The University of the State of New York

The State Education Department
State Review Officer
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No. 15-114

Application of the BOARD OF EDUCATION OF THE CHAPPAQUA CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Lisa S. Rusk, Esq., and Mark C. Rushfield, Esq., of counsel

Asher, Gaughran LLP, attorneys for respondents, Rachel Asher, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Westfield Day School (Westfield) for the 2012-13 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

A review of the hearing record reflects that the student has received diagnoses of attention deficit hyperactivity disorder (ADHD) and bipolar disorder (Dist. Exs. 15; 18; Parent Ex. 92 at p. 2). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) to the student in December 2010 yielded a full scale IQ (FSIQ) of 82, which falls within the low average range of ability; however, the testing psychologist advised caution in interpretation of this score, as the student's scores on individual scales varied greatly (Dist. Ex. 11 at p. 2). The Behavior Assessment System for Children, Second Edition (BASC-2) was also administered in December 2010 and the student scored in the "at-risk" range on the adaptive skills composite and in the "clinically significant" range for depression, somatization, and internalizing problems (id. at p. 4). The hearing record shows that the student has received special education and related services from

the district since 2007, and as of February 2012 was eligible for services as a student with an emotional disturbance (Tr. pp. 1059-62; Dist. Ex. 5).[1]

A CSE convened on February 15, 2012 to review the student's program (Tr. p. 35; Dist. Ex. 5 at p. 1). The February 2012 CSE recommended continuing direct consultant teacher services six times per four day cycle for 40 minutes per session in English, math, science, and social studies and added a 12:1 special class for skills instruction (12:1 special class-skills instruction) four times per four day cycle for 40 minutes per session, counseling two times per month for 30 minutes per session in a group of five, individual counseling two times per month for 30 minutes per session, 2:1 teaching assistant support in "core academic" classes, and 1:1 teaching assistant support in "non-academic" classes, lunch and recess (Dist. Ex. 5 at pp. 9-10).[2] The February 2012 IEP indicates that the student required positive behavioral interventions as well as a behavioral intervention plan (BIP), and states that a BIP had been developed to target behaviors such as avoiding work and leaving classes, and the student's need for redirection (id. at p. 8). The February 2012 CSE further recommended an updated reading evaluation based on the private psychologist's concerns (id. at p. 2). The student's special education teacher administered selected reading subtests of the Wechsler Individual Achievement Scale – Third Edition (WIAT III) on March 20, 2012 (Dist. Ex. 9 at p. 1).

A CSE convened on May 1, 2012 to conduct an annual review and to develop the student's IEP for the 2012-13 school year (Dist. Ex. 6 at p. 1). During the May 2012 CSE meeting, the parents requested "a full battery" of educational testing and the CSE agreed to update the educational testing and reconvene at a later date to review the results of the assessments and continue the "planning process" (id. at p. 2). On May 10 and 11, 2012, the student's teacher administered the mathematics and listening comprehension subtests and selected reading subtests of the WIAT III and the Test of Written Language – Fourth Edition (TOWL-4) (Dist. Exs. 6 at p. 5; 10 at p. 1).

The CSE reconvened on June 1, 2012 to prepare a completed IEP for the student for the 2012-13 school year (Dist. Ex. 6 at p. 2).[3] The June 2012 IEP reflects the results of the updated educational assessment (compare Dist. Ex. 6 at pp. 3-5, with Dist. Exs. 9; 10). The June 2012 CSE recommended supports to address the student's specific needs, including direct and indirect consultant teacher services three times per six-day cycle in each core academic class, 12:1 special class-skills instruction four times per six-day cycle for 55 minutes, the support of a 1:1 teaching assistant for all classes, lunch, and recess, counseling in a group of five once per week for 25 minutes, individual counseling once per six-day cycle for 25 minutes, and parent counseling and training twice per month for 30 minutes (Dist. Ex. 6 at pp. 10-11). The June 2012 prior written

[1] The student's eligibility for special education and related services as a student with an emotional disturbance is not in dispute in this proceeding (see 34 CFR 300.8[c][4][i]; 8 NYCRR 200.1[zz][4]).

[2] The February 2012 IEP appears to delineate English, math, science and social studies as "core academic" subjects (see Dist. Ex. 5 at pp. 9-10).

[3] As the June 1, 2012 CSE meeting was a continuation of the May 1, 2012 CSE meeting, a new IEP was not generated; rather, the IEP in the hearing record reflects the results of the May and June 2012 CSE meetings in a consolidated IEP; however, the dates of the meetings are reflected in the comments section rather than in the "Date" field of the form itself (Dist. Ex. 6 at pp. 2; 16-18). The IEP will hereinafter be referred to as the "June 2012 IEP" (Dist. Ex. 6).

notice attached to the June 2012 IEP reflects that the CSE considered the need for 12-month services but deemed that no substantial regression had occurred and, therefore, 12-month services were not recommended (id. at p. 17).

The student visited Westfield during the summer 2012, and was accepted into Westfield on July 25, 2012 (Tr. pp. 946-47; Parent Ex. 99 at p. 2).

On July 27, 2012 a CSE convened in response to the parent's request for transportation to Westfield (Dist. Exs. 7 at p. 2; 31). The hearing record indicates that the CSE discussed the student's current program as well as the program offered at Westfield, and agreed to provide the student with transportation to Westfield because it determined that Westfield provided special education services similar to those recommended by the CSE (Dist. Exs. 7 at pp. 2, 16; 32).

In a letter dated August 10, 2012, the parents informed the district that they were dissatisfied with the recommendations made by the June 2012 CSE, that they intended to place the student at Westfield for the 2012-13 school year, and that they would seek reimbursement from the district for the cost of the student's tuition at Westfield (Dist. Ex. 33).

On August 30, 2012 a CSE reconvened to discuss the parents' concerns (Dist. Ex. 8 at p. 1; see Dist. Exs. 34; 36). A review of the August 2012 IEP reflects changes to the student's program, including changes to the annual goals, the addition of program modifications and testing accommodations, and the addition of behavior consultant services to support the development of a functional behavioral assessment (FBA) and BIP and to attend parent counseling and training sessions (Dist. Ex. 8 at pp. 2, 10-14). The student subsequently attended Westfield for the 2012-13 school year (Tr. pp. 605, 949; see Dist. Ex. 40; Parent Ex. 109).

A. Due Process Complaint Notice

On May 27, 2014, the parents filed a due process complaint notice with the district, asserting that the student had been denied a FAPE for the 2011-12 and 2012-13 school years, including summer 2011 and summer 2012 (Dist. Ex. 1 at pp. 3-17). The due process complaint notice contained 17 pages, comprising 132 enumerated statements of fact, as well as two additional pages titled "Statement of Claims" (id.). The district responded to each of the parents' statement of claims and in a letter dated June 6, 2014 and raised the statute of limitations as a defense to "all claims prior to May 27, 2012," objected to the lack of specificity with respect to claims associated with Section 504 of the Rehabilitation Act of 1973 (section 504) and the Americans with Disabilities Act (ADA), and contended that the hearing should be limited to the 2012-13 school year, including ESY services for summer 2012 (Dist. Ex. 2).

In an amended due process complaint notice dated July 27, 2014, the parents asserted that the district denied the student a FAPE for the 2011-12 and 2012-13 school years (Dist. Ex. 3).[4] The amended due process complaint notice contained 22 pages, comprising 173 enumerated

[4] The amended due process complaint notice does not seek a determination that the district denied the student a FAPE for the 2011-12 school year, which had been included in the original due process complaint notice (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 1 at p. 1). However, the amended due process complaint notice included a number of detailed allegations related to the 2011-12 school year and requested relief for that school year (Dist. Ex. 3 at pp. 2-3, 8-15, 22).

statements of fact, and a slightly altered "Statement of Claims," which included additional claims asserting an exclusion from services, inadequate counseling, and a failure to consider the recommendations of private evaluators, among other changes (compare Dist. Ex. 3 at pp. 20-21, with Dist. Ex. 1 at pp. 15-16). Additionally, although the amended due process complaint notice recited factual allegations going back to the 2009-10 school year, the parents sought relief related only to the 2011-12 and 2012-13 school years (Dist. Ex. 3 at 1-4, 22).

With respect to the 2011-12 school year, the parents raised claims relating to the conduct of both the March 2011 and February 2012 CSEs (Dist. Ex. 3 at pp. 8-15). The parents asserted that they were denied meaningful participation in the creation of the student's educational plan because the CSE (a) predetermined the student's placement by refusing to consider an out of district therapeutic placement; (b) refused to provide a list of out of district placements upon the parents' request; (c) failed to consider the input from the providers privately obtained by the parents; (d) failed to provide the parents with information regarding teacher reports concerning the student's behaviors, including walking out of class when asked to do work; (e) failed to act upon the March 19, 2012 letter of concern from the student's treating psychiatrist; (f) drafted the student's goals after the CSE meeting; (g) failed to consider appropriate methodologies for the student; and (h) refused to allow the parents to observe the district's proposed classroom or provide them with a class profile (Dist. Ex. 3 at pp. 2, 8, 12-15, 21).

