. 3; 28 at pp. 2, 5, 15). The student has also presented with attentional and behavioral needs (see Dist. Exs. 27 at pp. 6-7; 28 at p. 1). With respect to the student's educational history, the student received early intervention services (EIS) and preschool special education services, consisting of occupational therapy (OT), physical therapy (PT), and speech-language therapy (Tr. pp 2512, 2518). The student transitioned to the CSE for the 2009-10 school year and continued to receive special education services for kindergarten and first grade (Tr. pp. 2514, 2526, 2528).[2]

On April 6, 2011, the CSE convened to conduct an annual review and to develop the student's IEP for the 2011-12 school year (Dist. Ex. 61 at p. 1).[3, 4] Finding that the student remained eligible for special education as a student with an other health-impairment, the April 2011 CSE recommended a 12:1+1 special class for English language arts (ELA) (45 minutes twice daily) and mathematics (45 minutes once daily) (id. at pp. 1, 12).[5, 6] The April 2011 CSE also recommended a 1:1 aide throughout the school day and related services of: two 30-minute sessions per week of speech-language therapy in a small group, one of which was to be delivered in the special class; two 30-minute sessions per week of OT in a small group; and one 30-minute session per week of counseling in a small group in a "[n]on-[i]ntegrated/[i]ntegrated" setting (id.). The April 2011 CSE also recommended a behavioral intervention consultation for the student's educational team for two hours per month and parent counseling and training for one hour every alternate month (id. at pp. 1, 12-13). In addition, the April 2011 CSE recommended supports to address the student's management needs (such as refocusing and redirection, implementation of a positive reinforcement plan, repeating directions, checking for understanding, reteaching of materials, and reading and rereading directions), 29 annual goals to address the student's needs (in the areas of study, reading, writing, mathematics, speech-language, social/emotional, and motor skills), social skills training, and special transportation (adult supervision) (id. at pp. 8-13, 15). The April 2011 IEP noted that the student required a behavioral intervention plan (BIP) and indicated that the student's BIP would be updated in September 2011 (id. at p. 9).

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[2] The hearing record indicates that the student attended kindergarten for the second time during the 2009-10 school year (Tr. p. 2561).

[3] The body that convened was a subcommittee on special education; however, there is no argument that the district was required to convene a full CSE in this instance (see 8 NYCRR 200.3[c]). Accordingly, for purposes of this decision all subcommittees on special education are referred to as CSEs.

[4] The parties' familiarity with the underlying facts, proceedings, and hearing record is presumed and will not be recited here in detail. Those facts necessary to the disposition of the parties' arguments will be set forth as necessary to resolution of the issues presented in this appeal. In addition, because the merits of any of the parents' claims with regard to the IEPs developed for the student for the 2009-10 and 2010-11 school years, as well as the implementation of those IEPs during the 2009-10 and 2010-11 school years, are not addressed in this appeal for the reasons stated below, a summary of the factual background and procedural history relevant to those two school years is not necessary here.

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

[6] The April 2011 CSE recommended a 12-month school year program but only with respect to the provision of parent counseling and training during July and August 2011 (see Dist. Ex. 61 at pp. 1, 13-14).

According to the district's behavioral consultant, the April 2011 CSE determined that a new functional behavioral assessment (FBA) would be developed if the student exhibited different behaviors during the beginning of the 2011-12 school year, relative to those observed during the 2010-11 school year (Tr. pp. 1388-89). According to the student's special education teacher, he began exhibiting behaviors during the middle of September 2011 (Tr. pp. 900-01). The student's educational team collected behavioral data from September 19, 2011 through September 23, 2011, and the behavioral consultant developed an FBA and a BIP, dated September 26, 2011 (Tr. pp. 910-11, 1385-89; see generally Dist. Ex. 77). Further, due to concerns regarding the increase in the frequency of the student's refusals and the severity and intensity of inappropriate and self-injurious behaviors observed in October 2011, the district also developed an interim safety plan, dated October 18, 2011, as a "crisis measure" in order to "safeguard [the student] as an individual as well as staff and peers around him based on presenting behaviors" (Tr. pp. 148-49, 416-17; Dist. Ex. 12).

By correspondence, dated October 20, 2011, the parents informed the district that student's "current placement [wa]s not working out" and requested that the student be "home schooled with services provided by the district" and that the district complete a reevaluation of the student, noting that the student was due for his triennial evaluation (Dist. Ex. 13). The parents also indicated that they would provide the district with a private neuropsychological evaluation and suggested that the CSE could "reconvene" in order to consider the completed evaluations "and a[n] appropriate placement for [the student]" (id.).

The CSE reconvened on October 28, 2011 to expedite a review of the student's recent behaviors, to respond to the parents' October 20, 2011 request for home instruction, to discuss conducting evaluations of the student, and to determine if the CSE should consider alternative placements (see Tr. pp. 158-59; Dist. Exs. 14 at p. 1; 16 at pp. 1-2). The October 2011 CSE recommended a complete reevaluation of the student, including a psychiatric evaluation, and agreed to explore out-of-district placements that offered a therapeutic component (Dist. Ex. 16 at p. 2). In addition, the October 2011 CSE added 30 minutes per day of 1:1 reading instruction to the student's IEP (id.).

On May 11, 2012 the CSE convened to conduct the student's annual review to develop an IEP for the 2012-13 school year (Tr. pp. 237-38; Dist. Ex. 47). During the May 2011 CSE meeting, the CSE reviewed the results of the reevaluations of the student and discussed the status of the intake process for the out-of-district placements (Tr. p. 239). An IEP was not generated as a result of the May 2011 CSE meeting (id.).

On May 23, 2012, the parents signed an enrollment contract with Eagle Hill for the student's attendance during the 2012-13 school year (see Dist. Ex. 64 at pp. 2).[7]

The CSE reconvened on June 15, 2012 and recommended a 12-month school year program in a 12:1+1 special class in a therapeutic day program at a State-approved nonpublic school (Dist. Ex. 47 at pp. 1, 10, 13-14, 16). The June 2012 CSE also recommended a 1:1 aide during the first quarter of the school year and the related services of: two 30-minute sessions of counseling per

[7] The Commissioner of Education has not approved Eagle Hill as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

week, one individually and one in a small group; one 60-minute session of OT in a small group; and two 30-minute sessions of speech-language therapy in a small group, one of which was to be delivered in the classroom (id. at pp. 1, 13-14).[8] In addition, the June 2012 recommended supports to address the student's management needs (such as refocusing and redirection, implementation of a positive reinforcement plan, repeating directions, checking for understanding, reteaching of materials, provision of information in small sequential units, and allowance for movement breaks), 21 annual goals to address the student's needs (in the areas of study, reading, writing, mathematics, speech-language, and social/emotional and behavioral skills), testing accommodations (tests read, extended time, and flexible location), and special transportation (adult supervision) (id. at pp. 9, 11-16). The June 2012 IEP noted that the student's BIP was updated on September 26, 2011 and that an interim safety plan was created on October 10, 2011 (id. at p. 10).

The hearing record indicates that, at the end of the CSE meeting, the parents rejected the June 2012 IEP and expressed their intent to unilaterally place the student at Eagle Hill and seek reimbursement for the costs of the student's tuition (see Tr. pp. 1036, 1589, 2698).

By letter to the district dated July 20, 2012, the parents again rejected the June 2012 IEP as not appropriate for the student and indicated their intent to unilaterally place the student at Eagle Hill for the 2012-13 school year at public expense (Dist. Ex. 50).

A. Due Process Complaint Notice

By due process complaint notice dated September 19, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) and/or implement the student's educational program for the 2011-12 and 2012-13 school years (Pet. Ex. 1 at 3; see id. at ¶¶ 1-4, 59-64).[9, 10] Initially, the parents set forth a recitation of facts consisting of 54 numbered paragraphs (id. at ¶¶ 5-58). With respect to the 2011-12 school year, the parents asserted that the district failed to "properly implement[]" the student's BIP and failed to "follow its own recommendation to implement ABA principals or methodologies" (id. at ¶¶ 61-62). The parents also alleged that, given language in the student's IEPs for the 2010-11 and 2011-12 school years that the student's deficits interfered with his participation in age appropriate activities, "it [wa]s not possible that [the student] could have made progress in either school year" (id. at ¶ 63). As to

[8] The June 2012 CSE recommended a similar special education program and services for July and August 2012, absent the recommendations for counseling (Dist. Ex. 47 at pp. 1, 4-15).

