The University of the State of New York

The State Education Department
State Review Officer
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No. 17-027

Application of the BOARD OF EDUCATION OF THE Minisink Valley Central School District for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Michael K. Lambert, Esq., of counsel

Cuddy Law Firm, PLLC, attorneys for respondent, Jason H. Sterne, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2014-15 school year was not appropriate. The parent cross-appeals from the IHO's determination that the educational program and services recommended for the 2013-14 school year were appropriate and for additional compensatory education services. The appeal must be dismissed. The cross-appeal must be sustained.[1]

[1] In September 2016, Part 279 of the practice regulations were amended, which amendments became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although the relevant events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279 unless otherwise specified.

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 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's early history is notable for seizures and regression of speech; he received services through the Early Intervention Program (Parent Ex. IIII at pp. 1-2). For preschool, the student attended a full-day 12:1+4 special class and received related services of speech-language and play therapies (Dist. Ex. 59 at p. 1; Parent Ex. IIII at p. 2). In May 2013, a private neuropsychologist evaluated the student and concluded that he met the criteria for attention deficit hyperactivity disorder (ADHD), primarily hyperactive type, as well as an autism disorder (Parent Ex. IIII at pp. 7-8). Throughout kindergarten and first grade, the student presented with academic weaknesses, often as a result of his attending difficulties and interfering behaviors (Dist. Exs. 6 at pp. 1-6; 42 at pp. 5-8; 58 at pp. 4-5; 59 at p. 1; Parent Exs. E at pp. 5-8; F at pp. 6-8; I at pp. 5-7; K at pp. 5-7; P at pp. 4-5, IIII at pp. 2, 7-8). During these school years, the student was the subject of multiple disciplinary referrals and in-school and out-of-school suspensions (see Dist. Ex. 63; Parent Exs. ZZZZ; AAAAA-HHHHH). The hearing record indicates that the student demonstrated cognitive skills and general performance abilities in the average range accompanied by low average verbal abilities (Dist. Ex. 59 at pp. 2-4; Parent Ex. EEEE at pp. 5-6).

The CSE met on April 9, 2013 to develop the student's IEP for the 2013-14 school year and to transition the student from the Committee on Preschool Special Education (CPSE) to kindergarten and CSE (Parent Ex. P at pp. 1-2). Having found the student eligible for special education services as a student with a speech or language impairment, the CSE recommended the student for placement in a 15:1 special class for English language arts (ELA) (five 90-minute sessions per week), mathematics (five 40-minute sessions per week), and science and social studies (five 40-minute sessions per week) (id. at pp. 1, 8).[2] The April 2013 CSE also recommended related services to include two 30-minute sessions of individual speech-language therapy per week, one 30-minute session of speech-language therapy in a small group per week, and one 30-minute session of counseling in a small group per week (id.).

The student entered the recommended kindergarten program in September 2013 (see Tr. pp. 544-47; Parent Ex. P). The CSE convened five times during the 2013-14 school year to discuss and/or amend the student's IEP (Dist. Exs. 6; 58; Parent Exs. K; L; M). On October 22, 2013, the CSE convened and discussed concerns regarding the student's behavior; however, according to the October 2013 CSE meeting minutes, "there were incidents at the beginning of the year, but [the student] [wa]sn't displaying the same behaviors" and the district had put "strategies . . . in place for all areas of the child's day" (Dist. Ex. 58 at pp. 1-2). No changes were made to the IEP (compare Dist. Ex. 58, with Parent Ex. P).[3]

[2] The student's eligibility for special education and related services is not in dispute, although the parent alleges that speech or language impairment was not the most appropriate disability category for the student (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[3] Most of the meetings convened after the April 2013 CSE meeting were convened by Subcommittees on Special Education (CSE subcommittees), with the exceptions of the March 2014 and April 2014 CSE meetings (see Parent Exs. D at p. 1; E at p. 1; F at p. 1; G at p. 1; H at p. 1; I at p. 1: J at p. 1; K at p. 1: L at p. 1; M at p. 1; Dist. Exs. 6 at p. 1; 58 at p. 1). As the use of CSE subcommittees is not challenged by the parent, the term CSE is used in this decision to refer to both the CSE and the CSE subcommittees.

By letter dated November 7, 2013, the parent requested that the district take certain actions relating to assessment of and programming for the student and expressed that "the constant removals [of the student] from his classes, and even the school itself, [we]re preventing [the student] from having a free appropriate public education" (Dist. Ex. 4). Also on November 7, 2013, the CSE met, reviewed the results of a May 2013 private neuropsychological evaluation, and discussed concerns related to the student's behaviors (Dist. Ex. 6 at pp. 1-2; Parent Ex. MMM at p. 1). According to the November 2013 CSE meeting minutes, "there had been five major incidences of the child showing physical aggression in school and his safety and the safety of others is a concern" (Dist. Ex. 6 at p. 1; Parent Ex. MMM at p. 1). The November 2013 CSE changed the student's eligibility classification from speech or language impairment to autism and recommended a functional behavioral assessment (FBA), including an adaptive behavior scale assessment and ABC data sheets (Dist. Ex. 6 at pp. 1-2; Parent Ex. MMM at p. 1). In December 2013, the district conducted an FBA and developed a behavioral intervention plan (BIP) for the student (Parent Exs. VVVV at p. 1; WWWW at p. 1). The district began to implement the December 2013 BIP on January 6, 2014 (Tr. pp. 72, 172, 239, 475).

On January 23, 2014, the CSE convened and discussed an escalation in the student's aggressive behaviors including hitting, kicking, spitting, and biting, as well as his eloping behavior (Parent Exs. M at p. 2; EEE at p. 1). According to meeting minutes, the student's behavior was such that he "needed to be removed from the classroom almost daily" and the principal reported that the "safety of the students and others [wa]s a significant concern" (Parent Ex. M at p. 2). The meeting minutes further indicated that the committee was "recommending an alternate placement" for the student with which the parent was "not in agreement"; however, the parent was willing to tour a board of cooperative educational services (BOCES) program (id.). The CSE ultimately recommended the continuation of the student's 15:1 special class placement for academics, as well as his related services, but added a 1:1 aide, as requested by the parent, and recommended an occupational therapy (OT) evaluation, including a sensory profile, and an evaluation by a behavioral consultant (id. at pp. 2, 8).

After the January 2014 CSE meeting, the district contracted with a private agency to conduct a review of and revise the student's FBA and BIP (see Parent Exs. L at pp. 2-3; M at p. 2; PPPPPP at p. 1). The private agency drafted a new FBA and BIP for the student on February 27, 2014, which identified the student's inappropriate behaviors and detailed the target behaviors for change, skills to improve, and the functions maintaining the target behaviors (Parent Ex. UUUU pp. 1-4). The February 2014 FBA and BIP provided detailed strategies for increasing appropriate work/social behaviors and decreasing target behaviors, recommended a hierarchy of prompting, provided justification for an independent activity schedule, and recommended curricula for addressing the student's social skills and behavior self-management (id. at pp. 7-12). On March 12, 2014, the private agency updated the February 2014 FBA and BIP (compare Parent Ex. TTTT, with Parent Ex. UUUU).

On March 17, 2014, the CSE convened and reviewed the FBA and BIP developed by the private agency, as well as the completed OT sensory evaluation (Parent Exs. L at p. 2; WW at pp. 1-2). The March 2014 CSE recommended adding the FBA and BIP to the student's existing program, as well as a sensory plan and twice monthly monitoring by an occupational therapist (Parent Ex. L at pp. 2-3, 9). The March 2014 CSE also recommended 25 hours of board certified behavior analyst (BCBA) support per week to provide staff training and to implement the FBA

and BIP (id. at pp. 2, 10). The March 2014 CSE meeting minutes noted that the CSE would reconvene again on April 21, 2014 to review "the next four weeks of implementation," as well as the plan's effectiveness and the necessity for an alternate placement (id. at p. 3).

On April 21, 2014, the CSE convened and reviewed the implementation of the BIP thus far and discussed the student's need for an alternate placement (Parent Ex. K at pp. 1-2). According to the meeting minutes, the student had begun to show some success in large group settings, his problem behaviors significantly decreased when transitions were minimized, the student was able to stay at his desk in the classroom, and he was starting to seek out peer interactions (id. at p. 2). However, academic demands on the student had been lessened (id.). The CSE chairperson noted that, while the data charts showed some progress, it was not adequate (id.). The chairperson expressed concern regarding the number of daily transitions, the significant level of support that the student required, the student's behavioral needs hindering his academic progress, and the safety of the student, staff, and peers (id.). A new, therapeutic BOCES placement was discussed and the parent agreed to take a tour (id.). The April 2014 CSE did not recommend a change in the student's placement, but it did recommend 12-month school year services and special transportation (id. at pp. 2, 11). BCBA staff support was reduced to up to 20 hours per week (id. at p. 10).

In or around May 2014, the BCBA who had been working with the student was replaced with two different BCBAs from the private agency (Tr. pp. 575-76). Also in May 2014, the private agency provided the district with protocols to be used when removing the student from the classroom into office space and generally identified the target behaviors, when the student required removal, how the staff was to proceed with the student removal, room conditions, staff demeanor, task completion terms, and conditions under which the student might return to the classroom (Parent Ex. OOOO).

Turning to the student's first grade year, on June 17, 2014, the CSE convened for the student's annual review to develop the student's IEP for the 2014-15 school year (Parent Ex. J at p. 1). The June 2014 CSE recommended a BOCES 6:1+1 special class program to commence in July 2014 as part of the student's 12-month school year services with related services to include two 30-minute sessions of individual speech-language therapy per week and one 30-minute session of speech-language therapy in a group per week (id. at pp. 1, 12). The June 2014 CSE also recommended one 30-minute session of counseling in a group per week and OT monitoring two times per month (id.). For the 10-month portion of the 2014-15 school year beginning in September 2014, the June 2014 CSE recommended the continuation of a 15:1 special class for ELA (five 90-minute sessions per week), mathematics (five 60-minute sessions per week), and science and social studies (five 40-minute sessions per week) (id. at pp. 1, 11). The CSE also recommended two 30-minute sessions of individual speech-language services per week, one 30-minute session of group speech-language services per week, and one 30-minute session of group counseling per week (id.). The June 2014 CSE further recommended the continuation of the 1:1 aide and the FBA and BIP, but did not recommend BCBA consultation services or monitoring by an occupational therapist (compare Parent Ex. K at pp. 7, 9-10, with Parent Ex. J at pp. 8, 11).

The student attended the BOCES program during summer 2014 (see Parent Ex. NNNNN). The student began the 10-month portion of the 2014-15 school year in the placement recommended by the June 2014 CSE (Tr. pp. 102-03). In a memorandum and BIP summary, the district indicated that it would continue to implement the same FBA and BIP as that developed for student during

the 2013-14 school year (Dist. Ex. 51 at p. 1). The BIP summary included a "Protocol for removal to Calm Room" (id. at p. 3).

In late September, the district moved the student, with the parent's permission, to a general education classroom for mathematics on a trial basis; following the student's reported success in mathematics, the district moved the student, again with the parent's permission, to a general education classroom for science and social studies as well (Tr. pp. 108, 160-62, 316, 595-97; Parent Ex. H at p. 1).

On October 3, 2014, the CSE, with parental agreement and without a meeting, changed the student's counseling services from one 30-minute session per week in a group to two 20-minute sessions per week on an individual basis and one 20-minute session per week in a group (Parent Ex. I at pp. 1, 10). The October 2014 CSE meeting minutes indicated that the change in services for counseling was in response to the student's need for increased support for behavior management and social skills and that the decrease in duration was due to the student's short attention span (Tr. p. 423; Parent Ex. I at p. 3).

On November 25, 2014, the CSE convened and discussed the student's progress in the mainstream setting, as well as his overall progress to date (Parent Ex. H at p. 1). The November 2014 CSE recommended the discontinuation of the 15:1 special class for math, science, and social studies and continuation of the student's placement in a general education class for those subjects (id. at pp. 2, 9). The CSE further recommended retaining the 15:1 special class for ELA only, without change to the related services, the 1:1 aide, or the FBA and BIP (id. at pp. 1-2, 9). The November 2014 CSE meeting minutes noted that the student had shown "minimal socialization or collaboration with his peers in [the general education] setting," would "leave[] the classroom on a frequent basis due to behaviors," required "constant redirection" to complete work and was dependent on his aide to complete academic tasks, and that he had "no peer relationships" and "prefer[red] to interact only with his aide" (id. at pp. 1-2). Although the IEP stated that an "[a]lternate placement ha[d] been recommended to support the student's social-emotional, academic and management needs," and that the student would "remain in district, with a 1:1 aide and [an] FBA/BIP pending an alternate placement," the "Recommended Special Education Program and Services" section of the student's IEP did not reflect an alternate placement recommendation (id. at pp. 2, 9). However, the meeting minutes stated that, if a placement was "not . . . secured by January 30, 201[5], home instruction w[ould] commence on February 1, 2015, pending alternate placement" (id. at p. 2).

While no IEP was generated as a result, the CSE convened on January 5, 2015 at the parent's request (Parent Ex. G at p. 1). The parent expressed concern that the student was not receiving a full day of academic instruction and special education, questioned the frequency and duration of time that the student was removed to a quiet room from September 11 to September 14, 2014, and requested a manifestation determination review (id. at pp. 1-2). According to CSE meeting minutes, the committee discussed the various placements to which the student had been referred (id. at p. 2). Also, following the CSE meeting, the chairperson reviewed documentation regarding use of the quiet room with the student and determined that, in September 2014, the student had been removed to the room 10 times for a total of five hours, and that the amount of time did not warrant a manifestation determination review (id.).

On January 20, 2015, a manifestation determination review team convened to review the student's behavior that resulted in a five-day suspension and concluded that "[d]ue to the child's inability to control self-regulation and impulse," there was "a direct and substantial relationship between disability and misconduct" (Parent Exs. XXXX; YYYY at pp. 1-2; see Parent Ex. ZZZZ). On January 20, 2015, the CSE also convened and reviewed the January 5, 2015 CSE meeting discussion regarding the student's dependency on the 1:1 aide, to the exclusion of interactions with peers, and the student's self-directed behavior and safety issues (Parent Ex. G at p. 2). The January 20, 2015 CSE also considered additional behavioral and academic information and concluded that a search for a smaller, more therapeutic placement was appropriate (id.). The January 20, 2015 CSE also reviewed a list of schools to which the student had been referred and which had accepted or rejected the student for placement (id.; see Parent Exs. WWWWW, XXXXX, YYYYY). The parent requested that the student remain in his then-current placement; however, the January 20, 2015 CSE refused the parent's request due to the district's inability to maintain the student in his current placement based on his behavior and academic achievement (id.). According to the meeting minutes, the CSE recommended placing the student in a BOCES 8:1+1 special class with a 1:1 aide and related services of speech-language therapy and counseling (id.). However, the CSE ultimately recommended that, until an alternative placement could be secured, the student receive home instruction consisting of five 60-minute sessions per week of 1:1 instruction, as well as three 30-minute sessions of speech-language therapy per week at home and three 20-minute sessions of counseling per week at home (id. at pp. 1, 2, 9-10).