With respect to the appropriateness of the IEPs developed at the March 2011 and February 2012 CSE meetings, the parents asserted that: (a) the student was inappropriately placed in a general education classroom for his core classes and in a 12:1 special class for skills instruction; (b) the FBA and BIP were insufficient; (c) the CSE changed the student's classification to emotional disturbance and decreased the amount of homework he was required to complete; (d) the social-emotional goals were inappropriate in that they remained unchanged from the prior school year; (e) the student was not recommended for occupational therapy (OT) despite his documented hand writing issues; (f) the IEP did not provide for services or goals to address the student's depressed fluency skills in math, reading, or writing; and (g), the level of counseling recommended was inadequate (Dist. Ex. 3 at p. 2, 8-15, 20-21).

With respect to the implementation of the March 2011 and February 2012 IEPs, the parents asserted that: (a) the staff allowed the student to take too many breaks leading to a lack of academic instruction; (b) the staff allowed the student to eat to excess resulting in the student being rendered inert and exhausted during the school day; (c) the school promoted the student to eighth grade despite a lack of required "seat time;" (d) the staff failed to address the student's interfering behaviors at school and at home; (e) the teachers and staff were not trained in the appropriate methodologies; and (f) the student's assigned 1:1 teaching assistant was not informed as to what she was supposed to do with the student and was not trained to address the student's needs (Dist. Ex. 3 at pp. 2-3, 8-15, 20-21).

The parents asserted that the process by which the May, June, and August 2012 CSEs convened to create and modify the student's IEPs for the 2012-13 school year denied the student a FAPE (Dist. Ex. 3 at pp. 2, 15-18, 20-21). Specifically, the parents asserted that the district (a) prevented the parents from meaningful participation by not providing CSE members crucial documents, including staff emails, and by refusing to discuss other options or alternatives; (b) failed to provide adequate prior written notice to the parents; (c) engaged in predetermination by refusing to consider the private evaluator's input, including the recommendation for an out of

district therapeutic placement; (d) did not assess the student in all areas of need; (e) failed to consider ESY services or engage in a discussion regarding the student's regression; (f) refused to allow the parents to observe the proposed classroom or provide them with a class profile; (g) failed to conduct an FBA, develop a BIP, or otherwise address the student's behaviors; (h) failed to address the negative effects of the student's behaviors on both the student and on the other students in the class; and (i) failed to consider appropriate methodologies (id.).

With respect to the IEPs generated during the May 2012 to August 2012 time period for the 2012-13 school year, the parents asserted that the: (a) present levels of performance were inaccurate; (b) the student's needs in pragmatic language, articulation, reading, writing, math, assistive technology, functional behavior, and OT were not appropriately addressed; (c) the recommended placement in a general education classroom with consultant teacher services was inappropriate given the student's need for a small class setting; (d) the goals were not appropriate, relevant, meaningful, or measurable; and (e) the student was not recommended for ESY services for the summer 2012 despite his regression (Dist. Ex. 3 at pp. 2, 15-17, 20-21).

For relief, the parents requested an order awarding compensatory education for the district's failure to provide the student with a FAPE during the 2011-12 and 2012-13 school years and directing the district to reimburse the parents for all expenses they incurred, including the student's tuition at Westfield for the 2012-13 school year as well as the costs of private evaluations, tutoring and related services (Dist. Ex. 3 at pp. 1, 22).

The district responded to the amended due process complaint notice by letter dated August 6, 2014 (Dist. Ex. 4). The district repeated its objections regarding claims that should be barred by the statute of limitations and the lack of specificity regarding of claims related to section 504 and the ADA (id. at p. 1). The district further alleged that the parents' claims related to "seat time" during the 2011-12 school year were first raised in the July 2014 amended due process complaint notice and were therefore untimely raised and barred (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 16, 2014 and concluded on June 17, 2015 after seven days of hearing (Tr. pp. 1-1557). During the course of the impartial hearing, the parents and district each made a motion: the parents requested that the IHO deny the district's request to subpoena the student's treating physicians and therapists and the district moved to dismiss several of the parents' claims related to section 504 and the ADA (IHO Decision at p. 5). In her first interim order, the IHO denied the district's subpoena requests (December 4, 2014 Interim Order at p. 6). In a second interim order, the IHO determined that an impartial hearing was not the proper venue for the parents' section 504 or ADA claims and that those claims were properly referred to the district's assistant superintendent (January 11, 2015 Interim Order at p. 4). During the course of the impartial hearing, the district also reasserted its objection to the parents' claims involving the 2011-12 school year as being beyond the two year statute of limitations; however, the IHO did not immediately rule on the matter, instead choosing to hear testimony and receive written memoranda on the issue (Tr. pp. 7-9, 20-25).

In a decision dated November 4, 2015, the IHO determined that the statute of limitations did not bar the parents' claims related to the 2011-12 school year, that the district failed to offer the student a FAPE for the 2011-12 and 2012-13 school years, as well as for the summer 2012,

and that Westfield was an appropriate unilateral placement for the student for the 2012-13 school year (IHO Decision at pp. 61-74).

In determining that the statute of limitations did not bar the parents' claims related to the 2011-12 school year, the IHO determined that the parents' claims did not accrue until 2014, when the parents became aware that the district withheld information related to the student's education (IHO Decision at pp. 72-73). The IHO found that the parents had not been provided with the student's entire attendance record, information on the student's interfering behaviors, the nurse's log, and school staff emails until after requesting the student's educational records in June 2014 (id.). Moreover, the IHO determined that the district did not follow its notification policy with respect to the student's missed class time, and therefore the parents did not know about the student's unexcused absences until 2014 (id. at p. 64-65). The IHO found that this information "made the parents aware of the numerous deficiencies in [the student's] educational program and their adverse impact on [the student's] emotional and academic performance" and found that the parents' claims did not accrue until they received the information (id. at pp. 72-73).

In determining that the district failed to offer the student a FAPE for the 2011-12 school year, the IHO found that the CSE: did not address the student's behavioral issues; did not give appropriate consideration to input from the students' private providers; did not conduct a sufficient FBA (noting that the district only collected data for 11 days), nor did it create a sufficient BIP (noting that the BIP did not conform to professional standards or the district's policy) (IHO Decision at pp. 65, 73-74). The IHO found that the CSE's recommendation for placement in a general education class setting was inappropriate given the student's inappropriate behavior and declining academic and social-emotional performance (id. at pp. 73-74). The IHO determined that the student "required a small, structured setting that provided more emotional support" (id. at p. 74).

The IHO rejected the district's argument that compensatory education is only available if it is determined that the "district engaged in 'gross violations of the IDEA,'" reasoning that the "gross violation" standard only applies to students who are no longer eligible for special education services due to age or graduation (IHO Decision at pp. 74-75). After finding a denial of FAPE for the 2011-12 school year, the IHO awarded reimbursement for private psychiatric treatment, psychotherapy, and tutoring obtained by the parents between September 2011 and June 2012, as an award of compensatory education (id.).

The IHO also determined that the district denied the student a FAPE for the 2012-13 school year (IHO Decision at pp. 62-70). The IHO determined that although the CSEs had a significant amount of information, they failed to consider information regarding the student's behaviors, progress, and attendance that the IHO found to be "material" (id. at pp. 64-65). Specifically, the IHO found that the CSEs failure to consider the June 2012 progress report, staff emails, FBA data sheets, and the student's attendance records coupled with the failure to create a proper FBA and BIP cumulatively resulted in a denial of FAPE (IHO Decision at p. 65).[5] With respect to the 2012-13 school year IEPs, The IHO determined that it was undisputed that the student engaged in inappropriate behaviors that impeded his learning and occasionally that of other students (IHO

[5] The IHO also made a ruling related to whether the August 2012 CSE was properly composed; however, the IHO's ruling is unclear and could be read in favor of either party (IHO Decision at pp. 65-66).

Decision at p. 65). In support of her decision that the CSE failed to create a proper FBA and BIP, the IHO determined that the student's behavior had become very aggressive during the 2011-12 school year, noting that the student had been physical with the parents at home and had broken things in the home, and that the police had been called to the student's home four times during the school year (id. at p. 67). The IHO also noted that the parents had contacted the district concerning the student's escalating disruptive and aggressive behaviors at home, and expressed concern that these behaviors may spill over into school (id.). Further, the IHO noted the opinion of the parent's behavioral analyst who testified that the district's FBA and BIP did not meet his professional standards and that they may have been a quick summary of a more thorough document, which was not entered into the hearing record (id. at p. 65). Further, the IHO noted that the district did not provide additional information regarding the FBA and BIP worksheets or explain why data was collected on the student for only 11 school days (id.). The IHO further determined that although the district employed other behavior interventions, those interventions were not sufficient to get the student's behaviors under control (id.).