[9] In this case, the parents' due process complaint notice was not entered into the hearing record (see Dist. Exs. 1-89; Parents Exs. A-MM; IHO Exs. 1-6). Instead, the parents attached the due process complaint notice, in addition to other supplemental documentary evidence addressed more fully below, to their petition (see Pet Exs. 1; 2). The due process complaint notice will be considered because it is necessary to the resolution of this appeal (see Pet. Ex. 1 at pp. 1-19; see, e.g., Application of a Student with a Disability, Appeal No. 13-238; see also 8 NYCRR 279.10[b]). While not in effect at the time of the impartial hearing, the parties are reminded that State regulation now requires that the hearing record include "the due process complaint notice and any response to the complaint" (8 NYCRR 200.5[j][5][vi]).

[10] The exhibits submitted with the parents' petition were not consecutively paginated. Several of these exhibits, in turn, include multiple unrelated documents, each of which is paginated independent of the exhibit as a whole (see Pet. Exs. 1; 2). With respect to the due process complaint notice (which consists of a cover letter, a completed form due process complaint notice, and an accompanying addendum), where applicable, citations are to the numbered paragraphs of the addendum (see Pet. Ex. 1 at pp. 1-19).

the 2012-13 school year, the parents alleged that the district admitted it "could not provide a program with the required supports to address [the student's] emotional and behavioral needs" (id. at ¶ 64).

The parents also alleged that the student's unilateral placement at Eagle Hill was appropriate to address his special education needs (Pet. Ex. 1 at ¶¶ 65-69). The parents further maintained equitable considerations weighed in favor of their request for relief (id. at ¶¶ 70-84).

As to relief, the parents requested a declaratory finding that the student's IEPs for the 2011-12 and 2012-13 school years were not appropriate and that Eagle Hill was an appropriate unilateral placement for the student for the 2012-13 school year (Pet. Ex. 1 at pp. 4, 19). The parents also sought (1) unspecified compensatory additional services to remedy the district's alleged failure to provide the student with a FAPE during the 2011-12 school year and (2) tuition reimbursement for the costs of the student's attendance at Eagle Hill for the 2012-12 school year (id.). Finally, the parents sought an order granting the parents prevailing party status and attorneys' fees and costs (id.).

B. Impartial Hearing Officer Decision

On February 5, 2013, an impartial hearing convened in this matter and concluded on July 17, 2013, after fifteen days of proceedings (Tr. pp. 1-2990).[11] Intially, the IHO made several interim rulings. In an interim decision dated March 22, 2013, the IHO denied the district's motion to dismiss for failure to prosecute, finding that there were no purposeful delays by the parents, that extensions were warranted in the case due to the complexity of issues presented at the impartial hearing, and that any extension would have had no impact on the student's education because the student had been attending Eagle Hill (IHO Ex. 4 at pp. 3-4; see also IHO Decision at p. i). In addition, by interim decision dated April 22, 2013, the IHO granted the district's motion to prohibit the disclosure of the reporter and the circumstances of a child protective services (CPS) report through testimony or documentary evidence at the hearing (IHO Ex. 5 at p. 13; see also IHO Decision at p. i).[12] Finally, in response to the IHO's disclosures regarding his prior employment as the director of special education services in a non-party school district and that one of the parents' witnesses was employed as a consultant psychiatrist by that same non-party school district (IHO Ex. 3 at p. 1; see also Tr. p. 168), the parents requested that the IHO recuse himself (see Tr. pp. 1406-10). Noting that he had no personal or professional relationship with the parents' witness since 1995 or with either party that conflicted with his objectivity at the hearing, the IHO denied the recusal motion (see Tr. pp. 1410-13; IHO Ex. 3 at p. 1; see also IHO Decision at pp. i-ii).

By final decision dated October 23, 2013, the IHO determined that the district offered the student a FAPE for the 2011-12 and 2012-13 school years (IHO Decision at pp. 34-52). Initially, the IHO summarized the factual background relative to the student's medical and educational

[11] The cover page of the certified copy of the transcript for Volume 6 (April 4, 2013) is mislabeled as "Vol. IV." The first page of the transcript volume, however, is correctly labeled as Volume "VI" (Tr. p. 960).

[12] In support of his ruling, the IHO found that State law provided that the identity of the person making a referral to CPS was confidential and all identifying information about the report exempt from disclosure unless otherwise specified in the Social Services Law (IHO Decision at p. 1; IHO Ex. 5 at pp. 12-13; see Soc. Serv. L. § 422[4][A], [5][a][i]-[v], [7]).

history, including facts relevant to the 2009-10 through and 2010-11 school years (id. at pp. 2-23). However, the IHO acknowledged in the headings relative to these discussions that these school years were "not at issue in this action" (id. at pp. 3, 8).

As to the 2011-12 school year, the IHO found that the parents were afforded an opportunity to participate, and did participate, in the development of the student's April and October 2011 IEPs a (IHO Decision at p. 38). With regard to the student's April 2011 and October 2011 IEPs, the IHO found that the supports and recommendations made by the CSEs were appropriate and consistent with federal and State regulations (id at p. 34). Specifically, the IHO found that the recommendation of a 1:1 teacher's aide, along with the "support of four staff members" in the mainstream setting, was appropriate to meet the student's needs (id.). To the extent that the parent alleged that the district should have recommended that the student's educational program include instruction using the Orton-Gillingham approach for reading and writing, the IHO found that the district's use of an alternative program was within its prerogative and that the student had made educational progress when using "curriculum bench marks" (id. at pp. 36-37). To the extent that the parents argued that the criteria used to determine the success of a particular annual goal was too low in the student's April 2011 and October 2011 IEPs, the IHO found that the claim was not properly raised in the parents' due process complaint notice (id. at p. 39). The IHO also found that the district's rejection of the parent's October 2011 request for home instruction and services at district expense did not deny the student a FAPE because home instruction would not have met the student's needs in the least restrictive environment (LRE) (id. at 38).

As to the September 2011 BIP developed for the student, the IHO found that, although the student continued to exhibit inappropriate behaviors during the 2011-12 school year, he continued to make progress academically in both reading and mathematics (IHO Decision at p. 35). Further, the IHO found that the BIP was based on an FBA that provided a description of the student's problem behaviors and an understanding of why those problem behaviors occurred and provided "intervention strategies that included behavioral supports and services" (id. at p. 36). The IHO noted that during the 2011-12 school year, the student's behaviors were managed by district staff by implementation of the BIP, and the IHO rejected the parents' allegation that the student's extreme behaviors occurred only at school and not at home (id. at pp. 26, 34, 38-39).

Relative to the 2012-13 school year, the IHO found that the May and June 2012 IEPs included a statement of the child's present levels of academic performance and annual goals that were designed to help the student overcome his educational deficits (IHO Decision at p. 51). The IHO also found that the 12:1+1 special class at the recommended therapeutic day program with related services of counseling, speech-language therapy and OT was an appropriate educational program for the student and aligned with the recommendations set forth in the private evaluations (id. at pp. 49-59). With regard to the parents' allegations at the impartial hearing that the severity of the student's medical needs rendered the assigned therapeutic day program identified in the June 2012 IEP inappropriate, the IHO found that the evidence in the hearing record revealed that the student exhibited a high level of physical activity and was able to, and did, fully participate in recess and physical education activities (id. at p. 50). The IHO also found that the parents failed to inform the CSE of any issue regarding the length of the student's bus ride to the assigned therapeutic day program, and, moreover, that the student had endured bus rides on field trips of equal or greater length (id. at pp. 50-51). Finally, to the extent that the parents argued that the makeup of the student's class at the assigned therapeutic day program was inappropriate because

no class profile was provided at the time of the impartial hearing, the IHO found that "the makeup of the [student's] class was not known" and, therefore there was no basis for the parents' concern that students who had received diagnoses of autism spectrum disorder would be in the student's class (id. at p. 49). Accordingly, the IHO denied all relief sought by the parents as to the 2011-12 and 2012-13 school years (id. at pp. 51-52).