By letter to the parent dated January 22, 2015, the district assured the parent that the CSE's recommendation for home instruction "was not disciplinary in nature" but was, instead, intended to provide "a more supportive and structured [IEP]" for the student (Parent Ex. JJ). On January 26, 2015, the parent filed a due process complaint notice (Parent Ex. C).

On January 29, 2015, the CSE convened to discuss the "status of the search for an alternate placement" (Parent Ex. F at p. 1). The CSE chairperson indicated that, to date, the CSE had received two acceptance letters from BOCES programs (id.). The CSE reviewed the student's present levels of performance and individual needs, concluding that two additional math goals would be added to the IEP; furthermore, to more fully assess the student, the CSE recommended an assistive technology evaluation, an adapted physical education evaluation, an OT evaluation, updated academic testing, an assessment using the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP), and an updated FBA and BIP (id. at pp. 2-3).[4] The district also determined that additional training of staff by the BCBAs from the private agency was not necessary at the time since staff in the district had previously been trained and the school psychologist had "reviewed the FBA/BIP with each staff member in the fall" (id. at p. 2). For the remainder of the 2014-15 school year, the CSE recommended that the student be placed in a BOCES 8:1+1 special class, along with a 1:1 aide and weekly related services of three 30-minute sessions of individual speech-language therapy, one 30-minute session of small group speech-language therapy, two 30-minute sessions of individual counseling sessions, one 30-minute session of small group counseling, and one 30-minute session of parent counseling and training

[4] In his January 2015 due process complaint notice, the parent requested that the IHO order the district to complete an FBA and a BIP, an assistive technology evaluation, and an adapted physical education evaluation (Parent Ex. C at p. 10).

(id. at pp. 3, 11). The CSE also recommended support for school personnel on behalf of the student that included one hour daily of BCBA support for transition, for two weeks (id. at pp. 3, 12). The parent declined this placement at the meeting based upon the distance of the BOCES from the student's home, the lack of a specific transportation plan, and the lack of a safety plan for the bus (id. at p. 3).

While the hearing record is unclear as to exactly when, at some point after the parent filed the January 2015 due process complaint notice, the student returned to the 15:1 special class placement specified on the October 2014 IEP as his pendency placement (see, e.g., Tr. pp. 119, 162, 285, 431, 451, 1641, 2214-15; Parent Exs. A at p. 6; B at p. 6; JJJJ; HHHH at pp. 1-5). On February 25, 2015, the parent filed an amended due process complaint notice (Parent Ex. B).

On April 13, 2015, the CSE convened and reviewed the "updated academic evaluation" conducted by the district, physician reports submitted by the parent, and additional "out of district program letters" (Parent Ex. E at p. 1). According to CSE meeting minutes, the "BOCES team" determined that another BOCES program was appropriate for the student (id. at p. 2). The BCBA, retained by the district to "conduct an FBA/BIP" of the student suggested continuing BCBA support of "one full day a week, or two half days a week for one to two months, to train the staff," and that, after that time, a "one time a month consult [wa]s recommended" (id.). The CSE recommended placement in a BOCES 6:1+1 special class with the support of a 1:1 aide, related services of speech-language therapy and counseling, parent counseling and training support, a BIP, and BCBA support as detailed above (id. at pp. 2, 10-11). The parent again declined the CSE recommended placement based upon the length of travel to the BOCES placement, the lack of a definitive plan for the BCBA, and the lack of an autism-specific program at that school (id. at p. 2). The parent also submitted a request for a speech-language independent educational evaluation (id.; see Dist. Ex. 34). On April 29, 2015 and again on June 2, 2015, the CSE convened to review updated evaluations recommended in the previous CSE meetings and, at neither point, did the CSE recommend changes to the program or services set forth on the April 13, 2015 IEP (Dist. Exs. 37 at pp. 1-2, 12-13; 42 at pp. 1-2, 11). A manifestation determination review team convened on June 8, 2015 to review the student's behavior that resulted in a five-day suspension and found that the student's misconduct related to his disability (Dist. Ex. 46; see Parent Ex. JJJJJJ).

Turning to the student's second grade year, on April 29, 2015, the CSE convened to develop the student's program for the 2015-16 school year (Parent Ex. D at p. 1). Staff working with the student noted considerable improvements in his behavior (id. at p. 2). Specifically, staff reported that the student was still self-directed but required less prompting; no longer sat at a separate table and had moved to sitting with his peers; was much more receptive to his "work/play chart;" stayed with the group more often; was transitioning more and was more engaged; and that the student was "a lot more verbal" (id.). The student's counselor also noted that the student's behaviors had improved and that he was much easier to redirect, and that he could "attend to task, listen[] and follow[] directions" (id.). According to CSE meeting minutes, the school psychologist reported a decrease in all behaviors from February through April (id.). For the 2015-16 school year, the CSE recommended a summer BOCES program and, for the 10-month portion of the school year, placement in a 15:1 special classes for academics, with a 1:1 aide, along with related services of speech-language therapy, counseling, parent counseling and training, OT (monitoring), and a daily language program (id. at pp. 3, 12-15). The CSE also recommended BCBA support to train staff (id. at p. 13).

A. Due Process Complaint Notice

In a second amended due process complaint notice, dated May 7, 2015, the parent argued that the district denied the student "special education and related services" and failed to provide the student a free appropriate public education (FAPE) for the 2013-14 and 2014-15 school years, and "failed to recommend an appropriate program" for the 2015-16 school year (Parent Ex. A at pp. 1, 8).[5, 6]

With respect to the 2013-14 school year, the parent contended that, although the district was provided with the May 2013 neuropsychological evaluation report, which "diagnosed [the student] with autism," immediately after it was completed, the district failed to change the student's disability classification to autism until the November 2013 CSE meeting, six months later (Parent Ex. A at pp. 2, 8). The parent also alleged that, after the student was classified with autism, the district failed to recommend a program that was appropriate to address the student's needs; in particular, the parent asserted that, although the report recommended a small class for instruction, the district recommended placement in an inappropriate 15:1 special class for half of the student's school day, with no special education supports for the remainder of the day (id. at pp. 2). The parent further asserted that, although the parent requested an "independent [FBA] on November 7, 2013, the CSE unreasonably delayed this request . . . , during which time the [s]tudent's behaviors continued to impact on his educational program" (id. at pp. 8-9). The parent also contended that the December 2013 FBA and BIP were deficient as they did not comply with the requirements set forth in State regulations (id. at pp. 3-4, 8, 10). Similarly, the parent also asserted that the CSE "failed to consider strategies, including positive behavioral interventions[,]. . . supports and other strategies to address the [s]tudent's disruptive behavior" (id. at p. 10). The parent further argued that the district sought to change the student's placement without having conducted an appropriate FBA or having developed or implemented an effective BIP (id. at p. 4).

As to the 2014-15 school year, the parent claimed that, at the June 2014 CSE meeting, the district "failed to recommend additional consultations with a BCBA to ensure that the Student's behaviors were being appropriately addressed," and this resulted in the inconsistent implementation of the BIP and behavioral regression during the 2014-15 school year (Parent Ex. A at pp. 4-5, 10-12). The parent argued that, in November 2014, the student's placement was changed to a general education classroom in math, science, and social studies, but that these changes were not memorialized in an IEP and "no transition support services were provided to assist the Student with this change"; furthermore, the parent asserted that the district failed to make changes to the student's BIP as needed as a result of the change in his placement (id. at pp. 5, 11). The parent claimed that, although district staff acknowledged the difficulties the student was having in the general education program, the November 2014 CSE did not change the student's placement (id. at p. 5). The parent further claimed that the CSE failed to consider the May 2013 neuropsychological evaluation that recommended a small class size for the student and a program that "should address his needs related to autism" when it recommended placement in a general

[5] As noted above, the parent filed the original due process complaint notice on January 26, 2015, which he amended on February 25, 2015 (Parent Exs. B; C).

[6] As discussed below, the parent's claims related to the 2015-16 school year are not at issue in this appeal, and the claims raised by the parent pertaining to the 2015-16 school year will not be further detailed.

education classroom setting for the 2014-15 school year (id. at p. 9). The parent also contended that the January 20, 2015 CSE failed to recommend an updated FBA and BIP be conducted after a manifestation determination review team determined the student's behaviors were related to his disability (id. at pp. 5-6, 9). The parent additionally argued that the April 13, 2015 CSE failed to obtain and review evaluations recommended at the January 29, 2015 CSE meeting prior to recommending placement in an 6:1+1 special class program (id. at p. 9). The parent claimed that the CSE also failed to address the student's reliance on his 1:1 aide in an FBA or BIP (id.). The parent also claimed that the CSE's recommendation for a 6:1+1 special class in a BOCES program at the April 13, 2015 CSE meeting was inappropriate due to the distance from the student's home, its lack of an appropriate "autism program," and its lack of opportunities for the student to interact "with typical peers" (id. at p. 11). The parent claimed that the recommendation for home instruction violated the least restrictive environment provision (id. at p. 11). The parent also claimed that the CSE predetermined decisions regarding the recommendations for "home instruction and alternate placement" and failed to discuss less restrictive options (id. at p. 12).

The parent also raised numerous claims without specifying the particular time frame or IEP to which they related. The parent claimed that the CSE(s) failed to obtain sufficient evaluative information and recommend a program that "addressed the [s]tudent's autism," including the use of appropriate methodologies (Parent Ex. A at pp. 9, 11). Specifically, the parent claimed that district failed to obtain an assistive technology evaluation of the student and the student did not receive assistive technology devices or speech-language services to address a "severe articulation disorder" identified by the CSE (id. at pp. 2, 9-10). The parent also asserted that the CSE(s) failed to obtain an "adaptive physical therapy" evaluation of the student (id. at p. 9). The parent also argued that the CSE(s) failed to recommend appropriate amounts of OT to address the student's sensory needs (id. at p. 10). The parent asserted that the CSE(s) failed to recommend a program that included "appropriate accommodations" or parent counseling and training for the 2013-14 and 2014-15 school years (id.). The parent next claimed that the CSE(s) failed to identify on the student's IEPs that "removal to a time out room was part of his [BIP]" and that the district failed to ensure that "removals to [the] time out room were in accordance with" State regulations (id. at p. 11). The parent further claimed that the CSE(s) failed to "identify the [s]tudent's present levels of performance in the areas of social/emotional and management needs" (id.). In addition, the parent argued that the CSE(s) failed to recommend specific transportation requirements (id.).

As for relief, the parent requested: (1) an independent FBA be conducted and BIP developed by the private agency; (2) the CSE reconvene to develop "appropriate recommendations," including, an 8:1+1 special class, a 1:1 aide, and social skills training; and (3) compensatory education services in the form of 180 hours of instruction with a special education teacher "trained in autism," and 60 hours of speech-language services (Parent Ex. A at pp. 13-14).

B. Impartial Hearing Officer Decision

On September 15, 2015, the parties proceeded to an impartial hearing, which concluded on February 9, 2016, after eleven days of proceedings (see Tr. pp. 1-2237). In a decision dated February 13, 2017, the IHO concluded that the district provided the student a FAPE for the 2013-14 school year but that it failed to provide the student a FAPE for the 2014-15 school year (IHO

Decision at pp. 49-55).[7] As to the 2015-16 school year, the IHO found that because "the parent only request[ed] a finding of a denial of a FAPE for the 2013-2014 and 2014-2015 school years" in his post-hearing brief, "the parent ha[d] withdrawn [his claim] that the student was denied a FAPE for the 2015-2016 school year" (id. at pp. 7-8 n.1).

For the 2013-14 school year, the IHO determined that, although the district failed to promptly "consider [the May 2013 neuropsychological evaluation report] and change the student's classification from speech or language impairment to autism when it received the evaluation," and that this failure constituted a procedural error, this error did not rise to the level of a denial of a FAPE because the speech or language impairment classification "continued to be applicable," and the district changed the student's classification within a few months (IHO Decision at pp. 49-50). Regarding parent counseling and training, the IHO found that the district's failure to provide parent counseling and training did not result in a denial of FAPE, especially since the parent was in regular contact with district staff concerning "the student's program and progress," the CSE met on a regular basis to review the student's program, and the district hired the private agency to provide behavioral supports, which lessened the student's interfering behaviors (id. at p. 50). The IHO found that the district's use of a "separate room" did not deny the student a FAPE, as the record established that the student engaged in maladaptive behaviors and, while the IEP did not "expressly provide for" the use of such a room, because the parent was "aware[] of the use of the space" and the room was referred to in the student's BIP and the private agency's removal protocols, its use did "not constitute a deviation from substantial or significant provisions of the student's IEP in a material way" (id. at pp. 50-51).

Next, the IHO found that the parent's claims "that the district failed to provide appropriate modifications, supports and accommodations" were not supported by the hearing record (IHO Decision at pp. 51-52). The IHO also found that the district addressed the student's sensory needs (id. at p. 52). The IHO further found that the 15:1 special class was appropriate for the 2013-14

[7] The length of time it took the IHO to issue a decision in this case is a concern. When a parent files a due process complaint notice, 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]). 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]). Pursuant 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]). In this case, the IHO failed to explain why she determined the record close date to be January 30, 2017, almost one year after the hearing concluded, and over nine months after the parties submitted their post-hearing briefs (IHO Decision at p. 1; IHO Exs. II at p. 29; III at p. 29). While the IHO noted that "[e]xtensions of the compliance date were granted due to witness availability, receipt of the final transcript, writing and submission of the closing briefs by both parties and time to review the transcripts, evidence and closing documents and render a decision" (IHO Decision at p. 7), the IHO failed to include any documentation relating to her granting of the parties' extension requests in the hearing record as required by State regulations (8 NYCRR 200.5[j][5][i], [iv], [vi][c]). Furthermore, the timeframe within which a decision must be rendered is a regulatory requirement regardless of the length of the hearing record (8 NYCRR 200.5[j][5]). The IHO is reminded that she is required to abide by the regulatory requirements governing the timelines within which impartial hearings must be conducted and IHOs must issue decisions.

school year, that the student made academic progress while in the 15:1 special class, and the program addressed his academic and speech-language needs (id. at pp. 52-53).

