



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 17-003

**Application of a STUDENT SUSPECTED OF HAVING A  
DISABILITY, by his parent, for review of a determination of a  
hearing officer relating to the provision of educational services  
by the Ithaca City School District**

**Appearances:**

Bond, Schoeneck & King, PLLC, attorneys for respondent, Kate I. Reid, 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 parent) appeals from a decision of an impartial hearing officer (IHO) which found that respondent (the district) properly determined that the student was not eligible for special education. The appeal must be sustained.

#### II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2],

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

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

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

The student has received diagnoses of attention deficit hyperactivity disorder (ADHD)-combined presentation, sensory integration disorder, insulin resistance, Tourette syndrome, obsessive compulsive disorder (OCD), specific phobia (spiders), tic disorder, and generalized anxiety disorder (Dist. Exs. 2; 9 at p. 2; 11 at p. 10; 13; 22).<sup>1</sup> He is reported to have insomnia, which caused difficulty waking for school and subsequent frequent tardiness and has a history of taking multiple medications to address the symptoms related to his various diagnoses (Dist. Ex. 12 at p. 3).

The hearing record reflects that the student has attended several different schools within the district. According to the parent, the student attended his first school from kindergarten (2008-

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<sup>1</sup> The March 2014 independent psychological evaluation report noted that the current International Statistical Classification of Diseases and Related Health Problems (ICD) diagnostic manual and the Diagnostic and Statistical Manual of Mental Disorders (DSM) do not recognize procedural codes for sensory integration issues (Dist. Ex. 11 at p. 10).

09 school year) until April or May of fourth grade (2012-13 school year), when he transferred to another district elementary school following "issues with bullying" and an incident where a teacher videotaped an interview with the student (Dist. Exs. 4 at p. 1; 12 at p. 4; 44 at p. 1; 79 at p. 2).<sup>2</sup>

The student began receiving accommodations pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794[a]) (section 504) at the end of the 2011-12 (third grade) school year (Dist. Ex. 53 at p. 3).<sup>3, 4</sup> The student finished fourth grade at the second district elementary school and, in mid-October of fifth grade (2013-14 school year), he transferred to a third district elementary school because, according to the parent, the student had been "disciplined for making toy gun noises during a fire drill, his teacher placed [the student] in a segregated part of the classroom due to his Tourette's symptoms," and because "communication was restricted between [the student's] mother and teacher" (Dist. Exs. 12 at p. 4; 44 at p. 1; 79 at p. 2). On October 6, 2013, during fifth grade, the parent referred the student to the CSE (Parent Ex. E at p. 223).<sup>5</sup> However, on January 28, 2014, the student was found ineligible for special education as a student with a disability (Dist. Exs. 7 at pp. 1-4; 8 at p. 1; Parent Ex. E at p. 223). The hearing record reflects that the student subsequently continued to receive section 504 accommodations during fifth through seventh grades (see Dist. Exs. 2a; 25 at p. 1; Parent Exs. D at pp. 21-25, 26-29, 30-32; AA at pp. 1-4).<sup>6</sup>

In March 2014, after the student was found ineligible for special education services under the IDEA by the CSE, the parent requested a psychological independent educational evaluation (IEE) which was funded by the district and completed on March 20 and 21, 2014 (Tr. pp. 191-92; Dist. Ex. 11 at pp. 1-8). Additional documentation of the student's diagnoses and needs was also compiled by the parent around this time including: a March 12, 2014 letter from the student's pediatric neurologist, noting the student's diagnoses of Tourette syndrome and anxiety and making a request for section 504 accommodations based on these diagnoses (Dist. Ex. 9 at p. 2); a June 18, 2014 letter from the student's psychiatrist, who wrote at the request of the parent, stating the parent felt the student's needs would be better addressed by an IEP (Dist. Ex. 13 at p. 1); a June 4, 2014 observation report by an advocate from the Tourette Syndrome Association of Greater New York State (Tourette advocate) (Dist. Ex. 12 at pp. 1-2); and a June 13 and 30, 2014

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<sup>2</sup> The hearing record reflects that the student attended school in another country for one month during first grade (Dist. Ex. 4 at p. 1).

<sup>3</sup> Although the hearing transcript indicated that a June 12, 2013 section 504 accommodation plan was entered into evidence as district exhibit 3, it was not included in the hearing record filed with the Office of State Review (Tr. p. 3; see IHO Decision at p. 36). As the exhibits received by the Office of State Review are labeled as though the June 2013 accommodation plan was not in evidence, this exhibit has been renumbered district exhibit 2a by Office of State Review staff. The district exhibits are otherwise cited as marked, consistent with how they are referenced in the IHO's exhibit list (although the IHO cited variously to the exhibits as marked and as referenced in the hearing transcript), but not as labelled in the hearing transcript (compare Dist. Exs. 3-90, and IHO Decision at pp. 36-41, with Tr. pp. 3-12).

<sup>4</sup> The parent's June 2016 due process complaint notice indicates that the parents requested a section 504 plan for the student in third grade and a plan was provided in June 2012 (Dist. Ex. 53 at p. 3).

<sup>5</sup> The student also began receiving outside therapy for anxiety and OCD associated with Tourette syndrome in Fall 2013 (Dist. Ex. 4 at p. 3).

<sup>6</sup> Many of the parent's exhibits include multiple documents within one exhibit (see Parent Exs. A-I, L, N-X).

neuropsychological executive functioning screening report (id. at pp. 3-9).<sup>7</sup> Both the psychological and neuropsychological evaluations recommended that the district convene to determine if the student was eligible for special education services (Dist. Exs. 11 at pp. 1, 10; 12 at p. 8). The district also completed an occupational therapy (OT) evaluation on July 7, 2014 (Dist. Ex. 15 at pp. 1-5).

In May 2014, near the end of his fifth grade year, the student transferred to a fourth district elementary school after an incident in which a teacher "disclosed [the student's] 504 in front of the classroom which upset [the student]" (Dist. Exs. 12 at p. 4; 44 at p. 1; 79 at p. 2).<sup>8</sup> On July 8, 2014, a CSE meeting was held to review the psychological and neuropsychological evaluations and reconsider the student's eligibility for special education (Dist. Exs. 59 at p. 1; 62 at p. 3); however, at the parent's request, the meeting was tabled because no special education teacher was available to participate in the meeting (Dist. Ex. 18 at p. 1). On August 26, 2014, the CSE eligibility determination meeting was continued, and the student was determined ineligible for special education as a student with a disability (id.).

On July 17, 2014, the parent filed a due process complaint notice requesting an impartial hearing (Dist. Ex. 16 at pp. 1-5). As a solution to the problems identified in the due process complaint notice, the parent requested, in part, that the student be classified as a student with an other health-impairment and provided with assistance for writing and organization and mental health support (id. at pp. 4-5). The parent also requested that the district conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) for the student (id. at p. 4). The July 2014 impartial hearing request was resolved by resolution agreement executed on November 6, 2014, pursuant to which the district agreed to provide specified services and accommodations including: a "homework support lab . . . in a 8:1 class" to assist the student with written expression and organization; push-in support for written expression and organization on an unspecified basis; counseling; and peer and staff training by the Tourette advocate (see Dist. Ex. 19 at pp. 1-2). Although the Resolution Agreement did not require the district to conduct an FBA, it called for the district to collect data to monitor the student's "behavior, performance and engagement" (id.). On August 17, 2014, a writing assessment and learning profile consultation of the student was completed at the request of the parent, to clarify the student's needs related to written work (Dist. Ex. 17 at pp. 1-5).

The student attended a district middle school beginning in sixth grade in September 2014 (Tr. pp. 195-96; Dist. Exs. 23 at p. 1; 79 at p. 2). In June 2015, the parent filed a complaint with the United States Department of Education Office of Civil Rights (OCR), alleging that the district had failed to implement the student's section 504 plan (see Tr. pp. 193-94; Dist. Ex. 24). The parent's complaint was resolved by an agreement primarily relating to the mode of contact between the parties; the district also agreed to provide training regarding Tourette syndrome to the student's service providers (Dist. Ex. 31 at pp. 1-4).

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<sup>7</sup> District exhibit 12 consists of both the June 2014 letter from the Tourette advocate (Dist. Ex. 12 at pp. 1-2) and the June 2014 neuropsychological executive functioning screening report (id. at pp. 3-9).

<sup>8</sup> The student was also reported to have an increase in insomnia in response to violence seen during a movie in literature class, although it is unclear from the hearing record in which school this occurred (see Dist. Ex. 12 at p. 4).

The hearing record reflects that, in September 2015, at the start of the student's seventh grade year, the district notified the parent that it would be conducting a reevaluation of the student to determine his current needs and continuing eligibility for section 504 services, noting that the student's teachers and providers reported the student's needs had changed since he was last evaluated, and requested consent to conduct the evaluations (Dist. Exs. 32 at pp. 1-2; 33 at p. 2).<sup>9</sup> The parent ultimately did not sign and return the consent form, which the district interpreted as the parent declining to provide consent (Dist. Ex. 33 at pp. 1-2; see Tr. p. 1942).

In November 2015, the student transferred to another middle school in the district because the parent was dissatisfied with how the student's section 504 plan was being implemented by staff at the first middle school; the student completed seventh grade at the second middle school (Tr. pp. 198, 200-01; see Dist. Exs. 41 at p. 1; 44 at p. 1; 71; 79 at p. 2).

On May 6, 2016, at the student's annual section 504 meeting, it was determined that the student continued to be eligible for section 504 accommodations (Dist. Exs. 48 at p. 1; 50 at p. 1; 51 at p. 1). Several changes were made to the student's accommodations at this meeting (see Dist. Ex. 50 at pp. 1-2). On June 3, 2016, the parent referred the student to the CSE to determine the student's eligibility for special education (Dist. Ex. 54).

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

By due process complaint notice dated June 3, 2016, the parent challenged the process and outcome of the May 2016 section 504 committee meeting, asserting that the district unilaterally removed essential accommodations from the student's section 504 plan and that the resulting plan was "grossly insufficient" and did not meet the student's needs (Dist. Ex. 53). As relief, the parent requested, among other things, that the district develop an IEP for the student "designed around his specific needs to support his education" (id. at p. 9). In the alternative, the parent requested that, if the student was found ineligible for special education, the district should develop a "strengthened" section 504 plan that would be "consistently implemented" (id.). Finally, the parent also set forth a series of "supports" that she asserted were "essential in ensuring [the student] receives [a] FAPE," which included, among other things, that the district conduct an FBA (id. at pp. 9-11).

In an amended due process complaint notice, dated June 15, 2016, the parent alleged that the student's "functional and academic performance underwent a marked decline" during the 2015-16 school year and, therefore, the district "had a responsibility to refer him to the [CSE], and should have provided an [IEP] designed around his specific needs" (Dist. Ex. 59 at p. 1). The parent also asserted that evaluative information gathered with respect to the student during 2014, "together with his educational records," was still valid and sufficient to establish the student's eligibility for special education services under the IDEA (id. at p. 2).

The district responded to the amended due process complaint and asserted that the parent was able to participate in the formation of the student's section 504 plan, that the plan was

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<sup>9</sup> The request for consent indicated that the reevaluation would include: an assessment of academic achievement, a behavior assessment, a classroom observation, a student interview, a review of records and a teacher report (Dist. Ex. 32 at p. 1; see Dist. Ex. 33 at p. 2).

appropriate, that the student was not eligible for services under the IDEA, and that it had not violated the child find provision of the IDEA (Dist. Ex. 62).

### **B. Facts Post-Dating the First Due Process Complaint Notice**

On June 10, 2016, the section 504 committee met again to consider a May 10, 2016 OT evaluation report (Dist. Exs. 49; 52 at p. 1; 56 at pp. 1-8; 57; Parent Ex. D at pp. 30-32). The hearing record reflects that the parent disagreed with some of the changes made to the student's services at the May and June 2016 section 504 meetings (see Dist. Ex. 61 at p. 1).

By e-mail dated June 29, 2016, counsel for the district notified the parent of the district psychologist's attempts to contact her in order to schedule the psychoeducational testing that needed to be completed before the student's initial eligibility meeting took place (Dist. Ex. 63). The parent responded later that day and, consistent with her June 15, 2016 amended due process complaint notice, stated that she did not want her son to undergo a new battery of tests and that his evaluations from two years ago were still "valid, accurate, and useful, and . . . sufficient to establish eligibility, together with his educational records" (id.).

On July 1, 2016, counsel for the district exchanged a series of e-mails with the parent regarding which tests the parent would consent to being used to evaluate the student (Dist. Ex. 75 at pp. 1-3). The parent's response indicated, among other things, that she had concerns regarding the usefulness of tests recommended by the district and that she felt additional intelligence and achievement testing were not necessary; however, she believed additional neuropsychological testing to assess the student's executive function deficits would be worth considering (id. at pp. 2-3). In another e-mail exchange on July 6, 2016, the parent agreed to administration of both the Behavior Rating Inventory of Executive Function (BRIEF) and the Behavior Assessment System for Children (BASC) (see Dist. Ex. 77 at p. 1).

In a confidential student report for the student's initial eligibility determination meeting, dated July 12, 2016, the district special education teacher described the student's current functioning and summarized his academic, behavioral, and evaluation history (see Dist. Ex. 78 at pp. 1-3). The report also summarized the student's current section 504 supports and concluded, after a review of the evaluative information, that the section 504 plan provided sufficient support for the student's needs (id.).

In a report dated July 13, 2016, the district school psychologist completed a confidential record review to assist in determining the student's eligibility for special education services at the upcoming CSE meeting (Dist. Exs. 79 at pp. 1-13; 80). The report also reflected that the BASC and BRIEF were administered (Dist. Ex. 79 at pp. 13-20).

The CSE meeting took place on July 19, 2016 (Dist. Ex. 82 at pp. 9-22). Based on a review of evaluations, teacher reports, classroom functioning, parent information, and committee discussion, the CSE determined that the student was not eligible for special education as a student with a disability (Dist. Ex. 86 at p. 1). The CSE informed the parent of its decision by prior written notice dated July 19, 2016 (Dist. Ex. 83 at p. 1).