IV. Appeal for State-Level Review

The parents appeal, seeking to overturn the IHO's determinations that the district offered the student a FAPE for the 2011-12 and 2012-13 school years.[13] Initially, the parents argue that the IHO erred in granting the district's motion to preclude the parents from introducing evidence relative to the CPS report noted above.[14] The parents also argue that the IHO should have recused himself due to his previous employment as the director of special education services in a non-party school district and because one of the parents' witnesses was employed as a consultant psychiatrist by that same non-party school district. The parents also argue that the IHO "lacks the legal knowledge to make a reasoned decision." Turning to the merits, the parents identify various factual findings in the IHO's decision relative to the 2009-10 and 2010-11 school years, which they assert were not supported by the evidence in the hearing record.[15]

With regard to the 2011-12 school year, the parents argue that the April and/or October 2011 IEPs were procedurally inadequate because the district did not take into consideration the parents' (1) request for home instruction; (2) request for 1:1 instruction utilizing the Orton-

[13] The parents included additional documentary evidence with their petition. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Over the course of 15 hearing dates, the parents had ample opportunity in this case to offer the evidence attached to their petition. Moreover, there is no evidence in the hearing record suggesting that the parents were deprived of any opportunity to present documentary or testimonial evidence or to rebut that offered by the district. Finally, the exhibits attached to the parents' petition are largely cumulative of the evidence already presented in this case and/or are not necessary in order to render a decision. Accordingly, with the exception of the parents' due process complaint notice, addressed above, the additional documentary evidence attached to the parents' petition will not be considered.

[14] The parents primarily sought admission of the CSP report to challenge the veracity of the report and to demonstrate that equitable considerations supported their claim for tuition reimbursement for the 2012-13 school year (see IHO Ex. 5 at p. 3). As to the veracity, such a claim concerns a matter that falls outside the purview of the IDEA and the Education Law (see Educ. Law 4404[1]) and, as noted below, it is not necessary to reach equitable considerations in this matter. Moreover, the parents have failed to cite to any legal authority to counter the IHO's reasoning with regard to whether the CPS report could properly be made available to an IHO or an SRO (see Soc. Serv. L. § 422[4][A], [5][a][i]-[v], [7]). Therefore, I decline to disturb the IHO's ruling on the admissibility of the disputed evidence.

[15] In the parents' memorandum of law in support of the petition, the parents also set forth various arguments related to the applicability of the statute of limitations to their claims pertaining to the 2009-10 and 2010-11 school year, as well as the relevance of the evidence in the hearing record relating to these school years, notwithstanding their concession that they did not seek relief relating thereto.

Gillingham approach; (3) request for a special class placement for the student, as opposed to a recommendation that the student attend some general education classes; and (4) the parents' opinion that the student's interfering behaviors were attributable to learning difficulties. The parents further argue that the educational program for the student's 2011-12 school year was inappropriate and that the district was not responsive to the student's needs throughout the 2011-12 school year. Additionally, the parents assert that the September 2011 FBA was inappropriate as drafted because the FBA: (1) was not based on multiple sources of data; (2) failed to identify antecedent behaviors; and (3) did not provide a baseline of the student's problem behaviors in sufficient detail to form the basis for the September 2011 BIP. The parents also argue that the September 2011 FBA and BIP were inappropriate as drafted because the BIP offered the same token/penny system that had previously failed.

The parents also assert that the district failed to properly implement the student's April and/or October 2011 IEPs because the district did not utilize the Orton-Gillingham approach when providing reading instruction to the student during the 2011-12 school year. Specifically, the parents aver that the student required a more intensive program and that the "Fundations" reading program used by the student's special education teacher during the 2011-12 school year provided no benefit to the student. Moreover, the parents argue that the district's failure to implement the student's IEP properly was evident from the student's failure to make meaningful progress in reading and math and evident from the student's academic, emotional, and behavioral regression.

The parents also argue that the district failed to appropriately implement the student's September 2011 BIP. Specifically, the parents assert that the IHO erred in finding that the student's problem behaviors were managed by the district staff by implementation of the student's BIP, that the parents agreed with the interventions. The parents also argue that the district withheld information about student's problem behaviors at school during the 2011-12 school year (i.e., physically harmful behaviors, head-banging, and expressions of suicidal thoughts) and that the communication book or log omitted many serious incidents. Relative to the effective management of the student's problem behaviors, the parents also argue that the IHO erred in making certain factual findings, including that (1) the student's extreme behavior occurred at home as well as at school; (2) that the student's at-home behaviors were not of the same intensity, frequency, or duration as his in-school behaviors; (3) that the student's academic frustrations caused the student's problem behaviors; and (4) that asthma and ADHD medication caused the student's problem behaviors.

With regard to the IHO's findings and determinations regarding the 2012-13 school year, the parents assert that the IHO erred in finding that the June 2012 IEP was appropriate and likely to produce progress. The parents also argue that the IHO erred in finding that the environment at the assigned therapeutic day program was appropriate for the student because the student had impairments in his capacity for behavioral regulation and required a program that targeted his academic needs. The parents further argued that the assigned therapeutic day program was inappropriate for the student because it was located on a farm that would expose the student to environmental allergens and medical risks associated with the student's fragile respiratory system and that the June 2012 CSE was on notice of these concerns yet failed to take doctors' recommendations into consideration. The parents also contend that the assigned therapeutic day program was inappropriate because it was located too far from the student's home for the student to travel on the bus due to the student's medical conditions.

The parents also argue that Eagle Hill was an appropriate unilateral placement for the student for the 2012-13 school year, noting that Eagle Hill was on the State-approved emergency placement list for the 2012-13 school year. The parents further argue that equitable considerations weigh in favor of their requests for relief.

In an answer, the district responds to the parents' petition by admitting and denying the allegations raised and arguing that the IHO's decision should be affirmed in all respects. As an initial matter, the district argues that, by their petition and accompanying memorandum of law, the parents attempted to circumvent and did, in fact, exceed, the page-limitation set forth in State regulation by using a narrow type and smaller font in violation of the form pleading requirements. On this basis, the district argues that the parents' petition should be dismissed. Next, the district maintains, in pertinent part, that there was no evidence of bias in favor of the district at the impartial hearing and that the IHO properly denied the parents' motion to for his recusal. Next, the district argues that the IHO correctly declined to reach any claims relating to the 2009-10 and 2010-11 school years because such claims were not at issue during the impartial hearing and accrued outside of the statute of limitations period.

As to the 2011-12 school year, the district argues that it provided the student with a FAPE, that the IHO correctly determined that the September 2011 BIP was appropriately implemented for the student, and that the student's educational program satisfied all regulatory requirements and was adaptive to the student's changing behavioral needs during the 2011-12 school year, during which time the student also made progress. As to the 2012-13 school year, the district argues that the CSE's recommendation that the student attend the assigned therapeutic day program was appropriate because, among other things, the program included an intensive therapeutic component, a strong reading program, individual and small-group instruction, and consistent structure and routine, all of which would have targeted the student's unique academic and behavioral needs. The district also argues that Eagle Hill was not an appropriate unilateral placement to address the student's educational needs and that equitable considerations did not weigh in favor of the parents' request for relief.

In a reply to the procedural defenses raised by the district, the parents argue, among other things, that their petition and memorandum of law do not violate the form requirements applicable to pleadings and, if they do, the SRO should exercise his discretion and accept the pleadings.

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]; see also Reyes v. New York City Dep't of Educ., 2014 WL 3685943, at *6 [2d Cir. July 25, 2014]).