For the 2014-15 school year, the IHO found that the student's placement in a 15:1 special class combined with the general education setting was not appropriate to address the student's behavioral needs, and found that the student "required a consistent and smaller student to teacher ratio class" (IHO Decision at pp. 53-54).[8] The IHO found that, although the student was less aggressive and more attentive when he received medication to address his ADHD, it was inappropriate to keep the student in a 15:1 special class when there was "evidence that he was more successful in a smaller class size" (id. at pp. 54-55). The IHO also found that the BOCES programs recommended by the district were inappropriate because of their distance from the district, that "the student simply could not handle the long ride" because of his ADHD and autism diagnoses, and that there were smaller class ratios available within the district (id. at p. 54).

For relief, the IHO found that compensatory services were warranted as a result of the district's failure to provide the student with a FAPE for the 2014-15 school year (IHO Decision at p. 56). The IHO determined the student should "receive tutoring to address the lack of an appropriate program for the 2014-15 school year," found that the Huntington Learning Center (HLC) identified by the parent was "an appropriate service to provide the tutoring," and awarded 100 hours of compensatory tutoring at HLC "considering the student's academic delays" (id. at pp. 56-58). The IHO further directed the CSE to reconvene "to develop an appropriate program and placement, with appropriate behavioral supports" (id.). However, the IHO found that there was no evidence in the record "to support an award of 60 hours of [speech-language therapy s]ervices" (id. at p. 57).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO incorrectly found that the student was denied a FAPE for the 2014-15 school year and erred in awarding the parent compensatory education services. The district claims that placement of the student in a general education class on a "trial basis" between September 2014 and November 2014 was reasonably calculated to enable the student to make progress, despite the fact that the placement was ultimately not successful. The district also argues that it "logically chose to maintain" the student's placement in a general education class between November 2014 and January 2015 while it attempted to find a placement that was able to address the student's behavioral needs. Additionally, the district contends that the IHO incorrectly found that the student was expelled, and asserts that it recommended home instruction until it could determine an appropriate therapeutic placement, rather than return the student to a 15:1 special class that would not be able to address safety concerns regarding the student's behaviors.

The district next argues that the IHO incorrectly determined that the 15:1 special class placement was not appropriate for the student between January 2015 and April 2015 because the student was in a 15:1 special class as a result of pendency. The district asserts that the IHO acknowledged the CSE's recommendation for an 8:1+1 special class placement in a BOCES

[8] The IHO also noted the escalation in the student's behaviors during the 2014-15 school year, ultimately resulting in suspensions and expulsion (IHO Decision at p. 53).

program was warranted and that the IHO erred finding that the recommended BOCES program was inappropriate because of its distance from the district. The district argues that the hearing record contains no evidence indicating the student could not have tolerated a bus ride of that length. The district further argues that the IHO incorrectly found that there were smaller special class placements available in the district and that the only other special class placement option in the district was a 12:1+1 special class that was not appropriate for the student. The district next asserts that, even though the IHO premised her determination that the recommended BOCES programs were not appropriate based on their distance from the district, the 6:1+1 special class in a BOCES program recommended between April 2015 and June 2015 was a reasonable distance from the student's home.

The district asserts that the IHO erred in awarding compensatory education services in the form of HLC tutoring. The district claims that the hearing record does not support an award of compensatory services both because the student made meaningful gains during the 2014-15 school year and because the hearing record does not indicate that the services recommended by HLC were appropriate to address any denial of a FAPE. Finally, the district claims that the IHO erred in not dismissing the parent's claims relating to the 2015-16 school year with prejudice.[9]

In an answer and cross-appeal, the parent responds to the district's request for review by asserting admissions and denials, and requests that the IHO's decision that the district denied the student a FAPE for the 2014-15 school year be upheld. The parent also maintains that the IHO did not err in not dismissing his claims relating to the 2015-16 school year claims with prejudice. In the cross-appeal, the parent asserts that the IHO erred in not finding that the district denied the student a FAPE for the 2013-14 school year and in not awarding the parent the full amount of compensatory educational services requested. The parent also raises additional bases on which he asserts the IHO should have found a denial of a FAPE for the 2014-15 school year.

Regarding the 2013-14 school year, the parent claims the IHO erred in not finding a denial of a FAPE because the district's failure to review the May 2013 neuropsychological report prevented the district from conducting an FBA or developing a BIP at the beginning of the year. The parent also asserts that, if the district had reviewed the report earlier, it would have identified the student as a student with autism and the student or parent would have been entitled to receive transitional support services and parent counseling and training. The parent also argues that the district did not address the student's problems with transitions, which resulted in escalation of his behavioral difficulties. The parent also claims that the student was "deprived of significant educational benefit and opportunity due to the repeated use of an illegal timeout room," the use of which reinforced the student's "negative behaviors." The parent specifically contends that the "calm room" utilized by the district met the definition of a timeout room, that the use of the room was not memorialized on the student's IEPs," that the parent was not shown the room until May 2014, and that the maximum amount of time the student was to be in the calm room was "never

[9] The district concedes in the request for review that it did not timely serve a notice of intention to seek review upon the parent. Although the parent requests that the district's request for review be dismissed, the parent does not raise any allegation of prejudice related to the district's untimely service and was granted an extension of time to answer the request for review. Accordingly, I exercise my discretion to accept the district's request for review notwithstanding its failure to timely serve the notice of intention to seek review (8 NYCRR 279.2[f]).

determined or documented." The parent also claims that the district's failure to offer smaller special class ratios in the public school violated its obligation to offer a continuum of services and resulted in the student's inappropriate placement in a 15:1 special class, an "inappropriate mainstream class," and the district recommending the student's placement in "an overly-restrictive offsite BOCES placement," denying the student a FAPE.[10] Next, the parent argues that the district failed to address the student's sensory needs.

With respect to the 2014-15 school year, in addition to the denial of a FAPE identified by the IHO, the parent claims that the district's removal of BCBA support services resulted in significant increases in the student's "negative behaviors." Furthermore, the parent claims that the CSE reduced the support provided to the student by placing him in a general education class for all subjects except ELA.

With respect to both the 2013-14 and 2014-15 school years, the parent claims that the district impermissibly predetermined aspects of the student's program, depriving the parent of his right to participate in the development of the student's program.

As for relief, the parent claims that the IHO erred in not awarding the full 135 hours of services recommended by HLC, and that such an award would allow the student "to make up the skills necessary to perform on grade level."

In an answer to the parent's cross-appeal, the district responds to the parent's allegations, asserts that the IHO properly determined that the student was not denied a FAPE for the 2013-14 school year, and requests that the parent's cross-appeal be dismissed. The district also contends that the parent's claim of predetermination was not raised in the due process complaint notice and is without merit in any event.

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,

[10] While this argument is identified as a claim related to the 2013-14 school year, the student was not placed in a general education class or recommended to attend a BOCES program until the 2014-15 school year.

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).

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; see Endrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 998-1001 [2017] [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

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).

VI. Discussion

A. Preliminary Matters—Scope of Review

1. 2015-16 School Year Claims

The district alleges that the IHO erred by not expressly directing that the parent's claims regarding the 2015-16 school year were dismissed with prejudice. Review of the IHO's decision reflects that the IHO noted that, although the parent's amended due process complaint notice alleged that the district denied the student a FAPE for the 2015-16 school years, the parent's post-hearing brief requested a finding of a denial of a FAPE for the 2013-14 and 2014-15 school years only; as a result, the IHO found that the parent had withdrawn his claim that the student was denied a FAPE for the 2015-16 school year (IHO Decision at pp. 7-8 n.1).

Although the IHO characterized the parent's claim as "withdrawn," State regulations do not explicitly deal with withdrawal of individual claims in a due process complaint notice. Moreover, even if State regulations applied in this instance and the parent explicitly sought to withdraw his claims relating to the 2015-16 school year, the IHO could not have dismissed the matter with prejudice absent a request from the district, notice to the parent, and provision of an opportunity for the parent to be heard (8 NYCRR 200.5[j][6][i]-[ii]).

The IHO may have more aptly characterized the parent's claim relating to the 2015-16 school year as abandoned. To the extent the district asserts that the parent abandoned his claims relating to the adequacy of the April 29, 2015 IEP by not raising them in his post-hearing brief, I agree, and note that the parent has not raised any arguments relating to these claims on appeal (8 NYCRR 279.8[c][4]; see N.B. v. New York City Dep't of Educ., 2016 WL 5816925, at *4 [S.D.N.Y. Sept. 29, 2016]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *14 [S.D.N.Y. Feb. 20, 2013]). Accordingly, as these claims are not raised for review, there is no reason to determine prospectively in this proceeding whether the parent is precluded from asserting them in a subsequent proceeding (cf. K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *4-*5 [S.D.N.Y. Jan. 13, 2012] [finding that the doctrine of res judicata precluded relitigation of issues]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006] [same]).

2. Predetermination

In his cross-appeal, the parent claims that the district's "predetermination of programing" impeded his ability to participate in the development of the student's programs for the 2013-14 and 2014-15 school years, and provides several bases for this claim. In particular, the parent asserts that the district: failed to inform the parent how long the student would remain in the timeout room;

never identified the role the private agency would serve during the 2014-15 school year and predetermined its recommendation to terminate such services; failed to provide the parent with information about the distance to the recommended BOCES programs; and failed to provide parent counseling and training. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[c][2][E][i][I]; [f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 849-50 [2d Cir. Dec. 30, 2015]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]). The only claim of predetermination raised in the parent's due process complaint notice asserted that the CSE failed to consider or discuss less restrictive options when it recommended "home instruction and [an] alternate placement" (Parent Ex. A at p. 12).[11] Therefore, the parent's arguments related to predetermination are dismissed.

3. Transition Needs

The parent also argues that, if the district "addressed [the student's] problems with transitioning from the start of kindergarten, his behavioral escalations could have been prevented." As an initial matter, with respect to the parent's reference to the phase "transition support services," in his Request for Review, the parent appears to confuse a specific requirement in State regulation with the student's difficulties in transitioning between activities. Transitional support services are defined by State regulation as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). Transitional support services are required by State regulation to be included on a student's IEP when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement," and consist of "a special education teacher with a background in teaching students with autism [who] shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). While the parent refers to transition support services several times in his Request for Review, when read in context, the parent's arguments relate more to the student's needs with respect to transitioning from class to class in school and the district's failure to address those needs.

In the due process complaint notice, the parent's original claim did reference the State regulation described above, stating that the CSE failed to "recommend appropriate transition[al] support services . . . when [the student] transferred from his special class into the general education setting" as required by 8 NYCRR 200.13 (Parent Ex. A at pp. 5, 11). However, the parent's arguments on appeal relate to the student's needs transitioning from class to class during the school day and, therefore, were not properly raised in his due process complaint notice and are dismissed (see 20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i],

[11] To the extent the parent also raised these claims on appeal on the merits in addition to as claims of predetermination, they are discussed in further detail below.

[j][1][ii]). However, the student's difficulties with transitions will be discussed below to the extent relevant to the broader discussion of the student's behavioral needs.

B. 2013-14 School Year

1. Consideration of Evaluative Material

The parent claims that the district failed to review the May 2013 neuropsychological report prior to the beginning of the 2013-14 school year and, if not for this failure, the district could have developed "behavioral interventions from the start of kindergarten"; specifically, the parent claims that a review of this evaluation "should have prompted" the district's completion of an FBA at the beginning of the school year. The parent also claims that the parent could have been provided parent counseling and training if the evaluation had been reviewed earlier and the student's eligibility classification changed to autism.

In developing the recommendations for a student's IEP, the CSE must consider: the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). It is well settled that a CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]).[12]

Here, it is not disputed that the district failed to review the May 2013 neuropsychological evaluation until the November 2013 CSE meeting. The CSE chairperson testified that the district had the evaluation available in July 2013 but that the CSE did not review it until the November 2013 CSE meeting, at which time the student's classification was changed to autism (Tr. pp. 59, 64, 66-67; see Dist. Ex. 6 at pp. 1-2).[13] Furthermore, the district conceded that "it was error not to consider [the May 2013 neuropsychological] evaluation at a more timely meeting in September, 2013" (IHO Ex. III at pp. 18-19).

Given the district's concession and the evidence in the hearing record, there is no reason to disturb the IHO's determination that the district's failure to consider the May 2013 neuropsychological evaluation at an earlier CSE meeting amounted to a procedural violation. However, such a violation could amount to a finding that the district denied the student a FAPE only if the procedural inadequacy (a) impeded the student's right to a FAPE, (b) significantly

[12] On the other hand, "[c]onsideration does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord [a] private evaluation any particular weight" (S.W. v. New York City Dep't of Educ., 92 F. Supp. 3d 143, 158 [S.D.N.Y. 2015]; see T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]).

[13] While neither the November 2013 IEP or the corresponding prior written notice specifically identify that the May 2013 neuropsychological evaluation was reviewed at the CSE meeting, the November 2013 CSE meeting minutes indicated that the CSE "reviewed an independent evaluation that the parent presented, which included a diagnosis of [a]utism," and the CSE "recommend[ed] changing classification to [a]utism" (Dist. Ex. 6 at pp. 1-2, 3; Parent Ex. MMM).

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]). The extent to which this procedural violation may contribute to a determination that the district failed to offer the student a FAPE for the 2013-14 school year as a result of its correlation to the timing of the district's completion of an FBA or the CSEs' failure to include parent counseling and training on the student's IEPs, as the parent alleges, will be examined below.

2. 15:1 Special Class and Supports for Behavioral and Sensory Needs

In his cross-appeal appeal, the parent claims that the district's failure to offer a full continuum of services, meaning a variety of special classes with different student-to-teacher ratios, limited the student's options for placement to an "inappropriate and illegal 15:1 class, an inappropriate mainstream class, or an overly restrictive off-site placement." In addition, the parent argues that the procedural violation described above, relating to the district's failure to consider the May 2013 neuropsychological report until November 2013, resulted in the district's failure to develop "behavioral interventions" or complete an FBA from the beginning of the school year. The parent further argues that the district failed to address the student's sensory needs and failed to conduct an OT evaluation until February 2014.

As to the parent's contention that the district was required to provide a more diverse selection of special classes beyond the 15:1 special class and a 12:1+1 special class that were available at the district elementary school (Tr. pp. 163, 165-66), federal and State regulations require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). Federal regulation provides that the continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]). For special classes, State regulation sets forth maximum class sizes, as well as the number of teachers and supplementary school personnel assigned to each class, varying based on students' management needs and needs for specialized instruction, which include 15:1 (or 12:1), 12:1+1, 8:1+1, 6:1+1, and 12:1+4 special classes (8 NYCRR 200.6[h][4]). However, there is no requirement in the IDEA or federal or State regulation that the district itself operate all alternative placements on the continuum or all different varieties of special classes defined in State regulation or that a district create a new placement specifically to serve the needs of one student (see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 165-66 [2d Cir. 2014] [noting that "[t]he continuum may instead include free public placements at educational programs operated by other entities, including other public agencies or private schools."]). Moreover, the hearing record does reflect that, while the district may not have itself operated every ratio of special class contemplated by State regulation, it had available a variety of alternative placements on the continuum, including general education classes, special classes, and special schools, including different special class ratios at BOCES programs located in neighboring school districts (see Tr. p. 166; Parent Exs. E at pp. 10, 13; F at pp. 11, 14).