On July 28, 2016, the parent consented to an amendment to the student's section 504 plan that would provide for "Professional Development in the Area of Disability, 1 time yearly," and that "[a] reasonable effort" would be made to "inform all building staff about Tourette Syndrome"

and "train all staff working with the student about [Tourette syndrome] and associated disorders" (Dist. Ex. 89 at p. 1). However, the parent noted she would prefer to remove the phrase "[a] reasonable effort will be made to" provide such training (*id.*). The consent form also reflected that the parent had "requested that the other removed provisions be reinstated as well" (*id.*).

The district responded by sending "prior written notice" of a proposed amendment to the student's section 504 accommodation plan without a committee meeting, dated July 26, 2016, to the parent (Dist. Ex. 90 at p. 1). The notice reflected that the "reasonable effort" language had not been removed and that the other "removed provisions" had not been reinstated (*id.*). In response, the parent typed on the notice that she did not agree with the statements on the notice that indicated there were no other options considered and there were no other factors relevant at the time (*id.*).

### **C. Second Due Process Complaint Notice**

By a second due process complaint notice and "request for consolidation," dated August 1, 2016, the parent challenged the processes and outcomes of the June 2016 section 504 meeting, as well as the July 2016 CSE meeting (Parent Ex. I at pp. 26-29). With respect to the July 2016 CSE meeting, the parent asserted that the district members of the CSE inappropriately failed to classify the student as eligible for special education under the IDEA despite evidence of the student's declining grades and struggles with functional performance and behavioral difficulties (*id.* at p. 28). The parent also challenged the district's failure to conduct an FBA to evaluate the student's functional and behavior needs in the classroom (*id.*).

### **D. Impartial Hearing Officer Decision**

After prehearing conferences on July 15, 2016 and August 1, 2016, on August 8, 2016, the parties proceeded with the impartial hearing, which concluded on September 22, 2016, after ten days of proceedings (*see* Tr. pp. 1-1950; IHO Decision at pp. 2-4).<sup>10</sup> In an interim decision, dated August 15, 2016, the IHO consolidated the parent's due process complaint notices (Aug. 15, 2016 Interim IHO Decision at p. 3).<sup>11</sup>

In a decision dated December 13, 2016, the IHO addressed the parent's claims arising under the IDEA (IHO Decision at pp. 2, 35).<sup>12</sup> Specifically, the IHO found that the July 2016 CSE correctly found that the student did not meet the criteria for eligibility for special education under the IDEA as a student with an other health-impairment (*id.* at pp. 30-33). The IHO observed that the definition of other health-impairment included a requirement that the student's impairment adversely affect his educational performance and noted that authority in the Second Circuit "uniformly held that 'an adverse effect on a student's educational performance' encompassed only academic performance and . . . not . . . social/behavioral functioning" (*id.* at pp. 30-31). The IHO found that the student continued to do well in school, making the honor roll during the 2015-16

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<sup>10</sup> The IHO referenced the prehearing conferences in his decision; however, the hearing record does not contain a transcript or written summary of the prehearing conferences, as required by State regulation (8 NYCRR 200.5[j][3][xi]).

<sup>11</sup> In addition, the IHO denied the parent's request for a pendency placement pursuant to section 504 on August 9, 2016 (IHO Decision at p. 3; Tr. pp. 211-12).

<sup>12</sup> By decision dated January 3, 2017, the IHO addressed the balance of the parent's claims under section 504 (Jan. 3, 2017 IHO Decision).

school year leading up to the July 2016 CSE meeting, and identified alternative causes for the temporary decline in grades unrelated to the student's asserted disabilities (*id.* at pp. 31-32). Additionally, the IHO found that the student's lower than usual score on a State math assessment "appear[ed] to be an anomaly," which alone did not suffice to establish an adverse impact on educational performance (*id.* at p. 32). The IHO also noted that the student met or exceeded "academic expectations in all subjects" despite varying reports regarding the student's social/emotional and behavioral functioning (*id.*). Finally, the IHO found that the suggestion of the private psychologist who conducted the March 2014 psychological IEE of the student that the student would benefit from an IEP did not warrant a different result (*id.*).

With respect to the parent's claim that the district should have conducted an FBA to assess the student's in-school behavior needs, the IHO found that an FBA was not required because the student's behaviors, which include impulsivity and hyperactivity, did not rise to a level that impeded the student's ability to learn or the ability of other students to learn (IHO Decision at p. 33). Rather, the IHO determined that the student's behaviors were "often that of a typical young boy and [we]re not that significant in school" (*id.* at pp. 33-34). Further, the IHO determined that the student's discipline history was "fairly insignificant" (*id.* at p. 34).

With regard to the parent's claims concerning the district's child find obligations, the IHO found that there was no evidence in the hearing record to support a finding that the district's child find policy was flawed and that, because the July 2016 CSE properly determined that the student was not eligible for special education, there could be no child find violation (IHO Decision at pp. 34-35).

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

The parent appeals, asserting that the IHO erred in finding that the student was not eligible for special education services as a student with an other health-impairment and erred in failing to order the district to conduct an FBA.<sup>13</sup> Initially, the parent points out numerous factual statements in the IHO's decision that she alleges are inaccurate, incomplete, or mischaracterizations of the hearing record evidence. The parent also asserts that the IHO failed to properly conduct the impartial hearing in that he failed to properly manage the scope or scheduling of the impartial hearing, failed to protect one of the parent's witnesses from badgering by the attorney for the district, was dismissive of the pro se parent's difficulties at the impartial hearing related to a hearing impairment, disrupted the parent's testimony by allowing repeatedly overruled objections to continue and by expressing impatience with the parent, inappropriately granted extensions to the regulatory timelines for the impartial hearing, and rendered a late decision.

As for eligibility, the parent asserts that the IHO used the wrong legal standard when determining that the student's disability had caused no adverse effect on his educational performance. In the parent's view "educational performance" includes both academic achievement and social/emotional and behavioral function in school. Moreover, the parent asserts that, when the student's purely academic performance is examined in detail, a marked decline in test scores and grades during the 2015-16 school year is apparent. With respect to the need for an FBA, the parent asserts that the IHO failed to give appropriate weight to the evidence of the student's

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<sup>13</sup> The parent submits several exhibits with her petition as additional evidence (*see* Pet. Exs. SR at pp. 1-71; HO at pp. 1-147).

consistent disruptive and off-task behaviors that demonstrated the need for an FBA because these behaviors impeded the student's learning and that of others. The parent also asserts that the IHO erred in his determination that the district did not violate its child find obligation. For relief, the parent requests that the student be found eligible for special education services, that the district be ordered to conduct an FBA, and that the district be ordered to conduct facilitated or mediated CSE meetings going forward.

In an answer, the district submits a counterstatement of facts and argues that the IHO's decision should be upheld in its entirety. In addition, the district argues that additional evidence attached to the parent's petition should not be accepted by an SRO because the documents were available at the time of the impartial hearing and are unnecessary for completing the record regarding any of the parent's IDEA claims. The district also asserts that the parent was afforded due process during the impartial hearing and that the IHO's delay in rendering a decision was caused in part by the actions of the parent and, in any event, did not prejudice the student or the parent. Next, the district asserts that an SRO has no jurisdiction to decide the parent's section 504 claims.

In a reply, the parent submits additional facts and argument, as well as additional evidence (see Reply Ex. at pp. 1-11), in support of the allegations raised in her petition.

## **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).

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Additional Evidence**

The parent submits additional exhibits for consideration with her petition and reply that were not offered into evidence at the impartial hearing (Pet. Exs. SR at pp. 1-71; HO at pp. 1-147; Reply Ex. at pp. 1-11). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 15-033; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

The parent submits a variety of additional documentary evidence with her petition, including: what appears to be the entirety of the e-mail correspondence between the parties during the course of scheduling, conducting, and concluding the impartial hearing; orders extending the impartial hearing compliance date; e-mail correspondence between the parent and the student's service providers; a report card relating to the 2015-16 school year; State Education Department documentation; and various materials published by the district. To the extent relevant to the parent's claims about the conduct of the impartial hearing, discussed below, the e-mails between the parties and the IHO relating to scheduling have been considered. The remainder of the additional evidence need not be considered because it was either entered into evidence or was available at the time of the impartial hearing and/or it is not necessary to render a decision in this case.<sup>14</sup>

With respect to the exhibits submitted with the parent's reply, they are also not necessary to render a decision on the issues raised in the parent's appeal. The parent submits correspondence postdating the impartial hearing as evidence of the student's interfering behaviors, as well as the student's progress reports and report cards for the 2016-17 school year. In addition to being unnecessary to render a decision, the proffered documents would also be of questionable evidentiary value since the documents postdate the disputed July 2016 CSE meeting and, therefore, could not be used to assess the appropriateness of the CSE's determination (see, e.g., C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that

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<sup>14</sup> The orders issued by the IHO extending the compliance date were submitted to the Office of State Review by the district as part of the hearing record; it is unnecessary to accept the additional copies proffered by the parent.

were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"], citing R.E., 694 F.3d at 186-87). Accordingly, these exhibits have not been considered.

## **2. Conduct and Timeliness of the Impartial Hearing and IHO Decision**

In her petition, the parent sets forth allegations related to the conduct and timeliness of the impartial hearing and the IHO's decision. In particular, the parent asserts that the IHO failed to conduct the hearing appropriately. The parent further contends that the IHO erred in extending the time in which the district was permitted to submit its post-hearing brief, and in granting extensions to the decision due date over her objections.

With respect to the conduct of the hearing, the parent argues that the IHO permitted counsel for the district to badger the Tourette advocate during cross-examination, dismissed the parent's "difficulties with capturing meaning" as a result of a hearing impairment, exhibited impatience during the parent's testimony, and permitted counsel for the district to interrupt the parent's testimony. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity, and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and not, by words or conduct, manifest bias or prejudice (Application of a Student with a Disability, Appeal No. 12-064).

First, the parent objects to the manner in which counsel for the district cross-examined the Tourette advocate. During the impartial hearing, the parent objected specifically to the "tone" used by counsel (Tr. p. 1703; see Tr. pp. 1694-95, 1697, 1699-1700, 1704, 1719-21, 1723-25, 1735-36, 1737-39). However, while a review of the hearing transcript cannot capture counsel's "tone," or whether counsel "sandwiched" the witness between herself and the IHO, leaving the witness "with nowhere to back up" (Pet. at p. 20), the transcript provides no indication that the witness felt uncomfortable or was unable to fully present her testimony as a result of counsel's conduct.

With respect to the parent's claims that she had difficulty "capturing meaning," the parent on several occasions during the impartial hearing indicated that, when there were competing sounds, she had difficulty understanding witnesses, the IHO, or counsel for the district because of a hearing and auditory processing impairment; the parent's requests to have questions or answers repeated were consistently granted (Tr. pp. 83-84, 89, 91, 299-300, 428, 450, 469, 768-69, 798-800, 812, 844, 1077-78, 1138, 1476-77, 1870). Additionally, the IHO informed the parent that she could request a break or to have questions repeated if she had any difficulties during the hearing (Tr. pp. 57-58, 799-800). The parent provides no citation to the record for the proposition that the hearing officer was "dismissive" of her difficulties (Pet. at p. 20).

To the extent the parent asserts that counsel for the district interrupted her testimony with meritless objections and the IHO was impatient during her testimony, a review of the hearing record does not support the parent's contention. Counsel for the district raised a number of objections regarding the scope of the parent's testimony that were overruled by the IHO; however, the fact that the objections were overruled does not establish that they were without merit but, rather, reflects that the IHO permitted the parent significant latitude in her direct testimony (Tr. pp. 1850-53, 1854, 1858-59, 1860, 1864-70, 1873, 1875-76, 1880-81, 1884-85, 1887-91, 1900).

With respect to the occasions on which the IHO asked the parent to attempt to be more concise, while it may have made it more difficult for the parent to provide her testimony in precisely the manner she desired, it was well within the IHO's authority to control the length of the impartial hearing—in addition to the IHO's obligation to exclude irrelevant, immaterial, or repetitious testimony—and these requests did not prevent the parent from presenting her case (Tr. pp. 1850, 1859, 1864-66, 1869-71, 1874, 1890, 1901; see 8 NYCRR 200.5[j][3][xii][d]). The hearing record, taken as a whole, reflects that the parent was permitted to testify at length, with exhaustive reference to the exhibits she introduced into evidence at the impartial hearing, and to provide extensive background information and testimony not directly relevant to allegations raised in her complaints (Tr. pp. 1839-1910).<sup>15</sup>

Furthermore, as required by the IDEA and State and federal regulations, I have conducted an independent and impartial review of the hearing record, and find that the parent had the opportunity to present her case at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]). Thus, the parent's assertions relating to the conduct of the hearing are dismissed.

Turning to the parent's allegations about the timeliness of the impartial hearing and the IHO's decision, when a parent files a due process complaint notice, the impartial hearing or prehearing conference must commence within 14 days of the IHO receiving the parties' written waiver of the resolution meeting, or the parties' written notice that mediation or a resolution meeting failed to result in agreement, or the expiration of the 30-day resolution period; unless the parties agree in writing to continue mediation at the end of the resolution period (8 NYCRR 200.5[j][3][iii][b][1]-[4]). The IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]).

An IHO may grant extensions beyond these timeframes; however, such extensions may only be granted consistent with regulatory constraints and an IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO must issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). According to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]).

By way of summary regarding the overall progress of the impartial hearing, as described above, the parent requested an impartial hearing by due process complaint notice dated June 3,

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<sup>15</sup> In addition, the IHO and district permitted the parent on multiple occasions to introduce evidence that had not been disclosed to the district in accordance with State and federal regulations (Tr. pp. 55-57, 792-93, 1585-90).