VI. Discussion

A. Form Requirements for Pleadings

In its answer, the district challenges the parents' petition as noncompliant with the form requirements set forth in the practice regulations applicable to proceedings before the Office of State Review. The district alleges that the parents' petition and memorandum of law both exceed the 20-page limitation set for each and impermissibly incorporate by reference the procedural and factual history of this case (see 8 NYCRR 279.8[a][5] [providing that "the petition, answer, or memorandum of law shall not exceed 20 pages in length" and that "[a] party shall not circumvent page limitations through incorporation by reference"]). Here, the district is correct and the parents' 21-page petition for review and 21-page memorandum of law fail on their face to comply with the 20 pages, albeit a slight noncompliance were that the only issue with their form.

More significant, however, is that the parents' petition for review and memoranda of law do not comport with the format requirements prescribed by State regulations. Specifically, State regulations require that "[a]ll pleadings and memoranda of law shall be in . . . 12-point type in the Times New Roman font (footnotes may appear as minimum 10-point type in the Times New Roman font). Compacted or other compressed printing features are prohibited" (8 NYCRR 279.8[a][2] [emphasis added]). Here, instead of using the required standard Times New Roman font, the parents' pleadings used an obviously compacted or compressed font that is blurry, difficult to read, and appears to serve the purpose of attempting to circumvent the 20-page requirement of 8 NYCRR 279.8(a)(5). Moreover, this technique for text compression is used for only those portions of the parents' submissions that are subject to page limitation requirements by regulation. For example, counsel for the parents correctly used the required font and did not compress the text for those portions of the parents' submissions that do not have page limitations specified by regulation, which in this case include the parents': (1) notice of intention to seek review; (2) notice with petition; (3) affidavit of verification; (4) affidavits of service; and (5) title page, table of contents, and table of authorities of the parents' memorandum of law, all of which are plainly legible.

State regulations provide that documents that do not comply with the pleading requirements "may be rejected in the sole discretion of the State Review Officer" (8 NYCRR 279.8[a]). Due to the foregoing violations of State regulations applicable to the form requirements for pleadings submitted to the Office of State Review, I exercise my discretion to reject the parents' pleadings in this case and dismiss the parents' appeal. Nevertheless, in this instance, I address, in the alternative, the merits of the parents' submissions below. I again remind parents' counsel of the pleading requirements expressly prescribed by State regulations and of the potential consequences in future appeals for failing to comply with the form requirements set forth in State regulations.[16]

B. Scope of Review

On appeal, the parents raise certain arguments relative to the 2009-10 and 2010-11 school years, which the IHO found to be not at issue in the underlying impartial hearing. The district argues that such claims accrued outside of the statute of limitations. The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]).[17] In this instance, it appears that, given that the parents filed their due process complaint notice in September 2012 (see Pet. Ex. 1), claims relating to an IEP developed

[16] The pleadings in Appeal No. 13-212 were also submitted by the attorney in this case and were also in violation of the identical pleading requirements (see Application of a Student with a Disability, Appeal No. 13-212).

[17] New York State has not explicitly established a different limitations period since Congress adopted the two-year limitations period.

or implemented prior to September 2010 were barred by the statute of limitations. While arguable that a claim relating to implementation of the student's IEP during the 2010-11 school year remained viable, it is not necessary to address this possibility in this instance, since the parents failed to raise any claim or request any relief in their due process complaint notice relative to the student's 2009-10 or 2010-11 school years. Further, the expiration of these respective school years renders the parent's claims moot because no meaningful relief can be given.[18]

Second, resolution of any of the parents' claims as to the 2009-10 or 2010-11 school year by either the IHO or SRO would be entirely inappropriate because resolution of the parents' claims as to either school year would deny the district due process of law and create an unfair advantage for the parents, as the parents stated at the beginning of the impartial hearing that all of their claims as to the 2009-10 and 2010-11 school years were simply "background history" (Tr. p. 71). Further, as to the 2010-11 school year specifically, while the parents' attorney urged that previous school years served as relevant background to the at-issue 2011-12 and 2012-13 school years, he expressly stated at the impartial hearing that the 2010-11 school year "is not an issue" and that the parents were not seeking tuition reimbursement or compensatory additional services for that school year (Tr. pp. 70-72; see also Tr. p. 78). Accordingly, given the parents' express representations made before the IHO, it would be inappropriate and unfair to allow the parents to now pursue a claim on appeal relating to either the 2009-10 or 2010-11 school years.

Moreover, various other claims raised by the parents during the impartial hearing or on appeal were not raised in the parents' due process complaint notice, which, while offering a detailed factual recitation, failed to identify with any specificity the parents' claims arising from the majority of those factual allegations. In addition to the requirement that parents "state all of the alleged deficiencies in the IEP in their . . . due process complaint" (R.E., 694 F.3d at 187-88 n.4), each allegation should include "a description of the nature of the problem," particularly where, as here, the due process complaint notice included in excess of 85 numbered paragraphs (8 NYCRR 200.5[i][1][iv]). For example, the IHO correctly determined that the parents' failed to sufficiently raise a claim relating to the annual goals included in the student's June 2012 IEP. Similarly, the parents' due process complaint notice raised no claim with regard to the development and content of the student's September 2011 FBA and BIP (indeed, the parents' specifically claimed only that the student's "BIP was not properly implemented, and thus ineffective"), the implementation of the student's counseling services during the 2011-12 school year, or the appropriateness the class profile of the proposed classroom at the assigned therapeutic day program for the 2012-13 school year (see Pet. Ex. 1 at pp. 1-19 [emphasis added]). Accordingly, arguments relative to these claims are not properly raised in this appeal will not be further addressed (20 U.S.C. § 1415 [f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]; R.E., 694 F.3d at 188-89 & n.4; see also 20 U.S.C. § 1415[c][2][E][i]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i]; M.H., 685 F.3d at 249-50).

[18] While it is generally accepted that a request for compensatory additional services as relief can survive a mootness challenge, as noted above, the parents did not request compensatory additional services relative to the 2009-10 or 2010-11 school years in this case (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 89-90 [2d Cir. 2005]). Furthermore, the parents do not request in their voluminous pleadings that an SRO grant compensatory additional services as relief for the district's alleged failure to offer the student a FAPE for the 2009-10 and 2010-11 school years.

On appeal, the parents' articulation of their claims has not improved. While I have carefully reviewed the entire hearing record to consider those claims that the parents have specifically identified in their petition (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]) and which appear to have been properly raised in the parents' due process complaint notice, I will not sift through the due process complaint notice, the hearing record, and the IHO decision for the purpose of asserting claims on their behalf, and I find the petition insufficient with respect to those issues that the parents have not taken the care to specifically identify (8 NYCRR 279.4[a]; see Application of a Student with a Disability, Appeal No. 12-032; Application of the Dep't of Educ., Appeal No. 12-022; Application of the Dep't of Educ., Appeal No. 11-127).

C. IHO Bias/Conduct of the Impartial Hearing

Turning next to the parent's assertions regarding the IHO's conduct during the impartial hearing, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability; Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). An IHO must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealing with litigants and others with whom the IHO interacts in an official capacity, and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021).

An IHO may not be an employee of the district that is involved in the education or care of the child; may not have any personal or professional interest that conflicts with the IHO's objectivity; must be knowledgeable of the provisions of the IDEA and State and federal regulations, and the legal interpretations of the IDEA and its implementing regulations; and must be possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Here, the parents argue that the IHO erred in denying their application for the IHO's recusal (Tr. p. 1406). The parents claim that the IHO was biased in favor of the district because of the IHO's past employment as a director of special education at a nearby school district. Under the circumstances presented, the hearing record reveals that the parents' claim is entirely without merit (see D.R. v. Dep't of Educ., 827 F. Supp. 2d 1161, 1166 [D. Haw. 2011] [noting that the "IDEA expressly bars current employees of educational agencies from serving as hearing officers, but says nothing about former employees of those agencies"] [emphasis in original]). Indeed, the parents have failed to explain how the IHO's prior service as a director of special education was in any way a "negative" affiliation or how that prior service would negatively impact the IHO's ability to review the claims raised by the parents on behalf of the student in this case.