The IHO found the recommendation that the student be placed in a general education classroom with supports for the 2012-13 school year to be inappropriate (IHO Decision at pp. 66-69). The IHO found that the CSE did not give appropriate consideration to what the student's private clinicians, parents, and tutors reported as to the student's deteriorating and sometimes dangerous behaviors (IHO Decision at p. 68). The IHO determined that the student had been in a general education setting in the district for several years and his academic, social, and emotional skills had declined rapidly (id. at p. 66). The IHO also found that the student's overall performance academically, socially, and emotionally continued to decline during the 2011-12 school year despite receiving additional services, supports, and modifications, including the addition of a 1:1 aide (id. at pp. 69-70). The IHO found the student's psychologist's testimony that the student would not be successful in a general education setting, even with the addition of a behavioral consultant, to be credible, and further determined that the district did not appropriately consider the private psychologist and psychiatrist's recommendations for a small therapeutic environment (id. at pp. 68-69). The IHO noted that the district could have had the student evaluated by its own psychiatrist or behavioral consultant but never made a recommendation for such an evaluation (id.).

With respect to the parents' claim that the district should have recommended ESY services for the student, the IHO found that "[t]he District was not responsive to [the student's] overwhelming needs for summer services (IHO Decision at p. 69). The IHO determined that the student's need for placement in a psychiatric hospital on two separate occasions during the 2011 summer required that the district recommend ESY services for the 2012 summer (id.), In the IHO's recitation of the testimony, the IHO also noted that the May and June 2012 CSEs had acknowledged that the student exhibited regression during the summer before the 2011-12 school year, but did not discuss ESY services (id. at pp. 51).

With respect to the unilateral placement of the student at Westfield, the IHO determined that the parents' selection of Westfield was appropriate (IHO Decision at pp. 70-72). The IHO noted that Westfield provided the student with: (a) 1:1 or 2:1 student to teacher ratio for academic instruction; (b) twice weekly 1:1 reading instruction; (c) academic support sessions where the student received assistance with homework, executive functioning and organizational skills; (d) 1:1 writing support; and (e) 1:1 makeup instruction for missed instruction (IHO Decision at p. 71). In addition, the IHO found that Westfield was a therapeutic day school that provided the student with ample emotional support (id.). The IHO also found that while at Westfield, the student made

academic, social, and emotional progress, noting that testimony showed that the student was "a lot less explosive," happier, and able to get more work accomplished, had no periods of hospitalization, and the police did not have to be called to the home (id.). The IHO also noted that the student's private psychiatrist testified that after the student attended Westfield, the recommendation was made to reduce the student's therapy sessions (id.). Based on the record before her, the IHO determined that Westfield was an appropriate unilateral placement for the student (id. at pp. 70-72). Additionally, but without explanation, the IHO made a finding that the services obtained by the parents for the summer 2012 were also appropriate (id. at p. 72).

The IHO determined that equitable considerations supported the parents, in that the parents fully cooperated with the CSE, participated in all five of the CSE meetings in 2012 (February; May, June, July, and August) (IHO Decision at p. 72, 74). Although the IHO acknowledged that the parents did not request any of the services they provided the student during the 2011-12 school year and did not provide the district with notice of their intent to seek reimbursement for those services, the IHO declined to reduce the parents' request for relief based on equitable factors (id. at pp. 72, 74-75).[6]

The IHO ordered the district to reimburse the parents for the cost of tuition at Westfield for the 2012-13 school year and for the cost of services obtained by the parents during summer 2012, and the 2011-12 school year (IHO Decision at p. 75). The services obtained by the parents included the student's private psychiatrist and psychologist as well as tutoring services (id.). The IHO declined to award the parents reimbursement for the cost of a social skills program (id.).

IV. Appeal for State-Level Review

The district appeals from the IHO's decision and asserts that the IHO erred in determining that: (a) the statute of limitations did not bar the parents' claims related to the 2011-12 school year; (b) the district failed to offer the student a FAPE for the 2011-12 school year; and (c) the district failed to offer the student a FAPE for the 2012-13 school year, including the provision of ESY services.

With respect to the 2011-12 school year, the district asserts that the IHO did not apply the correct legal standard regarding the statute of limitations and that her findings are belied by the hearing record, which demonstrates that prior to the February 2012 CSE meeting the parents had access to the information that the IHO had determined was withheld from the parents. In the alternative, the district asserts that the IHO's substantive findings as to the 2011-12 school year IEPs were in error, as the district asserts, among other things, that the February 2012 CSE addressed the student's attendance and behavioral needs through an FBA, a positive behavioral support plan, the addition of a 12:1 special class for skills instruction, and the inclusion of other services and supports. The district further asserts that the IHO erred in finding that the student did not receive instruction when he was out of class due to breaks and that the student's behaviors had become aggressive during the 2011-12 school year.

With respect to the 2012-13 school year, including the summer 2012, the district asserts that the IHO erred in determining that the CSE did not consider "material documents" and that the

[6] The IHO refers to "compensatory education" when discussing the parents' request for reimbursement for the private services they procured during the 2011-12 school year, and summer 2012 (IHO Decision at pp. 74-75).

CSE was not properly composed. The district also asserts that the IHO disregarded the CSE's recommendation for an updated FBA and BIP, as well as the services of a behavioral consultant when the IHO determined that the district did not have an FBA or BIP at the start of the school year. The district further asserts that the IHO misrepresented the testimony of the district school psychologist in finding that she testified that a behavioral consultant would not have been effective.

The district also asserts that the IHO erred in giving credit to the parents' providers' testimony rather than deferring to the district staff concerning the student's behavior. The district points to the private providers' lack of information regarding the student during the school day, the lack of an observation of the student in a district setting, and the lack of any consultations with district staff. The district also asserts that the private providers' conclusions were made based on information provided by the student, who the district asserts was acknowledged to be an unreliable reporter, and the parents, whom the district asserts were compelled to rely on the student's versions of events.

The district also contends that the parents did not raise any objections to the program recommended for the student's 2012-13 school year, other than the recommendation for placement in a general education setting. Regarding placement, the district asserts that the IHO erred in determining the student required a smaller, more therapeutic setting and noted that the student would continue receiving the support of a 1:1 teaching assistant, that an FBA and BIP were in place, and that they would be updated.

The district also asserts that the IHO erred in determining that Westfield was an appropriate unilateral placement for the student. The district argues that Westfield could not meet the student's unique needs and that there is insufficient evidence in the hearing record regarding the therapy provided at Westfield to support the IHO's findings. The district further contends that the IHO erred in finding that the student made progress at Westfield during the 2012-13 school year. The district asserts that the student napped frequently at Westfield, continued to exhibit disruptive behaviors, and that the hearing record lacked any objective evidence indicating that the student made progress. In addition, the district alleges that Westfield lacked a written plan to address the student's behaviors. Lastly, and without further explanation, the district asserts that the IHO erred in denying the district's subpoena for the personal medical notes and treatment history from the student's private providers. The district requests that the IHO's decision be reversed in its entirety.

In their answer, the parents generally respond to the district's allegations with admissions, denials, or various combinations of the same, and argue in favor of the IHO's determinations that the district failed to offer the student a FAPE for the 2011-12 and 2012-13 school years, that Westfield was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' requested relief.

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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8

NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Statute of Limitations

The district asserts that the IHO erred in determining that the parents' claims for the 2011-12 school year were not barred by the statute of limitations. The parents assert that their claims related to the 2011-12 school year did not accrue until 2014 because they were not aware of the extent of the student's absences or behaviors, until they were provided with attendance records and

other educational records in 2014. Alternatively, the parents assert that an exception to the statute of limitations should apply because the district withheld information from them.

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]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 Fed. App'x 56, 57 [2d Cir Feb. 11, 2014]; R.B. v. Dept. of Educ., 2011 WL 4375694, at *2, *4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]). Exceptions to the timeline to request an impartial hearing applies if a parent was 1) prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or 2) the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B., 2011 WL 4375694, at *6).

The hearing record shows that the parents filed their first due process complaint notice on May 27, 2014, and therefore, barring either of the aforementioned exceptions, any of the parents' claims that accrued on or before May 26, 2012 are time-barred (see 20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]; R.B., 2011 WL 4375694, at *6).

The parents' primary contention is that the district withheld information from them regarding the extent of the student's missed instruction time and in-school behaviors (see Dist. Ex. 3 at pp. 3-5). The hearing record however, shows that the parents knew or had reason to know about the student's attendance issues and behaviors. For example, the hearing record shows that attendance information was available to the parents on the calendar page of the parent portal, which was the first screen available after log in, and attendance incidents were identified on the calendar by a yellow bell (Tr. pp. 1514, 1539-40; Dist. Exs. 48 at p. 2; 50 at pp. 2-3). The parents signed and returned the portal agreement in November 2011, and logged into the parent portal 12 times during the 2011-12 school year (Dist. Ex. 51). The parent testified that she was not aware that attendance information was available on the parent portal, but knew that attendance was on the student's report card and also that the report card was available on the parent portal (Tr. pp. 1325). Also, the issue of the student missing class time and instruction time, as well as the student's behavior at home appearing to be "leaking" into school were raised during the February 2012 CSE meeting, as was the possible need for a more therapeutic environment to meet the student's needs (Dist. Ex. 5 at pp. 1-2; see also, Tr. pp. 46, 47, 116, 151-52). Further, the members of the CSE, including the parents, were provided a packet of information, including report cards, teacher reports, classroom observations, and attendance records (Tr. pp. 36-37; 1319-22; Dist. Ex. 5 at pp. 3-4). As such, the parents' assertions regarding the information they claim was withheld from them is without merit, and any claim regarding information the February 2012 CSE lacked accrued on that day – more than the two year statute of limitations period.