2016 (Dist. Ex. 53), which she amended by due process complaint notice dated June 15, 2016 (Dist. Ex. 59). The parties informed the IHO by e-mail that they held a resolution meeting on June 29 and were unable to reach an agreement, and indicated their willingness to schedule the impartial hearing (Pet. Ex. HO at p. 16). The parties thereafter engaged in a protracted discussion of available hearing dates, determining that there were no hearing dates for which all parties were available prior to August 8, 2016 (*id.* at pp. 21-39). In particular, the parent was unavailable during the second half of July 2016 (*id.* at p. 14). A prehearing conference was held on June 15, 2016 (IHO Decision at p. 3; *see* Pet. Ex. HO at pp. 46-48). A second prehearing conference was held on August 1, 2016 (IHO Decision at p. 3; *see* Pet. Ex. HO at pp. 63-66). The parent filed a second due process complaint notice dated August 1, 2016, and requested that it be consolidated for hearing with her prior complaints (Parent Ex. I at pp. 26-29). At the initial hearing date on August 8, 2016, the parties agreed to consolidate the matters, which was memorialized by written decision of the IHO dated August 15, 2016 (Aug. 15, 2016 Interim IHO Decision; Tr. pp. 78-79). The parent requested accommodations related to the conduct of the impartial hearing, including breaks and shortened hearing days, which were granted (Tr. pp. 57-58; Pet. Ex. HO at pp. 24, 34, 38, 45). After the first few hearing dates were completed, the district sought to call additional witnesses for which the parent requested an offer of proof or that additional hearing dates be scheduled to accommodate her case (Pet. Ex. HO at pp. 82-87). The IHO and district agreed to additional hearing dates in late September (*id.* at pp. 87-92).

Turning to the timelines at issue, while the IHO indicated in a writing to the parties that the date by which his decision was required to be issued was August 5, 2016, based on the parties' waiver of the remainder of the resolution period, an extension to the decision timelines was not requested by either party until August 29, 2016 (Tr. pp. 762-63; Pet. Ex. HO at p. 53). On the other hand, the IHO's decision indicated that the resolution period ended on July 15, 2016, 30 days after submission of the amended due process complaint notice, which would have made the initial decision due date August 29, 2016 (45 days from the end of the resolution period) (IHO Decision at p. 3). As the district notified the IHO of the parties' willingness to forego the remainder of the resolution period by e-mail dated June 29, 2016 (Pet. Ex. HO at p. 16), it is unclear whether the IHO properly considered the resolution period not to have expired based on of his receipt of "the parties' written confirmation that a . . . resolution meeting was held but no agreement could be reached" (8 NYCRR 200.5[j][3][iii][b][2]). In any event, the hearing record reflects that the IHO issued documented extensions to the 45-day timeline on several occasions (*see* Sept. 5, 2016 Interim IHO Decision; Sept. 29, 2016 Interim IHO Decision; Nov. 1, 2016 Interim IHO Decision; Dec. 6, 2016 Interim IHO Decision). While the parent objected to any extensions of the decision timeline beyond that granted on August 29, 2016, the IHO noted that the parties had previously added hearing dates in September, which would require at least one more extension to the decision date (Tr. pp. 762-65). The district request an extension of the decision timeline, which was granted, making the new decision due date September 28, 2016 (Sept. 5, 2016 Interim IHO Decision; Tr. pp. 762-63).

The hearing record reflects no requests made by the parties for the next extension, which was granted after the conclusion of the impartial hearing (*see* Sept. 29, 2016 Interim IHO Decision). However, the hearing record indicates that the parties agreed at the September 21, 2016 hearing date to submit post-hearing briefs by close of business on October 31, 2016, necessitating

the September 29, 2016 extension of the decision due date to October 28, 2016 (Tr. pp. 1837-38).<sup>16</sup> By e-mail dated October 10, 2016, the district requested an extension of the deadline for submission of the parties' post-hearing briefs to November 14, 2016, which the IHO granted over the parent's objection, but did not at that time further extend the decision due date (Pet. Ex. HO at pp. 107-12). On November 1, 2016, the IHO informed the parties of the expiration of the timeline in which to issue a decision, to which the district responded with a request for extension of the decision due date, which the IHO granted to November 27, 2016 (Nov. 1, 2016 Interim IHO Decision; Pet. Ex. HO at pp. 114-17). By e-mail dated November 14, 2016, the IHO informed the parties that the hearing record would "remain open until we have an opportunity for a conference call to confirm all evidence received" (Pet. Ex. HO at p. 118).

By e-mail dated December 1, 2016, the IHO informed the parties that the timeline to issue a decision had expired, indicated that he was currently examining the record to ensure its completeness, and informed the parent that he was unable to view exhibits she had provided in electronic format (Pet. Ex. HO at pp. 128-29). The parent responded, indicating that she had uploaded the files to the internet, in response to which the IHO informed the parent that he required a copy of the files on physical media before the record could be closed (*id.* at pp. 129-31). Also on December 1, 2016, the district requested an extension of the timeline in which the IHO was required to issue a decision, which the IHO granted to December 21, 2016, over parental objection (Dec. 6, 2016 Interim IHO Decision; Pet. Ex. HO at pp. 130-32, 134). By e-mail dated December 5, 2016, the IHO informed the parent that he had still not received the physical media containing the electronic exhibits and noted that the parent had attached additional exhibits to her post-hearing brief (Pet. Ex. HO at p. 134). The parent responded, indicating her understanding that the IHO's decision was due two weeks after submission of the parties' post-hearing briefs (*id.* at pp. 135-36). In response, the IHO clarified that the decision would be issued within two weeks of the record being closed, upon his receipt of the missing parent exhibits (*id.* at pp. 136-37). The parent responded, indicating that the IHO had not reviewed her submissions when sent, but only raised issues regarding completion of the record afterward (*id.* at pp. 144-45). The IHO closed the hearing record on December 6, 2016, upon receipt of the requested exhibits from the parent, and issued his decision on December 13, 2016 (IHO Decision at pp. 4, 35).

Based on the foregoing, although the parent was understandably dismayed by what she saw as unnecessary extensions of time and delays, the IHO issued his decision prior to the then-current decision due date. However, the record reflects that, on several occasions, the IHO did not inform the parties that the timeline to issue a decision was approaching until after it had passed, and the parent is correct that the decision was technically untimely as a result. A better practice would be to schedule hearing dates and submission due dates with the decision due date in mind, rather than having to scramble to obtain requests for extensions from the parties after the decision is already untimely. Even so, despite any improprieties in the scheduling of the impartial hearing and decision issuance, the parent has interposed no request for relief based on the alleged untimeliness of the impartial hearing and IHO decision.

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<sup>16</sup> The parent's assertion that she did not agree to the brief submission date is not supported by her citation to the hearing record.

### 3. Scope of Review

In its answer, the district correctly asserts that an SRO has no jurisdiction to review any portion of a parent's claims or an IHO's findings regarding section 504. School districts are required to have policies and practices in place to implement the provisions of section 504 and to provide the opportunity for an impartial hearing and a review procedure, and districts may elect to satisfy the section 504 hearing requirement using the IDEA impartial hearing procedures (see 34 CFR 104.36). However, in New York, the review procedure under section 504 does not include State-level review by a State Review Officer, whose jurisdiction is limited to matters arising under the IDEA and Article 89 of the Education Law (Application of a Student Suspected of Having a Disability, Appeal No. 15-104; Application of a Child Suspected of Having a Disability, Appeal No. 03-094; Application of a Child with a Disability, Appeal No. 97-80). As the courts have recognized, the New York Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 hearings (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]). Therefore, an SRO has no jurisdiction to review any portion of a parent's claims or an IHO's findings regarding section 504 (see A.M., 840 F. Supp. 2d at 672).

In the instant matter, the IHO bifurcated his review of the parent's claims arising under the IDEA and section 504 and set forth his findings of fact and determinations of law in separate written decisions. The IHO's decision that addressed the parent's claims under section 504 (Jan. 3, 2017 IHO Decision) is not the subject of this decision and shall not be reviewed. Further, while the factual allegations underlying the parent's claims arising under the IDEA may at times overlap with her claims under section 504, to the extent the parent's petition may be read as asserting claims under section 504, they shall not be addressed.

#### B. Child Find

The parent contends that the district failed to comply with its child find obligations for two reasons. First, the parent asserts that the district failed to have procedures in place to identify, locate, and evaluate students suspected of having a disability. Second, the parent asserts that the district should have referred the student to a CSE when the student's grades declined and maladaptive behaviors increased during the 2015-16 school year. The district contends that, because the student does not qualify as a student with a disability, the parent's child find claims must fail. Further, the district asserts that the student's educational functioning and performance had been fully evaluated by the CSE in 2014 and later and that, based upon those evaluations and the student's continuing academic success, the district did not have a reason to suspect that the student may have been eligible for services as a student with a disability under the IDEA.

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]);

E.T. v. Bd. of Educ., 2012 WL 5936537, at \*11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; E.T., 2012 WL 5936537, at \*11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate the student (A.P., 572 F. Supp. 2d at 225, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]). see also 8 NYCRR 100.2[ii]).

At the impartial hearing, the district's building section 504/CSE chairperson described some of the procedures employed by the district to identify, locate, and evaluate students suspected of having a disability who thereby may be in need of special education and related services (Tr. pp. 1238-64).<sup>17</sup> She stated that she worked with the CSE and the building principal to monitor students who may have been in need of special education support by noting significant absences, failing grades, or behaviors resulting in students being removed from class (Tr. pp. 1239-40). She described the relevant group of people that would refer the student to the CSE for evaluation if a

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<sup>17</sup> It not entirely clear from the hearing record but it appears that the building section 504/CSE chairperson worked in the first school the student attended for middle school at the beginning of the 2015-16 school year (see Tr. pp. 1239, 1256).

need was detected as the "A-team" consisting of the building principal, the guidance counselors, the associate principal, the school nurse, a youth development person from a Board of Cooperative Educational Services (BOCES), and herself, the building section 504/CSE chairperson (Tr. p. 1240). She also stated that the district had a "response to intervention team" which would receive any concerns teachers had about students in their classrooms; the team met weekly and consisted of district personnel including reading teachers from each grade level, representative classroom teachers from each grade level, the school psychologist, the school social worker, the principal when he or she could attend, and herself, the section 504/CSE chairperson (Tr. pp. 1240-41). She also testified that she monitored the student information system quarterly for any grades issued with a score of 70 or below so she knew which students were struggling in class (Tr. pp. 1242-44). In light of the above, the hearing record supports a finding that the district had the requisite "procedures in place" to enable it to identify, locate, and evaluate students suspected of having a disability.

Turning to the question of whether the district should have referred the student to a CSE when the student's grades declined and maladaptive behaviors increased during the 2015-16 school year, this is not a case where school officials overlooked clear signs of disability or had been negligent by failing to order testing, or had no rational justification for deciding not to evaluate the student (see A.P., 572 F. Supp. 2d at 225). Rather, this student has been extensively evaluated and has been the subject of three CSE eligibility determinations, albeit by parent referral. For example, in October 2013 during fifth grade and at a time when the student had already begun to receive accommodations via a section 504 plan, the parent referred the student to the CSE for an eligibility determination (see Dist. Ex. 2a at pp. 1-2; Parent Ex. E at p. 223). However, on January 28, 2014, the student was deemed ineligible for special education as a student with a disability (Dist. Exs. 7 at pp. 1-4; 8 at p. 1; Parent Ex. E at p. 223). Thereafter, the parent requested an IEE and an independent psychological evaluation was conducted in March 2014 (Tr. pp. 191-92; Dist. Ex. 11 at pp. 1-8). The district completed an OT evaluation in July 2014 and, in August 2014, a writing assessment and learning profile consultation was completed at the request of the parent (Dist. Exs. 15 at pp. 1-5; 17 at pp. 1-5). In August 2014, the CSE again determined that the student was ineligible for special education as a student with a disability (Dist. Ex. 18 at p. 1). In September 2015, at the start of the student's seventh grade year, the district notified the parent that they would be conducting a reevaluation of the student to determine his current needs and continuing eligibility for section 504 services, and further requested consent for the evaluations, but the parent ultimately did not provide consent on the form sent by the district (Tr. pp. 1942-43; Dist. Exs. 32 at p. 1; 33 at p. 1-2). In May 2016, the district conducted an OT evaluation<sup>18</sup> and, in June 2016, the parent referred the student to the CSE again (Dist. Exs. 49; 54). The parent initially consented to evaluations with respect to this latest CSE eligibility process, but then stated that new evaluations were not required, and the parent and the district settled on a limited set of assessments (see Dist. Exs. 54; 63; 75 at pp. 1-3; 77 at p. 1; 78 at pp. 1-3; 79 at pp. 1-20; 80). After those evaluations were conducted, the CSE met in July 2016 and once again determined that the student was ineligible for classification as a student with a disability (Dist. Exs. 82 at pp. 9-22; 83; 86). The parent's disagreement with that CSE finding led to the matter at hand.

Setting aside the question of whether the July 2016 CSE correctly determined the student to be ineligible for classification as a student with a disability, which will be addressed below, for

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<sup>18</sup> It appears that the parent provided consent for the OT evaluation by e-mail (Tr. p. 1949).

the purposes of the parent's child find claims, the evidence in the hearing record supports a finding that the district both had the requisite "procedures in place" to enable it to identify, locate, and evaluate students suspected of having a disability and did not overlook clear signs of disability or negligently fail to order testing or decide not to evaluate the student. The parent's assertions regarding the student's grades and behaviors during the 2015-16 school year are addressed in detail in the context of the student's need for an FBA and IDEA eligibility below. Suffice it to say that, while the parent would have preferred the CSE to have found the student eligible for special education, child find is a distinct question from eligibility, and "[t]he IDEA does not call for instantaneous classification of a student upon suspicion of a disability" . . . rather, "[o]nce a school has 'reason to suspect a disability,' the school must conduct an evaluation of the child within a reasonable time" (W.A. v. Hendrick Hudson Cent. Sch. Dist., 2016 WL 6915271, at \*24 [S.D.N.Y. Nov. 23, 2016], quoting Murphy v. Town of Wallingford, 2011 WL 1106234, at \*3 [D. Conn. Mar. 23, 2011]). The district did so in this case. Accordingly, there is no basis in the hearing record to disturb the IHO's finding that the district did not violate its child find obligations (IHO Decision at pp. 34-35). Furthermore, even assuming the district was required to identify the student as a student with a disability at some earlier time, the parent requests no relief related to this claim.

## **C. Evaluative Information**

### **1. Evaluative Information Considered**

In this instance, although the sufficiency and consideration of the evaluative information before the July 2016 CSE is not directly in dispute (with the exception of the claim relating to the FBA, discussed below), a summary thereof provides context for the discussion of the remaining issues to be resolved.

As noted above, on July 19, 2016, the CSE convened to review the student's eligibility for special education and found the student not eligible (see Dist. Ex. 86). According to a CSE "Ineligibility Document," the July 2016 CSE considered the following evaluative information: a June 2014 psychological evaluation report,<sup>19</sup> a May 2016 OT evaluation report, a July 2016 special education teacher report, a July 2016 psychological report (record review), as well as the input of the attendees at the July 2016 CSE meeting, including a classroom teacher, the social worker who provided the student's counseling services, the school principal, the parent, the student, and the Tourette advocate (id. at pp. 1, 2; see Dist. Exs. 11; 12 at pp. 3-9; 49; 78; 79). The CSE ineligibility document also listed standardized test results from January and March 2014, including results from administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) and the Wechsler Individual Achievement Test, Third Edition (WIAT-III) (Dist. Ex. 86 at p. 2). A prior written notice, dated July 19, 2016, also added that the CSE considered the student's reports cards and performance on State assessments (Dist. Ex. 83 at p. 1). The district director of special education testified that the district "had a lot of documents on record" and the CSE "went with

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<sup>19</sup> The ineligibility document indicates that the July 2016 CSE considered a June 2014 psychological evaluation and, underneath, refers to the evaluation as the IEE completed by a named psychologist (Dist. Ex. 86 at p. 2). However, the IEE was completed in March 2014, not June 2014 (Dist. Ex. 11). In June 2014, a private neuropsychological executive functioning screening report was completed (Dist. Ex. 12). As both of these evaluations were ultimately referenced at the July CSE meeting (Parent Ex. W at pp. 77-79, 85), they are both summarized herein.

what we had" because the parent declined to consent to a complete new set of evaluations of the student (Tr. pp. 227; see Tr. p. 202).

The July 2016 CSE considered a psychological IEE conducted in March 2014 (Tr. p. 192; Dist. Ex. 86 at p. 2).<sup>20</sup> Within the March 2014 psychological evaluation report, the psychologist described that, during the assessment sessions, the student: was engaged and cooperative; was oriented to person, place and time; provided no evidence of impaired reality, ideations or suicidal/homicidal thoughts; and exhibited a quality of speech affect, mood, and perception within normal limits (Dist. Ex. 11 at p. 3). The psychologist administered ten subtests of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student (id.). The scores revealed that the student's general cognitive ability was in the high average range (FSIQ of 119) and his ability to sustain attention, concentration, and exert mental control was in the average range (id. at pp. 3-4). However, his score on the Trail Making Test, parts A and B, a test of cognitive motor integration, revealed scores in the low average range, which the psychologist stated was consistent with an individual whose attention span is limited and who struggles to complete speed assignments on time (id. at p. 5). Administration of the FAS Test of Verbal Fluency yielded scores in the below average range, which, according to the psychologist, indicated that the student possessed a low initiation and high perseveration rate (id.).

Administration of the Conners 3rd Edition, with the parent as informant, yielded "clinically significant scores. . . suggesting a DSM diagnosis of [ADHD]" (Dist. Ex. 11 at p. 6). The psychologist also noted a significant difference in the parent and teacher rating scales of the Behavior Assessment System for Children-Second Edition (BASC-2) (id. at p. 8). Parent rating scores for externalizing problems (i.e., disruptive behavior, hyperactivity, aggression, conduct problems) and for internalizing problems (i.e., anxiety, depression, somatization) fell in the clinically significant range, whereas teacher rating scores fell into the clinically significant range only for hyperactivity (id.). The psychologist opined that anxiety—an area in which the scores were especially elevated—could "affect schoolwork by affecting attention, concentration and ability to process information using working memory" (id.). The psychologist also indicated that he observed "a theme" in the assessments revealing that the student experienced feelings of inadequacy and insecurity, as well as a desire to exert control over his environment to a rigid degree, which could manifest in OCD symptoms including obsessive thoughts and compulsive behaviors (id.). With respect to Tourette syndrome, the psychologist reported that the student "manifest[ed] simple and complex tics," such as "echolalia (repetition of words and phrases), coprolalia (socially inappropriate words and phrases) and copraxia (socially inappropriate movements)" (id. at p. 9). In summary, the psychologist described the student as "of high average intelligence" but with "great difficulty with focus and attention" and determined that he met the criteria for the diagnoses of Tourette syndrome, ADHD combined presentation, and generalized anxiety disorder, and noted that a sensory integration disorder could not be ruled out (id. at pp. 9-10).

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<sup>20</sup> The district school psychologist reported that three days after the first March 2014 report was entered into the district's records, a second report was received with some changes (Tr. p. 544). At the July 2016 CSE meeting and in her testimony the district psychologist explained that the original report included the statement that the student did not meet the full criteria for OCD, while the amended version did not, and that the amended version included additional tic symptoms and the recommendation that therapy services should be offered in the school setting (Tr. pp. 544-45; Parent Ex. W at p. 143; compare Dist. Ex. 10 at pp. 8-10, with Dist. Ex. 11 at pp. 8-10).

In the March 2014 psychological IEE, the psychologist offered recommendations for supports or services from which the student might benefit, including behavior management therapy, treatment for the student and the family in the home based on life management skills and applied behavior analysis (utilizing more structure and behavior modification techniques), and discussion with the student's educational services team about attention concerns and concentration deficits, and therapy services in the school setting (Dist. Ex. 11 at p. 10). The psychologist opined that, according to the student's present test scores, he could be eligible for special education (*id.*). The psychologist further explained that test scores were one component of determination of eligibility and that a multidisciplinary team in the school should further determine program eligibility (*id.*).

A June 2014 private neuropsychological executive functioning screening report included a review of records (including review of the March 2014 psychological IEE) and administration of the Delis-Kaplan Executive Function System (D-KEFS), the NEPSY: A Developmental Neuropsychological Assessment Test-Second Edition (NEPSY-2), and the BRIEF (Dist. Ex. 12 at p. 3; see Dist. Ex. 11). The psychologist noted the student was polite, motivated, and persistent and that during the 1:1 session the student did not appear hyperactive or inattentive, enjoyed being challenged, and did not become frustrated (Dist. Ex. 12 at p. 4). The psychologist observed that facial tics were only noted once during the evaluation and did not impact the student's performance or impede his functioning (*id.*). Regarding attention and executive skills, the June 2014 screening found that the student performed in the high average range on objective measures of selective sustained auditory attention and in the average to high average range on objective measures of executive skills (i.e., ability to shift and maintain a new, more complex mental set; ability to inhibit the impulse to respond) (*id.* at p. 5). However, the psychologist noted that an analysis of the student's errors revealed a pattern of responding that was "likely to impact performance in a more functional (i.e., group or classroom vs. 1:1 session) setting" and that the student demonstrated deficits in inhibition and a tendency to behave impulsively (*id.*). In addition, the psychologist reported results of the BRIEF, with the parent as informant, which indicated student "problems" with inhibition, emotional control, initiation, working memory, planning and organizing, and performance monitoring (*id.* at p. 6). The psychologist found that the student's anxiety, insomnia, tics, obsessive thoughts, and impulsive behavior were "likely to significantly impair his ability to access learning in the classroom" and teachers reported disruption in the learning process due to late arrival to school related to sleep issues and removal from class due to anxiety provoking stimuli (*id.* at p. 8). The psychologist recommended that the school find the student eligible for an IEP under the classification of an other health-impairment to support the student's educational needs by providing accommodations in the classroom, executive functioning monitoring and training, behavior supports for impulsivity, and specialized academic instruction for writing and for missed instruction due to medical and psychological symptoms (*id.*).

While a March 2016 letter from the Tourette advocate—describing a classroom observation of the student—was not specifically listed on the CSE ineligibility document (Dist. Ex. 86), both the district psychologist and the district special education teacher shared information from the March 2016 observation in their record review reports and the Tourette advocate attended the July 2016 CSE meeting, during which she shared with the committee information from the observation (Dist. Exs. 78 at p. 2; 79 at pp. 10-11; Parent Ex. W at pp. 160-61). The Tourette advocate observed the student in the school cafeteria, as well as in health, science, and math classes

(Dist. Ex. 40 at pp. 1-3).<sup>21</sup> In health class, the advocate observed the student shout out the answer without raising his hand but not excessively and also described the student making a noisy exit when leaving the class to use the bathroom (id. at p. 1). She also observed the student echo what others said, which the advocate described as a tic, for which the student was reprimanded (id.). During health, the advocate also noted that the student was asked to leave during the viewing of a video, that the student seemed embarrassed to leave, and that after the video, the teacher forgot to instruct the student to return (id. at pp. 1-2). The advocate described the science class as unstructured and noted disruptive behaviors of the student, as well as the rest of the class (id. at p. 2). In math, the advocate noted that the class was more structured but observed the student viewing a screen on the computer other than the assignment (id.). In summary, the advocate described in her observation that the student was calmer in more structured classes and that, in unstructured settings, the student would "join in and create more chaos" (id. at p. 3). The Tourette advocate noted that the student had a loud voice and did not "naturally move around gracefully" and so he was more disruptive when he called out or moved around the room (id.).

According to the May 2016 OT evaluation report, the method of evaluation included an observation of the student in the classroom and in a separate room, the student's completion of the Adolescent Sensory Profile Self-Questionnaire, and the student's teacher's completion of the Sensory Profile School Companion (Dist. Ex. 49 at p. 1). The occupational therapist indicated that the student appeared to demonstrate age-appropriate sensory processing but noted that the student still exhibited difficulty focusing on verbal instruction and filtering social distractions (id. at p. 6). The occupational therapist determined that it was difficult for the student to maintain attention, which resulted in increased movement in order to seek peer interactions, rather than to seek sensory input (id.). The evaluator found that the student did not need OT services at that time (id.).

Although the CSE ineligibility document does not specifically reference that the CSE considered an April 2016 counseling report (Dist. Ex. 86), during the July 2016 CSE meeting, the counseling report was referenced as having been discussed at a 504 meeting regarding the student and the district social worker indicated that she did not have anything new to add except to note that the student was seeming to trust her more and had "sought" her out a little more for support in "other areas" where he might need some problem solving assistance (Parent Ex. W at p. 137). In the April 2016 counseling report, the social worker shared that the student had attended his counseling sessions (one 30-minute session per week) "cooperatively and willingly" but had, at that time, not sought out additional social/emotional support in addition thereto (Dist. Ex. 44). The social worker described that the counseling sessions focused on organization, helping the student "with any areas of struggle in his classes," and discussing topics that the student enjoyed (id.). The social worker noted that, during counseling sessions, the student did not raise concerns "outside of the school realm" and did not discuss his phobias (id.). Although the social worker indicated that the student did not use the organization strategies developed during the sessions (i.e., developing a daily reminder sheet and routine checklist, and examining methods of recording homework), she

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<sup>21</sup> Testimony by the Tourette advocate indicates she had seven years of experience working for the Tourette Association of America as their one and only education specialist, had published extensively in the field, and worked in the field for 37 years; however, her credentials indicate that she is certified only as a licensed French teacher (Tr. pp. 1595, 1597). Nevertheless, she had been qualified as an expert witness in Tourette syndrome in a school hearing and in a State court (Tr. pp. 1598-99). The IHO allowed her to testify with respect to her opinion on Tourette syndrome as an advocate in this hearing, noting that she did not have any medical license or any particular certification related to Tourette syndrome (Tr. p. 1599).

also indicated, without elaboration, that he had "developed strategies for organization and keeping track of his homework" (id.).

In July 2016, a district special education teacher completed "an academic assessment" of the student based on: parent interview; a review of "many reports," including 2014 results of the WIAT-III, an August 2014 writing assessment and learning profile completed by an education consultant and the March 2016 classroom observation by the Tourette advocate; as well as the student's academic transcript, grades from fourth through seventh grade, and scores on State assessments (Dist. Ex. 78 at p. 3; see Tr. pp. 273-74, 277-78; Dist. Exs. 5; 17; 40). Within the July 2016 report, the student was described as happy and pleasant and bright and energetic and as one who easily adjusts to new environments (Dist. Ex. 78 at p. 1). The special education teacher stated that the student had strong cognitive skills, was able to learn and retain content at high levels, was successful academically and had made the honor roll every semester in the seventh grade (id.). Regarding reading skills, the special education teacher stated that the student was able to access grade level text, write cohesive responses, and that results from the most recent formal academic testing (January 2014) found the student to be "well above average" in reading comprehension and "closer to average" in reading fluency (id.). However, the special education teacher noted that the student was struggling in his ELA class and was "pulled out of class" by the parent and that the district provided a tutor (id.). The July 2016 report indicated that the student was in an accelerated math class and included information from the math teacher that the student was a pleasure to have in class and understood difficult concepts, could complete algorithms correctly, and had a strong understanding of many math concepts, which was impressive for his age (id.). According to the report, formal testing from January 2014 found the student's math functioning in the average or above average ranges (id.; see Dist. Ex. 6 at pp. 1, 4-5). With respect to writing, the July 2016 report indicated that, according to the student's former teacher, the student was "very capable" of writing well thought out cohesive ideas and complete sentences whether hand written or typed (Dist. Ex. 78 at p. 1). The July 2016 report included results from testing conducted in August 2014—which included administration of the Word Identification and Spelling Test (WIST) and the Oral and Written Language Scales (OWLS)—that indicated that the student's spelling skills were within the average range and, overall, the student's encoding abilities were age and grade appropriate, but that the student exhibited "weakness in letter formation, writing fluency, and writing stamina," as well as qualitative (rather than quantitative) "weaknesses in punctuation and capitalization" (id. at pp. 1-2; see Dist. Ex. 17 at p. 1). According to the July 2016 report, the evaluator opined in 2014 that the student's "organization and concentration difficulties w[ould] further impact upon [his] written output in the sixth grade classroom" (Dist. Ex. 78 at p. 2; see Dist. Ex. 17 at p. 2).

The July 2016 academic assessment report indicated that the student's teachers reported similar experiences to that described by the Tourette advocate in her observation in that the student "blurt[ed] out" answers without raising his hand, struggled to stay focused, socialized at inappropriate times, and yelled across the room, and also noted that the student struggled with organization and benefitted from refocusing and redirection (Dist. Ex. 78 at p. 2). According to the report, the student would leave class "regularly" to get drinks and take breaks and that the teachers were concerned about the amount of time the student was out of the classroom (id.). The special education teacher further noted in the July 2016 report that the student had received large print space adapted assignments but that he regularly did not want them and would throw them out (id. at pp. 2-3). The special education teacher stated that, after a thorough review of all the

documentation, grades, medical reports, and academic testing scores she believed that the student's section 504 accommodation plan was sufficient support for his needs (id. at p. 3).

The CSE also considered a July 2016 record review report completed by a district school psychologist (Dist. Ex. 79; see Dist. Ex. 86 at p. 2). The school psychologist noted that typically a comprehensive psychological evaluation in conjunction with an educational assessment would be completed for a student's initial referral for special education but that the parent had declined and requested that the CSE utilize the results from the March 2014 independent psychological evaluation to determine the student's eligibility for services (Dist. Ex. 79 at p. 1; see Dist. Ex. 10). However, the school psychologist did administer the Behavior Assessment System for Children-Third Edition (BASC-3) (utilizing the parent form, the self report, and two teacher reports), and the BRIEF parent rating (Dist. Ex. 79 at p. 1). In addition, the school psychologist conducted a brief interview of the student and noted that the parent "sent a comprehensive file of all available evaluations" of the student (id.). As part of her record review, the school psychologist provided a summary of an extensive list of sources of information about the student's needs, including all of the reports summarized above, as well as medical reports and letters, a social history, and additional psychological and OT evaluation reports (Dist. Ex. 79 at pp. 2-12; see Dist. Exs. 2; 4; 5; 9-13; 15; 22; 26-27; 30; 35; 37; 40-41; 44; 49).

With respect to her interview with the student, the school psychologist indicated that the student "had a few tic symptoms" but that he "was very focused on completing" the BASC-3 self report (Dist. Ex. 79 at p. 12). After testing, the student played with fidget toys available at the testing table (id. at pp. 12-13). The school psychologist noted that the parent interrupted the student on four occasions (id. at p. 13). The student shared that his favorite aspect of his day was seeing his friends and that he enjoyed being in his science class this year with "a wonderful substitute teacher that challenged him" and excitedly stated that he got a 100 on the final exam and therefore would be placed in earth science, a high school-level Regents course, in the coming 2016-17 school year (eighth grade) (id.; see Tr. pp. 204, 308). The student noted that, for him, seventh grade was more challenging than sixth grade and that he disliked being bored and did not like it when teachers and staff were not nice to him (Dist. Ex. 79 at p. 13).

One of the teacher reports for the BASC-3 was completed by the student's band teacher and the ratings indicated that, in all clinical, adaptive and content scales, the student was able to achieve within the average or above average range and also that, in terms of executive functioning, the student was able to control and maintain his behavior and mood slightly better than others his age (Dist. Ex. 79 at p. 15). The ratings provided by the student's French teacher on the BASC-3 contrasted with those reported by the band teacher and indicated that, in an academic setting, the student had significantly more behavioral concerns (id. at p. 16). In the area of externalizing problems, the scores suggested that a high number of behaviors such as restlessness, over anxiety, distractibility, and impulse control were impacting other students in the classroom and that the student could have difficulty following directions and could struggle to maintain focus in this setting (id.). The report from the French teacher also suggested that the student was in the "at risk" range to sometimes be argumentative or defiant (id.). The French teacher reported that, when the student paid attention, he usually grasped concepts quickly, but that he was easily distracted, especially when eating and drinking during class, and distracted others by frequently talking, calling out, and commenting to others at inappropriate times (id.). The parent's responses to the BASC-3 ratings of the student at home and in the community suggest that the student could engage in disruptive, impulsive, and uncontrolled behaviors (id. at p. 18). The student's ratings suggested

that he enjoyed school but sometimes considered teachers to be unfair and uncaring (*id.* at p. 19). The student also reported that he had trouble maintaining attention in school, struggled to remain focused, and, at times, experienced restless and disruptive behaviors (*id.*). Overall, the student appeared to be within the average range on the majority of the emotional/behavioral subtests (*id.*). On the questionnaire, the parent's ratings indicated that the student had significant difficulties in all areas of executive functioning and in the two broader indexes of behavior regulation and active problem solving (*id.* at p. 20).

## 2. Functional Behavioral Assessment

The parent argues that the student's behaviors in class deteriorated during the 2015-16 school year and interfered with the student's learning, and that of his peers, such that an FBA was required to determine the cause of his interfering behaviors and identify ways to address them. The district contends that the student's behaviors were not severe enough to trigger the need to conduct an FBA and instead were in line with those of a typical student of his age and maturity.

A district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). To the extent the district asserts that the student's behaviors were appropriately managed with general behavioral interventions, a CSE must consider the development of a BIP for students who engage in behaviors that impede learning "despite consistently implemented general school-wide or classroom-wide interventions"; however, the obligation to conduct an FBA as part of an initial evaluation is not so limited (*compare* 8 NYCRR 200.4[b][1][v], *with* 200.22[b][1]). 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 includes, 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 regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student' record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

The Second Circuit has indicated 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" (*R.E.*, 694 F.3d at 190; *see L.O. v. New York City Dep't of Educ.*, 822 F.3d 95, 112-13 [2d Cir. 2016]). 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 substantive review is impaired because it is impossible to know what information an FBA would have provided, and particular care must be taken to determine whether the CSE had sufficient information to appropriately address the student's problem behaviors (*R.E.*, 694 F.3d at 190).

In this instance, the hearing record weighs in favor of a finding that the student exhibited behaviors that interfered with his learning and that of others during the 2015-16 school year and, therefore, the district should have conducted an FBA.

The student exhibited mildly disruptive behaviors throughout elementary school, at times by verbally distracting peers by calling out or talking to them during class activities, and at other times by engaging in a high level of motor activity (Parent Ex. A at pp. 8-9, 14-15). He was evaluated by a behavior specialist in kindergarten and again in second grade, who each time identified a behavioral goal for the student and recommended classroom strategies for the teacher to implement (*id.* at pp. 10, 15). In third grade, the student was evaluated by an occupational therapist who determined, based on the parent's completion of a sensory profile, that the student exhibited a "definite difference" on a sensory seeking factor, specifically vestibular processing, and on modulation related to body position and movement (Dist. Ex. 1 at pp. 3-4). The occupational therapist recommended that the student be provided with a designated work space, alternate seating options, sensory diet and fidget tools as means of helping him manage his impulsivity, establish boundaries, organize his body, and self-regulate (*id.* at pp. 4-5). These accommodations later appeared on the student's section 504 plans (compare Dist. Ex. 1 at pp. 4-5, with Dist. Exs. 2a; 25; Parent Ex. AA).

Additional evaluations, conducted at the end of the student's fifth grade school year, provide insight into how the student's diagnosed conditions affected his classroom behavior. For example, in June 2014 the Tourette advocate observed the student in his ELA class and, as a result of her observation, reported that the student's tics, OCD and anxiety appeared "to take him off task frequently and impinge on his ability to get his work done" (Dist. Ex. 12 at p. 2). The Tourette advocate further noted that during her observation the student was extremely fidgety and needed almost constant movement, that he shifted positions constantly, stretching his legs, sitting on his knees, lying down, and swaying from side to side (*id.* at p. 1). The advocate concluded that the student's tics waxed and waned, but could be "quite severe" and stated that the student's need for movement was "far worse than the vast majority of the students with this disorder" with whom she had worked (*id.* at p. 2). A second report, based on a June 2014 neuropsychological executive functioning screening, noted that the student's anxiety, insomnia, tics, obsessive thoughts and impulsive behavior were "likely to significantly impair his ability to access learning in the classroom" and further noted that teachers reported disruption in the learning process due to the student's late arrival to school related to sleep issues and removal from class due to anxiety provoking stimuli (*id.* at p. 8).

Although the student achieved his OT goals by the end of fifth grade and no further OT was recommended, the parents expressed concern that the student might experience increased anxiety, stress, and dysfunction upon entering middle school and require an increase in sensory supports (Dist. Ex. 23 at p. 1). As a result, twice weekly OT was reportedly added to the student's section 504 plan for sixth grade (*id.* at p. 1).

Despite the student's difficulties, the hearing record shows that the student transitioned well to middle school, where, as noted above, he received OT services via his section 504 plan for sixth grade (2014-15 school year) (Dist. Ex. 23 at pp. 1-2; see Dist. Ex. 41 at p. 1). Reports completed by the student's occupational therapist reflected that, at the end of the 2014-15 school year, the student was functioning well in school, getting good grades, and had not needed or used any of the offered sensory support or routines in school (Parent Ex. F at p. 49; see Dist. Ex. 23 at pp. 1-2).

The occupational therapist reported that school staff had not observed behaviors that were "beyond typical classroom management needs" (Tr. p. 1509; Dist. Ex. 23 at p. 2). The occupational therapist recommended that the student be provided with OT one time per month during the 2015-16 school year (seventh grade) to monitor whether there was a change in the student's needs and to provide him easy access to options (Dist. Ex. 23 at p. 2).

Turning to the student's behaviors during the 2015-16 school year leading up to the July 2016 CSE meeting, in or around November 16, 2015, the student transferred to a new middle school within the school district (Tr. pp. 1933). The student's occupational therapist reported that, upon the student's transfer she met with the student's teaching team and school staff, reintroduced herself to the student, observed him regularly in classes and the cafeteria, and reminded him of sensory supports that were available (Dist. Ex. 41 at p. 3).<sup>22</sup> She further indicated that she spoke regularly to the student's teachers to ask if they had questions or concerns about, among other things, the student doing his work or an appearance of discomfort or behaviors that interfered with his function in school (*id.*). The occupational therapist reported that "no unmet needs were reported or observed about sensory behaviors" (*id.*).

The student's occupational therapist reported that she recorded notes for the 2015-16 school year in the district's system (Tr. pp. 1524-25). The notes, which ran from December 2015 to June 2016 reflected the occupational therapist's observations of the student following his change of schools in November 2015 (*see* Parent Exs. A at pp. 16-17; F at p. 32). The occupational therapist's initial entry on December 2, 2015, noted that, since starting at the school, the student had missed 8 of 12 days due to absences or tardiness, which impacted his availability for services (Parent Ex. A at p. 17). As recorded by the occupational therapist, the student's guidance counselor and teachers reported that, aside from frequent absences or tardiness, there had been no issues reported or requests from the student for additional accommodations and cafeteria staff indicated the student appeared to enjoy lunch period, knew many students as well as staff and therefore had people he could go to if he needed support (*id.*). Subsequent entries reflected: that the student reported having "no trouble" with work or classes at his new school (December 2015); that the student participated in his first period class, engaged in the content, showed good active attention including looking at the speaker, kept pace with his peers in materials, and responded and engaged appropriately with no extraneous verbal or movement behaviors (January 2016);<sup>23</sup> and that during social studies class, the student was engaged in the ongoing activity in the same timeframe as his peers, and was able to appropriately shift his attention without any special supports used, requested, or required (February 2016) (*id.*). In her April 2016 entries, the occupational therapist reported that the student was engaged in the ongoing activity in his first period class, was smiling, relaxed, and followed adult verbal direction immediately and with skill and that, in mathematics class, the student started work immediately, persisted and worked without socializing initially, moved to the front of the room, and had already had a problem completed by the time the rest of the class had settled in to work (*id.* at p. 16). According to the occupational therapist, the student interacted with peers appropriately, checked a problem with a classmate, explained to the student

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<sup>22</sup> The student's occupational therapist at his new middle school had previously provided the student with OT services in fifth and sixth grades (Tr. p. 1029).

<sup>23</sup> Although some of the notes appear to have been modified at a later date by the occupational therapist (Parent Ex. A at p. 17), the hearing record indicates that the no edits were made to the notes, and that the modified date resulted from the occupational therapist placing a previously private file in a location accessible to other school personnel (*see* Tr. pp. 1201-03).

next to him how to do a problem, and assisted a group of students who were discussing a problem by explaining the answer and how to get it (*id.*). The occupational therapist further reported that the student stopped to follow teacher directions, worked successfully in a group of students and took his turn during group discussion (*id.*). The occupational therapist's April 2016 notes further indicated that, despite distractions, such as getting up to answer the door, listening to the announcements, and working in a less than quiet environment, the student was able to maintain his focus and return to work (*id.*). Toward the end of the 2015-16 school year, the occupational therapist's notes indicated that the student followed the directions of a substitute teacher in parallel with his peers, socialized appropriately while waiting his turn, and showed support for friends' performances (May 11, 2016); and was on time for his second period class and informed the teacher that, similar to other students, he did not have the materials needed, requested a copy, and followed along with the class (May 23, 2016) (*id.*). However, the occupational therapist also noted that the student left the classroom to go to the bathroom and, when he returned, another student questioned why he was so noisy (*id.*).