Second, to the extent that the parents claim that the IHO was incompetent to serve as the IHO in this case due to his lack of legal knowledge, and in their memorandum of law reference the IHO's age as further support for this assertion, the parents' claim is without merit. The plain language of the age-limitation statute to which the parents cite makes it patently clear that the statute is not applicable to administrative due process hearings. In any event, judges over the age of 70, including retired judges and justices, routinely issue well-written, thorough decisions in important cases (see, e.g., Lund v. City of Fall River, 714 F.3d 65, 67 [1st Cir. 2013] [Souter, J. (Ret.)]; Osterweil v. Bartlett, 706 F.3d 139, 140 [2d Cir. 2013] [O'Connor, J. (Ret.)]). Moreover, the parents have failed to cite to anything specific in the hearing record to suggest that the IHO was incompetent in this case. To the contrary, the IHO's management of and competence demonstrated during this case was outstanding, thorough, organized, and patient. For example, the IHO: issued several interim decisions, as summarized above, to deal with preliminary matters and motions raised by the parties; narrowed and clarified the issues properly raised at the impartial hearing and limited the issues for the impartial hearing; cited to applicable legal authority on complicated questions of law; managed effectively a contentious 15-day impartial hearing despite hundreds of objections made by the parties consistently throughout the impartial hearing; responded patiently and courteously to counsel for the parent's accusations of bias and incompetence; and issued a thorough, 52-page single-spaced decision adjudicating the parents' claims that were properly before him (see IHO Decision at pp. i-ii, 1-52; IHO Exs. 4-6; see generally Tr. pp. 1-2989).[19]

In this case, based on my independent review, and contrary to the contentions of the parents, I find that the hearing record does not support a reversal of the IHO's decision on the basis that he acted with bias, demonstrated incompetence, or abused his discretion in the conduct of the hearing. An independent review of the hearing record demonstrates that the parent was provided an exemplary opportunity to be heard at the impartial hearing, which I also find was conducted in a manner consistent with the requirements of due process (see 20 U.S.C. § 1415[g]; 34 CFR 300.514[b][2][i], [ii]; Educ. Law § 4404[2]; 8 NYCRR 200.5[j]).

[19] As in Application of a Student with a Disability, Appeal No. 13-212, the same cannot be said of the conduct of the attorney who represented the parents at the impartial hearing. The hearing record is replete—especially during the district's case-in-chief—with instances of counsel for the parents: ignoring objections; failing to comply with the IHO's reasonable directives; interrupting and attempting to speak over the IHO following unfavorable rulings; general rudeness; and sarcasm (e.g., Tr. pp. 798, 860, 1625, 1934-363, 1952-55, 1977-82, 2032-38, 2041-44, 2047, 2429-30, 2681-83, 2692-96, 2706, 2816-17). The IHO would have been well within his discretion to caution or rely on his inherent authority as an IHO to impose remedial sanction upon counsel for the parent regarding the failure to follow his reasonable directives (for the purpose of maintaining control of the proceeding), and SROs have previously upheld IHO dismissals of due process complaint notices for the failure to do so (Application of a Student with a Disability, Appeal No. 09-073 [finding that "[a]s a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the impartial hearing officer regarding the conduct of the impartial hearing"]; Application of a Child with a Disability, Appeal No. 05-026; see also Application of the Dep't of Educ., Appeal No. 08-052; Application of a Child with a Disability, Appeal No. 04-010). I note that the attorney who submitted the parents' petition for review and memorandum of law in this appeal, while from the same law office, is not the same attorney who appeared on the parents' behalf at the impartial hearing.

Having determined these initial procedural matters and the scope of matters properly raised on appeal for review, I now turn to the substantive claims concerning the IEPs developed for the 2011-12 and 2012-13 school years.

D. 2011-12 School Year

As an initial matter, the parents argue on appeal that the IHO erred in finding that the district afforded the parents the opportunity to participate in the development of the student's April and October 2011 IEPs. Here, the parents argue that the CSE failed to take into consideration the parents' (1) request for home instruction; (2) request for 1:1 instruction utilizing the Orton-Gillingham approach; (3) request for a special class placement for the student, as opposed to a recommendation that the student attend some general education classes; and (4) the parents' opinion that the student's interfering behaviors were attributable to learning difficulties. Contrary to the parents' assertions, there is no evidence in the hearing record suggesting that the CSE failed to consider the foregoing. Indeed, the evidence in the hearing record confirms that the parents participated at the April and October 2011 CSE meetings and had an opportunity to voice their requests and their disagreement with the recommendations of the CSE (see, e.g., Tr. pp. 1219-20; see also P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 210 Fed. App'x 1, 3, 2006 WL 3697318 [D.C. Cir. Dec. 6, 2006]). Moreover, the evidence in the hearing record confirms that the district considered the parents' request for home instruction at the October 2011 CSE meeting and amended the student's IEP to provide for 1:1 reading instruction (Tr. pp. 537-38, 1077-78; see also Dist. Exs. 14 at p. 1; 16 at p. 2); explored, beginning in October 2011, alternative placements with a therapeutic component (see Dist. Ex. 16 at p. 2); and were fully aware of the parents' views that the student's behaviors stemmed mainly from academic frustration (see Tr. pp. 158-63, 928-30, 1046, 1190, 1289, 1331-33, 1624, 1644, 1923-24; Dist. Exs. 14; 16 at p. 2).[20]

Next, a review of the evidence in the hearing record reveals that, contrary to the parents' contentions, the CSE was responsive to the student's needs and provided the student with the program and services mandated in his April and October IEPs during the 2011-12 school year.

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (T.L. v. New York City Dep't of Educ., 2012 WL

[20] To the extent that the parents challenged any aspect of the April or October 2011 IEPs, as drafted, the parents have not presented an argument on appeal with regard to any such claim with specificity. Under these circumstances, the parents have effectively abandoned these claims for relief by failing to identify them in any fashion or by making any legal or factual argument as to how the parent is entitled to such relief. Therefore, any challenge to the student's April or October 2011 IEP, as drafted, will not be further considered (see 8 NYCRR 279.4[a] [requiring the petitioner to "clearly indicate" the relief sought before the SRO]).

1107652, *14 [E.D.N.Y. Mar. 30, 2012]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). In order to show a denial of a FAPE based on a failure to implement an IEP, a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist., 200 F.3d at 349; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524-25, 2008 WL 3523992 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822 [holding that "[a] material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled [student] and the services required by the [student's] IEP"]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D. D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

In this case, insofar as the parents challenge on appeal the implementation of the recommended program for the student's 2011-12 school year, there is no evidence in the hearing record suggesting that the student did not receive the special education program and services recommended in the student's April or October IEPs (see, e.g., Tr. pp. 828-29, 843-45, 854-872, 1078-79; Dist. Exs. 8; 22; 24; 27; 31; 32; 34; 35 at pp. 6-7; 36; 41; 68; 69; 76; 77; 78 at p. 5).[21] Moreover, to the extent that the parent argues that the district should have used the Orton-Gillingham approach during the 2011-12 school year, neither the April nor the October 2011 IEP specified an particular methodology to be utilized in the student's reading instruction and there is no evidence in the hearing record suggesting that there was a clear consensus that the student

[21] To the extent that the parents argue that the district failed to provide, or failed to provide appropriate, counseling services to the student pursuant to his October or April 2011 IEPs (see Dist. Exs. 16 at p. 13; 61 at p. 1), as noted above, the parents failed to raise such a claim. In any event, the evidence in the hearing record confirms that the student did receive the counseling services that were recommended in his October and April 2011 IEPs (see, e.g., Tr. pp. 1426-29, 1432; Dist. Ex. 80), and the parents have pointed to no evidence in the hearing record that would suggest otherwise.

required a particular methodology (see generally Dist. Exs. 16; 61).[22] Furthermore, as discussed in more detail below, the evidence in the hearing record demonstrates that the Fundations reading program, which was used by the student's special education teacher during the 2011-12 school year, was effective in helping the student make academic progress during the 2011-12 school year.