The IHO found that the information the parents received from the district in 2014 after a request for the student's educational records in June 2014,[7] caused the parents to become aware that during the 2011-12 school year the student had missed all or a part of 197 classes, rarely ate in the cafeteria, wandered the halls, and exhibited other behaviors in school (IHO Decision at pp. 71-72). Upon review of the hearing record, the parents were aware of most of this information as of the February 2012 CSE meeting at the latest (see Tr. pp. 1218-24; Dist. Ex. 5 at pp. 1-2; Joint Ex. 1). The student's mother testified that she had regular communication with the school nurse and was aware that the student went to the nurse frequently in the beginning of the year to get out of class (Tr. pp. 1218-19, 1222-24). Additionally, the parents knew that the student was not eating lunch in the cafeteria during the seventh grade (Tr. pp. 1068, 1219). Comments in the February 2012 IEP showed that the student's father expressed concern that the student was missing a lot of class and was not learning and that the parents raised concerns that the student's "behaviors seen at home are leaking into school" (Dist. Ex. 5 at pp. 1-2). Regarding the student's behaviors, the parents raised his behavior as an issue during the February 2012 CSE meeting, but allege that the CSE did not otherwise discuss it (Tr. pp. 1234-35). However, the student's mother testified that she reviewed the FBA and BIP worksheets during one of the seventh grade CSE meetings (Tr. p. 1377).[8] According to the student's mother, the information contained in the data collection sheets regarding the student's behaviors was not surprising to her and the student exhibited similar types of behavior at home (Tr. pp. 1226-28, 1230-32). Additionally, as one of the behaviors involved the student "drawing on his arm" and the parent testified that the student "would come home with a lot of marks on his arm," the hearing record shows that the parent was aware that the student was exhibiting some of the behaviors in school (Tr. p. 1226). While some of the documentation included internal staff communications regarding the student's conduct in school, which could suggest that the student's behavior in school may been more problematic than what was discussed during the CSE meetings (Dist. Ex. 5 at p. 7; Parent Exs. 28; 31; 36; 49; 71), based on the above, the hearing record supports finding that as of the February 2012 CSE meeting, the parents knew about the student's missed class time and behaviors.

Additionally, the district's failure to provide the parents with information or documentation regarding the student's attendance or interfering behaviors is not the alleged action that forms the basis of the parents' complaint, that action is the school's alleged failure to address the student's interfering behaviors (see 20 U.S.C. § 1415[b][6][B]). The parents rely on K.H. v. New York City Dep't of Educ., in which the court held that claims under the IDEA "did not accrue until the family gained new information that made them aware of inadequacies in the student's prior special education program" (2014 WL 3866430, at *19 [E.D.N.Y. Aug. 6, 2014]). In this matter, the information that the parents received in 2014 did not impact the parents' opinion as to whether the program offered by the district during the 2011-12 school year was appropriate (see Dist. Exs. 21; 30; 36-38; Parent Exs. 28; 31; 48; 49; 72). As of the February 2012 CSE meeting, the parents requested that the CSE recommend placement in a therapeutic day school (Tr. pp. 1236-37). In addition, the student's psychologist recommended a smaller therapeutic placement and the parents'

[7] The fact that the parents' request to examine records was not made until July 2014 does not automatically lead to a finding that the district was "withholding" information from the parents, as that right to examine educational records regarding their child was continuously theirs at all relevant times prior to July 2014.

[8] The student's mother also testified that she was not aware that data was being collected on the student's behaviors as a part of the FBA; however, she signed a consent form for the FBA, which described an FBA as a "process of gathering and analyzing information about a student's behavior" (Tr. pp. 1362-65; Parent Ex. 86 at p. 1).

brought a letter from the student's psychiatrist recommending a structured therapeutic environment (Tr. pp. 147-51; Dist. Exs. 19; 20). While the later acquired documentation may have strengthened the parents' belief that the program provided by the district during the 2011-12 school year was inappropriate, and while it would have been an ideal practice for the district to have been more communicative with the parents regarding the student's attendance and behaviors, the parents knew of the actions that formed the basis for their complaint as of February 2012 at the latest.

Regarding the exceptions to the statute of limitations, the parents did not claim that the district made a specific misrepresentation to them that it had resolved the issues forming the basis for the due process complaint notice and accordingly that exception does not apply (see 20 U.S.C. § 1415[f][3][D][i]; Educ. Law 4401[1][a]; 34 CFR 300.511[f][1]; 8 NYCRR 200.5[j][1][i]). Rather, the parents asserted and the IHO determined that the district withheld "critical information" from the parents, including internal staff emails and attendance reports (IHO Decision at p. 73). However, the exception to the timeline to request an impartial hearing applies only when a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that *the district was required to provide* [*emphasis added*] (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]; R.B., 2011 WL 4375694, at *6). Case law interpreting the "withholding of information" exception to the statute of limitations has found that the exception essentially applies to the requirement that parents be provided with certain procedural safeguards required under the IDEA (see D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 [3d Cir. 2012]; Avila v. Spokane Sch. Dist. 81, 2014 WL 5585349, at *8 [E.D. Wash. Nov. 3, 2014]; R.B., 2011 WL 4375694, at * 6; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943, 945 [W.D. Tex. 2008]; Evan H. v Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *7 [E.D. Pa. Nov. 4, 2008]). Such safeguards include the requirement to provide parents with prior written notice and procedural safeguards notice containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3], [d]; 34 CFR 300.503, 300.504; 8 NYCRR 200.5[a], [f]). In this case, the hearing record demonstrates that the district provided the parents with prior written notice and the procedural safeguards notice in relation to the actions taken and recommendations made during the 2011-12 school year (Tr. pp. 1315-16; Dist. Ex. 39; Parent Exs. 26 at p. 1; 86). As such, under the current case law and the facts of this case, the hearing record does not support the IHO's determination that the parents were deprived of information that the district was required to provide and the two-year statute of limitations cannot be disregarded under the exceptions (see R.B., 2011 WL 4375694, at * 6).

While the statute of limitations bars the parents' claims regarding the student's IEPs developed for the 2011-12 school year and for the implementation of the student's IEPs for much of the 2011-12 school year, because the parents initial due process complaint notice was filed on May 27, 2012, an analysis of whether or not the district properly implemented the student's IEP for the period of May 27 through June 30, 2012 is necessary.[9]

[9] In New York, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (Educ. Law § 2[15]).

B. Implementation of the 2011-12 February 2012 IEP

With respect to the parties' contentions regarding whether or not the district provided the student with a FAPE from May 27, 2012 through June 30, 2012, in order to support a finding that the district failed to properly implement the student's IEP to the extent that a denial of FAPE occurs, the district must have materially or substantially deviated from the student's IEP (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; Y.F., 2015 WL 4622500, at *6; M.L. v. New York City Dep't of Educ., 2015 WL 1439698, at *11-*12 [E.D.N.Y. Mar. 27, 2015]). During the period in question, the February 2012 IEP was in effect (Dist. Ex. 5). According to the IEP, the district was required to provide the student with a teaching assistant (1:1 for non-academic classes and lunch, 2:1 for core classes), individual counseling, group counseling, direct consultant teacher services, special seating, short breaks or walks to combat frustrations, and modified homework assignments (id. at pp. 1, 9-10).[10] The district also conducted an FBA, resulting in a BIP developed to address the student's "work avoidance, need for redirection and leaving classes" (id. at p. 8). The crux of the parents' original assertion that the district failed to properly implement the student's IEP revolves around the district's failure to abate the student's behaviors and the amount of instruction he missed (see, Dist. Ex. 3 at pp. 4-5, 9, 10, 13).

The parents' primary concern regarding the implementation of the student's February 2012 IEP revolves around the level of direct supervision accorded the student by his assigned teacher assistant—namely, that despite being supervised at all times, the student was allowed to take too many breaks, which led to a lack of academic instruction and effectively resulted in the student being monitored and baby sat, and, the student was allowed to eat to excess, which resulted in the student being rendered inert and exhausted during school day. The hearing record shows that for the time period in question, the student was "TU" (tardy – unexcused) to three academic classes, and three homeroom periods (Parent Ex. 72 at p. 1). During the same time period, the student was marked as "AE" (absent – excused) for four academic classes, notably three of them for the ninth (final) period of the day, when according to the parent, she picked the student up early from his skills class to attend private tutoring sessions (Tr. p. 1375; Parent Ex. 72 at p. 1). Finally, the student was marked as "AU" (absent – unexcused) for a total of two academic classes and one homeroom period during the time in question (id.).[11] Further, the hearing record also shows that of the 13 total marks for absenteeism or tardiness, four were for the homeroom period (id.). In sum, the total amount of partial or wholly missed academic class time during the time period in question was only three academic classes (id.).

Furthermore, a review of the student's February 2012 BIP shows that leaving the classroom was a target behavior that the district was addressing (Dist. Ex. 14). A review of the hearing record reveals that in November 2011 the district provided the parent with prior written notice seeking consent to conduct an FBA of the student in order to assess behaviors that impact class

[10] In their amended due process complaint notice, the parents made no claims relating to a lack of the provision of counseling services, direct consultant teacher services, special seating, or the modification of homework assignments (see Dist. Ex. 3 at pp. 2-22).

[11] The hearing record is not entirely clear as to how district staff determined which code to use to mark the student's attendance: testimony indicates it was discretionary and could be based on building policy, and that the district did not track how much time the student missed per class when he was tardy or absent from the classroom (see Tr. pp. 475-76, 570, 1495-96, 1544; see also Tr. pp. 1527, 1529-30).

participation (Parent Ex. 86 at p. 1). The hearing record contains FBA data collection sheets for the period from January 28, 2012 to February 8, 2012 that identify the school period and class, and contain data collected via tally for behaviors—including: being prepared for class, being on task, needing redirection, handling redirection appropriately, being resistant to an adult, and leaving the classroom—which were identified as the "most challenging" by the student's educational team (Tr. p. 359; see Dist. Ex. 37).[12] Further, an FBA and BIP were developed on February 10, 2012 by the student's special education teacher in collaboration with the school counselor and school psychologist, and were based on the data collected by the student's teaching assistant (Tr. pp. 446-47; see Dist. Exs. 13; 14). The February 2012 FBA identifies three target behaviors (work avoidance, resistance to redirection from the teaching assistant. and leaving the classroom), identifies precipitating conditions and consequences that follow the behavior, and hypothesizes the functions of the behavior (Dist. Ex. 13). The February 2012 BIP identifies strategies for preventing target behaviors, outlines alternative replacement behaviors to be taught to the student, includes strategies for staff when responding to the target behaviors, and specifies rewards for positive behavior (Dist. Ex. 14).[13] The hearing record shows that the February 2012 FBA and BIP were included in the evaluative information available to the February 2012 CSE and the CSE chairperson testified that the February 2012 FBA and BIP were contained in the "packet" of information distributed at the February 2012 CSE meeting (Tr. pp. 37, 40-41; Dist. Ex. 5 at p. 2).[14] The February 2012 IEP indicates that a behavior support plan had been developed to address the issues identified in the February 2012 FBA, and includes management needs, such as redirection, positive reinforcement and chunking of assignments as well as accommodations/modifications—including teacher check for frustration, breaks when necessary, and modified homework—which correspond to the February 2012 BIP (compare Dist. Ex. 5 at pp. 7-8, 10, with Dist. Ex. 14).

The student's special education teacher testified that the February 2012 behavior plan was implemented by modifying the student's workload as needed, increasing the amount of space between the student and his teaching assistant, allowing the student "plenty of time" to complete work in school and "constantly" evaluating the student's need for additional support (Tr. pp. 447-48; see Dist. Exs 13; 14). The student's special education teacher also stated that the student "was open to discussion on these topics," especially with regard to increased independence, and was able to request breaks and respond to refocusing strategies, adding that after developing a classroom plan, the length of the student's breaks diminished and he "wouldn't be gone for an extended period of time" (Tr. pp. 448, 454).

With regard to the student's progress related to the FBA and BIP, the student's special education teacher recalled that some of the strategies were successful (Tr. pp. 447-48). He testified

[12] The hearing record contains an additional observation of the student's behavior during his classes on February 9, 2012 (Dist. Ex. 38).

[13] To the extent that the parent asserts that the district did not address the student's interfering behaviors in the home, evidence in the hearing record supports that the aggressive behaviors seen at home, which resulted in the parents or student calling the police, were due to issues unrelated to school work (Parent Exs. 35; 37; 47; 62). Further, the hearing record reflects that when the student's mother expressed concern that homework was becoming a source of difficulty at home, she was told by the student's special education teacher not to worry about it and that homework would be handled at school (Tr. p. 1145).

[14] The student's mother testified that she recalled discussing the FBA and BIP during one of the student's seventh grade CSE meetings (Tr. p. 1377).

that he "track[ed] the specifics of the [student's behavior] plan" using a "grid" to evaluate what the student's performance was "based upon the plan over the course of time," and affirmed that that information was tracked elsewhere but was not contained within the BIP (Tr. pp. 495-96; Dist. Ex. 14).

In consideration of the above, the hearing record supports finding that the February 2012 FBA and BIP were implemented, reviewed, and resulted in some progress in addressing the student's behavior that impeded his learning during the period from May 27, 2012 to June 30, 2012.

Finally, with respect to the parents' assertion that the district allowed the student to eat to excess, despite knowing that the student was off the meal plan, resulting in the student being rendered inert and exhausted during school day, the February 2012 IEP did not include any information on dietary restrictions or requirements (see Dist. Ex. 5). Furthermore, the student's excessive eating was raised and discussed through emails between the father and the student's special education teacher on December 5, 2011, with the teacher noting that this was not a pattern, but rather a rare instance, and no discussion of the matter occurred during the February 2012 CSE meeting (Parent Ex. 36 at pp. 1-2; Dist. Ex. 5 at pp. 1-2). Additionally, it was not addressed through the student's BIP because the special education teacher believed that the student's eating during the day was not enough of an issue to include it in the behavior plan (Tr. pp. 494-95).

Based on the above, I find the hearing record cannot support a finding that the district failed to properly implement the student's IEP to the extent there was a material or substantial deviation from the student's IEP so as to constitute a denial of a FAPE (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; Y.F., 2015 WL 4622500, at *6; M.L. v. New York City Dep't of Educ., 2015 WL 1439698, at *11-*12 [E.D.N.Y. Mar. 27, 2015]).

C. Extended School Year Services for Summer 2012

The IHO found that the student required a 12-month program and that the district's failure to discuss and recommend 12-month services at the May and June 2012 CSE meetings contributed to a denial of FAPE (IHO Decision at pp. 51, 69, 70). The hearing record does not support the IHO's determination.

State regulations require that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1][v]). "Substantial regression" is defined as the "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], [eee]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at http://www.p12.nysed.gov/specialed/ applications/ESY/ 2014-QA.pdf).

Based on the hearing record, the June 2012 CSE did not have evidence that the student exhibited substantial regression such that the CSE was required to recommend 12-month services for the student. During summer 2011 the student was treated at a psychiatric hospital twice, once as a "partial" patient and once as an inpatient, and underwent a change in medication (Tr. pp. 1140-

43).[15] Although the student's mother testified that there was a CSE meeting at the beginning of the 2011-12 school year, during which the CSE indicated that the student had regressed over summer 2011, there is no evidence in the hearing record to support her assertion that a CSE meeting occurred between the March 2011 CSE meeting and the February 2012 CSE meeting or that regression was an issue in that time period (Tr. p. 1251; see Dist. Ex. 5 at pp. 1-2).[16] Despite the student's social/emotional difficulties outside of school during summer 2011, his first quarter interim report and first quarter report card from the 2011-12 school year did not indicate he exhibited substantial regression in the form of any loss of skill (see Dist. Exs. 22; 26). The student's interim report from the first quarter of the 2011-12 school year detailed that the student was "enjoyable," "ha[d] high curiosity about the scientific world," was "meeting class expectations," and that he received interim grades in the A range (family consumer science) and in the B range (social studies) (Dist. Ex. 26). A review of the student's first quarter report card for the 2011-12 school year reveals that the student received a C in English, a B+ in social studies, a C+ in math, and a C in science (Dist. Ex. 22). Further review shows that the student's English teacher commented that the student's writing was "showing progress," his social studies teacher stated that"[seventh] grade [was] off to a solid start," his math teacher reported that the student was "working hard to improve" and had good class participation, and the student's family and consumer science teacher stated that he was making "good progress" (Dist. Ex. 22).[17, 18] The student's special education teacher testified that in September 2011 the student was "friendly," "conversed easily" with him, "would attend his classes" and "participated on par with his peers" (Tr. pp. 440-41). The special education teacher's progress notes from September and October of 2011 noted that the student had completed homework in all subjects, showed all passing grades with the exception of one graded homework assignment, and noted only a few missing assignments in science (Dist. Ex. 30 pp. 1-3).[19] Based on this, the hearing record does not show that the student experienced substantial regression following summer 2011, when he did not receive special education services.

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[15] The parent testified that the "partial program" was an outpatient program patients attend for approximately six hours per day and receive counseling services (Tr. pp. 1140-41).

[16] The only IEP in the hearing record indicating that the student exhibited regression was developed in September 2010 for the 2010-11 school year (Parent Ex. 17 at p. 5).

[17] The student's first quarter report card from 2011-12 also indicated that the student had not attended any physical education (PE) classes at that point in the school year; however, a review of the student's attendance record reveals that he was excused from PE from September 16, 2011 until October 11, 2011, was absent but unexcused with his special education teacher or at the nurse on three occasions from October 13, 2011 until October 19, 2011, and was thereafter simply marked absent—unexcused for the remainder of the quarter (Dist. Ex. 22; Joint Ex. 1).

[18] With regard to the student's social/emotional performance, there is no indication in the hearing record that the student struggled with social/emotional difficulties at school at the start of the 2011-12 school year. In December 2011, the student's teachers prepared reports for a requested CSE review and provided information about the student's attitude, achievement/grades, and observations (Dist. Ex. 29). The teacher reports reflect that the student generally had a good attitude, and the comments contained in those reports did not contain evidence of substantial regression during the school day (id.).

[19] With respect to the student's academic performance at the end of the 2011-12 school year the student's fourth quarter grades show that, with the exception of math, in which the student received an F, the student's grades remained consistent or improved in the 4th quarter (Dist. Ex. 25). Additionally, the student was making progress toward or had achieved his IEP goals (Tr. p. 198; see Dist. Ex. 21). With regard to the student's social-emotional needs, the May 2012 IEP indicated that student's parents reported concerns about the student's emotional challenges, aggression, lack of friends, and refusal to read at home (Dist. Ex. 6 at p. 2). However, the May 2012 IEP reflects that physical aggression is not observed in school, the student is reading in school and that the student

While the student's mother testified that the May and June 2012 CSEs did not discuss 12-month services, the CSE chairperson testified that the CSE considered 12-month services, but the teachers working with the student "had not indicated any substantial regression of skills that would require that support" (Tr. pp. 66, 1251; Dist. Ex. 6 at p. 1). She additionally stated that at the May and June 2012 CSE meetings the student's teachers indicated that there was "not evidence of substantial regression of skills" and that [the student] was "making progress toward [his] goals" (Tr. pp. 197-98).[20] Moreover, the prior written notice attached to the June 2012 IEP indicates that the CSE considered the student's need for 12-month services, but did not recommend them because the student's teachers did not report regression of skills (Dist. Ex. 6 at p. 17). Further, although a CSE convened in July 2012, the hearing record does not reflect that the parent requested 12-month services or reiterated the student's need for summer services at that point (see Dist. Ex. 7).

Despite the student's struggles in social/emotional areas outside of the public school, there is no evidence of the student exhibiting substantial regression and, consequently, the June 2012 CSEs recommendation of a 10-month program was appropriate.

D. 2012-13 School Year

The IHO found that the district failed to offer the student a FAPE for the 2012-13 school year through an aggregate finding of procedural faults with the CSE, including its composition (albeit arguably), the failure to provide the parents with material documents, and the failure to give due consideration to the information and documents provided by the parents' private providers (IHO Decision at pp. 65-66, 68). The IHO also found that substantively, the district denied the student a FAPE when the CSE recommended a general education classroom placement with special education supports for the student (id. at p. 70).

1. CSE Process - Composition of August 2012 CSE

The district appeals the IHO's determination that the August 2012 CSE team was improperly composed.[21] A review of both the original and amended due process complaint notices reveals that this issue was never raised (see Dist. Exs. 1; 3). Further, the issue was only addressed once during the hearing, and only to the extent that the parents' counsel inquired as to the fact that none of the student's 2011-12 school year teachers were present at the August 2012 CSE meeting (Tr. pp. 177-78).[22] No further mention was made concerning the issue during the impartial hearing

himself reported that he was interacting more during lunch and ate with others "almost all of the time" (id.).

[20] To the extent that the parent asserts that the student's declining score on the New York State Assessment for English language arts represents academic regression, this assessment does not measure regression as defined by State regulations (8 NYCRR 200.1[aaa], [eee]). Moreover, the hearing record shows that the student was resistant to the test-taking process and that the student himself reported that the week of the English language arts test was difficult for him (Tr. p. 397; Dist. Ex. 6 at p. 2).

[21] While the district appeals the IHO's ruling concerning the regular education teacher, the IHO's decision is ambiguous as to whether the IHO ruled in favor of the parents or the district on this issue, or even whether the IHO also found the absence of the student's special education teacher and counselor at the August 2012 CSE meeting constituted a procedural violation or a denial of FAPE (see IHO Decision at pp. 65-66).

[22] To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see N.K., 961

(see Tr. pp. 1-1556). Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see, e.g., N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584 [S.D.N.Y 2013]; see B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 2014 WL 2748756, at *1-*2 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]). As the district did not expressly consent to the issue being addressed during the hearing, it was error for the IHO to make any determination as to the composition of the August 2012 CSE, and the determination is reversed.

However, assuming for the sake of argument that the district acquiesced to the inclusion of the issue of CSE composition, it did not result in or contribute to a denial of FAPE. The IDEA requires that a CSE include not less than one regular education teacher of the student, if the student is or may be participating in the general education environment (20 U.S.C. § 1414[d][1][B][ii]; Educ. Law § 4402[1][b][1][a][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii] see also E.A.M. v. New York City Dep't of Educ., 2012 W.L. 4571794, at *6 [S.D.N.Y. Sept. 29, 2012]). The August 2012 CSE did not contain a regular education teacher who provided instruction to the student during the 2011-12 school year; however, it did include a regular education teacher (Tr. pp. 177-78; Dist. Ex. 8 at p. 1). Even assuming that this was a procedural violation, it did not rise to the level of a denial of FAPE in this instance (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). In this case, the CSE that met in May and June 2012, when the student's initial IEP for the 2012-13 school year was developed, included the student's 2011-12 school year regular education science teacher (Tr. pp. 44, 1235; Dist. Ex. 6 at pp. 1-2). As the prior CSE meetings for the same school year included a regular education teacher of the student, and the August 2012 IEP reflected input from the student's regular education teacher

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F. Supp. 2d at 585; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]). Here, the district did not initially elicit testimony regarding this issue (Tr. pp. 177-78), nor did it attempt to obtain a strategic advantage to defeat a claim raised in the due process complaint notices; therefore, the district did not "open the door" to these issues under the holding of M.H. (see A.M., 964 F. Supp. 2d at 283; J.C.S., 2013 WL 3975942, at *9; B.M., 2013 WL 1972144, at *6).

during those prior meetings (Dist. Ex. 8 at pp. 1-2), any procedural violation did not rise to the level of, or contribute to, a denial of FAPE (see M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *5 [S.D.N.Y. July 15, 2015] [where a CSE team relied on an IEP that was created one month prior, met without the special education teacher of the student present, the Court found a procedural error; however, as the CSE relied on the prior IEP, the violation did not result in a denial of FAPE]; M.H., 685 F.3d at 245; A.C., 553 F.3d at 172; Grim, 346 F.3d at 381; Perricelli, 2007 WL 465211, at *10).[23]

2. August 2012 IEP

Prior to reaching the parties arguments regarding the appropriateness of the supports and services included in the August 2012 IEP, a background review of the student's needs and the supports and services recommended in each of the IEPs designed for the 2012-13 school year is informative.

A CSE met on May 1, 2012 for the student's annual review and to develop an IEP for the 2012-13 school year (Dist. Ex. 6 at p. 1). The CSE had before it updated evaluative information, available subsequent to the February 2012 CSE meeting, including the student's March 2102 report card, a March 2012 teacher report and results of the March 2012 WIAT-III reading assessment (id. at pp. 3, 5). The May 2012 CSE discussed the student's classroom performance and noted improvements in: writing, when supported; classroom participation; remaining in class for longer periods of time; following directions and completing work; and, requesting time to work on assignments (id. at p. 2). With regard to the student's social/emotional performance at school, the student was reported to be conversing with peers more frequently, advocating for himself more often, more clearly expressing when he was tired or not feeling well, and was more open to suggestions but still needed reminders and refocusing to manage his frustration (id.). The parents expressed concerns about the student's anger and aggression at home; however, the June 2012 IEP reflects that physical incidents were not observed in school (id.). The May 2012 CSE also reviewed the results of the March 2012 administration of specific reading subtests from the WIAT-III, which were given in response to the parents' concerns about the student's reading skills (Tr. pp. 43; Dist. Ex. 6 at pp. 2; 5). During the meeting, the parents requested the completion of a full battery of educational testing and the CSE agreed to have the updated testing and conducted and reconvene to review the results and continue planning for the 2012-13 school year (Dist. Ex. 6 at p. 2).

The CSE reconvened on June 1, 2012 in order to complete the student's annual review (Dist. Ex. 6 at p. 2).[24] The June 2012 CSE had additional evaluative information, including a May 2012 IEP progress report, and the results of May 2012 administrations of additional reading and math subtests of the WIAT-III, and the TOWL-4 (Dist. Ex. 6 at pp. 3-5). On the combined reading

[23] For much the same reasoning, had the inquiry also included the issue of lack of the student's special education teacher, the result would be the same. The hearing record shows that the student's special education teacher participated in the creation of the student's IEP in May and June 2012, the August 2012 CSE relied on the information provided by the student's special education teacher during the prior meetings, and the August 2012 CSE included a special education teacher (Dist. Exs. 6 at p. 2; 8 at p. 2).

[24] As noted previously, although the IEP is dated May 1, 2012, it was completed at the June 1, 2012 CSE meeting and includes comments from both the May 2012 and June 2012 CSE meetings (Dist. Ex. 6 at pp. 1-2).

and math portions of the WIAT-III, with scores compiled from the subtests administered in both March 2012 and May 2012, the student obtained composite scores in the average range (Tr. pp. 55, 57-58; Dist. Exs. 9; 10).[25] On the TOWL-4, the student obtained composite scores in the average range (Tr. pp. 328; 1412; Parent Ex. 116 at p. 1). The CSE chairperson testified that the June 2012 CSE reviewed the student's March 2012 and May 2012 scores on the WIAT-III and the TOWL-4 and "discussed the [student's] needs and goals that were appropriate to address [those] needs," as well as the modifications, testing accommodations and support services he required (Tr. pp. 55-59; see Dist. Exs. 9; 10). The June 2012 prior written notice reflects that the June 2012 CSE also discussed the student's performance in school and the student's special education teacher reported that the student was completing his own writing tasks but his performance was inconsistent based on his emotional state and added that the student required a word processor for written work (Dist. Ex. 6 at pp. 16-17). According to the prior written notice, the student's guidance counselor reported that the primary concern for the student was his defiance, as he was refusing to complete work and participate consistently (id. at p. 17). The student's private psychologist felt that the student needed a more therapeutic placement, and the parent reported that the student was not invited to play dates or parties; however, the student's guidance counselor reported that in school peers reached out to the student and attempted to include him (id. at pp. 16-17).

To meet the student's specific needs the June 2012 IEP recommended consultant teacher services to direct and indirect support three times per six-day cycle for 40 minutes, in each core academic class, 12:1 special class-skills instruction four times per six-day cycle for 55 minutes per session, and counseling consultations two times per month for 30 minutes (Dist. Ex. 6 at p. 10). The June 2012 CSE also recommended increasing group counseling to one time per week for 25 minutes in a group of five, increasing individual counseling to one time per six-day cycle for 25 minutes, increasing teaching assistant support to 1:1 for 6.5 hours per day, adding parent counseling and training twice per month for 30 minutes and adding assistive technology in the form of a word processor for written work longer than one paragraph (compare Dist. Ex. 5 at pp. 9-10, with Dist. Ex. 6 at pp. 10-11). To support the student's academic and social-emotional needs, the June 2012 IEP contained 12 annual goals related to study skills, reading, writing, math and social/emotional development, and included modifications and accommodations such as special seating, teacher checks, breaks, checks for understanding, and an extra set of text books (id. at pp. 8-11). The June 2102 IEP further provided behavioral support for the student through and FBA and BIP (id. at p. 8).[26]

A CSE reconvened in August 2012 in response to concerns raised by the parents in an August 2012 letter (Dist. Ex. 8 at p.1). The August 2012 IEP reflects that the CSE had before it evaluative information — including, (1) the December 2010 psychological evaluation report; (2) the February 2012 FBA and BIP; (3) the May 2012 educational evaluation report; (4) the May 2012 writing evaluation report; (5) the June 2012 IEP; (6) parent and oral reports from June, July,

[25] The hearing record reflects that the student obtained a standard score of 73 (4th percentile) on the oral reading accuracy subtest; however, the student's special education teacher testified that this was due to the student self-correcting (Tr. pp. 45-46; Dist. Exs. 9; 10 at p. 1).

[26] A CSE convened on July 27, 2012 to address the parent's request for transportation of the student to Westfield (Tr. pp. 67-68; Dist. Ex. 7 at p. 16). The July 2012 prior written notice indicates that no other issues were discussed at the July 2012 CSE meeting (Dist. Ex. 7 at p. 16).

and August 2012; (7) the student's July 2012 report card; (8) August 2012 New York State testing results; and (9) an August 2012 social history update—which detailed the student's current performance (id. at pp. 4-5). The August 2012 prior written notice indicates that the student received a "score of three" on the New York State math assessment and a "score of one" on the New York State English language arts assessment; however, the school psychologist reported that the student was reluctant to participate in the English language arts assessment and the score did not accurately reflect his skills (id.). The August 2012 CSE considered the need for additional reading goals and related reading services, but determined that they were not necessary because the student's performance on the New York State English language arts assessment was impacted by his social/emotional needs (id. at pp. 17-18).[27]

In describing the student's academic performance, the August 2012 IEP indicates that the student struggled with managing assignments and homework of any length and that producing self-written work was an area of difficulty (Dist. Ex. 8 at p. 7). The student required support to ensure he was reading assigned work, and had difficulty reading independently at home but would read when motivated at school, and had improved in his ability to answer questions about what he had read (id.). The student benefitted from the use of summary devices to help him organize facts and information gained from text and was receiving academic intervention- services (AIS) for reading (id.). The August 2012 IEP indicates that the student could produce written works, including a multi-paragraph expository essay with a moderate level of detail and expansion on thinking with support from teachers, but needed to type his work, as the legibility of his handwriting was an issue (id. at p. 8). In math, the August 2012 IEP indicates that the student exhibited strong calculation skills, although he exhibited frustration if his work was not neat and easy to follow, and also at times abstract concepts were difficult to quickly master (id.). A review of the student's report card for the 2011-12 school year shows that the student received a final grade of C in English, B in social studies, D in math, and C in science and grades in the A and B range in all special area classes (Dist. Ex. 25). Of significance to the factor of progress under a prior IEP, the student's IEP progress report for the 2011-12 school year notes that the student achieved six of his seven academic annual goals and was progressing gradually on the seventh (Dist. Ex. 21 at pp. 1-3).

With regard to the student's social/emotional needs, the August 2012 IEP indicates that the student was a kind and caring young man who initiated conversations with peers and spent time with peers during lunch (Dist. Ex. 8 at p. 8). The student's social interactions could be immature or inappropriate, and at times the student misinterpreted his peers, which had a negative effect on his behavior (id.). The August 2012 IEP reflects that the student was sometimes overwhelmed by frustration and anxiety, which could cause him to shut down and withdraw from classroom activities, and further describes the student as having a propensity to focus on negative experiences and difficulty identifying successes (Dist. Ex. 8 at p. 8). The student was described in the August 2012 IEP as "empathetic and genuinely concerned" for the well-being of his peers, cooperative, and having a "hearty sense of humor" (id.).

[27] The evidence does not support a finding that reading deficits or poor instruction in reading was a significant factor in the student's performance on the English language arts assessment.

i. Special Factors – Interfering behaviors

The district asserts that the IHO erred in determining that the district did not appropriately address the student's behavioral needs. More specifically, the district contends that the IHO overlooked the June 2012 CSEs recommendation for an updated FBA and BIP, and the August 2012 CSEs addition of behavior consultant services to support the development of the FBA and BIP for the 2012-13 school year. The evidence in the hearing record supports the district's assertion that the August 2012 IEP adequately addressed the student's behavioral needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

> include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it (8 NYCRR 200.1[r]).

According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE shall consider the development of a BIP for a student with a disability when:

> (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[28] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the

[28] The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

The hearing record includes a February 2012 FBA and BIP (Dist. Exs. 13; 14). The June 2012 IEP noted that the student required a BIP and indicated that a current plan was on file (Dist. Ex. 6 at p. 8). The June 2012 prior written notice indicated that the student's guidance counselor felt that the FBA and BIP needed to be "fluid" to support the student's attendance in class and his ability to participate (id. at p. 17). The chairperson of the June 2012 CSE testified that an updated FBA and BIP were recommended at the June 2012 CSE meeting, and stated that neither was completed at that time because it was late in the school year, the data would not reflect the eighth grade setting, and there was not enough time to implement the plan and then evaluate its effectiveness (Tr. pp. 163-64).[29]

A review of the August 2012 student information summary shows that the August 2012 CSE discussed the student's behavioral difficulties both at home and at school, as well as his academic performance at the end of the 2011-12 school year (Dist. Ex. 8 at pp. 1-2). The information summary indicated that at the meeting changes were made to the student's social/emotional annual goals, which were to identify: factors related to anxiety and frustration that prevent work completion, strategies to initiate work product, successful behaviors linked to high achievement, social cues indicating a peer is initiating a social interaction, age appropriate conversations with a peer, and elements of positive social interactions (id. at pp. 2, 11). The August 2012 IEP included management strategies, such as reminders to offer age appropriate conversation and positive reinforcement and commendations for successes to support the student's social/emotional needs (id. at p. 9). The August 2012 CSE also recommended that the student receive one session of small group (5:1) and one session of individual counseling per week (id. at p. 11).[30] To further address the student's behavioral needs, the August 2012 CSE added the services of a behavior consultant (id. at pp. 2, 14). The August 2012 IEP continued to indicate that the student required a BIP and that one was on file (id. at p. 9).[31]

To the extent that the district also asserts the IHO erred in finding that the school psychologist testified that a behavior intervention consultant would not have been effective, a review of the hearing record does not support the IHO's finding. The school psychologist testified that contracted behavior consultants may have more time to observe students than school district staff and stated that this has been helpful in some cases, and would have been helpful to this student

[29] If there is an impending change in school year and environment, it is not inappropriate to briefly delay revisiting an FBA and BIP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at *3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by indicating that an FBA and BIP will be developed after a student begins in a new environment).

[30] The August 2012 IEP also provided two 30-minute sessions per month of individual parent counseling and training (Dist. Ex. 8 at p. 11).

[31] Although the February 2012 BIP was not updated prior to the start of the 2012-13 school year, the evidence in the hearing record shows that some of the strategies in the BIP were helpful for the student (Tr. pp. 447-48).

(Tr. p. 340). When asked if it would have been helpful to have a behavior consultant or consulting psychiatrist at any of the student's CSE meetings, the school psychologist responded that the student's team had a "good understanding of [the student's] emotional functioning at school" and stated that she did not think that [a behavior consultant or consulting psychiatrist] could provide a "significant amount of additional information" (Tr. pp. 393-94). The district psychologist further clarified that she was not saying that a behavior consultant "wouldn't have been effective" and added that "additional supports can be effective in certain situations"(Tr. pp. 393-94).

In light of the evidence above, a review of the hearing record supports a finding that the August 2012 IEP appropriately addressed the student's behavioral needs.

ii. General Education Setting

The issue of the student's placement, more specifically the parents' argument that the student required a small therapeutic setting rather than a general education setting, is at the center of the parents' assertion that the district failed to offer the student a FAPE for the 2012-13 school year. The district contends that the IHO erred in determining that a general education setting was not appropriate for the student and that the CSE failed to recognize that the student required a smaller program in a therapeutic environment. Upon review, the hearing record shows that a general education placement with special education supports and services was appropriate for the student.

A student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. Jun. 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [Dec. 2010]). Furthermore, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how a subsequent IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

During the 2011-12 school year the student received instruction in a general education setting, initially with consultant teacher support in his core academic classes, the support of a teaching assistant (2:1 for academic classes and 1:1 for non-academic classes), and group counseling (Dist. Ex. 5 at pp. 9-10; Parent Ex. 26 at pp. 9-10). In the latter part of the school year, the district also provided the student with 12:1 special class-skills instruction and increased individual counseling services (Dist. Ex. 5 at pp. 9-10). The hearing record reflects that, with the exception of a failing fourth quarter grade in math, the student received passing grades in all subjects for each quarter of the 2011-12 school year (Dist. Ex. 25). Despite having received a failing grade in math for the fourth quarter, the student received a final grade of D in math and achieved a three on the New York State assessment in math (Dist. Exs. 8 at p. 17; 25). Further, the student made progress towards his annual goals for the 2011-12 school year as shown on the end of year progress report, which indicates that the student completed six out of his seven academic goals and two out of his four social/emotional goals (Dist. Ex. 21 at pp. 2-4). The

student's social studies teacher testified that the student made progress socially as well as in class participation, made insightful comments in class, did "remarkably well" on assessments, participated in the seventh grade curriculum and used the same materials as other seventh grade students, and she also opined that the student made meaningful academic progress in seventh grade (Tr. pp. 247-49, 257). In addition, the student's special education teacher testified that the student participated in the seventh grade curriculum, completed grade level work, and made progress socially and academically (Tr. pp. 451-55). Moreover, as discussed previously, administration of the March/May 2012 WIAT-III and May 2012 TOWL-4 to the student yielded composite scores in the average range (Dist. Exs. 9; 10; Parent Ex. 116 at p. 1). Accordingly, the hearing record supports finding that with the supports available during the 2011-12 school year, the student was able to make some progress.

The hearing record shows that during the development of the student's program and placement for the 2012-13 school year, the CSE convened on multiple occasions and made adjustments to the student's program to meet his needs (compare Dist. Ex. 6 at pp. 1-2, 10-12, with Dist. Ex. 8 at pp. 1-2, 11-15). As noted above, the August 2012 CSE added the services of a behavior consultant to support district staff in conducting an FBA and developing a new BIP, and to attend parent counseling and training sessions to help address some of the problems the student was having in the home setting (Tr. pp. 338-39; Dist. Ex. 8 at pp. 2, 14). The student's private psychologist testified that the student would not have benefitted from an updated FBA and BIP or a behavioral consultant in a general education setting because the student was "too ill," he was unable "to understand cause and effect," he could not tolerate any frustration, and he could not inhibit angry impulses (Tr. pp. 749-53).[32] Along with the student's treating psychiatrist, the private psychologist recommended that the student be placed in a structured therapeutic environment (Dist. Exs. 19; 20). Although the student had exhibited behaviors in school requiring the formulation of an FBA and BIP, reports of the student's performance in school generally did not match the reports of the student's behaviors outside of school or the private psychologist's description of the student (see Dist. Exs. 11; 29; 37-38; Parent Ex. 61; 71).[33] Additionally, the CSE's recommendation for a 1:1 teaching assistant to implement the updated BIP throughout the school day, would have ensured that the student had staff available to address his behaviors as they occurred (Dist. Ex. 8 at pp. 12-13). Accordingly, while the hearing record indicates that the student's parents and private professionals wanted a structured therapeutic environment in response to the student's social/emotional challenges outside of school, the hearing record does not indicate that the student's behavior outside of school translated to the school environment to the extent that placement in a small therapeutic setting was necessary for the student to receive an educational benefit (see A.M. v. New York City Dep't of Educ., 2015 WL 8180751, at *4

[32] While the private psychologist testified that the student's behaviors could not be improved by a behavior plan or a behavioral consultant, the private psychologist later testified that the student's behaviors at Westfield improved due to a behavior plan requiring the parents to pick up the student and remove him from school if he was having a difficult day (Tr. pp. 814-15, 831).

[33] The student had one incident on the school bus in which he exhibited aggression towards another student; however, district staff testified that incidents of physically aggressive behavior were not being reported as occurring in school (Tr. pp. 323, 341, 450, 784-85, 1194-98). The hearing record also contains an e-mail from the school nurse to the parents indicating that in November 2012 the student had a day where he "was more impulsive than usual" and "hit" another student (Parent Ex. 41). In response, the parents indicated that the student's physician instructed them to increase the student's medication (id.).

[S.D.N.Y. Dec. 7, 2015] [holding that the evaluative reports supported the CSE's program recommendations even though the CSE's recommendations were not consistent with the evaluators' recommendations]; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9 [2d Cir. 2005]).

Moreover, the August 2012 prior written notice reflects that the August 2012 CSE considered the need to provide services in a more restrictive program, but that school staff participating in the August 2012 CSE "agreed that the program developed, inclusive of consultant teacher services, special class [instruction], counseling, and parent counseling and training [was] appropriate to meet the student's needs" (Dist. Ex. 8 at p. 18). The district's position is consistent with principals of LRE, which require that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Newington, 546 F.3d at 120-21).

Additionally, to address the student's specific needs, the August 2012 CSE recommended direct and indirect consultant teacher services three times per six-day cycle for 40 minutes per session in each core class, 12:1 special class-skills instruction four times per six-day cycle for 55 minutes per session, counseling one time per week for 25 minutes in a group of five and one time per week individually for 25 minutes, parent counseling and training two times per month for 30 minutes, the support of a full time 1:1 teacher assistant, and a counseling consultation two times per month for 30 minutes (Dist. Ex. 8 at pp. 8, 11-14). The August 2012 prior written notice indicates that the August 2012 CSE considered parent reports, the student's report card, and New York State testing results and that the CSE made changes to the student's program, including adding and updating social/emotional goals, adding program modifications and a testing accommodation to allow for individual administration of tests longer than 10 minutes and adding a behavior intervention consultation for the student's team to support the development of an updated FBA and BIP (id. at p. 17). Further, the August 2012 IEP included eight academic goals that focused on the student's specific needs, including study skills, reading comprehension, writing and math, and specified modifications and accommodations—specifically, special seating, teacher checks to gauge frustration, short breaks when frustrated or fatigued, checks for understanding, an extra set of textbooks for home, copies of class notes, and previews and social coaching prior to lunch (id. at pp. 10-13). The August 2012 IEP also included assistive technology in the form of access to a word processor for written work longer than one paragraph (id. at p. 14).

Given the evidence above, I find that, contrary to the IHO's conclusion, the August 2012 CSE's recommendations for a general education placement with direct and indirect consultant teacher services for all academic classes, 12:1 special class-skills instruction, both individual and group counseling, a full time 1:1 teaching assistant, and various program modifications/accommodations was reasonably calculated to enable the student to receive educational benefits in the least restrictive environment (see Dist. Ex. 8 at pp. 11-15). While I empathize with the parents over the student's out-of-school behavior, his interfering behavior in school was not such that the student's teachers unable to manage it in the context of providing his

instructional and support services, and, the IHO appears to have added the student's difficulties outside of the school environment as a predominate factor in the analysis of his school-related behavior, which is not supported by the evidence, and consequently the IHO erred in determining that the student's overall behaviors required that he be removed from a general education setting.

VII. Conclusion

Based on the foregoing, I find that the August 2012 IEP was reasonably calculated to enable the student to receive educational benefit (Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]). Additionally, the IHO erred in determining: (a) that the statute of limitations did not bar the parents claims related to the portion of the 2011-12 school year prior to May 27, 2012; (b) that the district did not offer the student a FAPE for the 2011-12 school year; and (c) that the district did not offer the student a FAPE for the 2012-13 school year. Having found that the district offered the student a FAPE for the 2012-13 school year, I need not reach the issue of whether the private educational services obtained by the parents were appropriate for the student, or whether equitable factors would have prevented the parents from receiving any or all of an award for reimbursement, and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated November 4, 2015 is reversed to the extent that the IHO determined that the statute of limitations did not bar the parents claims with respect to the 2011-12 school year prior to May 27, 2012; that the district did not offer the student a FAPE for the 2011-12 school year; and that district did not offer the student a FAPE for the 2012-13 school year.

Dated: **Albany, New York**
January 7, 2016

JUSTYN P. BATES
STATE REVIEW OFFICER