Overall, the occupational therapist's documentation showed that the student was actively engaged and participated in class and did not exhibit any behaviors that impeded his learning or that of others. Moreover, as described below, testimony by several school staff members similarly indicated that the student's behaviors were not unlike that of typical seventh grade students. For example, the student's seventh grade English teacher at his first middle school stated that the student's behaviors were "totally normal," were "nothing out of the norm for any seventh grade student," and that "any student in the seventh grade would present with similar moments of distraction or moments [of] need for refocusing and redirection" (Tr. p. 454). The student's seventh-grade math teacher at his second middle school stated that the student's behavior was "fairly typical for his age range," when compared to other students that he saw (Tr. pp. 130-31). The principal at the student's second middle school stated that the student's behavior was not perfect but that the school had "lots of kids in a similar boat" (Tr. p. 310). He indicated that, if there was a substitute in a class, students "might see how goofy they can be and . . . push the sub's buttons," "show off," or "challenge the teacher a little more" (*id.*). The principal opined that the student was "within the range of . . . normal middle school behavior" (*id.*). The student's occupational therapist testified that the student was the first to notice and greet anyone new coming into the classroom but that he always returned to what he was doing before and got as much or more done than anyone else in the class (Tr. p. 1782). She stated that the student was "always in the first half of the students to get things done" (Tr. pp. 1782-83). The occupational therapist further stated that the student got into "a little bit of trouble" if there was not something intellectually stimulating or occupying and that, during downtime, he may at times, be seen "goofing around or being social with other kids, but it does not stand out in a group . . . of middle school boys"; rather, she described him as "right in the middle and they're all doing the same things" (Tr. p. 1783).

However, in contrast to the above, the hearing record also includes a number of teacher reports as well as e-mails between teachers or school staff and the parent, which document the student's disruptive and off-task behavior in school. For example, an e-mail from the student's health teacher sent to the student's father on February 24, 2016, indicated that the student had been "increasingly disruptive in class," talking to anyone who was near him, speaking excessively out of turn, and regularly making inappropriate comments (Parent Ex. E at p. 68). The health teacher further indicated that it appeared the student was attempting to make his classmates laugh and that he tended to draw attention to himself whether he was in his seat or moving around the classroom

and that she found it necessary to speak with the student several times a class period regarding his behavior (*id.*). The health teacher indicated that the disruptions were interfering with teaching and learning (*id.*).

On February 26, 2016, the student's French teacher e-mailed the student's father informing him of the circumstances that led to the student being sent out of class (Parent Ex. E at p. 69). She described the student's behavior during a class discussion in which the student shouted out inappropriately several times, making loud comments and engaging other students in questions completely unrelated to the class (*id.*). The French teacher stated the student's comments were a disruption and waste of class time and that she had asked the student at least five times to stop (*id.*). When she gave the student a pass and asked him to leave, he intentionally fell in the hall, made more noise, and caused even more disruption (*id.*). The teacher noted that two days earlier the student had started singing in class and, when asked to stop, he walked out of the room without permission but returned shortly thereafter (*id.*). The French teacher described the student's recent behavior as both "elevated" and "new" stating that the student "usually responded to gentle reminders to be quieter or more focused" and that he was now "louder and more apt to continue talking, ignoring [her] attempts at redirection" (*id.*).

Similarly, in an e-mail dated March 22, 2016, the student's health teacher informed the parent that she had sent the student to the office with an "ET" pass that day due to the student's "continued disruption to class learning and continued refusal to follow teacher direction" (Parent Ex. E at p. 72).<sup>24</sup> She described the student as "continually shouting to a classmate across the room and attempting to carry on a conversation while she was teaching" (*id.*). She added that, although the other student eventually stopped talking when asked to, the student did not and he then became argumentative (*id.*).

On March 23, 2016, the principal e-mailed the student's father to let him know that the student had been asked by a substitute teacher to leave the last class of the day for engaging in disruptive behavior (Parent Ex. E at p. 73). Also during March 2016, when the Tourette advocate observed the student, she noticed that the student had recently been given lunch detention for squirting water in another student's face (Parent Ex. 94).

On April 8, 2016, the principal e-mailed the student's father reporting to him that again, under the direction of a substitute teacher, the student was asked to leave his science class and report to the principal's office because he was being disruptive (Dist. Ex. 43 at pp. 1, 2; Parent Ex. E at p. 78). A student referral related to this incident indicated that the student was "rolling around on the floor" and "disrupting class" and "not following the teacher's directions" (Dist. Ex. 42 at p. 1).

In response, the student's father e-mailed the principal stating, among other things, that "[t]he increasing number of incidents that have resulted in [the student] being sent to the office indicate that it is time for a Behavior[a] Intervention Plan. [The student] is losing too much

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<sup>24</sup> An ET pass is defined in the hearing record as a pass to the office wherein the student was required to phone home and speak to their parents about their inappropriate behavior in an effort to address it early (Tr. pp. 308-09).

learning time in these visits to the office and is getting discouraged" (Dist. Ex. 43 at p. 3).<sup>25</sup> He added that "[f]requent disciplinary actions tend to bring out the defiance in ADHD and Tourette Syndrome," and requested that the district conduct an FBA (id.).

The student continued to engage in disruptive behavior subsequent to the father's request for an FBA. On April 11, 2016, the principal e-mailed the student's father again, stating that, although there was a different substitute teacher in the science class on this day, multiple students, including his son, were asked to leave the class for being "silly and disruptive" (Dist. Ex. 43 at p. 1). Later that month, the parent e-mailed the principal regarding his son's report that he had gotten in trouble with the new long term substitute for vocalizing or "talking to the air" in science class that day (Parent Ex. E at p. 83).

On June 3, 2016, the principal e-mailed the parent regarding an incident in art class (Parent Ex. E at p. 86). The art teacher's description of the incident reflected that, after speaking to the student a few times to settle down and focus and after a few students at his table complained they could not focus because the student kept distracting them, she moved him to a different table (id.). Another boy stated that the student threw a ruler at him, although the student indicated he "'tossed'" the ruler (id.). However, after a third student stated he saw the ruler thrown, the art teacher sent the student out of class with an "ET" pass (id.).

Additionally, the student testified that, during the final three months of seventh grade, he was sent to the office "sometimes two, three times a week" for talking out of turn, socializing at inappropriate times or leaving his seat (Tr. pp. 1015-17).

With respect to teacher reports, the student's sixth grade English, mathematics and social studies teachers provided information on the student's performance during sixth grade in an Annual/Program Review Comment Sheet (Dist. Ex. 29 at pp. 1-2). With regard to following directions and class behavior, all three teachers indicated the student required reminders for refocusing; however, they also noted that he was quickly and easily redirected (id.). With regard to arriving to class on time, his English teacher indicated the student would often arrive late to the first period class (id. at p. 2). The mathematics teacher noted the student was late to math every day but that the tardiness was due to his medication schedule which coincided with the beginning of the ninth period (id.). All three teachers indicated that the only challenge the student exhibited was in the area of focusing (id. at p. 2).

In a May 3, 2016 Teacher Report, the student's seventh grade mathematics and social studies teachers reported similarly strong reviews of the student's academic abilities (Dist. Ex. 46 at p. 1). However, a comparison of the reports shows that both teachers reported the student exhibited much more significant difficulties in class during seventh grade (compare Dist. Ex. 29 with Dist. Ex. 46). For example, the social studies teacher reported that the student socialized inappropriately and yelled across the room, while the mathematics teacher indicated that the student needed reminders to stay in his seat and to refrain from talking to his peers (Dist. Ex. 46 at pp. 1-2). Both teachers reported that the student was often not prepared for class with class materials such as a pencil (id. at p. 1). The social studies teacher indicated that the student was

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<sup>25</sup> The father's e-mail response does not include a date (see Dist. Ex. 43 at pp. 2-3). However, based on review of the e-mail chain, it appears to have been written between April 8, 2016, and April 11, 2016 (see Dist. Exs. 42 at p. 1; 43 at pp. 1-3; Parent Ex. 78 at p. 1).

often off task during small group work which affected the other group members who reported difficulty getting the student to focus on tasks (*id.*). The mathematics teacher reported the student often blurted out answers without raising his hand, at times before the teacher had finished asking the question, and that he often failed to turn in completed assignments when they were due despite both whole class and individual reminders (*id.* at p. 2). The mathematics teacher further reported that the student missed a lot of class time due to taking breaks, using the bathroom, or getting a drink, as well as absences due to appointments, music lessons, etc. (*id.*). The teacher indicated that this time away from class was negatively impacting the student's performance in math noting that he "struggled greatly" during the last unit, performing poorly on the test and failing to submit most of the homework assignments (*id.*).

Most of the student's seventh grade teachers made positive remarks about him on his seventh grade report card, such as "pleasure to have in class" (Dist. Ex. 71). However, the support lab teacher noted that the student was "easily distracted," and the art teacher stated that the student had "difficulty staying focused" and "disrupts others in class" (*id.*).

By the time of the July 2016 CSE meeting, the district had not completed an FBA and the CSE did not decide that one should be conducted (Dist. Ex. 83 at p. 1). However, the special education teacher who completed a record review reported at the July 2016 CSE eligibility meeting that the student struggled with answering without raising his hand, socializing at inappropriate times, and organization of materials, and was not always prepared for class (Parent Ex. W at p. 128; *see* Dist. Ex. 78 at p. 2). In addition, the student's social studies teacher during seventh grade reported at the July 2016 eligibility meeting that the student struggled with socialization and that he had some behaviors and some organizational skills which could use help (Parent Ex. W at p. 130).<sup>26</sup>

Although the occupational therapist's documentation pointed to a lack of interfering behaviors and other district staff commented that the student's exhibited average behaviors for a student his age, based on the substantial evidence to the contrary, the hearing record supports a finding that the district was aware that the student was engaging in behavior that impeded his learning and that of others and, as such, the district should have completed an FBA of the student. Had the district completed an FBA, the analysis of the student's behavior would have provided the parties with information that could have helped illuminate whether the student's increased behavior was specifically related to his Tourette syndrome and ADHD diagnoses or rather was more willful in nature, which would then provide valuable information to the district as to how to address these behaviors. As noted below, such information may also have been instructive to the CSE in determining whether his disabilities adversely affected his educational performance.

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<sup>26</sup> In contrast, the district psychologist, who conducted a July 2016 record review and who was present at the July 2016 CSE/eligibility meeting, testified that, with regard to behavior concerns shared by the parent at the CSE meeting, she felt that none of the behaviors were serious, that they were typical of middle school students, and did not rise to a level of concern where she would be involved (Tr. pp. 557-58).

## D. Eligibility under the IDEA

The IDEA defines a "child with a disability" as a child with specific physical, mental, or emotional conditions, including an other health-impairment, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1]).

### 1. Other Health-Impairment

Under State and federal regulations, other health-impairment is defined to mean "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that . . . [i]s due to chronic or acute health problems such as . . . attention deficit hyperactivity disorder, . . . and Tourette syndrome" (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]). The district does not contest that the student's diagnoses of ADHD and Tourette syndrome may satisfy this part of the standard (Dist. Mem of Law at p. 3).

The other health-impairment category also requires an examination of whether the student's condition or deficits adversely affected his educational performance (see 34 CFR 300.8[c][9][ii]; 8 NYCRR 200.1[zz][10]). Whether a student's condition adversely affects his or her educational performance such that the student needs special education within the meaning of the IDEA is an issue that has been left for each state to resolve (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D. Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 944 [9th Cir. 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at \*8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. of Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; see Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 297-98 [S.D.N.Y. 2010] [emphasizing that educational performance is focused on academic performance rather than social development or integration]; see also C.B. v. Dep't of Educ., 322 Fed. App'x 20, 21-22 [2d Cir. Apr. 7, 2009]; Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; W.G. v. New York City Dep't of Educ., 801 F. Supp. 2d 142, 170-75 [S.D.N.Y. 2011] [finding insufficient evidence that the student's "academic problems—which manifested chiefly as truancy, defiance and refusal to learn—were the product of depression or any similar emotional condition"]; A.J. v. Bd. of Educ., 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. 2010] [noting the difficulty of interpretation of the phrase "educational performance" and holding that it must be "assessed by reference to academic performance which appears to be the principal, if not only, guiding factor"]; Eschenasy v. New York City Dep't of Educ., 604 F. Supp. 2d 639, 649-50 [S.D.N.Y. 2009]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], aff'd, 300 Fed. App'x 11 [2d Cir. Nov. 12, 2008]; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 399).

The July 2016 CSE found that the student was not eligible for special education (Dist. Exs. 82 at pp. 20-21; 83 at p. 1; Parent Ex. W at p. 172). The district determined that the student's then-

current section 504 plan provided for the accommodations the student required in order to access the general education curriculum (Dist. Ex. 83 at p. 1).

The parent maintains that the student's grades saw a sharp decline in the seventh grade (2015-16 school year) and that the progress reports and report card grades confirmed that the student was struggling. The student's sixth grade report card listed final grade averages for the student in the core academic subjects of English 91, social studies 91, accelerated math 94, science 95, and final grades of between 92 and 100 for all other classes such as art, physical education, choir, and band (Dist. Ex. 28). The student's first quarter progress report for seventh grade reveals the following grades: English 70, social studies 95, accelerated math 84, science 97, French 99, and grades of between 89 and 100 for the student's other classes (Parent Ex. D at p. 12). A further review of the student's report cards for the seventh grade reveals the following: first marking period—English 60, social studies 96, accelerated math 79, science 89, French 93, and all other classes between 97 and 100 with one outlier, technology 65; second marking period—English 81, social studies 88, accelerated math 83, science 80, French 83, and all others between 95 and 99; third marking period—English "Satisfactory," social studies 89, accelerated math 83, science 89, French 80, and all others between 83 and 98; and the fourth marking period—English 93, social studies 89, accelerated math 80, science 85, French "Withdrawn," and all others between 97 and 99 with one outlier, art 69 (Dist. Ex. 71). The June 2016 report card indicated that the student's final grades placed him on the honor roll and included English 78, social studies 91, accelerated math 81, science 86, French "Withdrawn," all others between 91 and 99 (with outliers of technology 81 and art 69) (*id.*). Although the student's previous New York State math assessment scores (fourth grade—"four," fifth grade—"four", sixth grade—"three") were available to the July CSE, there is no evidence that the July CSE had available to them the results of the spring 2016 testing (seventh grade) (Dist. Exs. 83 at pp. 1-2; 86 at pp. 1-3; *see* Dist. Exs. 78 at p. 1; 79 at p. 12).<sup>27</sup>

The student's report card reflects a modest decline in grades, which the parent would ascribe to the student's special education needs. The district staff posit other explanations for the decline in grades that they deemed unrelated to the student's purported disabilities. Specifically, testimony from the district staff attributed the reduction to the student's transfer into the school midyear in November 2015 (which required the student's general adjustment and also meant that the student may have missed content at the beginning of the year), the challenging nature of the student's academic program, the student's active participation in multiple extracurricular activities or elective classes (including orchestra, jazz band, regular band, track, and a pre-engineering program), as well as to the fact that the student was often tardy, missed a significant number of classes (for appointments and extracurricular activities), and may not have handed in all of his

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<sup>27</sup> The parent argues that the IHO was incorrect in considering the student's results on the seventh grade New York State math assessment to be an anomaly and argues that the scores were important because they were an objective measure of to what degree the student had achieved the state's learning standards (Pet. at pp. 15-16). The student's seventh grade math teacher testified that the student scored a "high two" on the seventh grade New York State math assessment and noted that the student missed the cutoff for a "three" by three points (Tr. pp. 1540-41). The math teacher stated that she was "a little surprised" that his score was not a "three" but she explained that the content the student covered in her class was not the content that was covered on the test and that this may have affected his score (Tr. p. 1541). Regarding the seventh grade accelerated math class, the math teacher explained that, at the beginning of the second calendar year (January 2016), the class covered eighth grade content (Tr. p. 1541).

assignments or had completed assignments late (Tr. pp. 140-41, 168, 233-34, 242-43, 316-18, 432-34).<sup>28</sup>

The special education teacher present at the July 2016 CSE meeting acknowledged that the student's grades had slipped a bit from what he had been performing but noted that none of the grades fell within a range that would prevent him from achieving the expectations of his grade level (Parent Ex. W at p. 166). The principal added that, while the student's overall grades were a little lower than they were in the sixth grade, he felt the student's final grades were good and he noted that he believed the student was inducted into the junior national honor society (*id.* at p. 168). At the July 2016 CSE meeting, the school psychologist stated that the student demonstrated "pretty significant social skills," which have allowed him to transfer between six different schools in the last three years and adapt to each new environment in a successful manner (*id.* at p. 140).<sup>29</sup>

However, viewing the district's explanations for the decrease in the student's grades, questions of tardiness/attendance and failure to complete assignments should not be dismissed out of hand as not reflecting educational performance or as unrelated to the student's disability. At the July 2016 CSE meeting, the Tourette advocate indicated that the student's tardiness was a result of his anxiety (Parent Ex. W at p. 161). The student's school history is significant for absences, late arrivals, and early dismissals (Parent Ex. P at pp. 2-14; *see* Dist. Ex. 29 at pp. 1-2; Parent Ex. A at p. 17). Now with the challenges of the seventh grade as identified by district staff, the Tourette advocate, as well as the student, it may be that the student's attendance issues were impacting his academics (*see* Tr. p. 234; Dist. Exs. 46 at p. 2; 79 at p. 13; Parent Ex. W at pp. 159, 169). While some of the student's absences related to appointments scheduled by the parent (i.e., appointments for the student to receive response prevention therapy [ERP] for his phobias, a treatment only available at an anxiety clinic out-of-town) (*see* Tr. pp. 1902-04; Parent Ex. E at p. 59), information

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<sup>28</sup> There is also evidence in the hearing record that the student's academic success was, at times, related to his attitude toward the specific teacher and his willingness to learn. The parent argues that, in his decision, the IHO confused "a teacher's approach making learning difficult with the student's dislike of a subject," clarifying "that the student specifically explained that he liked French just fine when it was taught in a less dry way" (Tr. p. 1057; Pet. at p. 16; *see* IHO Decision at p. 32). Regarding the student's seventh grade English class before his transition in November 2015, he testified that "since I did not like the class and they were not good teachers . . . and they did not like me, I decided after a while of trying to like the class, which for me was impossible, I decided to just not do anything" (Tr. p. 1018). The student received an incomplete or 60 during that marking period (Tr. p. 434; Dist. Ex. 71). The student also stated that support lab was not helpful because the support lab teacher "didn't even really talk to me" (Tr. p. 1025). When asked to pick his favorite subject, the student responded that "it can be any subject. It just depends on again how the teacher teaches it." (Tr. p. 1043). The student further explained that he loved science, but that he did not like the subject at the new middle school because he "did not like the teacher" (*id.*). Additionally, the student stated that the substitute science teacher was "super nice and helpful" and that she "helped me get a 100 on a science final," but the student added that, if he was with his previous teacher, he "wouldn't have gotten that" (Tr. p. 1059). Further, the student stated that his English tutor was "decent," better than the previous teacher but that she "wasn't the best" and that he had wanted to switch to another teacher's class (Tr. p. 1024).

<sup>29</sup> Although the psychologist who completed the June 2014 private neuropsychological executive functioning screening report testified that for students transitioning to a more appropriate setting it tends to be a positive experience, she also stated that transition in general may be a difficult thing because there is not a consistency and that could create some discomfort and some increase in anxiety and for this student "the number of school transitions is definitely concerning" (Tr. pp. 1581-82). During the impartial hearing the student described the transition to a new school as "stressful" and stated that he hoped he could stay in the same district middle school for eighth grade so that he could have "just one year without having to switch schools" (Tr. pp. 1036, 1048).

available to the CSE indicated that the student's late arrivals and other instances of missing class time were attributable to the student's sleep issues and removal from class due to anxiety-provoking stimuli (see, e.g., Dist. Ex. 12 at p. 8).

At the July 2016 CSE meeting, the Tourette advocate also shared with the committee that one of the student's biggest struggles impacting his grades were his executive functioning skills and indicated that the student did not need "academic supports" in "understanding" or "getting the homework done" but instead needed someone to help him with executive function (i.e., to help him make up work he missed because he was having moments of inattentiveness in class or to help him in turning in assignments) (Parent Ex. W at pp. 161-62).<sup>30</sup> The special education teacher, present at the July 2016 CSE meeting, also noted that the student struggled with organization of materials (id. at p. 128; see Dist. Ex. 78 at p. 2). The student's progress reports during the 2015-16 school year (seventh grade) reflect that the student's missing assignments were affecting his grades at least temporarily. In marking period three, the student's science teacher indicated that his grade was a C- and that "Grade can improve if graphs are turned in" (Dist. Ex. 65). His final grade in science for that period was an 89 (Dist. Ex. 69). Also, for the third marking period, his French teacher reported "Homework sometimes not completed"; however, his band teacher indicated "Homework excellent" (id.). For the fourth quarter, the student's math teacher reported that his grade was a 65 and that "Grade low partly due to 5 missing assignments" (Dist. Ex. 66). His final math grade for that quarter was a 93 (Dist. Ex. 71). For the same quarter, his art teacher reported his grade as "approximately a D" and that "Work is in late or not at all" (Dist. Ex. 66). His final art grade for that quarter was a 69 (Dist. Ex. 71). Further, although an Annual/Program Review Comment Sheet completed during the student's sixth grade indicated that the student completed homework consistently (Dist. Ex. 29 at p. 1), a May 3, 2016 CSE/504 teacher report indicated that, in social studies, the student "struggle[d] with organization in class and [wa]s not always prepared for class with materials such as a writing utensil," and, in math, the student would often not hand in completed assignments when they were due, "even after a whole-class reminder and individual reminders" (Dist. Ex. 46 at pp. 1-2; see Tr. p. 516; but see Tr. p. 1329). The hearing record also indicates that the student's anxiety about turning homework in late interfered with his ability to turn in any math homework (Tr. pp. 336-38, 1882).

The student's issues with organization, handing in of assignments, and attendance/tardiness were compounded by the behaviors he exhibited in the classroom, such as attention issues, impulsivity, hyperactivity and distractibility (discussed in further detail above), all of which could be attributed to the student's disability. The student's June 2016 section 504 accommodation plan essentially articulated these areas of need, stating that the student's impairments of Tourette syndrome, executive functioning disorder, insulin resistance, sensory integration disorder, anxiety disorder and ADHD substantially limited the student in the areas of organization, concentration, attention, and behavior by adversely affecting age appropriate participation in school-aged activities (Dist. Ex. 58 at p. 2).

Evaluative information before the July 2016 CSE about the student included forecasts from evaluating psychologists that the student's anxiety, insomnia, tics, obsessive thoughts, and impulsive behavior could affect schoolwork, classroom performance, and ability to access learning

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<sup>30</sup> At the impartial hearing, the student's treating psychologist also opined that children with OCD often had trouble with homework because they would obsess on the homework being perfect and it would take "ten times as long" to complete (Tr. p. 674).

(see Dist. Exs. 11 at p. 8; 12 at pp. 5, 8). While these abstract predictions would not, on their own, be sufficient to establish an adverse effect on the student's educational performance (see Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 637 [7th Cir. 2010]), at the least, they should have triggered the CSE to further scrutinize the student's academic needs. While the input of the district staff regarding their observations of the student and descriptions of the student's strengths and weaknesses constitute a vital contribution to a CSE process, in the instant case, the district should have weighed the hypotheses of district staff regarding the causes of the student's declining grades, absences/tardiness, missing homework assignments, and organization issues with the clinical reasoning set forth in the evaluative information based on objective testing, which attributed such academic-related concerns to the student's disability. If the district sought alternative explanations for the student's performance, rather than finding it had sufficient information on record, it should have sought additional information—and an FBA, which the parent specifically requested, would likely have yielded information of this type (Tr. pp. 227, 636-37; 34 CFR 300.305[a][2]; 8 NYCRR 200.4[b][5][ii]).<sup>31</sup>

Discerning an adverse impact on educational performance in the case of a student that exhibits strong academic skills is not as apparent as it might be for a student who is failing or being retained in a course or grade. Given the student's academic successes in the present case, were the student's grades and test scores to be viewed as the litmus of "educational performance" a finding of adverse impact would be less likely. On the other hand, viewing the student's educational performance slightly more broadly to take into account academic considerations beyond grades (such as considerations related to the student's attendance, homework, and organization)—but not so broadly as to encompass social/emotional needs that have not necessarily translated to academics—is consistent with the approach taken by New York courts (see, e.g., M.N. v. Katonah-Lewisboro Sch. Dist., 2016 WL 4939559, at \*11-\*13 [S.D.N.Y. Sept. 14, 2016]; M.M. v. New York City Dep't of Educ., 26 F. Supp. 3d 249, 255-57 [S.D.N.Y. 2014]; cf. W.A., 2016 WL 6915271, at \*23 [in the child find context, distinguishing a narrow view of "academic success" (e.g., grades alone) from a broader view that included "feedback from teachers and standardized test scores as well"]). This interpretation of "educational performance" is in line with federal guidance from the Office of Special Education Programs (OSEP), discussing the eligibility of students with high cognition and providing an example of a student that sounds quite analogous to the student in the present case; to wit, "a child with high cognition and ADHD could be considered to have an 'other health impairment,' and could need special education and related services to address the lack of organizational skills, homework completion and classroom behavior, if appropriate" (Letter to Anonymous, 55 IDELR 172 [OSEP 2010]). The same guidance further describes OSEP's "long-standing position that, in general, it would be appropriate for the evaluation team to consider information about outside or extra learning support provided to the child to determine whether the child's current academic achievement reflects the service augmentation, and not what the child's achievement would be without such help" (Letter to Anonymous, 55 IDELR 172).

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<sup>31</sup> To be sure, in the present case, the district found itself in an unenviable position given the parent's declination of further assessments of the student (see Tr. p. 202; Dist. Exs. 33 at pp. 1, 2; 63). However, the parent surely would have consented to an FBA, which the student's father specifically requested, and the FBA may have ultimately provided data that supported the district's hypotheses regarding the reasons for some of the student's behaviors and declines in educational performance.

The student's section 504 accommodation plan, which was in place during the 2015-16 school year (seventh grade), included the provision of head phones with white noise, access to frequent breaks, sensory breaks as needed, seat away from high traffic areas, alternate seating/space in room when focusing is difficult, flexible seating options, avoid withholding physical activity as a consequence for misbehavior, allow use of fidget items, allow standing or movement while working and use of stability ball while working, use of routine checklists that the student helped develop, preview of and/or alternative materials provided to avoid violent or disturbing content, additional time to complete assignments due to the variable presence of tics and associated symptoms which may preclude timely production of work, a provision for the parents to note on homework when the student reached his frustration level and needed to stop, and a provision that the parents would be included if the student needed to be interviewed for behavioral concerns or sensitive issues, the provision of sensory breaks, daily physical education, use of a note pad to write down his questions so he wouldn't blurt them out and interrupt the class, and training provided on Tourette syndrome to all staff who work with the student (Dist. Ex. 25 at pp. 2-5). The plan also included direct OT services and psychological counseling services (*id.* at p. 2). Taking the student's various accommodations under his section 504 plan out of the equation, it is far from clear that the student would have achieved the grades he did. This question collapses into the final criterion for eligibility—the student's need for special education—and is discussed further below. Briefly, with respect to the accommodations under the section 504 plan, the hearing record does indicate that the student did not always utilize the accommodations made available by the district (*see, e.g.*, Tr. pp. 134-36, 311-12). On the other hand, descriptions of the manner in which the student's OT, counseling, and support lab were delivered during the 2015-16 school year indicates that all of the services/supports focused on the student's organization and homework-related needs (*see* Tr. pp. 319, 332, 556-57, 1313-14, 1510-11; Dist. Ex. 44).