The parents attempt to allege that the district's failure to implement was apparent by virtue of the fact that the student failed to make progress during the 2011-12 school year. Such an argument is misguided in that, progress, although an important factor in determining whether the student is receiving educational benefit, is not dispositive of all claims brought under the IDEA (see M.S. v. Bd. of Educ. of the City Sch. Dist. of the City of Yonkers, 231 F.3d 96, 103-04 [2d Cir. 2000], abrogated in part on other grounds, Schaffer v. Weast, 546 U.S. 49 [2005]). The goal of the IDEA is to provide opportunities for students with disabilities to access special education and related services that are designed to meet their needs and enable them to access the general education curriculum to the extent possible (20 U.S.C. §§ 1400[d]; 1414[d][1][A]). The IDEA provides no guarantee of any specific amount of progress, so long as the district offers a program that is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192). However, an implementation claim is a narrow inquiry into the actual delivery of the program and services recommended in the student's IEP, rather than the appropriateness of the recommended program and services or the student's progress thereunder. Indeed, an implementation claim is a narrow one and it has been held that such a claim must be closely examined to ensure that it involves nothing more than implementation of services already spelled out in an IEP (Polera v. Bd. of Educ., 288 F.3d 478, 489 [2d Cir. 2002] [reviewing the relevant claim and noting that the district's alleged failure to provide services was "inextricably tied to the content of the IEPs and therefore . . . much more than a failure of implementation"]; Donus v. Garden City Union Free Sch. Dist., 987 F. Supp. 2d 218, 231 [E.D.N.Y. 2013]; see also Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 682 [S.D.N.Y. 2011]).

In any event, contrary to the parents' contention that the student failed to make meaningful progress during the 2011-12 school year, the hearing record demonstrates that the student made progress behaviorally, emotionally, and academically. The student's special education teacher reported that, after the student began taking medication: he improved in his ability to sit for longer periods of time; his frequency of refusals decreased and were less in intensity and duration; and he was a little less agitated (Tr. p. 936). The behavioral consultant reported that, by late November

[22] While an IEP must provide for specialized instruction in a student's areas of need, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.H., 685 F.3d at 257; accord M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-CV-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; L.K. v. Dep't of Educ., 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs" (34 CFR 300.39[a][3]), the omission of a particular methodology is not necessarily a procedural violation (see R.E., 694 F.3d at 192-94 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"]; R.B. v. N.Y. City Dep't of Educ., 2013 WL 5438605, at * 11 [S.D.N.Y. Sept. 27, 2013]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]).

2011, after the change in medication, the student began to "gain more positive outcomes in school," for example, by exhibiting an improved ability to focus on his morning work, as well as "increased mornings of compliance, getting work done, and demonstrating learning growth" (Dist. Ex. 22 at p. 1). The behavioral consultant also reported improvement, comparing an observation in December 2011 when the student appropriately used his break time to get a drink of water, to an incident in October 2011 when he used his break time to flood the bathroom sink (id.). Furthermore, the June 2012 educational progress report showed the student's behavioral progress on a chart, which indicated the amount of time the student refused to participate (Dist. Ex. 41 at p. 3). The chart showed a significant decrease in the amount of missed educational time from November 2011 through June 2012 (id.). Notably, in November 2011 the student missed approximately 22 hours of instructional time; however, the amount of missed instructional time decreased significantly to approximately seven hours by January 2012; nine hours in March 2012; one hour in April 2012 and May 2012; and 3 hours in June 2012 (id.). Additionally, the teachers' observation notes from 2011-12 school year and the May 2012 behavior intervention summary note indicate that, while the student's behaviors continued throughout the school year, the frequency and duration of the behaviors decreased; however, it should be noted that the intensity of the behaviors did not lessen and continued throughout the school year (Dist. Exs. 34 at p. 2; 84). The student's private psychiatrist reported that after the trial of medication, the student's overall mood "became a little more stable and less intense and the frequency of disruptive episodes had decreased; however it did not "diminish the intensity of his distress when he became upset" or change the frequency of "self-critical verbalizations" (Dist. Ex. 28 at p. 4). In addition, the evidence in the hearing record demonstrates that, notwithstanding the student's behaviors at school, the student made academic progress during the school year. In particular, the student experienced success with the Fundations reading program and made progress in reading, writing, and math (see, e.g., Tr. pp. 889-90, 971-1020, 1372; Dist. Exs. 24 at pp. 15; 31; 69 at pp. 44-68; 82; 83). Furthermore, according to the student's special education teacher, the mother stated during a parent-teacher conference in December 2011 that she was happy with the student's progress that she had observed (Tr. p. 947).

Turning to the parents' argument regarding the implementation of the student's September 2011 BIP and effective management of the student's behaviors during the 2011-12 school year, the hearing record reflects that the district implemented the September 2011 BIP appropriately and responded to the behavioral needs of the student throughout the 2011-12 school year.[23] The evidence in the hearing record reflects that the April 2011 CSE determined that, if the topography of the student's behaviors changed during the beginning of the 2011-12 school year, a revised FBA would be developed (Tr. pp. 1388-89). The student's special education teacher during the 2011-12 school year indicated that, in the beginning of September 2011, she had used a classroom behavior plan, consisting of a token penny system by which each student could earn rewards or free time but that the student's response to this plan was inconsistent and he began exhibiting significant behaviors during the middle of September 2011 (Tr. pp. 900-06). Specifically, the special education teacher described that the student: began to refuse more; had become more easily agitated; had been laying down on the carpet; had receded into his cubby; used negative self-talk and inappropriate language; banged or hit his head with his hands; and had at one time kicked his

[23] As noted above, the parents' due process complaint notice may not be reasonably read to raise a claim that the September 2011 FBA and BIP were inappropriate as drafted. Nonetheless, to the extent relevant to the implementation claim, the development and content of the September 2011 FBA and BIP are addressed.

1:1 aide (see Tr. pp. 900-01). She further indicated that the student's behaviors occurred throughout the day and across all settings (Tr. p. 902).

Due to changes in the student's behaviors in September 2011, the behavioral consultant provided the student's educational team with charts for data collection, and they collected data from September 19, 2011 through September 23, 2011 (Tr. pp. 909, 1385-89; Dist. Ex. 77 at pp. 3-12). The behavioral consultant also summarized the data, noting the occurrence of 32 incidents that interfered with the student's access to the curriculum, ranging in duration from a few seconds to 35 minutes, with most being under five minutes (Tr. p. 1387; Dist. Ex. 77 at p. 1). The September 2011 FBA indicated that it was crucial for the student to begin the school year "with structure and success" and, therefore, the collection of further data was not necessary, and the resultant BIP was immediately implemented on September 26, 2011 (Tr. pp. 917, 1389-92; Dist. Exs. 8 at pp. 1-3; 77 at p. 1-2).

A review of the September 2011 BIP reveals that it identified the student's behavioral goals, targeting the student's ability to complete an activity or task, to appropriately navigate his environment, to reduce inappropriate behaviors and demonstrate safe behaviors, to follow simple teacher directions throughout the day, and to request help or to take a break (Dist. Ex. 8 at p. 1). The September 2011 BIP also contained recommendations for antecedent management including, among other things, the use of a token board reward system individualized to the student's targeted behaviors, as well as continuation of the classroom penny system (id. at pp. 1-2). The behavioral consultant testified that she recommended the continuation of the classroom penny system because the student wanted to participate in the same activities and gain access to the same rewards as his peers (Tr. pp. 2355-56; see Dist. Ex. 8 at p. 2). The September 2011 BIP also contained recommendations for consequence management for when behaviors occurred and strategies to decrease the likelihood of the behavior occurring again and included a detailed chart to be used for weekly data collection (Dist. Ex. 8 at pp. 1-3; see Tr. pp. 1389-91). The behavioral consultant testified that she would look at the data collected on these charts when she went into the classroom for consultation (Tr. p. 2332).