Regarding the parent's argument that the 15:1 special class was inappropriate. State regulation provides that a 15:1 special class placement is intended to address the needs of students

"whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]). Here, the hearing record shows that, for the 2013-14 school year, the CSE initially recommended the student for placement in a 15:1 special class for ELA, math, science, and social studies, and general education for the remainder of the school day (Parent Ex. P at p. 8).[14]

At the time of the student's initial CSE meeting in April 2013, the student was attending a full-day, non-integrated 12:1+4 special class for preschool (Tr. p. 49; Parent Ex. P at p. 1). The CSE chairperson testified that the student's academic abilities were in the average range, as was his IQ (Tr. pp. 41-42). However, the student's social and "management" needs were delayed and the student had been diagnosed as having seizures (Tr. p. 41). The CSE chairperson reported that, at the CSE meeting, she discussed the options that were available to the student, as she did with the families of all incoming preschoolers (Tr. p. 52). The CSE chairperson explained that one of the options was a "more restrictive" BOCES setting (id.). However, she recalled that the parent wanted the student to remain "in-district" and, therefore, the committee discussed in-district options for the student and ultimately recommended him for placement in the 15:1 special class, along with related services (Tr. pp. 52-53). The CSE chairperson testified that, by the end of the CSE meeting, the whole committee was in agreement with this recommendation (Tr. p. 54). In addition, according to the CSE chairperson, the committee determined that the student did not require an FBA or BIP because the 15:1 class was a special class and the teacher was able to "modify, put in behavior supports" (id.). The CSE chairperson further reported that, at the time, the special education kindergarten teacher and the committee as a whole did not think that an FBA was needed for the student (id.). The April 2013 CSE meeting minutes noted that the student followed routines and "transitioned from activities well," related appropriately to both adults and peers, and received play therapy that focused on turn-taking and appropriate social behaviors (Parent Ex. P at p. 2). However, the present levels of performance indicated that, with respect to social development, the student demonstrated social and emotional levels below age level expectations, had difficulty interacting with peers, and needed to learn to communicate with peers, as well as cope with disappointments in a socially appropriate manner (id. at p. 5). With respect to behavior, the IEP stated that the student demonstrated occasional tantrums when not given his way and that the student was impulsive and required frequent reminders to focus (id.). The CSE chairperson acknowledged that, at the end of the CSE meeting, she "had a question in [her] mind as to whether or not" the recommended placement was appropriate (Tr. p. 56). However, she stated that the CSE recommended the 15:1 special class placement because it was always trying to place students in the least restrictive environment and the CSE was trying to honor the parent's request to keep the student in the district (id.).

The district special education teacher testified that she also participated in the student's initial CSE meeting in April 2013 (Tr. pp. 546-47, 621). She stated that, based on what she heard at the meeting, she believed that the student would be a good fit for her 15:1 kindergarten class (Tr. pp. 621-22). She could not recall any discussion at the time of the meeting regarding whether

[14] Although the student's IEP stated that he would not participate in general education programs and required special instruction in an environment with a smaller teacher-to-student ratio (Parent Ex. P at p. 10), the CSE chairperson testified that the April 2013 CSE recommended the student for a 15:1 special class for ELA, math, science, and social studies but that the student would not be in a special class setting for physical education, art, music, lunch, and recess (Tr. pp. 52-53).

or not the student required a BIP (Tr. p. 548). Similarly, the school psychologist testified that she was present at the student's initial CSE meeting (Tr. p. 339). The psychologist reported that she had conducted an updated cognitive evaluation of the student at his preschool in spring 2013 (Tr. p. 337). According to the school psychologist, the student had some language and articulation deficits and his verbal IQ was weaker than his nonverbal IQ (Tr. p. 338). The school psychologist noted that the student had behavioral difficulties in preschool but that his behavior had greatly improved by the time of the meeting (id.). The school psychologist recalled that the CSE felt the student's behavioral needs could be addressed in the 15:1 special class setting (Tr. p. 340).

The parent's testimony regarding the April 2013 CSE meeting shows that he was generally in agreement with the student's needs as identified by the April 2013 CSE (see Tr. pp. 1671-1701). However, he noted that the student's preschool teacher expressed concern about the student going from a 12:1+4 special class to a 15:1 special class, specifically that the class might be too large for the student (Tr. pp. 1460-62). The parent opined that the CSE ultimately recommended the student for placement in a 15:1 special class because that was the only thing available in the student's local district elementary school (Tr. p. 1462).

The student's special education teacher and the parent agreed that the student started out doing well in the 15:1 academic special classes. According to the parent, the student started off the 2013-14 school year "very strongly" and the strong start lasted for a couple of weeks (Tr. pp. 1465, 1709-10). The student's special education teacher testified that the student initially did well within the special class setting, which was smaller than the mainstream setting (Tr. p. 548). She explained that the student "pretty much complied," did his work, and behaved much like the other special class kindergarten students (Tr. pp. 548, 552-53). The special education teacher recalled that the student was responding well to the behavior systems in place in her classroom (Tr. pp. 552-56; Dist. Ex. 58 at p. 2). However, she was aware that the student was having difficulty in the larger mainstream setting (Tr. pp. 552-53).

The hearing record shows that, by the second week in September 2013, the student was engaging in disruptive behaviors in speech-language therapy and in the general education setting such as playing/hiding under a table, kicking students and staff, and putting inedible objects in his mouth (Parent Ex. HHHHH at pp. 6, 27-29). While the parent reported that the student started off the school year "very strongly," he also reported that the student began acting out soon after the school year began (Tr. p. 1466). He reported that the student would start out humming or tapping a pencil and then move to kicking or tipping a chair over (Tr. p. 1466). The parent recalled that during this time (September 2013), he was being contacted by the district two to three times per week (Tr. pp. 1466-67; see Dist. Ex. 63 at p. 1). He also testified that the student was being sent to a time out room for an indeterminate amount of time (Tr. pp. 1467-69). The school psychologist reported that the student had a "a couple of incidents in September" and noted that the district set up a program review in October to address "anything that wasn't being addressed at the time" (Tr. p. 353). She reported that things had been "put into place" and the student was doing "pretty much overall okay behaviorally" (Tr. pp. 355-57). Although the CSE met in October 2013 and determined that strategies had been put in place "for all areas of the [student's] day," and the student was not exhibiting the same behaviors as he did at the beginning of the school year, the student's father opined that the student was not adjusting well to the 15:1 special class in the public school (Tr. p. 1474). The parent reported that he verbally requested an FBA and the support of a BCBA and 1:1 aide for the student at the October 2013 CSE meeting (Tr. p. 1477).

By November 2013, the student's acting out behaviors began to escalate in his 15:1 academic special classes (Tr. p. 556). According to the special education teacher, the student's behaviors increased greatly; the student would run around the room, throw objects, and generally engage in behaviors that required additional adult assistance to make her classroom safe (Tr. pp. 556-57, 561). The special education teacher reported that, while the student had initially responded to a star chart and alternating work demands with play breaks, in November 2013, the student was no longer able to be redirected (Tr. p. 559). Despite the student's behavior, the special education teacher reported that the student had the academic ability to perform typical kindergarten academic tasks (Tr. p. 562). The school psychologist confirmed the special education teacher's account of the student's behavior at school. She reported that, by November 2013, the student's behavior started to increase and the district needed to put something "a little bit more substantial in place for him" (Tr. p. 359). She noted that the student was exhibiting aggressive behaviors like hitting, kicking, and spitting (id.). According to the student's father, by November 2013, the district was not managing the student's behavior except through removal to the time out rooms (Tr. pp. 1482-83). The parent reported that there were no supports for the student in the general education setting (Tr. p. 1492).

By the time the CSE reconvened in November 2013, the student had engaged in an additional "five major incidences" of physical aggression in school (Dist. Ex. 6 at p. 1). The CSE chairperson testified that the November 2013 CSE recommended that an FBA be conducted and a BIP developed because the student was not "responding to the things that were in place in the classroom and the building" (Tr. p. 67; Dist. Ex. 6 at pp. 1-2).

According to his testimony, the parent presented a letter to the November 2013 CSE that memorialized in writing the things that he had verbally requested at the October 2013 CSE meeting (Tr. p. 1478; Dist. Ex. 4). In the letter, the parent stated that he had requested several meetings to address his concerns regarding the student's educational needs (Dist. Ex. 4). He noted that the student had been having ongoing behavioral difficulties and struggling in school and that he (the parent) was requesting the following: a clarification of classification; a significant change in placement classification; an IEE; an FBA and adaptive behavior scale assessment; the administration of autism diagnostic assessments; and copies of ABC data sheets (if already in use) (id.). The parent indicated that his request was based on previously submitted diagnoses of autism and pervasive developmental disorder and the student's behavior (id.). The parent asserted that the student's behaviors were unrelated to his then-classification of speech or language impairment and, further, that the student's constant removals from class and school were preventing the student from receiving a FAPE (id.). With respect to the requested "significant change in placement classification" (id.), the parent testified that, given the student's removal from class on a daily basis, missing out on all of his academics, and being sent home two to three hours early, two to three days a week, he felt this "was a significant change in [the student's] classification" (Tr. p. 1479). The parent further testified that the student's classification was 15:1 "and that certainly wasn't what he was getting" (Tr. pp. 1479-80).

The November 2013 CSE reviewed the results of the May 2013 independent neuropsychological evaluation, provided by the parent, and changed the student's classification to autism (Dist. Ex. 6 at pp. 1-2; see Parent Ex. IIII). The CSE also recommended that an FBA (including an adaptive behavior scales assessment and ABC data sheets) be conducted (Dist. Ex. 6 at p. 2). As described above, in his cross-appeal, the parent asserts that, had the CSE reviewed

this evaluation sooner, the district would have conducted an FBA of the student prior to the commencement of the 2013-14 school year. Despite the district's concession that the May 2013 neuropsychological evaluation should have been considered prior to the November 2013 CSE meeting, the evidence in the hearing record does not support the parent's claim that an earlier review would have prompted the district to conduct an FBA at that time. Although the neuropsychological evaluation noted that the student had "some" behavioral issues including defiance of authority, physical aggression, tendency to destroy property, and lack of guilt after misbehaving it appears that these behaviors were largely reported by the parent, and not by the student's teacher (see Tr. pp. 1031-38; Parent Ex. IIII 5-8, 12-13). According to the evaluator, completion of the Connors Early Childhood – Teacher by the student's preschool special education teacher yielded indices scores primarily in the average range, suggesting typical levels in each area (Parent Ex. IIII at p. 5). Based on the teacher's responses, the evaluator noted a slight elevation on the index of defiant and aggressive behavior and also on the index of restlessness and impulsivity (id. at pp. 5, 13). Moreover, the teacher's responses on the Gilliam Autism Rating Scale- Second Edition (GARS-2) indicated that the observed level of stereotyped behaviors, communication difficulties, and social interaction difficulties were within the extremely low range and that a diagnosis of autism would be unlikely based on these observations (Tr. pp. 1036, 1389; Parent Ex. IIII at p. 7). Thus, even if the neuropsychological evaluation had been reviewed earlier than November 2013 by the CSE, such a review, in and of itself, would not show that any delay in conducting an FBA resulted in a denial of a FAPE to the student.

However, by the November 2013 CSE meeting, the student's teachers were reporting a significant increase in the student's behaviors. According to the November 2013 CSE meeting minutes, the special education teacher reported to the committee that the student was not responding to the classroom behavior plan and that the student had started taking items off the shelves (Dist. Ex. 6 at p. 1). The regular education teacher reported that "there [were] no known cause[s]" to the student's behaviors at that point (id. at pp. 1-2). Additionally, the regular education teacher reported that the student was in some instances very difficult to redirect and also exhibited bolting behavior (id. at p. 2). According to the present levels of performance recorded in the IEP, with respect to social development, the student occasionally became defiant when not given his way, often interacted with peers with a self-directed agenda, and sometimes had difficulty when peer interactions did not go his way (compare Dist. Ex. 6 at p. 5, with Dist. Ex. 58 at p. 5).

Based on the recommendations of the November 2013 CSE, in December 2013, the district school psychologist conducted an FBA and developed a BIP, which was implemented in January 2014 (Tr. pp. 70-72, 361-67; Parent Ex. VVVV). The school psychologist testified that the plan was implemented for 12 days prior to the CSE reconvening on January 23, 2014 (Tr. p. 367-68). She reported that there was a spike in the student's behaviors and significant safety concerns for both the student and staff (Tr. p. 368). The school psychologist stated that "we needed to address things quickly. We couldn't just continue on with the plan [given the] safety concerns. They needed to be addressed right away" (id.). The special education teacher concurred that the student's behaviors had gotten worse and were escalating (Tr. pp. 563-64). She indicated that previously successful behavior management strategies were no longer working (Tr. p. 564). The special education teacher reported that the student was "having to be removed from the classroom" (id.). On January 9 and 17, 2014, the student received two suspensions for one day each for behaviors involving disruption of instruction and physical aggression towards students and/or staff (Parent Exs. FFFFF; GGGGG).

At the January 24, 2014 CSE meeting, in addition to the needs previously addressed, the student's counselor reported that the student exhibited non-compliant behavior and that "the student's behaviors have escalated to aggressive behaviors including hitting, kicking, spitting, biting, running away, etc." (Parent Ex. M at p. 2). According to the meeting minutes, the special education teacher also reported that the student's noncompliant behaviors had recently increased (id.). The regular education teacher reported that, when the student's behavior escalated, there was not always an apparent cause and that the student's behavior had been escalating since winter break; additionally, the regular education teacher noted that the student exhibited an increase in mouthing and licking of objects (id.). The minutes indicated the committee's impression that the student's behavior interfered with his academic performance in the classroom in that he was unable to attend and focus, complete academic work, and was removed from the classroom almost daily for several weeks (id.). With respect to social development, the present levels of performance in the January 2014 IEP additionally noted that the student exhibited difficulty with transitions and that the student's behaviors could escalate when he was not given his way (including running away, hitting, and kicking) (id. at p. 5).

For the first time at the January 2014 CSE meeting, the committee began to discuss the possibility of an alternate placement for the student (Tr. pp. 76, 564; Parent Ex. M at p. 2). The parent's advocate, who attended the January 2014 CSE meeting, testified that, while the parent was requesting a 1:1 aide and a sensory profile, district staff asserted that "an alternate placement was probably the best option" (Tr. pp. 788-89). According to the advocate, the special education teacher was very reluctant to try an aide and that, "across the board," the teachers insisted that the student required a different school, specifically a BOCES program located in a neighboring school district (Tr. pp. 788-89). The parent requested that the district try an aide before considering an outside placement but, according to the advocate, district staff insisted that doing something in-district was not going to make a difference (Tr. pp. 790, 792).

Although the January 2014 CSE meeting minutes indicated that the CSE was recommending the student for an alternate placement and that the parent was willing to tour a BOCES program, the student's IEP continued to reflect a 15:1 special class placement for academics, with the addition of a 1:1 aide for all classes (Parent Ex. M at pp. 2, 8). The parent explained that the CSE did not recommend the alternate placement at this meeting because he had just returned to work and would not be available to tour the recommended program for several months (Tr. pp. 1505-06). According to the CSE chairperson, in addition to the 1:1 aide, the January 2014 CSE recommended a BCBA to review the BIP developed by the district and an OT/sensory evaluation to determine the student student's sensory needs and whether he required additional supports throughout the day with regard to sensory regulation (Tr. pp. 74-75; Parent Ex. M at p. 2).

The district subsequently contracted with a private agency to conduct an FBA and develop a BIP for the student (Tr. pp. 77-80; see Tr. pp. 1133-35; Parent Ex. UUUU).[15] A March 14, 2013 progress report, generated by the private agency, indicated that, in response to initial implementation of strategies of the BIP (in February and March), the frequency of the student's aggressive behaviors, property destruction, and elopement were reduced to low to near zero, rated

[15] On February 6, 2014, the student received another suspension, this time for two days (Parent Ex. EEEEE).

daily (Parent Ex. SSSS at p. 4). According to the report, the highest frequency of problem behaviors for the prior week was for noncompliance (id.). The report indicated that, on some occasions, the student had received instruction in a 1:1 setting with his teacher assistant to increase his success and to provide staff training (id.). The report further indicated that, during the first 10 days of March, the student was able to receive the majority of his instruction integrated with peers in small groups of approximately 4-6 students and large groups of 20 students and did not require instruction in an alternate space or room (id.).

The CSE reconvened on March 17, 2014 (Parent Ex. L). The parent testified that, based on information provided by the BCBA, the student was starting to show improved behaviors (Tr. p. 1524). In addition, the CSE meeting minutes indicated that the CSE reviewed the results of an OT sensory evaluation, which included information: that there was a "definite difference" in seven of thirteen sensory categories; that the classroom teacher reported that the student was less involved with other students and more involved with the BCBA and 1:1 aide; that the student acted out in response to demands and the special education teacher reported that the student's academics had been put aside to focus on behavior; and "that when the group got larger the behaviors began" (Parent Ex. L at pp 2-3; see Parent Ex. DDDD at p. 2). The CSE concluded by agreeing to reconvene in four weeks to review implementation of the BIP, the effectiveness of the plan, and the need for an alternate placement (id. at p. 3). The CSE adopted the BIP developed by the private agency and added OT monitoring, a sensory plan, and 5 hours daily of BCBA services to implement the student's BIP and provide staff training (id. at pp. 9-10). The CSE chairperson testified that the CSE continued to encourage the parent to tour an alternate placement (Tr. pp. 250-51).

The hearing record shows that the student received in school suspension on or around March 28, 2014 (Parent Ex. HHHHH at p. 10). An April 10, 2014 progress report, completed by the private agency noted the following positive behaviors had been observed: the student was able to participate in mainstream settings with the absence of problem behaviors on several occasions; the student demonstrated successes in large group settings and in social settings frequently throughout the school day; and the student was using functional communication cards to label his emotions/feelings and on one occasion had requested a break (Parent Ex. PPPP at p. 2).

The CSE reconvened on April 21, 2014. (Parent Ex. K). While the student's speech-language pathologist and counselor noted some progress, the special education teacher indicated that the student's behaviors were self-driven and his compliance was inconsistent and that the academic demands on the student had been lessened (id. at 2). According to meeting minutes, the parent believed that the student required more time to adjust to the aide, schedule changes, and routine (id.). The CSE chairperson concluded that the student was not making adequate progress and expressed concern regarding the number of daily transitions in the student's program, the significant level of support required by the student, the student's behavioral needs hindering his academic progress, even with modifications, and the safety of the student, peers, and staff (id.). Although the CSE recommended special transportation for the student, it determined that there would be no other changes to the student's program for the remainder of the school year (id.). The

CSE chairperson testified that the CSE was still recommending an alternate placement for the student (Tr. pp. 255-56).[16]

The student's special education teacher testified that, beginning in November 2013 and continuing through May 2014, the student was unavailable for instruction due to his behavior (Tr. pp. 640-643). The special education teacher reported that, in May 2014, the student was "more" available for instruction (Tr. p. 643).

In summary, regarding the parent's argument that the district failed to address the student's sensory needs, the evidence in the hearing record does not indicate that the student presented with sensory needs or that the parent requested the student be evaluated in relation to his sensory needs prior to the January 2014 CSE meeting. As summarized above, once the CSE identified that the student's behaviors could be related to sensory needs at the January 2014 CSE meeting, the CSE recommended the OT evaluation with the sensory profile (Tr. pp. 75, 555; Parent Ex. M at pp. 2, 8) and shortly afterwards, at the March 2014 CSE meeting, recommended OT (on a monitoring basis), as well as a sensory plan for the student (Parent Ex. L at pp. 1, 9). Based on the information available to each of the CSEs that convened during the 2013-14 school year, the timing of these recommendations does not contribute to the finding that the district denied the student a FAPE.

However, based on all of the foregoing, while the 15:1 special class appeared to be an appropriate placement for the student as of the beginning of the 2013-14 school year, the hearing record supports the parent's argument that, during the course of the 2013-14 school year, the 15:1 special class placement ceased to be a sufficiently supportive setting within which to manage the student's behavioral needs. The district made admirable efforts to balance the requirements of LRE, the parent's preference that the student attend his local public elementary school, and the student's escalating need for a more supportive environment. However, while the district convened CSEs frequently during the school year and added more supports and services into the student's educational program, the student's needs changed such that the core structure of the 15:1 special class program itself was no longer aligned with the student's needs or the regulatory definition of a 15:1 special class; rather than primarily needing specialized instruction, the student's management and behavioral needs became paramount as the school year progressed (see 8 NYCRR 200.6[h][4]). The district acknowledged the same by referencing its "recommendation" that the student attend an "alternative placement" as of the January 2014 CSE meeting (Parent Ex. M at p. 8). While it is not necessary to opine on what may have been an appropriate placement for the student instead of the 15:1 special class, I reiterate that, contrary to the parent's argument, it was not inappropriate for the district to consider options outside of the district's available continuum (see T.M., 752 F.3d at 165-66). It may be that, but for the parent's preference that the student attend the local public school, the district would have officially memorialized its "recommendation" for an "alternative placement" in an IEP earlier; however, the parent's expressed preference did not relieve the district of its obligation to ensure that the student's special education program and related services aligned with the student's needs (Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 657-58 [8th Cir. 1999] [noting that although the district's obligation "to permit parental participation in the development of a child's educational plan should not be

[16] Following the April 2014 CSE meeting the student was suspended on at least two occasions for aggressive behavior (Parent Exs. CCCCC, DDDDD).

trivialized . . . , the IDEA does not require school districts simply to accede to parents' demands"]; cf. Loretta P. v. Bd. of Educ., 2007 WL 1012511, at *6 [W.D.N.Y. Mar. 30, 2007] [observing that no party claimed "that the [d]istrict's acquiescence to the parents' request for home instruction was compatible with the IDEA or [the student's] right to an IEP which satisfied the [d]istrict's obligation to provide a [FAPE]"]).

3. Parent Counseling and Training

In his cross-appeal, the parent claims that, had the district reviewed the May 2013 private neuropsychological evaluation when it received the evaluation rather than waiting until the November 2013 CSE meeting, the district would have been required to include parent counseling and training on the student's IEP earlier based on the diagnosis of autism set forth in the private evaluation. The parent also alleges that the district conceded that it did not provide parent counseling and training to the parent during the entirety of the 2013-14 school year.

State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's [IEP]" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, the Second Circuit has consistently held that the failure to include parent counseling and training on an IEP does not usually constitute a denial of a FAPE (see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 122-23 [2d Cir. 2016]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]; R.E., 694 F.3d at 191;see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 538 [2d Cir. 2017]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 32 [2d Cir. Mar. 16, 2016]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 39 [2d Cir. Mar. 19, 2015]; but see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80-82 [2d Cir. 2014]). The Second Circuit explained that, "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 2013 WL 3814669 [2d Cir. Jul. 24, 2013]).

As set forth above, the delay in the district's review of the May 2013 private neuropsychological evaluation, itself, amounted to a procedural violation. At the November 2013 CSE meeting, during which the district reviewed the private evaluation, the CSE changed the student's eligibility classification to autism, making parent counseling and training a service mandated by State regulation to be included on the IEP (Dist. Ex. 6 at pp. 1-2; see 8 NYCRR 200.13[d]). The district has conceded that "it was error not to place parent counseling and training on the IEP in accordance with" State regulations after the change in the eligibility classification (IHO Ex. III at p. 19). Indeed, parent counseling and training was not added to the student's program until the January 29, 2015 IEP and was not provided at any point during the 2013-14

school year (Parent Ex. F at pp. 3, 11; see Dist. Exs. 6; 58; Parent Exs. K; L; M; P).[17] For that reason, I find that the district's failure to recommend parent counseling and training constituted a violation of State regulation.[18] While I agree with the IHO that, standing alone, the district's failure to provide parent counseling and training may not have risen to the level of a denial of a FAPE, under the circumstances of this case, this procedural violation adds to the ultimate determination that the district failed to offer the student a FAPE for the 2013-14 school year.

4. Time Out Room

On appeal, the parent claims that the "calm room" utilized by the district met the definition of a timeout room and argues that the use of the time out room was "not on the IEP." The parent also claims that the student was "deprived of significant educational benefit and opportunity due to the repeated use of an illegal timeout room," which denied the student a FAPE. The parent asserts he was not shown the time out room until May 2014 and that the maximum amount of time the student was to be in the room was "never determined or documented."

The hearing record supports a finding that the student's removals from the classroom environment into another room constituted removal to a "time out room" as defined in State regulation, and that the district did not comply with State regulations when using the time out room. Furthermore, the hearing record reflects that the district failed to properly implement the use of the time out room in a manner consistent with the student's BIPs.

According to State regulations, "a time out room is an area for a student to safely deescalate, regain control and prepare to meet expectations to return to his or her education program" (8 NYCRR 200.22[c]). State regulations further provide that time out rooms "are to be used in conjunction with a [BIP] in which a student is removed to a supervised area in order to facilitate self-control or to remove a student from a potentially dangerous situation" in order to "teach and reinforce alternative appropriate behaviors," except that a time out room may also be used as an emergency intervention in "unanticipated situations that pose an immediate concern for the physical safety of a student or others" (8 NYCRR 200.22[c], [c][3]; see "Policy and Guidance on the Use of Time Out Rooms," Field Mem. [Apr. 1994], available at http://www.p12.nysed.gov/specialed/publications/policy/timeout.pdf). District staff referenced the rooms to which the student was removed by several names, including "quiet room," "calm room," "calm space," or "safe room," and disputes on appeal whether the room was a "time out room" as defined in State regulation (see Tr. pp. 436, 447, 515, 577, 638-39). However, the evidence in the hearing record establishes that the alternate spaces utilized by the district functioned as time out rooms as defined by State regulation. The special education teacher testified that, early in the 2013-14 school year, staff would remove him from the classroom "because it was unsafe and he would go to the office area," but eventually a room was "established so he could be safe in getting out his anger [and] wouldn't hurt himself or anyone else" (see Tr. pp. 639-40). The December 2013 BIP developed

[17] The parent also testified that, as of November 2014, he had not received any parent counseling and training (see Tr. p. 1619).

[18] Whether the district committed a procedural violation based on the failure to recommend parent counseling and training at some point earlier than the November 2013 CSE meeting by virtue of the district's delay in reviewing the May 2013 neuropsychological evaluation report is of little consequence since the district's denial of a FAPE is established for the 2013-14 school year for the reasons detailed herein.

by the district identified that, if the student required removal from the classroom, he would be allowed to return to class if he was "able to calm down and cease the target behavior" (Parent Ex. VVVV at p. 3). The BIP also identified that the student should only be removed from class when his behavior was "a safety concern in the classroom," the student was "physically aggressive," or the student's behavior was a "disturbance to the functioning of the entire class" (id.). Finally, the school psychologist testified that the student was removed to a safe place where he could deescalate and regain control, and return to classroom to meet expectations, which describes the definition of a time out room in State regulation (Tr. pp. 514-15; see 8 NYCRR 200.22[c]). Therefore, regardless of how the district labeled the spaces utilized, in practice, they functioned as time out rooms as defined in State regulation.

State regulation provides that all schools that use a time out room for behavior management are required to develop and implement policies and procedures related to the use of the time out room (8 NYCRR 200.22[c][1]). At a minimum, the school's policies and procedures are required to include: prohibitions on placing a student in a locked room or a room in which the student cannot be continuously observed; circumstances under which the time out room may be used; limitations on the duration of time for which the time out room may be used; data collection to monitor the effectiveness of the use of the time out room; information that will be provided to parents; and staff training on the policies and procedures related to the use of the time out room (8 NYCRR 200.22[c][1][i]-[vi]).

State regulations also include specific requirements relating to the physical structure of a time out room, including that the room employed must

> provide a means for continuous visual and auditory monitoring of the student. The room shall be of adequate width, length and height to allow the student to move about and recline comfortably. Wall and floor coverings should be designed to prevent injury to the student and there shall be adequate lighting and ventilation. The temperature of the room shall be within the normal comfort range and consistent with the rest of the building. The room shall be clean and free of objects and fixtures that could be potentially dangerous to a student and shall meet all local fire and safety codes.

(8 NYCRR 200.22[c][5]).

In addition, the room must be kept "unlocked and the door must be able to be opened from the inside," and "[s]taff shall continuously monitor the student in a time out room [and] must be able to see and hear the student at all times" (8 NYCRR 200.22[c][6], [7]). State regulation also imposes requirements that schools "document the use of the time out room, including information to monitor the effectiveness of the use of the time out room to decrease specified behaviors" (8 NYCRR 200.22[c][8]).

State regulation further requires that a student's IEP "specify when a [BIP] includes the use of a time out room for a student with a disability, including the maximum amount of time a student will need to be in a time out room as a behavioral consequence as determined on an individual basis in consideration of the student's age and individual needs" (8 NYCRR 200.22[c][2]). Further, before implementing a BIP "that will incorporate the use of a time out room," districts must afford

parents "the opportunity to see the physical space that will be used as a time out room" and provide the parent with a copy of the school's policy related to time out rooms (8 NYCRR 200.22[c][4]).

The district began using the time out rooms before they were referenced on any of the student's IEPs or BIPs. The parent testified that, at the beginning of the 2013-14 school year, the student was removed from his classroom to a time out room "two to three times per week" (Tr. pp. 1466, 1468). The student's special education teacher also testified that, at the beginning of the school year, "[i]f it was seeming to be unsafe in the classroom, I would call the office," and "a number of people [would] . . . escort [the student] to the office or to that quiet room" (Tr. pp. 639-41). In addition, the November 2013 CSE recommended an FBA, but it did not reference the practice of removing the student to another room outside the classroom (Dist. Ex. 6 at p. 2). Disciplinary referral documents identified that the student was removed from the classroom to the office on at least eight occasions before the district completed the student's first BIP in December 2013 (see Parent Exs. VVVV at p. 1; HHHHH at pp. 21-26, 28-29).

As to the parent's argument that the maximum amount of time the student could spend in the time out room was not addressed, neither the BIPs developed by the district or the private agency, nor any of the student's IEPs, provide this information. The December 2013 BIP detailed the targeted behavior, prior interventions, the student's behavior patterns, response to discipline, learning style, parent involvement, special considerations, and goals, and set forth a plan to address the student's behavioral needs (Parent Ex. VVVV). The BIP provided for the use of removal from the classroom as a strategy to address certain behaviors and identified the conditions for the student to return to the classroom (id. at p. 3). However, the BIP did not specify anything else about the location to which the student would be removed, the maximum length of time that the student could be kept there, or whether and by whom the student would be supervised while removed from the classroom (id.).[19] Additionally, the February 2014 BIP developed by the private agency and the March 2014 update identified that the student was "sent to the office when he demonstrate[d] an inappropriate or aggressive behavior," and that it was important "during this time that he . . . not receive positive or negative attention from adults, as this w[ould] increase the future occurrence of inappropriate behaviors" (Parent Exs. TTTT at p. 11; UUUU at p. 11). The February 2014 BIP also identified crisis management strategies to use if "necessary to safely remove [the student] from the room," and that such interventions would be appropriately used only after "[two] minutes ha[d] elapsed of continued and intensified engagement in the target behavior" (Parent Ex. UUUU at p. 14).[20] Other than these statements, the documents provide no further details related to the student's removal to a time out room. Furthermore, the student's January 2014, March 2014, and

[19] However, the BIP identified that, prior to its development, interventions to address the student's behaviors included "referrals to the principal's office" (Parent Ex. VVVV at p. 1). The BIP also noted that when the student's noncompliant "behaviors persist[ed] for a length of time," consequences had included "verbal reprimands, removal from the classroom, referrals to the principal's office, and occasionally being sent home for the remainder of the school day" (id. at p. 2).

[20] Whereas the February 2014 FBA/BIP included an appendix B, which set forth crisis management strategies for staff to follow if the student exhibited "hitting, kicking, pinching, property destruction," or any combination thereof "to minimize the risk of injury," the updated March 2014 did not include this appendix (compare Parent Ex. UUUU at p. 14, with Parent Ex. TTTT).

April 2014 IEPs did not include any information about the use of a time out room, quiet room, safe room, or calm room (see Parent Exs. K; L; M).[21]

In May 2014, the private agency developed and documented protocols for the student's removal to an "office space" (Parent Ex. OOOO).[22] When the student exhibited a target behavior for an extended period, the protocols identified that he could be removed from the classroom to the office after two minutes "of continued and intensified engagement in the target behaviors" (Parent Ex. OOOO). The document also identified that the office would be cleared of any items that the student could kick or throw (id.). While the student was in the office space, the protocols identified that staff would remain with him and "retrieve materials necessary to complete activities/tasks"; the protocols also required that the student "complete the work that was brought down for him" before he would be permitted to return to the classroom (id.). The protocols provided that, "[m]ost importantly, [the student] need[ed] to be calm" and provided for an "instructor [achieving] control of the behavior before moving forward" (id.). The protocols did not specify the maximum duration of time that the student could be kept in the office space (see id.).

The hearing record includes behavior reports indicating that from May 6, 2014 to June 16, 2014, the student was removed to "Office Space" 23 times on 10 separate days, with removals lasting up to 85 minutes (Dist. Ex. 50 at pp. 3-4; see Parent Ex. IIII). ABC reports reflect that the student was removed from the classroom for 30 minutes on May 13, 2014 and for one hour and twenty-five minutes on May 15, 2014 (Parent Ex. IIIII at pp. 4, 8; see Dist. Ex. 50 at pp. 3-4). A referral notice from January 14, 2014, indicates that the student was removed from the classroom for 15 minutes and one hour in quick succession (Parent Ex. HHHHH at p. 17). While New York State does not identify a specific maximum amount of time a student can be removed to a time out room, other state regulations are illustrative with respect to an average appropriate duration. Other states limit removal to a time out room to " one (1) minute per each year of age of the child" (Tenn. Comp. R. & Regs. 0520-12-01-.09[5][j][2]); 5 minutes for preschool students, 15 minutes for "lower elementary" students, and 20 minutes for "middle/upper elementary" students (Ark. Admin. Code 005.18.20-20.04[6][1]); 45 minutes (Ala. Admin. Code 290-3-1-.02[1][f][1][vi]), or "not . . . for longer than is therapeutically necessary, which shall not be for more than 30 minutes after [the student] ceases presenting the specific behavior for which isolated time out was imposed" (23 Ill. Admin. Code 1.285[e][1]). Similarly, the New York State Office for People with Developmental Disabilities (OPWDD) provides that, in "all residential facilities certified or operated by OPWDD," "[t]he maximum duration of time a person can be placed in a time-out room shall not exceed one continuous hour" (14 NYCRR 633.16[a][1]; [j][3][iv][c]; see also Vt. Admin. Code 12-3-508:700 [providing that the duration of a time out in residential treatment programs "is

[21] However, the January 2014 CSE meeting minutes reflected that the student was "removed from the classroom almost daily over the last few weeks" (Parent Ex. M at p. 2). The March and April 2014 CSE meeting minutes indicated the student's special education teacher reported the student was spending less time out of the classroom, in part because of reduced academic demands (Parent Exs. K at p. 2; L at p. 3).

[22] Furthermore, a June 2014 behavior report authored by the private agency identified that school staff was trained on the "implementation of new Protocol for Removal to Office Space"; the report also noted that a new ABC data checklist was introduced and "include[d] an additional space to document removals to office space and duration of time in office space" (Dist. Ex. 49 at p. 1). However, the hearing record does not include any ABC forms dated after May 20, 2014 or which used the new checklist (Parent Ex. IIIII at p. 1).

limited to the amount of time it takes the child/youth to compose him/herself "]). In this case, it is concerning, not only that the district failed to identify a maximum duration for which the student could be kept in a time out room but that, in practice, the duration was subject to a high degree of variability, and in some instances the time out room was used for extended periods of time. Tangentially, it is also unclear how the requirement that the student complete his work before being permitted to return to the classroom was related to ensuring that the student safely deescalate, regain control, and prepare to meet expectations to return to his educational program.

Moreover, the hearing record reflects that the district failed to adequately monitor the use of the time out room and its effectiveness as required by State regulation (8 NYCRR 200.22[c][8]). Although the school psychologist testified that use of the calm room was "documented on the ABC forms," the district kept no additional documentation concerning the use of the calm room or how long the student could be in the "calm room"; furthermore, the district never analyzed the information on the ABC forms to determine if the calm room was effective at reducing the student's behaviors (Tr. pp. 514-16).[23] Under these circumstances, the district should have determined if the use of the time out room was itself becoming a reinforcer of the behaviors sought to be reduced through the BIP.

During the 2013-14 school year, the hearing record reflects that there was little consistency regarding the specific time out room being used and when or how the time out rooms were being utilized. The parent testified that early in the 2013-14 school year, the student was removed to a conference room until "the principal and the vice-principal felt [the student] could either transition back to his classroom or until they called me to come pick him up" (Tr. p. 1469). The parent expressed concern to the district about the use of the conference room (Tr. p. 1483). As an alternative, the parent testified that the district began removing the student to a computer lab where he would "watch . . . videos" (id.). The parent also testified that, after the November 2013 CSE meeting, the student was being removed to an "extra office"; the parent also objected to the use of the office as a time out room because, like the conference room, it was "promoting his escape" (Tr. pp. 1498-1501).[24] However, referral notices indicated that the district continued to remove the student to a variety of locations after the December 2013 BIP was implemented, including the office, the conference room, an art room, and the school psychologist's office (Parent Ex. HHHHH at pp. 13, 18-20). Furthermore, according to the ABC reports, the student was removed to various locations including "the small room," the "quiet room," a room to "calm down," "the office," and the "conference room," even though the February 2014 BIP and protocols for removal specifically identified that the removals would be to the "office space" (see Parent Exs. IIIII at pp. 1-4, 8, 21, 31, 38, 64, 75; OOOO; UUUU at p. 11). The student was also sent home early from school on four occasions between November 2013 and January 2014 (Parent Ex. HHHHH at pp. 17, 18, 21, 25).

An email from the special education teacher on March 4, 2014 requested that the FBA document that the student was being "routinely removed from . . . direct instruction" when he

[23] In addition, the district did not submit ABC charts covering the entirety of the 2013-14 school year.

[24] The father asserted in a November 7, 2013 letter to the CSE that "the constant removals from his classes, and even the school itself, are preventing [the student] from having a free and appropriate public education" (Dist. Ex. 4).

became "non-compliant and behaviors escalate[d]"; the special education teacher further noted that the student was sometimes removed to "a separate location in [the] classroom to do worksheets," or was "removed to another room entirely," and that the work he was being required to do did not reflect his abilities (Parent Ex. PPPPPP at p. 33). The special education teacher also testified that the student was being taken out of the classroom "every other day [or] every third day," and she believed that the removals were "a reward [for the student] rather than having him comply with what [was being] asked" (Tr. p. 571). She also testified that when the BCBA began working with the student, he "would . . . get taken out [of] the classroom very frequently and seemed to enjoy getting out" (Tr. p. 570). This is especially concerning where, as here, both the February 2014 FBA and the March 2014 update determined that one function of the student's aggressive behaviors was "as a way to escape task demands" (Parent Exs. TTTT at p. 4; UUUU at p. 4). Accordingly, the associated BIPs indicated that "evidence-based effective teaching procedures should be used to decrease the value of escape as a reinforcer" and that it was "essential that the work demand be maintained" (Parent Exs. TTTT at pp. 7; UUUU at pp. 7, 11).

In addition to the regulatory requirement that schools monitor the effectiveness of the use of a time out room with respect to decreasing the incidence of specific behaviors, longstanding guidance from the State Education Department provides that although "[t]he amount of time a student will need to be in a time out room will vary with the student's age, individual needs and behavior management plan[, c]areful monitoring of the amount of time a student is in a time out room is required to insure that a time out room is not being used to the detriment of a student's educational program" ("Policy and Guidelines on the Use of Time Out Rooms," supra, at p. 3). For the foregoing reasons, the hearing record supports a finding that the district failed to follow regulatory requirements related to the use of time out rooms during the 2013-14 school year and that its use of a time out room to manage the student's behaviors contributed to a denial of a FAPE to the student.

5. Summary—Cumulative Impact

A brief summary is warranted in this case regarding the identified deficiencies in order to clarify the basis for the determination that the district failed to offer the student a FAPE for the 2013-14 school year and examine the cumulative impact, if any, of the identified procedural violations (M.M. v New York City Dep't of Educ., 2016 WL 4004572, at *1 [2d Cir July 26, 2016]; L.O., 822 F.3d at 123 [finding that four procedural violations, three of which were identified as "serious," as well as "additional isolated deficiencies" in the IEPs, cumulatively denied the student a FAPE]; T.M., 752 F.3d at 170; R.E., 694 F.3d at 191 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]).

As detailed above, the violations arising from the CSEs' continued recommendation of the 15:1 special class placement once it became apparent that the setting was insufficiently supportive to address the student's needs, as well as the district's use of a time out room, denied the student a FAPE for the 2013-14 school year. The remaining violations, including the untimely consideration of the May 2013 neuropsychological evaluation and failure to provide of parent counseling and training, considered individually, might not have resulted in a finding of a denial of a FAPE. However, in this case, it is sufficient to note that each violation contributes to the ultimate determination that the district failed to offer the student a FAPE for the 2013-14 school year (see R.E., 694 F.3d at 191; R.B., 15 F. Supp. 3d at 434).

C. 2014-15 School Year

1. General Education Classes and Supports for Behavioral Needs

The crux of the parties' disputes relating to the 2014-15 school year pertain, again, to the student's behavioral needs and the manner in which those needs could be or were being met in relationship to the removal of BCBA support from the June 2014 IEP and the November 2014 CSE's recommendation for the student to attend primarily general education classroom settings (or the district's earlier implementation of the same on a trial basis). The district asserts that the district and the CSE acted logically in placing the student in the general education setting in an attempt to address the student's negative behaviors while the CSEs sought an alternative placement for the student outside the district public school.

Toward the end of the 2013-14 school year, at the April 2014 CSE meeting, the CSE indicated that "[o]ver the next [three] weeks, the behavior consultant will complete the staff support training," and the school psychologist testified that "the goal for [the private agency] coming in was to create the plan, help us and train us in how to implement it so that we could take over in implementing it so that their services were to be weaned off at that point" (Tr. p. 389; Parent Ex. K at pp. 2-3). Furthermore, the school psychologist testified that, because of the student's improving behaviors, the district was "going to start out the [2014-15] school year without the support [of a BCBA] because they had trained us and then we would call them if necessary for consultation" (Tr. p. 390).

The June 2014 CSE meeting minutes included information indicating that the student had made some improvements behaviorally by the end of the 2013-14 school year but still required behavioral supports. According to the minutes, the special education teacher noted that the student's compliance improved, that he was capable of completing school work, and that he was "attending more to lessons" including his science and social studies lessons (Parent Ex. J at pp. 1-2). However, the special education teacher also identified that the student "cannot have any wait time" (id. at p. 1). The student's general education teacher identified that walking in the hallway had improved, that the student had no problems in unstructured time, and that "he still d[id] what he want[ed] to do, but in a more compliant way" (id. at p. 2). The student's counselor also noted that the student had made good progress socially, initiating interactions with peers, and had become more flexible with his peers (id.). In addition, the BCBA reviewed the latest BIP data and indicated that the intensity of the student's behaviors was "medium to low," the duration of incidents was "less than [four] minutes," and the frequency of the student's removals to the office space was zero (id.).[25] Further, the BCBA noted that, while the student was still engaging in interfering behaviors, he was also beginning to tell adults what was wrong and he was responding to tokens and reinforcers and making progress sitting with peers during work (id.). Contrary to the parent's claims, the BCBA did not indicate the need for continued staff training (id.). The speech-language pathologist also identified that the student was often distracted, requiring redirection to tasks, and that this distraction made it difficult for the student to follow increasingly

[25] However, the BCBA also reported "8 consequent days of removal to office space" (Parent Ex. J at p. 2). In addition, the behavior report completed by the private agency indicated that the student was removed to the office space on 23 occasions between May 6, 2014 and the June 2014 CSE meeting (Dist. Ex. 50 at p. 3).

long and complex directions (id.). The June 2014 IEP also continued the 1:1 aide services for the student (id. at p. 11).

The IEP reflected that the student required a BIP to address non-compliance, eloping and aggressive behaviors, and the IEP continued to reflect the need for positive behavioral interventions (Parent Ex. J at pp. 7-8). In addition, the June 2014 CSE indicated that the student required reduced "downtime between transitions within activities" (id.). Further, the CSE noted that the student needed to comply with school rules and school staff directives during structured and unstructured/transition times and needed to seek out appropriate people to ask for help when under stress (id. at p. 8).

The parent asserts that the student began exhibiting a significant increase in aggressive and non-compliant behaviors and an increase in the frequency and duration of removals from the classroom throughout the 2014-15 school year and that the June 2014 CSE's recommendation to remove BCBA support contributed to this escalation. Even assuming that the hearing record supports the parent's assertion about the increase in the student's behaviors and/or his removals from the classroom (see Parent Exs. G at pp. 1-2, 9-10; H at pp. 1-2, 9-10), this after-the-fact evidence may not be used to retrospectively evaluate the sufficiency of the program offered by the district (R.E., 694 F.3d at 186-88). However, as of the June 2014 CSE, given the contemplated role of the BCBA—i.e., to formulate the student's BIP and train district staff in its implementation (see Parent Exs. F at p. 2; L at pp. 2, 10)—it was not unreasonable for the CSE to conclude that the service was not necessary for the student for the 2014-15 school year, provided that there was district staff sufficiently trained in the implementation of the BIP. Leading into the 2014-15 school year, the district did prepare a memorandum and BIP summary directed to district staff who be assigned to work with the student, which summarized the BIP and indicated that staff should let district school psychologist know if they had questions (Dist. Ex. 51 at pp. 1-2). While it is understandable that the parent would prefer the continued support of the BCBA, the omission of this service from the June 2014 IEP does not contribute to a finding that the district denied the student a FAPE for the 2014-15 school year.

With respect to the placement set forth in the IEP, the June 2014 CSE recommended a 15:1 special class placement for math, ELA, social studies, and science for the 2014-15 school year (Parent Ex. J at p. 11). Additionally, the student's IEP identified that the student would "not participate in general education programs and require[d] special instruction in an environment with a smaller student to teacher ratio and minimal distractions in order to progress in achieving the learning standards" (id. at p. 13). Nevertheless, this recommendation was short lived and, according to district staff, by mid-September 2014 the student was attending a general education class for math (Tr. pp. 595-96). By October, the student began attending a general education class for social studies and science as well (Tr. pp. 160-62, 271-72, 595, 597). Both the CSE chairperson and the parent testified that the parent was asked permission before the student was placed in general education classes; however, the district did not document the parent's permission in writing and did not document this amendment to the student's educational program in an IEP until

November 2014 (Tr. pp. 108, 160-62, 1608-609, 1611-612, 2200-201; Parent Ex. H at pp. 1-2).[26] While the district did not formally recommend a general education placement for math, social studies, and science classes for the student until the November 2014 CSE, the actual classes in which the district placed the student shall be examined for purposes of determining whether or not the district provided the student a FAPE from September through November. In other words, it would make little sense to examine the appropriateness of the 15:1 special class mandated by the June or October IEPs when no party disputes that these are not the classes that the student attended per the district's recommendation.[27]

With regard to the parent's argument that the district based the placement decision on a single observation of the student in a general education gym class, district staff largely corroborated this understanding. The CSE chairperson and psychologist testified that the basis of the district's decision to place the student in general education classes was due to the student's success in a general education gym class as noted in the June 2014 psychiatric evaluation, which, according to the school psychologist, stated that the student "did better when . . . appropriate typical peers were around him" (Tr. pp. 108-09, 272, 425; see Parent Ex. BBBB at pp. 2-3). The evaluation report included a summary of the psychiatrist's observation of the student, including that, when the student transitioned to the physical education class he "became appropriate" and "engag[ed] appropriately with classmates"; however, the psychiatrist specified that the student had "the ability to control his behavior and demonstrate age appropriate social interactions with fellow peers while in a non-academic setting" (Parent Ex. BBBB at pp. 2-3 [emphasis added]). The psychiatrist also indicated that the student exhibited "significant behavioral difficulty during academically based tasks which require sustained attention or focus"; the evaluation also recommended "consideration of a smaller classroom setting utilizing a structured behavioral management system" (id. at p. 3), which would further suggest that the student's placement in general education classes for academic instruction was not appropriate.

The special education teacher and psychologist also both testified that the student was put into a "mainstream math [class]" by "mid September," because the student's math skills were a "high skill set" and "much higher than that of all of the students in the special class" (Tr. pp. 425, 595). They both believed that a general education class would expose the student to a more "challenging curriculum," "a faster pace," and "a new teacher perspective on things," and that the student would be able to observe other students "who were behaving socially appropriately [so that] he would have a good base of role models to copy" (Tr. pp. 425-26, 595-96). However, the

[26] To change an IEP by agreement, the parents and district may agree not to convene a CSE meeting and instead develop a written document to amend or modify the student's current IEP (20 U.S.C. § 1415[d][3][D]; 34 CFR 300.324[a][4][i]; 8 NYCRR 200.4[g][2]). State regulation expressly provides that if a district wishes to amend a student's IEP by agreement, the district must provide the parent with a written proposal to amend the IEP and the parent must agree in writing to the proposed amendments (8 NYCRR 200.4[g][2]).

[27] Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). In this instance, however, the parent did not assert a claim that the district failed to implement the student's June or October 2014 IEPs.

psychologist also testified that one of the concerns of placing the student in a general education classroom was related to the "behavioral components and the attentional factors" (Tr. p. 426).

By the November 2014 CSE meeting, district staff testified that the student "wasn't doing that well" in a special class setting, so the CSE "discontinue[d] the special class math, science and social studies," and recommended that the student continue in general education classes for math, science, and social studies (Tr. pp. 108-09, 427; see Parent Ex. H at p. 7). Furthermore, according to the school psychologist, when the student was moved to general education classes, "[t]he data show[ed] some improvement in overall behaviors" (Tr. p. 428).[28] Regarding his time in the general education classes, the CSE chairperson also testified that the student's behaviors (Tr. p. 281).

However, the November 2014 CSE meeting minutes also reflect less positive accounts of the student's experience in general education classes. The regular education teacher noted that the student showed minimal socialization or collaboration with peers in the general education setting and chose to work in a separate area of the classroom (Parent Ex. H at p. 1). The regular education teacher also indicated that, occasionally, the student would allow a peer to get near him but would quickly tell them to go back to their seats; she further shared that the student's engagement with peers was otherwise minimal (id.).[29] In addition, the teacher reported that the student was primarily self-directed and demonstrated no independent work skills for teacher-directed tasks (id.). The teacher further noted that the student left the classroom on a frequent basis due to his behaviors and required intensive and constant support of his 1:1 aide to complete any academic tasks (id. at p. 2). Moreover, the teacher reported that she was unable to formally assess the student because he did not complete work independently (id.). The regular education teacher noted that the student was "frazzled" by the afternoon and "had a very rough time in gym, and had to be removed many times" (id.). The special education teacher noted that the student was dependent on his 1:1 aide and required "breaks throughout the day to support his behaviors" (id.). The student's social worker also commented that, on occasion, the student eloped from their sessions and that he needed to focus on improving coping and anger management skills (id.).

The school psychologist also testified that the student did not "integrate" with other students in the general education classes (Tr. p. 281). The school psychologist further opined that, when the student was in the mainstream program, "he almost had a separate program within [it]," and preferred to "interact only with his aide" (Tr. p. 450). She also testified that his "desk was separate," that "typically all of his educational program was given to him . . . one-on-one by the teacher," and that he was "very separated from the rest of the group" (id.).

The November 2014 CSE meeting minutes also indicated that the CSE recommended an "[a]lternate placement . . . to support the student's social-emotional, academic and management needs," but that the student would "remain in district, with a 1:1 aide and [an] FBA/BIP" until such a placement was found (Parent Ex. H at p. 2). Furthermore, the meeting minutes noted that, in the

[28] In apparent contrast to this testimony, behavioral data summaries indicate that the student was removed from the classroom on 17 occasions from September through October 2014 (Dist. Ex. 52 at p. 7).

[29] According to the November 2014 IEP, the student's special education teacher, speech-language pathologist, social worker, and psychologist made similar comments regarding the student's lack of peer interactions (see Parent Ex. H at p. 2).

event a "placement [was] not . . . secured by January 30, 201[5], home instruction w[ould] commence on February 1, 2015, pending [an] alternate placement" (id.). Ultimately, the student's IEP provided that the student would "not participate in general education programs in the area of ELA" but otherwise reflecting that the student would participate in the general education curriculum (id. at pp. 2, 7, 9, 11). To clarify, the CSE chairperson opined that, "even though we continued to have a recommendation of an alternate placement, we wanted to continue to try to do everything we could to see in the meantime if putting him in a mainstream class for a couple of subjects . . . would . . . influence his behaviors in a positive way" as a result of peer pressures while in that larger class (Tr. p. 108).

Based on the foregoing, the evidence in the hearing record supports the conclusion that the district and the November 2014 CSE's recommendations for the student's placement in general education classes both for the trial basis and as memorialized on the IEP denied the student a FAPE. While the hearing record includes some evidence that the student exhibited progress in the behavioral realm towards the end of the 2013-14 school year, in light of the evidence discussed above indicating that a 15:1 special class offered an insufficiently supportive setting within which to manage the student's behaviors for the majority of the 2013-14 school year, the progress was inadequate to justify the change to a significantly less supportive placement. Moreover, the November 2014 CSE's recommendation was particularly inappropriate given the information available to the CSE that the student's experiences in the general education classes on the trial basis revealed that he was essentially as an island unto himself, completely segregated from the other students and reliant on his aide (cf. D.N. v. Bd. of Educ., 2015 WL 5822226, at *12 [E.D.N.Y. Sept. 28, 2015] [indicating that it "would be no differen[t] if the IEP provided that his classes were held at a local public school, on a desert island, or in an abandoned warehouse" given the segregation the student experienced from all other students]).

2. Other Claims

The district raises several claims that post-date the student's return to a 15:1 special class pursuant to pendency. The district claims that the IHO: erred in finding that the student was "expelled" during the 2014-15 school year; incorrectly made "decision[s] as to the appropriateness" of the 15:1 special class, which was in fact the student's pendency placement; and erred in finding that the recommended BOCES programs were inappropriate because of the length of the bus ride to the programs.

With respect to the IHO's determination that the student was expelled from school, the district is correct that this finding is not supported by the hearing record. The parent testified that the student was suspended sometime in 2014-15, "and essentially expelled and placed on at home alternate placement until eventually he got pendency placement to go back to the school district" (Tr. p. 1623). While the IHO may have felt that the district's recommendation for home instruction was constructively identical to an expulsion, the evidence does not otherwise indicate that the student was expelled (see generally Dist. Ex. 63; Parent Exs. XXXX; YYYY; ZZZZ). In any case, it does not appear that the IHO's observation regarding expulsion was critical to her ultimate determination on the district's provision of a FAPE and, accordingly, it is unnecessary to further explore this aspect of the district's appeal.

With respect to the district's assertion that the IHO erred in reviewing the appropriateness of the 15:1 special class that the student attended pursuant to pendency, the IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). The CSE chairperson testified that the student continued in the general education placement until the parent filed the first due process complaint notice, after which the student was returned to his "pendency placement" (Tr. pp. 119, 162). The parent also identified in the second amended due process complaint that "as a result of the pendency protection . . . the [s]tudent was returned to his placement at [the district elementary school] on February 3, 2015" (Parent Ex. A at p. 6).[30] A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey v. Bd. of Educ., 386 F.3d 158, 160-61 [2d Cir. 2004]; Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; O'Shea, 353 F. Supp. 2d at 459 [finding that "pendency placement and appropriate placement are separate and distinct concepts"]). Accordingly, the district is correct that, once the student attended the 15:1 pursuant to pendency, the appropriateness thereof was not an issue to be determined by the IHO.

Finally, with respect to the IHO's finding regarding the appropriateness of the BOCES programs, review of merits is of little utility at this point, since: a denial of a FAPE has been established that, as described below, warrants an award of all of the compensatory education relief the parent seeks in his cross-appeal; the student did not attend the placements recommended in the January 29, April 13, April 29, and June 2, 2015 IEPs as a result of the operation of pendency; and the district did not continue recommendations for the BOCES programs into the 2015-16 school year (thereby making review of the placements less useful for purposes of future educational planning). In any event, while the placement of an individual student in the LRE shall, among other things, "ensure" that a student attend a placement "as close as possible" to his or her home and "in the school that he or she would attend if nondisabled," "[u]nless the IEP . . . requires some other arrangement" (34 CFR 300.116[b][3], [c]; see 8 NYCRR 200.4[d][4][ii][b]), numerous courts have held that this provision does not confer an absolute right or impose a presumption that a student's IEP will be implemented in the school closest to his or her home or in his or her neighborhood school (see White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380-82 [5th Cir. 2003]; Lebron v. N. Penn Sch. Dist., 769 F. Supp. 2d 788, 801 [E.D. Pa. 2011] [finding that "though educational agencies should consider implementing a child's IEP at his or her

[30] At the hearing, there was disagreement about precisely when the student returned to the 15:1 special class pursuant to pendency. The psychologist testified that the student returned "sometime in the spring, maybe April, May," while the student's special education teacher testified that she believed he returned sometime in February 2015 (Tr. pp. 431, 451, 597-98). The father testified that he believed the student returned to the 15:1 special class approximately one and a half months after the due process complaint was filed, in mid-March 2015, and that the student's return to the pendency placement was not "immediate" (Tr. pp. 1641, 2214-15). A data summary report of the student's behaviors establishes that the student returned to the district on or about February 3, 2015 (Parent Ex. JJJJ), and a disciplinary referral indicates that he had returned to the district by no later than February 17, 2005 (Parent Ex. HHHHH at p. 5).

neighborhood school when possible, [the] IDEA does not create a right for a child to be educated there"]; Letter to Trigg, 50 IDELR 48 [OSEP 2007]; see also R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 1191 n.10 [11th Cir. 2014]; A.W. v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; McLaughlin v. Holt Pub. Sch. Bd. of Educ., 320 F.3d 663, 672 [6th Cir. 2003]; Kevin G. v. Cranston Sch. Comm., 130 F.3d 481, 482 [1st Cir. 1997]; Flour Bluff Ind. Sch. Dist. v. Katherine M., 91 F.3d 689, 693-95 [5th Cir. 1996]; Urban v. Jefferson Cnty. Sch. Dist. R–1, 89 F.3d 720, 727 [10th Cir. 1996]; Poolaw v. Bishop, 67 F.3d 830, 837 [9th Cir. 1995]; Murray v. Montrose Cnty. Sch. Dist. RE-1J, 51 F.3d 921, 929 [10th Cir. 1995]; Schuldt v. Mankato Indep. Sch. Dist. No. 77, 937 F.2d 1357, 1361–63 [8th Cir. 1991]; Barnett v. Fairfax Cnty. Sch. Bd., 927 F.2d 146, 152-53 [4th Cir. 1991] [holding that a district must "take into account, as one factor, the geographical proximity of the placement in making these decisions"]; H.D. v. Cent. Bucks Sch. Dist., 902 F. Supp. 2d 614, 626 [E.D. Pa. 2012]; Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1177-79 [S.D.N.Y. 1992] [noting that "[t]here is no requirement though that a child receive a residential placement located in his immediate geographic area" and finding that New York may permissibly restrict nonpublic school placement choices by districts to schools preapproved by the State]). Accordingly, the distance of the BOCES programs, alone, would not be sufficient, in this instance, to establish that the district denied the student a FAPE as a result of those recommendations, given the student's apparent need for a more structure and supportive placement to address his behavioral needs at that point in time.

D. Relief—Compensatory Education

On appeal, the district claims that the IHO erred in awarding the student 100 hours of tutoring at HLC because the student made "meaningful gains" by the end of the 2014-15 school year. In his cross-appeal, the parent claims that the IHO erred in "failing to award the full 135 hours recommended" by HLC since such an award would allow the student to make up the "skill[s] necessary to perform on grade level," and the district provided no evidence to the contrary. As discussed below, the parent's request for 135 hours of HLC tutoring is reasonable to remedy the district's denial of a FAPE to the student for the 2013-14 and 2014-15 school years.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that

compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30. 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

The district argues that, even if it did not offer the student a FAPE, the student made "meaningful gains" such that no award of compensatory education is warranted. However, a review of the evidence in the hearing record establishes that, while the student made some progress during the 2013-14 and 2014-15 school years, his progress was reduced as a result of his interfering behaviors, which the district did not sufficiently address. As an initial matter, testimony from the student's special education teacher concerning the student's progress in the 2013-14 and 2014-15 school years reflects that the teacher observed some progress but inconsistently. The special education teacher testified that the student "had pretty good knowledge of kindergarten [skills] upon entry into kindergarten" (Tr. pp. 587-88). She opined that the student could move beyond the kindergarten curriculum requirements in mathematics; specifically, she stated that he "enjoyed writing numbers in sequence" and "could probably go to 100," while the expectation for kindergarten students was to write numbers to 30 (see Tr. pp. 589-90). However, she testified that the student's behaviors interfered with his instruction by November 2013; additionally, she testified that from November 2013 through April 2014, the student was not available for instruction for "[a] substantial amount of time (see Tr. pp. 641-43). Regarding the June 2014 CSE meeting for the 2014-15 school year (first grade), the special education teacher testified that the student was performing at the "typical kindergarten level" academically and was doing "pretty typical kindergarten reading, writing and math work," and that he had a "good handle on kindergarten writing skills as a whole" (Tr. pp. 582, 590). By the end of 2014-15 school year, the special education teacher testified that the student was in the "low average [range] in math" and that the student was not keeping pace with expectations for mainstream students in mathematics (Tr. pp. 617). However, she also testified that the student had made progress in math, science, and social studies for the 2014-15 school year (Tr. p. 618).[31]

The student's progress reports and report cards for the 2013-14 and 2014-15 school years indicate that the student made limited progress. The end of the year progress report for the 2013-14 school year noted that the student progressed gradually on two of his reading goals, had achieved one other reading goal, progressed gradually on two writing goals, and had achieved all of his math goals (Dist. Ex. 55 at pp. 1-4). In the end of year report card for the 2013-14 school

[31] The special education teacher could not testify as to the student's progress in ELA during the 2014-15 school year as she was not his teacher for that subject (see Tr. p. 616).

year, two teachers, including his special education teacher, noted that the student's behaviors interfered with his academic progress in the second and third quarter (Dist. Ex. 54 at p. 2). The end of the year progress report for the 2014-15 school year identified that the student progressed gradually on two reading goals and progressing inconsistently on one other, had achieved all math goals, and progressed satisfactorily and gradually on two writing goals (Parent Ex. HHHHHH at pp. 2-4). The student's report card reported that the student "need[ed] improvement" in most areas; however, the student had made progress in some areas (Parent Ex. GGGGGG).

The hearing record also includes the results of the WIAT-III from December 2013 and March 2015. A comparison between these two documents highlights a disparity in the student's standardized scores between the 2013-14 and 2014-15 school years. On the early reading skills subtest, the student achieved a standard score (percentile rank) in 2013 of 100 (50), compared to 81 (10) in 2015 (compare Parent Ex. FFFF, with Parent Ex. YYY at p. 1). In the area of mathematics, in 2013 the student achieved a composite standard score (percentile rank) of 102 (55), while in 2015 he achieved a 79 (8) (compare Parent Ex. FFFF, with Parent Ex. YYY at p. 2). The student's scores on various mathematics subtest declined as well, in math problem solving from 93 (32) to 72 (3), and in numerical operations from 111 (77) to 72 (3) (compare Parent Ex. FFFF, with Parent Ex. YYY at p. 1). With respect to written expression, the student achieved a composite standard score (percentile rank) of 115 (84) in 2013, compared to 67 (1) in 2015 (compare Parent Ex. FFFF, with Parent Ex. YYY at p. 2). The student's scores similarly declined in various subtests testing aspects of writing, in alphabet writing fluency from 126 (96) to 60 (0.4), and in spelling from 103 (58) to 77 (6) (compare Parent Ex. FFFF, with Parent Ex. YYY at p. 1). While the student received scores all in the average range and above on the 2013 administration of the WIAT-III, he achieved scores all in the below average range and below during the 2015 administration (compare Parent Ex. FFFF, with Parent Ex. YYY at pp. 1-2; see Tr. pp. 656-59). The discrepancy between the two administrations shows that the student did not continue to make progress as expected across multiple academic domains.

In addition, a comparison of the May 2013 and September 2015 neuropsychological evaluation reports also reveals that the student made little progress during this timeframe (compare Parent Ex. IIII, with Parent Ex. OOOOOO).[32] The neuropsychologist reported in the 2015 report that the student showed improvement from May 2013 in the areas of abstract and social reasoning, perspective taking, receptive language, and some aspects of reading, mathematics, writing, and fine motor skills (Parent Ex. OOOOOO at pp. 10-11, 17). The neuropsychologist noted that the student's abilities in visual reasoning, overall motor skills, recognition of details in a story, general verbal ability, and information processing remained consistent with the 2013 report (id.). However, the neuropsychologist noted that the student performed less well in 2015 than he had during the 2013 evaluation in the areas of overall intellectual functioning, communication, expressive vocabulary, visuospatial skill, gross motor skills, memory for story details verbally presented, general visual ability, attention/processing speed, visual searching skills, reading, and ability to follow increasingly complex verbal instructions (id.). The neuropsychologist indicated

[32] The same neuropsychologist conducted the May 2013 and September 2015 neuropsychological evaluations (compare Parent Ex. IIII at pp. 1, 10, with Parent Ex. OOOOOO at pp. 1, 18). The neuropsychologist set forth comparisons of the student's performance on the May 2013 versus September 2015 evaluations in the September 2015 evaluation report (Parent Ex. OOOOOO at pp. 10-17).

that the student's reading and writing skills were rated as moderately low but noted a slight increase from the 2013 report (id. at p. 10). In relation to academics, the student's reading skills were in the borderline range in 2015, whereas, in 2013, he was in the average range (id. at p. 11). The neuropsychologist concluded that, while there were some signs of gains across reading, mathematics, and writing skills, performance was at a kindergarten to first grade level and the student was not keeping up with his peers with respect to academic development (id. at p. 17).[33]

To identify the student's areas of need for the purposes of determining an appropriate compensatory education services award, the parent has provided evidence related to his request for 135 hours of individual tutoring services to make up the "skill[s] necessary" for the student to "perform on grade level." Generally, compensatory services are not designed for the purpose of maximizing the student's potential or to guarantee that the student achieves a particular grade-level in his areas of need (see Application of a Student with a Disability, Appeal No. 16-033; cf. Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). However, the district has failed to provide evidence that the student does not require compensatory education services as a result of progress he made during the 2013-14 and 2014-15 school years. The burden of proof has been placed on the school district during an impartial hearing by State law, 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]). Accordingly, SROs have consistently allocated to districts some burden of going forward with respect to a parental request for compensatory education and have expected a district to address such a burden by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (see Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-050; Application of a Student with a Disability, Appeal No. 16-033; Application of a Student with a Disability, Appeal No. 14-179; Application of a Student with a Disability, Appeal No. 13-168). Here, the district argues on appeal that basing an award of compensatory education on the evaluations conducted by HLC is inappropriate because the hearing record is insufficient to establish that HLC's recommendation for compensatory services is related to any harm caused to the student. However, the district has not set forth its position as to what an appropriate award would be.

The parent provided evidence in the hearing record that 135 hours of individual tutoring services would be an appropriate remedy for a denial of a FAPE based upon the results of evaluations conducted at HLC. The student was administered several examinations related to his reading, writing, and math abilities (see Parent Ex. QQQQQQ at pp. 3-4, 6). Based upon the results of the testing, the HLC director of educational services testified that the student was

[33] The neuropsychologist administered six subtests of the WIAT III in September 2015 that were administered in March 2015, and the scores between those administrations are generally consistent (compare Parent Ex. YYY, with Parent Ex. OOOOOO at p. 21). Specifically, the student achieved similar scores on the Early Reading Skills and Spelling subtests, which were reported to be in the Borderline range; performed slightly worse on the Numerical Operations subtest, also in the Borderline range; performed slightly better on the Word Reading and Math Problem Solving subtests, both in the Low Average range; and performed significantly better on the Alphabet Writing Fluency subtest, in the High Average range (id.). This illustrates that the student's performance could be variable, and underscores the importance of adequately managing his behaviors.

functioning below grade level in reading, math, and writing at the time the tests were administered (Tr. pp. 1891-92, 1894-95, 1909, 1915-16, 1919-22; Parent Ex. QQQQQQ at pp. 3-4). As a result of the student's performance on the evaluations, HLC determined that the student required 135 hours of individual instruction by a "certified [HLC] tutor" in the following areas: 71 hours in reading; 34 hours in "phonics"; and 30 hours in math (Tr. p. 1922; Parent Ex. QQQQQQ at pp. 1-2). However, the basis for these calculations had seemingly little to do with the student's needs or the district's failure to provide the student with an appropriate program. For instance, the recommendations for tutoring were generated by HLC's "operating system," which did not consider the student's current program; also, HLC was not provided with any of the student's IEPs or educational evaluations, and the director had never met the student (Tr. pp. 1923, 1958-959, 1966). Furthermore, the director testified that the recommendation was better described as an "estimate" of how much instruction would be required for the student to achieve grade-level performance (see Tr. pp. 1923-25).

While there is not a clear nexus between the recommendations made by HLC and the district's failure to provide the student a FAPE, additional evidence in the record indicates that these services are reasonable to remedy the denial of a FAPE. Notably, the student's special education teacher testified that the student was substantially unavailable for academic instruction from December 2013 to May 2014 as a result of his behaviors (Tr. pp. 640-43). Furthermore, evidence in the hearing record shows that the student's frequent removals from the classroom throughout the 2013-14 and 2014-15 school years deprived the student of instruction. From May 6, 2014 through June 16, 2014, the student was sent to the "office space" 23 times over 10 days; collectively, the student was removed from the classroom for a total of 435 minutes, or 7 hours and 15 minutes (Dist. Ex. 50 at p. 4). Based upon school referral letters, the student was removed to the office, or some other space, a total of nine times between September 11, 2013 and February 17, 2015 (Parent Ex. HHHHH at pp. 5-6, 13-28). The student's ABC reports from March 10, 2014 through May 20, 2014 indicated that the student was removed from the classroom on at least an additional twelve days (Parent Ex. IIIII at pp. 1-5, 8-9, 21, 31, 38, 64, 75, 78).[34] The May 15, 2014 ABC report identified that the student was removed for one hour and twenty-five minutes (Parent Ex. IIIII at p. 4). Between September 3, 2014 and October 31, 2014, the student was removed from the classroom to the "[c]alm [s]pace" 17 separate times, in some instances multiple times a day (Dist. Ex. 52A at p. 7). From November 3, 2014 through January 14, 2015, the student was removed to the calm space 16 times, in some instances multiple times a day (Parent Ex. KKKK at p. 6). Finally, while evidence indicates that the student was provided with assignments when he was removed from the classroom, there is no indication that he received instruction from a qualified teacher during those times (see Parent Exs. IIIII at pp. 8, 75; OOOO). The foregoing evidence in the hearing record is sufficient to justify the parent's requested hours of compensatory education just based on a quantitative view of the time that the student missed instruction.

Therefore, an award of compensatory education services in addition to that awarded by the IHO is warranted to remedy to the denial of a FAPE for both the 2013-14 and 2014-15 school

[34] Certain dates were identified in both the behavior report authored by the private agency and the ABC reports (compare Parent Ex. IIIII at pp. 1-4, 8, with Dist. Ex. 50 at p. 4). Other dates may also have been identified in the private agency behavior report; however, this is unclear based on the way the data was graphed in the report (see Dist. Ex. 50 at p. 4).

years, and, despite the district's claims that the award calculated by HLC was inappropriate, the evidence in the hearing record shows that an award of 135 hours of tutoring services is reasonable.

VII. Conclusion

In summary, the evidence in the hearing record shows that the district denied the student a FAPE for the 2013-14 and 2014-15 school years, and that the parent's requested relief is warranted to cure the denial of FAPE.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated February 13, 2017, is modified by reversing that part which determined the district offered the student a FAPE for the 2013-14 school year; and

IT IS FURTHER ORDERED that the district shall fund the cost of 135 hours of 1:1 instruction at HLC.

Dated: **Albany, New York**
May 17, 2017

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SARAH L. HARRINGTON
STATE REVIEW OFFICER