In summary, the student's decline in grades, along with his performance in the areas of attendance, organization, and homework completion were areas of need described by the private evaluators and acknowledged by the district. Based on the foregoing, the hearing record supports a finding that the student exhibited limited alertness with respect to the educational environment due to chronic or acute Tourette syndrome and ADHD and that the student's academic performance and social behavior in the classroom had been adversely affected thereby.

## **2. Need for Special Education**

In addition to meeting criteria for a specific disability category, in order to be deemed eligible for special education, a student must by reason of such disability, "need special education and related services" (34 CFR 300.8[a][1]; 8 NYCRR 200.1[zz]). State regulation defines "special education" as "specially designed individualized or group instruction or special services or programs" (8 NYCRR 200.1[ww]; *see* 20 U.S.C. § 1401[29]; Educ. Law § 4401[2]; 34 CFR 300.39[a][1]). "Specially-designed instruction," in turn, means "adapting, as appropriate, to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]). In New York, the Education Law describes special education as including "special services or programs," which, in turn, includes, among other things, "[s]pecial classes, transitional support services, resource rooms, direct and indirect consultant teacher services, transition services . . . , assistive technology devices as defined under federal law, travel training, home instruction, and special [education] itinerant teachers [services] . . . ." (Educ. Law § 4401[1],

[2][a]). In New York the definition of "special services or programs" (and therefore special education) also encompasses related services, such as counseling services, OT, physical therapy, and speech-language therapy, as well as "other appropriate developmental, corrective or other support services" (Educ. Law § 4401[2][k]).

The issue of whether a student requires special education is not always clear, because some services described by special education teachers and providers appear at times to be similar to services that are provided to regular education students (see, e.g., L.J. v. Pittsburg Unified Sch. Dist., 835 F.3d 1168, 1175-78 [9th Cir. 2016] [finding that a student's receipt of 1:1 assistance, mental health services, behavioral interventions, and accommodations to the general educational environment constituted specially designed instruction despite the school district's assertion that they were general education services]; Alvin Indep. Sch. Dist. v. A.D., 503 F.3d 378, 384 [5th Cir. 2007] [finding that, although a district developed an academic and behavior contract to assist the student and identified him at risk, the student demonstrated academic progress and social success and, therefore, did not need special education]; M.P. v. Aransas Pass Ind. Sch. Dist., 2016 WL 632032, at \*5 [S.D. Tex. Feb. 17, 2016] [finding that district employees managed [the student's] behaviors using interventions available to all students, and therefore, the student did not need services under the IDEA]; Ashli C. v State of Hawaii, 2007 WL 247761 at \*10-\*11 [D. Haw. Jan. 23, 2007] [distinguishing the differentiated instruction the student received in a general education setting, which was available to all students, from accommodations or specially designed instruction]).<sup>32</sup> Further, there may be overlap between "protections and requirements of the IDEA and those of Section 504 and the ADA" that the IDEA and its implementing regulations do not address (see Parental Revocation of Consent for Special Education Services, 73 Fed. Reg. 73,013 [Dec. 1, 2008]). The provision of accommodations under section 504 rather than special education under the auspices of the IDEA has caused conflict in terms of differentiating eligibility under the two statutes (compare Hood v. Encinitas Union Sch. Dist., 486 F.3d 1099 [9th Cir. 2007] [affirming denial of IDEA eligibility for child receiving accommodations under section 504], with Mr. I., 480 F.3d 1 [finding that a student afforded services under section 504 should have been found eligible for special education under IDEA]).

The broad definition of special education within New York's Education Law includes related services such as psychological counseling (Educ. Law § 4401[2][k]).<sup>33</sup> Other accommodations, including allowing the student to be excused from watching videos deemed by the parent to "contain violent or disturbing content" and participation in a support lab, might be considered special education under some circumstances (Dist. Ex. 58 at p. 3). For example, the broader accommodation pertaining to disturbing content (which encompassed books and videos) included in the student's earlier section 504 plan was implemented for the student's ELA class during the later portion of the 2015-16 school year by way of one-to-one instruction with use of alternative texts (see Tr. pp. 314-16, 1024; Dist. Ex. 25). This reflects an individualized adaptation of the content and delivery of instruction to address the student's anxiety resulting from his

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<sup>32</sup> For example, State law and regulation in New York also specifically contemplate the provision of academic intervention services (AIS), response to intervention (RtI) support, or "additional general education support services" to students in the general education setting (see Educ. Law §4401-a[3]; 8 NYCRR 100.1[g]; 100.2[ee], [ii]; 200.4[a][9]).

<sup>33</sup> This would not mean that every student who needs counseling services would qualify as a student eligible for special education since, first, the student would have to fall within one of the disability categories.

disability (8 NYCRR 200.1[vv]). The support lab, while generally considered by the district to be a general education support, was intended to assist the student with turning in homework and organization—executive functioning needs related to the student's disability (Dist. Ex. 58 at p. 2; see Tr. pp. 298, 319-20, 332). Such a support might be deemed an "other appropriate developmental, corrective or other support services" under the definition in section 4401[2][k] of the State Education Law.<sup>34</sup> The section 504 chairperson's description of the student's support lab during the start of the 2015-16 school year even more closely resembles a special education service—i.e., the chairperson testified that the student received support lab in a 1:1 setting with a special education teacher (Tr. p. 1268)—however, it is not entirely clear if this was due to convenience/schedule or related to the student's needs.<sup>35</sup> According to the principal of the student's second middle school during the 2015-16 school year, the student attended support lab weekly during the beginning of the student's time at the school but that the service was changed to daily late in the school year and was more effective for the student (Tr. pp. 319, 328-29). He further stated that the support lab "maxes out" at ten students and one teacher, but that he believed only eight students were typically in the student's class (Tr. pp. 332-33).

In conclusion, under the circumstances of this case, given the array of supports and services that, according to the section 504 plans developed by the district, the student required, the weight of the evidence supports a finding that, at the time of the July 2016 CSE meeting, the student should have been found eligible for special education programs and services as a student with an other health-impairment under the IDEA (see 20 U.S.C. § 1401 [3][A]; Educ. Law § 4401[1], [2][k]; 34 CFR 300.8 [a][1], [c][9]; 8 NYCRR 200.1[zz][10]; see also Muller, 145 F.3d at 105 [finding that the district's section 504 plan "was not an adequate substitute" for devising an IEP for the student pursuant to the IDEA]). With that said, nothing in this decision should be interpreted as finding that the section 504 plan offered insufficient support to address the student's needs (which, as noted above, is an issue outside the scope of my review) or that it would be inappropriate for a CSE to recommend the same or similar supports and services on an IEP for the student.

## **E. Relief**

In summary, a review of the hearing record supports a finding that the student is eligible for special education as a student with an other health-impairment. The district is ordered to obtain

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<sup>34</sup> Certain additional instructional or supportive services may be available to special education students and non-disabled students alike (e.g., academic intervention services or "building level services"); however, according to the State Education Department, such services should not be listed on a student's IEP (see "Academic Intervention Services: Questions and Answers," at pp. 5, 20, Office of P-12 Mem. [Jan. 2000], available at <http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf>). On the other hand, services that clearly fall into the realm of special education services are required to be listed on an IEP, at least according to United States Department of Education guidance, which states that "[t]he IEP Team is responsible for determining what special education and related services are needed to address the unique needs of the individual child with a disability. The fact that some of those services may also be considered 'best teaching practices' or 'part of the district's regular education program' does not preclude those services from meeting the definition of 'special education' or 'related services' and being included in the child's IEP" (Letter to Chambers, 59 IDELR 170 [OSEP 2012]). This observation relates to considerations after a determination of eligibility but is generally relevant to the question of whether certain supports or services may be deemed special education in a particular instance.

<sup>35</sup> There are four daily roster reports for homework support lab at the student's first middle school during the first quarter of the 2015-16 school year that appear to show support lab classes containing between two and five students (Parent Ex. X at pp. 1-4; see Tr. pp. 1371-72).

an FBA of the student to be conducted by a behaviorist or a licensed psychologist with experience working with individuals with Tourette syndrome. Additionally, the district should consider what other additional information, if any, is needed to determine the student's educational needs and present levels of performance and conduct such evaluations, subject to the parent's consent. When the FBA and other evaluative information is obtained, the CSE shall convene to develop an IEP for the student.

The parent requests that the district be ordered to conduct facilitated or mediated CSE meetings going forward. The parent refers to a State pilot program for facilitated CSE meetings and, in the alternative, identifies a particular firm with which the district should contract for mediation. With respect to facilitation, in October 2015, the New York State Education Department, Office of Special Education, initiated a three-year pilot program of the early dispute resolution option of IEP Facilitation, which was made available to limited school districts in the State (the district at issue is not among the districts selected to participate in the pilot program) (see "Individualized Education Program [IEP] Facilitation Pilot Program," Office of Special Educ. Special Educ. Field Advisory [Oct. 2015], available at <http://www.p12.nysed.gov/specialed/dueprocess/iep-facilitation/documents/IEPFacilitationFieldAdvisory.pdf>). Within the pilot districts, while either a parent or a district may suggest IEP facilitation, both the parent and the district must agree to participate (Individualized Education Program [IEP] Facilitation Pilot Program," at p. 2). Similarly, participation in the mediation process contemplated by the IDEA must be voluntary on the part of both the parents and the school district (20 U.S.C. § 1415[e][2][A][i]; 34 CFR 300.506[b][1][ii]; 8 NYCRR 200.5[h][1][i]). Accordingly, while ordering a facilitator or mediator to attend the student's CSE meeting might be an optional form of relief, these processes are generally premised upon a voluntarily accord between parents and districts to engage more cooperatively with each other. Further, a mediation process, in general, is available to parties to resolve a dispute, which, relative to the CSE meeting ordered herein, is premature and hopefully not inevitable. However, the parties are encouraged to consider whether the attendance of a neutral party at the student's CSE meeting might allow the committee, including the parent, to more effectively focus on the statute's goal of developing an IEP that is reasonably calculated to enable the student to receive educational benefits in the LRE.<sup>36</sup>

Further comment on cooperation in this matter is warranted. The evidence in the hearing record shows that the parent is a caring and zealous advocate for her son, which is very important and admirable. On the other hand, it shows that, at times, she can be demanding, blaming, and insistent upon doing things her way when it comes to the student's education. The evidence demonstrates that the district has made significant efforts to address the parent's concerns but, over time, has become increasingly defensive with the parent. Indeed, the cycle of communication between the parents and the district has become defensive and dysfunctional, with meaningful communication about the student's needs being overlooked in favor of the parties defending their respective positions. Based on the determination that the student is eligible for special education under the IDEA, going forward, the parent shall be entitled to certain procedural safeguards (20 U.S.C. § 1415[b][1]); however, the parties are hereby reminded that "[t]he core of the [IDEA] is

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<sup>36</sup> If the parties agree to pursue facilitation or mediation, they may wish to seek information from Central Regional Office of NYSED regarding the availability of trained facilitators (of the sort utilized in the facilitation pilot program), mediators (such as those on the list maintained pursuant to section 4404-a of the Education Law), or other similar resources.

the cooperative process that it establishes between parents and schools" (Schaffer v. Weast, 546 U.S. 49, 53 [2005]).<sup>37</sup> It is my sincere hope that the parent and district will work together to develop a program that meets the student's needs, rather than fall back upon old patterns of mistrust and obfuscation.

## **VII. Conclusion**

Upon review, the hearing record supports a finding that the student is eligible for special education programs and related services as a student with an other health-impairment. I have considered the parties' remaining contentions and find that I need not address them in light of the determinations set forth above.

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED**

**IT IS ORDERED** that the IHO's decision, dated December 13, 2016, is modified, by reversing those portions which held that the district was not required to conduct an FBA and that the student was not eligible for special education services under the IDEA as a student with an other health-impairment; and

**IT IS FURTHER ORDERED** that the CSE shall convene within 15 school days of the date of this decision to schedule an FBA of the student to be conducted in accordance with the body of this decision and determine what additional information, if any, is needed to determine the student's educational needs and present levels of educational performance; and

**IT IS FURTHER ORDERED** that the CSE shall conduct such evaluations as are necessary to obtain the additional information required, subject to the parent's consent, in accordance with the timelines set forth in State regulations; and

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<sup>37</sup> Yet another example of this breakdown has been alluded to on appeal. The additional evidence submitted by the parent contains a representation from counsel for the district that, as of November 1, 2016, the parent was "declining" services provided for by the student's section 504 plan, including counseling and support lab (Pet. Ex. HO at p. 115). While the parent replied that "the information [provided by counsel for the district] . . . is not quite correct," the additional evidence submitted by the parent does not indicate whether she is permitting the district to provide the services called for by the student's currently-effective section 504 plan (id. at p. 116). Going forward, the parent should note that, while federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]) and the parent remains free not to provide consent for the provision of services or to revoke consent once given (34 CFR 300.9[c]; 300.300[b]), she may not control or direct the specific manner in which the district implements services recommended by the CSE once she has provided consent for the provision of services (White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380 [5th Cir. 2003] [holding that "[t]he right to provide meaningful input is simply not the right to dictate an outcome and obviously cannot be measured by such"]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988] ["parents, no matter how well-motivated, do not have a right under the [predecessor statute to the IDEA] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child"]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*11 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [Nov. 9, 2012]; L.K. v. Dep't of Educ. of New York, 2011 WL 127063, at \*11 [E.D.N.Y. Jan. 13, 2011]).

**IT IS FURTHER ORDERED** that upon completion of the necessary evaluations, the CSE shall convene to develop an IEP for the student within the timelines set forth in State regulations.

**Dated:**            **Albany, New York**  
                         **February 3, 2017**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**