In October 2011, the student's educational team developed the interim safety plan due to concerns about the escalation of his refusals and the frequency and intensity of his self-injurious and inappropriate behaviors (Tr. p. 922; see Dist. Ex. 12).[24] The October 2011 interim safety plan was to be used when the strategies and recommendations from the September 2011 BIP were not effective and it addressed "serious behavior problems" the student was exhibiting, which were affecting his social/emotional health and safety and his academic learning (Tr. p. 918; Dist. Exs. 8 at pp. 1-2; 12 at p. 1). Specifically, the interim safety plan addressed behaviors categorized as verbal/nonverbal, aggressive and significantly aggressive, and detailed the steps to be used when the September 2011 BIP was unsuccessful (Dist. Ex. 12 at p. 2). Verbal/nonverbal behaviors were described as using inappropriate language, chanting made up songs, self-deprecating comments, negative comments towards others, adamant refusals to participate or follow directions, making sexually inappropriate comments, ripping/destroying work/papers, and ignoring adult directives

[24] The hearing record indicates that the student began taking a medication to treat symptoms of ADHD in October 2011; however, after having a reaction to the first medication, a different medication was prescribed in November 2011 (Tr. pp. 934-35, 2421, 2632-33; Dist. Exs. 22 at p. 1; 25 at p. 3). Notably, it was during this time period that the severity and intensity of the student's behaviors increased and that the interim safety plan was developed.

(id.) Aggressive behaviors were described as violent comments, banging things, throwing classroom items, licking inappropriate items, spitting, hiding behind doors or in cubby holes, jumping on chairs, and laying upside down on chairs (id.). Significantly aggressive behaviors were described as banging head, running into walls, hiding under the carpet, and choking himself (id.). The student's special education teacher testified that the interim safety plan was in place so that "when his behaviors began we could move him to a safer place out of the classroom with the school psychologist . . . where he could decompress and talk it out" (Tr. pp. 922-23). The assistant director of special services testified that the interim safety plan was developed as a safeguard and a "crisis measure" for the student, as well as for staff and peers (Tr. pp. 148-49, 416-17). The hearing record indicates that the October 2011 interim safety plan was never fully implemented because the parents rejected the plan based on their position that removal of the student from school (included in the plan as step to be taken after the student was removed from the classroom due to repetitive aggressive or significantly aggressive behaviors) was not appropriate or in the student's best interest (Tr. p. 2623; Dist. Ex. 12 at p. 1; see Dist. Ex. 13). Thus, the special education teacher testified that, pursuant to the interim safety plan, the student was removed from the classroom due to his behaviors but that he was never removed from the school because the parents were not "going to pick [him] up" (Tr. p. 1307; see Dist. Ex. 12 at p. 1).

Further review of the evidence in the hearing record indicates that, upon implementation of the September 2011 BIP, the student's educational team continued to make changes, modifications, and accommodations as needed due to the student's inconsistent response to the behavioral interventions utilized throughout the school year. For example, the special education teacher testified that the behavioral consultant would observe the educational team and indicated they were correctly implementing the September 2011 BIP (see Tr. pp. 918, 940). However, the hearing record indicates that the student often exhibited behaviors with unknown antecedents and he inconsistently responded to the September 2011 BIP and the October 2011 interim safety plan throughout the school year (Tr. pp. 906, 920-21, 1381, 1618-19, 1906, 1967). Moreover, the behavioral consultant indicated that, in September 2011, the student had been exhibiting attention seeking and escape avoidant behaviors; however, as the year progressed other behaviors became a concern "over and above antecedents" (Tr. pp. 1628-29). The behavioral consultant described these behaviors, among other things, as inappropriate comments or sexually inappropriate comments, which were not necessarily connected to a demand (Tr. pp. 1628-29). She testified that, when BIPs become inconsistent, the classroom work should be modified around the behaviors, and she suggested that a psychiatric evaluation might help to identify if behaviors are related to "something medical" that is not always observable to the educational team (Tr. p. 1381). She also testified that the student had been meeting his behavioral goals for a long period but that when the work demands increased and he struggled when the work became frustrating, other adaptations were done "over and above the behavior plan" (Tr. pp. 1616-17).

Furthermore, the behavioral consultant also reported that, during the course of the 2011-12 school year, accommodations and modifications were made to address the student's inconsistent response and changing behaviors, and she described some of the "structural programmatic adaptations" that were done to support the student, such as removing the student from the difficult environment and providing him with one-to-one instruction during writing opportunities after lunch and story time (Tr. p. 1617). The behavioral consultant further indicated that, even though the student stayed in the mainstream classroom after the October 2011 IEP meeting, adaptations were made such as additional 1:1 reading support, allowing the student to go into the classroom

before his peers so he wouldn't become overwhelmed by the crowd, shortening the amount of time that he was in the larger classroom, and adapting his work in the general education classroom (Tr. pp. 2321-22; Dist. Ex. 34 at p. 2).

Finally, to the extent that the parents argue that the district failed to accurately report or withheld from the parents information regarding the student's behaviors during the 2011-12 school year, a review of the hearing record indicates that, consistent with State regulations, the parents were notified of the student's inconsistent response to the September 2011 BIP, along with the reasons for the development of the October 2011 interim safety plan (Tr. pp. 153, 1209-10, 1306-07; Dist. Exs. 12; 13). Moreover, the hearing record indicates that, throughout the 2011-12 school year, using a variety of methods, the parents were notified about significant behaviors, often including information regarding the student's response to the teacher's directives and redirections, as well as how long it took for the student to respond (Tr. pp. 1210, 1303-04, 1306-07; Dist. Exs. 71 at pp. 7, 9; 78 at pp. 2, 4, 11, 12, 14, 18; Parent Ex. I at pp. 1-87). Furthermore, the behavioral consultant developed a behavioral intervention summary note in May 2012, summarizing the student's behaviors and the district's response to the behavior interventions utilized over the course of the school year, which was discussed during the May 2012 CSE meeting that the parent attended (Tr. pp. 2358-59; Dist. Ex. 34; 47 at p. 2). Accordingly, the evidence in the hearing record demonstrates that the district adequately monitored the student's progress throughout the implementation of the student's September 2011 BIP and continuously reported the student's progress to the parents (see 8 NYCRR 200.22[b][5]).

Accordingly, there is no evidence in the hearing record suggesting that the district failed to implement the special education program and services recommended in the student's April and October 2011 IEPs or the student's corresponding BIP. Based on the foregoing, there is no basis for an award of compensatory relief relative to the student's 2011-12 school year.[25]

E. 2012-13 School Year

Turning to the parties' dispute regarding the 2012-13 school year and the parents' request for reimbursement for the cost of the student's tuition at Eagle Hill, the parents argue that the June 2012 IEP developed for the 2012-13 school year was not designed to meet the student's unique needs. As an initial matter, a review of the hearing record shows that the student's needs were adequately addressed in the June 2012 IEP. The hearing record indicates that the June 2012 CSE had available to it and considered a November 2011 social history, a December 2011 psychological assessment, a January 2012 psychiatric report, a February 2012 speech-language evaluation, a February 2012 OT evaluation, a March 2012 private psychological evaluation, an April 2012 teacher report, an April 2012 educational progress report, a May 2012 counseling progress summary, a May 2012 behavior therapy progress report, and a June 2012 private psychiatric evaluation (Tr. pp. 457, 1026, 1029, 1034, 1969; Dist. Exs. 25; 27; 28; 29; 31, 32; 34; 35; 36; 41; 47 at p. 2) . Comparison of the evaluative data available to the June 2012 CSE with the June 2012 IEP present levels of performance shows that the evaluative information was directly reflected in the IEP (compare Dist. Exs. 25, 27, 28, 29, 31, 32, 34, 35, 36, 41, with Dist. Ex. 47 at pp. 2-10). Further review indicates that each of the evaluations, including the two private evaluations

[25] The parents have also failed to specify the nature of compensatory relief sought or explain how any requested relief would remedy any alleged harm.

provided by the parents, as well as the progress reports, are summarized in the June 2012 IEP present levels of performance (compare Dist. Exs. 25, 27, 28, 29, 31, 32, 34, 35, 36, 41, with Dist. Ex. 47 at pp. 2-10).

The June 2012 IEP identified the student's needs in the areas of reading, mathematics, oral motor skills, receptive and expressive language skills, pragmatic language skills, social/emotional skills fine, motor skills, sensory processing difficulties, and visual motor difficulties related to a diagnosis of Duane syndrome (Dist. Ex. 47 at pp. 2-9). The June 2012 IEP further described the student's significant attentional and behavioral management needs, indicating throughout the June 2012 IEP present levels of performance that the student had significant difficulty with following directions, attention/focusing, impulsive behavior, coping with change or disappointment, organization, class participation, self-concept, expressing his wants and needs, and dealing with frustration (id. at pp. 2-10). Additionally, the June 2012 IEP recommended a behavior plan that provided clear and consistent structure and expectations throughout the day, as well as a positive reinforcement plan (id. at pp. 9-10). However, the IEP also indicated that the student's response to these plans was inconsistent and he may not achieve success if he was experiencing any difficulty (id.). Moreover, the June 2012 IEP indicated that the student needed individual and small-group instruction, with consistent structure and routine in a therapeutic setting with hands-on and experiential learning, and specified that the student's difficulties with impulsivity, organization, and regulating his behaviors, combined with his learning needs, negatively impacted his academic progress (id. at p. 10).

The June 2012 IEP recommended a twelve month program consisting of a 12:1+1 special class at a therapeutic day program with and a 1:1 aide and the related services of counseling twice per week for 30-minutes individually and in a small group; speech/language therapy twice per week for 30-minutes in a small group; and OT once per week for 60-minutes in a small group (Dist. Ex. 47 at p. 13). To further address the student's identified needs, the June 2012 IEP contained 21 annual goals which address study skills, reading, writing, mathematics, speech/language skills, pragmatic language skills, and social/emotional/behavioral skills (id. at pp. 11-12).

With regard to the specific assigned therapeutic day program identified in the June 2012 IEP, the parents argue that the IHO erred in finding the environment appropriate due to the student's impairments in his capacity for behavioral regulation. The parents also contend that the student's academic needs required greater attention because the student's behaviors would decrease if his academic success improved. The evidence in the hearing record confirms that the IHO did not err in finding that the recommended 12:1+1 special class at the assigned therapeutic day program with related services in counseling, speech- language therapy, and OT was appropriate for the student (Dist. Ex. 47 at pp. 1, 13).[26] The assigned therapeutic day program is described in the hearing record as a private kindergarten-through-12th-grade school for students with both behavioral and learning disabilities (Tr. pp. 1535-36, 1540; see generally Tr. pp. 1540-55). Contrary to the parents' contention that the assigned therapeutic day program did not provide an

[26] A 12:1+1 special class is defined as a special class "containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, . . . with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][i]).

adequate academic component for the student, the intake coordinator testified that the program was "prepared to address both behavioral and learning disabilities," and she described a typical school day consisting of eight periods, six of which were academic and two of which consisted of specials, which were therapeutic activities or programs (Tr. pp. 1536, 1544). Moreover, the evidence demonstrates that the program would also target the student's therapeutic needs, given that the intake coordinator further stated in her testimony that the therapeutic activities and programs (also called "specials" or "special activities") included farm science, therapeutic horseback riding, wildlife class, swimming, woodshop, gardening and horticulture, cooking, music, art, and outdoor education, which included canoeing, kayaking, a climbing tower, a high ropes course, snowshoeing, and other outdoor activities (see Tr. p. 1534-35, 1541-44). The intake coordinator described how the specials constituted therapeutic opportunities for the students to feel successful, confident, and to have something to look forward to at school and so "they can feel good about themselves" (Tr. p. 1547). She also explained that counseling was programmatic and described how involved the social workers were in the classrooms to, in addition to provide the counseling recommended in the student's IEP, check in on the students at the beginning and end of the day and provide crisis intervention as needed (Tr. pp. 1553, 1586). Additionally, the intake coordinator explained how the assigned therapeutic day program had a full health center with nurses on staff 24 hours per day and a pediatrician who visited twice per week—all of which would have been available to the student should any issues have arisen as to the student's medication or health (Tr. p. 1545). The evidence also shows that OT and speech-language therapy—each of which were included as recommendations in the student's June 2012 IEP—were components of the assigned therapeutic day program (see Tr. pp. 1552-56; Dist. Ex. 47). The foregoing evidence demonstrates that the June 2012 IEP and the assigned therapeutic day program would have appropriately addressed the student's behavioral, social/emotional, and academic needs.[27]

The parents also contend that the assigned therapeutic day program was an inappropriate placement for the student because it was on a "farm" and required a bus-ride commute, each of which could have, according to the parents, exposed the student to environmental allergens and medical risks associated with the student's respiratory system. The evidence in the hearing record, however, does not establish that the student was restricted to the degree that the parent alleges or that the student would have been at a greater risk for serious health issues. While evidence in the hearing record certainly establishes the severity of the student's medical history and ongoing health concerns, which are not to be understated or taken lightly, the hearing record does not, however, contain sufficient evidence that the student had environmental allergies or that he would be at risk for serious health issues when exposed to farm animals, hay, barns, woodshops, or on the bus ride to school. To the contrary, the hearing record contains evidence that there were no restrictions on the student's activities and he did not require special accommodations or environmental modifications, which is reflected in part on the "Eagle Hill School Emergency Medical Information Form" on which the parents indicated that the student did not have any environmental allergies

[27] In addition, the CSE's recommendation that the student attend the assigned therapeutic day program for the 2012-13 school year was not inconsistent with the recommendations expressed by the private neuropsychologist and private psychiatrist, each of whom recommended in their reports that the student required: an educational program with a smaller classroom setting with trained staff; a program with opportunities for physical activity; a program that would address the student's emotional and psychological needs; and a program that would include related services consisting of OT, PT, and speech-language therapy (see Dist. Exs. 28 at pp. 15-17, 21; 29 at pp. 5-6).

(Dist. Ex. 64 at p. 1). Furthermore, there is evidence in the hearing record demonstrating that the parents represented to the district that the student did not have any activity restrictions, did not require special accommodations, or did not have any special health concerns when the student was in school or in any particular environment (Tr. pp. 2816; Dist. Exs. 11; 19 at pp. 1-2; 64 at pp. 4-6). In addition, the hearing record indicates that the student was very athletic, participated in activities such as swimming in a pool, swimming and surfing in the ocean, and riding his bike to the beach (see Tr. pp. 475, 2875, 2926, 2929-30; Dist. Exs. 28 at p. 2; 70).

Furthermore, with regard to the parents' contention that the June 2012 CSE did not consider the student's doctors' recommendations regarding the student's need for a shorter bus ride and commute, the evidence in the hearing record demonstrates that these letters and recommendations contained therein were provided to the school district in July 2012 (Tr. p. 2698; Parent Exs. D; E; F), which was well after the June 2012 CSE meeting, and, therefore, the recommendations are not relevant to the inquiry regarding appropriateness of the June 2012 IEP at the time the CSE convened and drafted the IEP (see R.E., 694 F.3d at 186; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 2013] ["The appropriate inquiry is into the nature of the program actually offered in the written plan." (internal quotation marks omitted)]). In addition, at the June 2012 CSE meeting, the parents verbally rejected the recommended IEP and orally informed the district that they would be unilaterally placing the student at Eagle Hill School and that they would be seeking tuition reimbursement (see Tr. p. 2698 ["We rejected the IEP and said that we would be seeking tuition reimbursement for [the student] at Eagle Hill."]; Parent Exs. D; E; F). Therefore, absent a parental request that the CSE reconvene to do so, the CSE was not obligated to reconvene to consider the new evaluative information submitted after the parents' rejection of the June 2012 IEP and notice to the district that the student would be attending Eagle Hill (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; Application of a Student with a Disability, Appeal No. 12-194).

In accordance with the foregoing, the evidence in the hearing record demonstrates that the IHO did not err in finding that the June 2012 IEP and the assigned therapeutic day program were appropriate for the student for the 2012-13 school year.

VII. Conclusion

Having determined, as did the IHO, that the evidence in the hearing record establishes that the district offered the student a FAPE for the 2011-12 and 2012-13 school years, the necessary inquiry is at an end, and there is no need to reach whether the student's unilateral placement at Eagle Hill was an appropriate placement or whether equitable considerations would have weighed in favor of the parents' request for relief (Burlington, 471 U.S. at 370; see Voluntown, 226 F.3d at 66). In light of these determinations, there is no need to address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 9, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER