



The University of the State of New York

The State Education Department

State Review Officer

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No. 18-081

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

Appearances:

Ingerman Smith, LLP, attorneys for petitioner, by Emily J. Lucas, Esq.

Cuddy Law Firm, PLLC, attorneys for respondents, by Lauren Eisler, Esq.

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 Committees on Special Education (CSE) for respondents' (the parents') son for the 2015-16, 2016-17, and 2017-18 school years were not appropriate. The parents cross-appeal from those portions of the IHO's decision which denied their request for reimbursement for private evaluations and their requests for certain compensatory relief. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student was found eligible for special education services as a student with a speech or language impairment for the 2005-06 and 2006-07 school years (kindergarten and first grade) due to articulation delays (Parent Exs. B at pp. 1-3; C at pp. 1-4; see Parent Ex. L). He was declassified

at the end of first grade and recommended for declassification support services (Parent Ex. HH at pp. 1-2).¹ During the 2009-10 school year (fourth grade) the student was administered a social/emotional screening, the results of which suggested that he met the diagnostic criteria for attention deficit hyperactivity disorder (ADHD)-inattention type, and highlighted concerns regarding his anxiety and depression at home and in school, and peculiar or odd behaviors in school (Parent Ex. O at p. 1).²

The parents referred the student to the CSE during the 2010-11 school year (fifth grade) due to concerns regarding his reading, writing, and speech-language development (Parent Exs. N at p. 1; O at p. 1). In response, the district conducted a social history, a psychoeducational evaluation, a speech-language evaluation, and a classroom observation (Parent Exs. N; O; Q; R). The January 2011 psychoeducational report indicated that the student's academic skills were in the average range and teachers did not have concerns with the student's attention or self-control; however, teacher ratings reflected difficulty with executive functioning, peer relations, and some oppositional behavior, atypicality, and withdrawal, while parent ratings reflected some attention concerns (Parent Ex. O at p. 8).³ The results of a January 2011 speech-language evaluation reflected age appropriate receptive and language processing skills, adequate expressive language skills, and a weakness in social communication skills that reportedly did not interfere significantly with the student's academic performance (Parent Ex. R at p. 4). A CSE convened on March 9, 2011, and found the student ineligible for special education services at that time (Dist. Ex. 43).⁴

The student transitioned well into sixth grade (2011-12 school year) and, "for the most part," his grades in major content areas ranged from the mid to high 70s to the low 90s (Parent Ex. T at p. 1). At the end of the school year, he was suspended for two days for injuring another student (id.). The student maintained good grades and attendance for seventh grade (2012-13

¹ The CSE meeting information summary noted that the student continued to have articulation difficulties at the phrase and sentence level (Parent Ex. HH at p. 1). The summary further noted that, while the student was making good progress, at times he was verbally intrusive (id.). In addition, the summary indicated that the student's pragmatic skills (turn taking) "[we]re somewhat lower" but that this appeared to be related to impulsivity and immaturity as opposed to a skill deficit (id.).

² The March 2010 social/emotional screening was not included in the hearing record, but a January 2011 psychoeducational evaluation report included a record review that summarized the findings of the screening (Parent Ex. O at p. 1).

³ Although the student attained scores in the average range on standardized tests, the hearing record indicates that he was receiving reading intervention to increase fluency and comprehension (Parent Ex. O at p. 2; see Parent Ex. R at p. 1).

⁴ In January 2011, the parents described the student as strong-willed, moody, anxious, and manipulative; however, behavior ratings were not clinically significant (Parent Exs. N at p. 2; O at pp. 5-8). When the March 2011 CSE convened, the student was reportedly functioning on grade level in all areas, demonstrating an improved attitude towards school, and working more cooperatively with peers (Dist. Ex. 43 at p. 1).

school year), with the exception of ELA, where his grades decreased each quarter (id.). In February 2013, the student was hospitalized for psychiatric reasons (id. at pp. 1-2). Following the hospitalization, he began "a medication regimen as well as weekly private therapy" (id. at p. 1). In April 2013, the student was suspended again for injuring another student (id. at p. 2).

The parents made another referral to the CSE prior to the start of the 2013-14 school year (eighth grade) due to concerns regarding the student's social/emotional functioning, social communication, anxiety, and rigid/perseverative behaviors (Parent Exs. T at p. 1; BB). In July 2013, the district conducted a psychoeducational evaluation that included assessments of the student's cognitive, academic, and social/emotional functioning (see Parent Ex. T).⁵ The evaluating psychologist reported that of "utmost concern" was the student's emotional and social well-being as it related to his functioning within the school environment (id. at p. 8). A CSE convened on August 1, 2013, and determined that the student was not eligible for special education; however, the committee recommended a functional behavioral assessment (FBA) of the student and indicated that the CSE would reconvene in the second week of October (Parent Ex. JJ at pp. 1-2).⁶

An FBA was conducted in September 2013; however, shortly after the beginning of the school year, the student was hospitalized again for suicidal ideation (Parent Ex. U at pp. 2-3; see Parent Ex. KK). According to the psychologist who conducted the FBA, the CSE was informed that the student had received a working diagnosis of psychotic disorder-not otherwise specified (NOS) and that additional diagnoses of Asperger syndrome, pervasive developmental disorder (PDD), and Retts disorder should be ruled out, and the student's private therapist indicated that it was likely that the student had been slowly decompensating, with a recent onset of psychosis (Parent Ex. U at p. 1; see Dist. Ex. 33).

The student was discharged from the hospital on October 10, 2013 (Parent Ex. KK). A CSE convened on October 11, 2013, determined the student was eligible for special education as a student with an emotional disturbance, and recommended: two 30-minute individual counseling sessions per week; support of a full-time aide; a behavioral intervention plan (BIP) to focus on the student seeking out help when he felt like hurting himself; "check and connect" for five minutes daily; communication between the school and the student's home and outside therapists; and the

⁵ Results of the July 2013 psychoeducational evaluation indicated that the student continued to exhibit average to above average cognitive abilities and academic skills, but had difficulties with social communication, social skills, and interpersonal relationships, and occasional instances of aggressive behaviors resulting in disciplinary actions (Parent Ex. T at p. 8).

⁶ Notes from the CSE meeting indicated that a behavioral intervention plan (BIP) would be developed in conjunction with the student and include: a place for him to go if he needed a break; the ability to "check and connect" with a psychologist, social worker, or guidance counselor in the morning and afternoon; a plan for addressing those times when the student was "'off"; and initial daily contact with parents (Parent Ex. JJ at p. 2). The comments also noted that consent to exchange information with the student's private psychiatrist and therapist was on file (id.).

testing accommodation of providing the student a break if overwhelmed (Dist. Ex. 37 at pp. 1-2).⁷ The CSE further determined that an application should be made for the student to attend an intensive day treatment program at a board of cooperative educational services (BOCES) (Tr. pp. 197-99; Dist. Ex. 37 at p. 2; see Dist. Ex. 38).⁸ The student was accepted into the intensive day treatment program but was subsequently hospitalized for two weeks at the beginning of November due to a "major depressive disorder, single episode, severe with psychotic" features (Tr. p. 203; Parent Ex. MM at p. 1).⁹

A CSE met on December 6, 2013, and recommended that the district apply for a long-term day treatment program for the student (Tr. pp. 230-31; Dist. Ex. 39 at pp. 1-2).¹⁰ At a meeting on January 13, 2014, the CSE recommended the student attend an 8:1+1 special class placement at a BOCES therapeutic support program and receive weekly group and individual counseling (Dist. Ex. 40 at pp. 1, 7).¹¹ In addition, the January 2014 IEP included various supports and accommodations carried over from the prior IEP, including: a BIP to focus on the student seeking out help when he felt like hurting himself; "check and connect" for five minutes daily; communication between the school and the student's home and outside therapists; and the testing accommodation of providing the student a break if overwhelmed (compare Dist. Ex. 40 at pp. 6-8, with Dist. Ex. 37 at pp. 5-7).

The student began attending the long-term BOCES therapeutic support program but shortly thereafter, at the end of January into February 2014, was hospitalized and found to meet the criteria for diagnoses of intermittent explosive disorder, sleepwalking disorder, rule out schizophrenia-undifferentiated type, PDD-NOS, anxiety disorder-NOS, and hypothyroidism (Dist. Ex. 17 at pp.

⁷ The hearing record contains multiple duplicative exhibits (compare Parent Exs. D, E, F, G, H, I, J, W, and Y, with Dist. Exs. 1, 2, 3, 4, 8, 11, 37, 39, and 40). For purposes of this decision, the parent exhibit was cited in instances where multiple identical or very similar copies of an exhibit were entered into evidence, except in the instance of IEPs, for which the district exhibit was cited since the district versions also included cover pages summarizing IEP information and CSE recommendations, as well as "meeting information" (compare Parent Exs. D, E, F, G, H, I, and J, with Dist. Exs. 1, 2, 3, 4, 37, 39, and 40). The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

⁸ The district pupil service (PPS) director testified that the intensive day treatment program was not placed on the October 2013 IEP because it was not a special education placement; rather, she explained that the intensive day treatment was a short-term placement for any student in crisis and did not require an IEP (Tr. pp. 210-11).

⁹ The student was found to meet the criteria for a primary diagnosis of psychotic disorder-NOS (Parent Ex. MM at pp. 1, 3).

¹⁰ The PPS director reported that the intensive day treatment program would not keep a student beyond 30 days unless the student had a placement and the intensive day treatment program knew where the student was going eventually (Tr. pp. 211-12).

¹¹ The BOCES therapeutic support program was located within a middle school in a neighboring school district (Tr. pp. 232, 234).

1-2). Following the student's discharge from the hospital, he returned to the BOCES program and remained there for the duration of the 2013-14 school year (Tr. p. 235).

A CSE convened on May 30, 2014, to conduct the student's annual review and to develop his IEP for the 2014-15 school year (ninth grade) (Dist. Ex. 5 at p. 1). The May 2014 CSE recommended that the student continue in the same therapeutic support program at the high school for the 2014-15 school year (id. at pp. 1, 6; see Tr. p. 252). The meeting information summary attached to the May 2014 IEP reflected that the student's mood was stable at that time, he had made friends and participated in class, and he was doing well academically (Dist. Ex. 5 at p. 1). The student attended the recommended placement for the 2014-15 school year (see Tr. pp. 251-54; Dist. Exs. 16; 27).

A CSE convened on May 19, 2015 to conduct the student's annual review and to develop his IEP for the 2015-16 school year (10th grade) (Dist. Ex. 4 at p. 1). The May 2015 CSE recommended a 12:1+1 special class placement at the same therapeutic support program and weekly individual and group counseling (id. at pp. 1, 7, 9). Teacher comments included on the summary page of the May 2015 IEP suggested that the student performed well academically except for some missing assignments, participated in class, and was liked by other students (id. at p. 1). The student's counselor reported that the student was obsessed with certain interests which set him apart from his peers at times; however, the May 2015 IEP also noted that the student had been more appropriate and integrated into the program better after a hospitalization in the fall 2014 (Dist. Ex. 4 at p. 1; see Parent Ex. W at p. 1).

In March 2016, the parents obtained a private psychiatric evaluation of the student (Parent Ex. W).¹² Also in March 2016, BOCES conducted reevaluations of the student consisting of an intellectual assessment, as well as achievement testing (Dist. Ex. 13).

On April 18, 2016, the student was involved in an incident, in which he was accused of assaulting two other students, that resulted in the student's suspension (Tr. pp. 261-62; Parent Exs. X; OO). A team convened on May 19, 2016 for a manifestation determination review (MDR) and determined the student's behavior was a manifestation of his disability (Dist. Ex. 41 at p. 1). Notes from the May 2016 MDR indicated that, should the student's suspension be extended, that "BOCES and tutors will stay in touch re: work completion" (id. at pp. 1-2). The CSE planned to reconvene in July to determine the student's placement for the 2016-17 school year after obtaining information from the student's private therapist (Tr. pp. 272-73; Dist. Ex. 41 at p. 2). As a result of a superintendent's hearing, in a decision dated June 9, 2016, an IHO recommended to the superintendent that the student be placed in a 45-day interim alternate educational setting (IAES) (Parent Ex. QQ at pp. 3-4).¹³

¹² The diagnostic impression included in the March 2016 private psychiatric evaluation report stated that the student appeared to meet the criteria for a diagnosis on the autism spectrum (Dist. Ex. W at p. 6).

¹³ There is some indication that the student received home instruction during his suspension but the evidence in

A CSE convened on July 22, 2016, to conduct the student's annual review and develop an IEP for the 2016-17 school year (11th grade) (Dist. Ex. 3 at p. 1). The July 2016 CSE discussed conducting a program search for a more therapeutic setting for the student due to concerns that the student's mental health status/prognosis was possibly changing (*id.* at pp. 1-2). The parents disagreed with the CSE's plan (*id.*). Subsequently, the district conducted updated evaluations of the student, including a July 2016 psychoeducational evaluation, an August 2016 social history, and a September 2016 psychiatric evaluation (Parent Ex. Y; Dist. Exs. 7; 9).¹⁴ According to the psychological evaluation report, the student scored in the average range on academic skills and applications in reading, written language, and mathematics, and in the low average range in academic fluency (Parent Ex. Y at p. 5). The psychiatrist who completed the September 2016 psychiatric evaluation found that the student met the criteria for diagnoses of an autism spectrum disorder-mild to moderate, without intellectual impairment or language impairment, and major depressive disorder-moderate to severe, without psychosis (Dist. Ex. 7 at p. 4).

A CSE convened on September 23, 2016, to conduct a "placement review" (Dist. Ex. 2 at p. 1). The September 2016 CSE recommended a 12:1+1 special class in the STAR program, as well as weekly group and individual psychological counseling services (*id.* at pp. 1, 7).¹⁵ Additionally, the September 2016 IEP included supports and accommodations carried over from the student's previous IEPs, including: a BIP to focus on the student seeking out help when he felt like hurting himself; "check and connect" for five minutes daily; communication between the school and the student's home and outside therapists; and the testing accommodations of providing the student a break if overwhelmed and on-task focusing prompts when needed (*compare* Dist. Ex. 2 at pp. 5, 7-8, *with* Dist. Ex. 3 at pp. 5, 7-8, *and* Dist. Ex. 4 at pp. 5, 7-8). The September 2016 IEP included two social/emotional/behavioral goals, as well as postsecondary goals and transition activities (*id.* at pp. 6, 8-9).¹⁶ The CSE also discussed that, as the student progressed through the program, he would be offered opportunities for mainstreaming (*id.* at p. 1). The student began attending the STAR program on September 28, 2016 (Dist. Ex. 6 at p. 1).

the hearing record in sparse on this point (*see* Parent Ex. ZZ at p. 2). According to the district PPS director, the May 2016 CSE recommended that the student "continue on home instruction for the duration of the suspension"; however, the IEP document does not reflect a discussion of or recommendation for home instruction (Tr. pp. 272-73; Dist. Ex. 41 at pp. 1-2; Parent Ex. QQ at p.1).

¹⁴ The parents requested the psychiatric evaluation in a letter to the district dated August 3, 2016 (Parent Ex. GG). The district contracted with a psychiatrist from BOCES to conduct the psychiatric evaluation (Tr. p. 295).

¹⁵ The STAR program is a therapeutic alternative education program located in a high school in a neighboring school district (Tr. p. 85).

¹⁶ The transition activities identify that BOCES was the agency responsible; however, the CSE recommended the STAR program (Dist. Ex. 2 at pp. 8-9).

A CSE convened on May 22, 2017 to conduct the student's annual review and develop an IEP for his 2017-18 school year (12th grade) (Dist. Ex. 1 at p. 1). The May 2017 CSE continued the recommendations from the September 2016 IEP (compare Dist. Ex. 1 at pp. 1, 5, 7-8, with Dist. Ex. 2 at pp. 1, 5, 7-8). According to the meeting information summary attached to the May 2017 IEP, the student was an active participant in group counseling and accessed individual counseling regularly but was not able to access medication or private therapy due to a lapse in health insurance during the year, which reportedly had a negative impact on his coping skills and behavior (Dist. Ex. 1 at p. 1; see Dist. Ex. 6 at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated August 29, 2017, the parents asserted that the district denied the student a free appropriate public education (FAPE) for the 2015-16, 2016-17, and 2017-18 school years (Parent Ex. A at pp. 1-2, 15).¹⁷ The parents asserted several claims without specifying to which school year they applied, including that: (a) the CSEs failed to convene for timely and compliant annual reviews; (b) the CSEs denied the parents their right to meaningfully participate in the development of the student's IEPs; (c) the district failed to conduct timely, comprehensive, or thorough evaluations of the student; (d) the CSEs failed to appropriately document the student's present levels of performance; (e) the CSEs failed to properly classify the student as a student with autism and, therefore, failed to recommend appropriate special education services to the student; (f) the CSEs failed to develop appropriate, measurable, and specific goals for the student that were achievable and, therefore, would not be repeated from one IEP to the next; (g) the district failed to conduct FBAs or create BIPs or otherwise address the student's behavioral needs; (h) the CSEs failed to recommend placements with the appropriate levels of support and services to address the student's needs and allow him to make meaningful educational progress or with an appropriate composition of students; (i) the CSEs failed to recommend appropriate related services, including counseling, speech-language therapy, occupational therapy (OT), applied behavior analysis (ABA), or parent counseling and training; (j) the CSEs failed to recommend appropriate transition services; (k) the CSEs failed to provide for appropriate, evidence-based instructional methodologies (id. at pp. 2, 15-19).

In addition to these claims, the parents also set forth a lengthy recitation of the student's educational history, within which they included more specific allegations about the district's alleged failures during the relevant school years (Parent Ex. A at pp. 2-15). In addition to referencing the general claims summarized above, this section of the due process complaint notice included the following additional or more particularized arguments.

With respect to the 2015-16 school year, the parents asserted that the May 2015 IEP repeated testing and evaluative data from the October 2013 IEP and that the district did not conduct evaluations to explain the student's difficulties described in the present levels of performance

¹⁷ The parents also raised claims pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794[a]); however, the parents withdrew those claims during the impartial hearing (Tr. p. 1658; Parent Ex. A at pp. 2, 14-15).

(Parent Ex. A at p. 8). In addition, the parents alleged that the May 2015 CSE failed to develop reading or writing goals and that the CSE repeated social/emotional/behavioral goals from the prior IEP—except it reduced criteria for several of the goals—reflecting the student's lack of progress and/or that the CSE developed inappropriate goals (id. at p. 9). The parents also objected to the level of support for the student's behavioral needs, indicating that two sessions of counseling per week was insufficient and that, although the CSE indicated the student's need for a BIP on the IEP, a BIP was never developed (id.). With respect to the recommended placement, the parents argued that the CSE inappropriately recommended a less supportive 12:1+1 special class with no individual paraprofessional support despite the student's continued struggles and documented safety concerns (id.). The parents also alleged that, despite information that the student exhibited pragmatic language needs, the district did not conduct a speech-language evaluation since 2011 and the May 2015 CSE failed to recommend speech-language therapy (id.). Further, the parents argued that the transition services included on the May 2015 IEP were vague and inappropriate (id. at pp. 9-10).

Relating to the disciplinary actions arising out of the April 2016 incident, the parents asserted that the district failed to timely hold an MDR, failed to conduct an FBA, failed to provide counseling services during the period of time that the student was placed in an IAES, and continued the student's placement in the IAES beyond the permitted time frame (Parent Ex. A at pp. 10-11, 16-19).

Turning to the 2016-17 school year, the parents asserted that the July 2016 CSE occurred over one year after the CSE had last convened (Parent Ex. A at p. 11).¹⁸ The parents disagreed with the district's July 2016 psychoeducational evaluation of the student on various grounds, including that the school psychologist who completed the evaluation failed to conduct particular assessments, failed to discuss a decrease in the student's scores on another assessment, and failed to observe the student in his educational setting (id. at p. 12). As for the September 2016 CSE, the parents asserted that the committee failed to reference the September 2016 psychiatric evaluation or make recommendations consistent with the psychiatrist's report, such as recommendations for speech-language therapy or ABA services (id. at p. 13). The parents alleged that the September 2016 IEP included the same two inadequate social/emotional/behavioral goals as the previous IEP (id.). Additionally, the parents objected to the 12:1+1 special class and the sufficiency of the recommended counseling service (id.).

With respect to the 2017-18 school year, the parents set forth claims generally consistent with the recitation set forth above applicable to all school years (Parent Ex. A at pp. 14, 15-18).

For relief, the parents requested that the district be required to provide all "related services encounter attendance records" for the 2015-16, 2016-17, and 2017-18 school years (Parent Ex. A

¹⁸ The parents also allege that the July 2016 CSE failed to consider a March 2016 private psychiatric evaluation, listed outdated evaluation results in the IEP, included insufficient annual goals, failed to address the student's behavioral needs, failed to recommend a class size and placement, inappropriately recommended home instruction, and failed to recommend parent counseling and training (see Parent Ex. A at pp. 1-12).

at p. 19). The parents also requested an interim order requiring the district to fund independent educational evaluations (IEE) for all areas of need, including speech-language, OT, assistive technology, and neuropsychological evaluations, as well as an FBA and corresponding BIP (*id.*). The parents also sought that the CSE be required to reconvene and create an IEP to reflect the results of the IEEs, as well as specific recommendations for the student, including placement in an appropriate nonpublic or out-of-district placement, with the placement meeting specifically listed requirements (*id.* at pp. 19-20). Finally, the parents requested compensatory education services in the areas of academic services, parent counseling and training, OT, speech-language therapy, ABA instruction, counseling, and services to address the student's behavioral, social/emotional, and life skills deficits (*id.* at p. 21). The parents also requested transportation costs to and from the new placement and the compensatory education services (*id.* at pp. 20-21).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 22, 2017 and concluded on April 16, 2018 after eight days of proceedings (Tr. pp. 1-1694).¹⁹ At the conclusion of the third hearing day, on December 12, 2017, the IHO ordered the district to conduct speech-language and OT evaluations of the student and provide the results to the parents two weeks prior to the next scheduled impartial hearing date (Tr. pp. 614-15, 627-28, 631).²⁰ By the next hearing date on February 15, 2018, the ordered evaluations had been completed (*see* Tr. p. 879; IHO Exs. I; II).²¹

In a decision dated June 13, 2018, the IHO determined that the district failed to offer the student a FAPE (*see* IHO Decision at pp. 43-44, 47, 49). Initially, the IHO determined that, based upon the date of the due process complaint notice—August 29, 2017—the two year statute of limitations would not permit claims that arose prior to August 29, 2015, which the IHO indicated "would allow examination of the student's education in the 2015-2016, 2016-2017, and 2017-2018 [school years] but not to the extensive history recited in the [due process complaint notice]" (*id.* at pp. 41-42). The IHO provided examples of issues she deemed outside of the scope of the impartial hearing, including those surrounding the January 2014 and May 2015 CSE meetings, which preceded the statute of limitations accrual date (*id.*).

With respect to the merits of the parents' claims pertaining to the 2015-16 through 2017-18 school years, inclusive, the IHO determined that the district's failure to conduct an FBA and

¹⁹ A prehearing conference was held on October 5, 2017 (IHO Ex. III).

²⁰ The parents objected to the IHO only ordering district-conducted evaluations and requested that the IHO order either non-district IEEs or concurrent IEEs, and the IHO denied these requests (Tr. pp. 616-630).

²¹ After the parents' due process complaint notice but prior to the commencement of the impartial hearing, the parents obtained a private OT evaluation of the student, which took place on September 9, 2017 (Parent Ex. YY), as well as a private speech-language evaluation of the student, which took place on November 15, 2017 (Parent Ex. XX). Later, the parents also obtained a private neuropsychological evaluation, which took place on March 31, 2018 (Parent Ex. ZZ).

develop a BIP, when coupled with the failure to conduct a speech-language evaluation and provide speech-language therapy, denied the student a FAPE (id. at pp. 43-44, 47, 49). The IHO found that the parents' other claims did not contribute to the denial of a FAPE (id. at p. 44, 49).

The IHO determined that, given the student's "clear need for behavioral strategies and supports," the district's failure to conduct an FBA or develop a BIP for all the school years in question "constituted a clear failure on the part of the district to assess the child in all areas of need" (IHO Decision at p. 44). The IHO found that the September 2013 FBA was by "its own terms a brief impression based on incomplete data at best" (id. at p. 45). In addition, the IHO rejected the explanation of the district's director of pupil personnel services (PPS) that the placement of the student in a therapeutic setting made an FBA unnecessary (id.). The IHO found the generic school-wide behavior programs and counseling supports insufficient to address the student's behavioral needs, noting the lack of data collection (id. at pp. 45-47). The IHO also observed that the April 2016 incident should have led to an FBA and BIP and, moreover, that despite the CSE finding that the student's behavior was a manifestation of his disability, "the district ignored regulations requiring . . . the CSE must conduct a[n] [FBA] and implement a [BIP]" (id. at p. 46). The IHO specified that the district's failure to conduct an FBA or develop a BIP, by itself, was insufficient to rise to the denial of a FAPE, but that the district's violations relating to the lack of a speech-language evaluation "compounded the difficulty for [the student]" (id. at p. 47).

As for the speech-language evaluation, the IHO found that, given the student's initial classification in elementary school as a student with a speech or language impairment and the student's "poor pragmatic language skills," "there was no reasonable explanation as to why" the district did not conduct a speech-language evaluation of the student (IHO Decision at pp. 47-49). The IHO rejected the notion that counseling or programmatic work on the student's social skills sufficiently addressed the student's pragmatic language skills (id. at p. 48). The IHO also noted that the district and the private speech-language evaluations conducted subsequent to the parent's due process complaint notice noted the student's pragmatic language deficits (id. at p. 49). The IHO concluded that, as a consequence of the district's failure to evaluate the student in this area of need, the student "was not provided with needed speech and language therapy to address his pragmatic difficulties" (id.). In combination with the lack of an FBA and BIP, the IHO found that the failure to evaluate the student's speech-language needs, "left school officials, those subjective teachers in the classroom, without the roadmap needed to properly treat the student" (id.).

The IHO also addressed the parents' other claims, which she concluded did not contribute to her determination that the district denied the student a FAPE (IHO Decision at pp. 46, 49-54). Specifically, with respect to the parents' contentions arising out of the disciplinary actions following the incident in April 2016, the IHO determined that the placement of the student in an IAES was effective with the CSE's determination on May 19, 2016 and ended upon the student's placement in the STAR program on September 28, 2016, which the IHO found constituted a period of time falling within the 45-school day limit (id. at p. 46).

With respect to the issue of parental participation, the IHO found the evidence showed that the parents participated in the CSE meetings, and that their participation was noted on successive IEPs, as were their objections to the recommended placement (IHO Decision at p. 54).

Turning to the parents' claim that the CSE failed to conduct timely and comprehensive evaluations, the IHO found that, aside from the lack of a speech-language evaluation and an FBA, the district had sufficient evaluative information about the student (IHO Decision at pp. 53-54). Specifically, the IHO found that the testimony showed that the student did not present with either gross or fine motor skills deficits thereby defeating that assertion that he needed an OT evaluation (*id.* at p. 53). The IHO also noted testimony that the parents had not requested either an OT or assistive technology evaluation, as well as the testimony concerning the student's performance as an athlete, artist, and his use of an iPad (*id.*). The IHO also discounted the parents' assertion that the district should have conducted a neuropsychological evaluation to assess the student's academic functioning and "better understand" his autism and ADHD, noting that the psychological and psychiatric examinations were conducted to address the student's academic and psychological needs (*id.*). The IHO also expressed skepticism about a diagnosis of autism for the student (*id.* at pp. 53-54).

The IHO also examined the content of the disputed IEPs. As for the parents' assertion that the district improperly classified the student as a student with an emotional disturbance, the IHO determined that, while the CSE failed to consider the classification category of autism, the student's emotional issues were "at the forefront of the constellation of symptoms" as demonstrated by the student's many diagnoses, his behaviors, and his hospitalizations (IHO Decision at pp. 49-50). With respect to the present levels of performance and annual goals contained within the IEPs, the IHO found that the student's social/emotional/behavioral needs—the "predominant issues facing the child"—were addressed (*id.* at p. 52). Next, the IHO noted that there is no requirement to place a specific methodology on an IEP but that, in any event, the student received instruction through the dialectical behavioral therapy (DBT) model while in group sessions (*id.*).

With respect to the parents' assertions concerning the placements and programs recommended for the student, as well as the parents' request that the student be placed in a nonpublic school, the IHO determined that the parents' primary objection was that the student was not receiving his instruction and related services in the public school in the district (IHO Decision at pp. 50-51). Initially, the IHO found that a therapeutic support program was an appropriate placement for the student (*id.* at p. 45). In particular, the IHO found that the CSE's placement of the student at the BOCES therapeutic support program for the 2015-16 school year, following his success in the same program the prior year, was appropriate (*id.* at p. 51). For the 2016-17 and 2017-18 school year, the IHO also found the STAR program to be appropriate, citing to recommendations in the private therapist's letter, as well as the private neuropsychological evaluation (*id.*). The IHO also noted that the parents did not claim that the student had not done well in his classes in the three years at issue or that he was not qualified to graduate on schedule with a Regents diploma (*id.*). The IHO also found that the evidence did not show that the student needed compensatory services in reading, math, or writing (*id.* at p. 52).

Regarding the parents' claim that, due to the lack of comprehensive evaluations, the district failed to provide the student with needed related services, the IHO found that, aside from speech-language therapy, the evaluative information demonstrated that the student did not need other related services (IHO Decision at p. 54).

Finally, with respect to the parents' demand for speech-language, OT, assistive technology, and neuropsychological IEEs, the IHO denied the requests, and determined that, contrary to the regulations, the parents did not proffer any disagreement with any district evaluation (IHO Decision at pp. 54, 55, 56). The IHO also noted that the district did not have a chance to conduct such evaluations prior to the filing of the due process complaint notice (*id.* at pp. 54-55). However, with respect to speech-language, the IHO indicated that, but for equitable circumstances, she would have ordered the IEE in order to inform the hearing record with regard to the student's specific deficits resulting from a possible loss of FAPE and the formulation of an award of compensatory education (*id.*). The IHO found that, due to "the parent attorney's deliberate misleading of the hearing officer and the district concerning the status of evaluations that had already been conducted," the parents would not be awarded the costs of the November 2017 speech-language evaluation, noting that, had the report been shared, the IHO would not have ordered the district to conduct an evaluation (*id.* at p. 55). Similarly, the IHO also noted that the parents had obtained a private OT evaluation prior to the resolution session and chose to withhold the existence of and results of the evaluation from the CSE and the IHO (*id.* at pp. 55-56).

In considering relief for the district's failure to offer the student a FAPE for the relevant school years, the IHO acknowledged that the student was "scheduled to graduate later th[at] month" and that relief, therefore, had to be "fashioned to the circumstances of his educational status" (IHO Decision at p. 56). To address the district's failure to recommend related services to address the student's pragmatic language needs, the IHO ordered a bank of 160 hours of compensatory speech-language therapy to be delivered in individual and group sessions by a licensed speech therapist over a two year period (*id.* at pp. 56, 57).²²

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in finding that the district failed to offer the student a FAPE for the 2015-16, 2016-17, and 2017-18 school years.²³

Specifically, with respect to the IHO's determination that the lack of an FBA or a BIP contributed to a denial of FAPE, the district asserts that the student did not exhibit behavior which impeded his learning or that of others and, therefore, did not require either an FBA or a BIP. The district also argues that the BOCES program was a therapeutic support program with sufficient

²² The IHO based her award on the recommendations in the November 2017 private speech-language evaluation (*id.* at p. 56).

²³ With its request for review, the district provides two documents for consideration on appeal (Req. for Rev. Exs. 1-2). Whether or not this additional evidence will be considered is discussed below.

built-in support to address the student's behaviors. Further, the district indicates that, other than the one "aberrant" incident in April 2016—which the district attributes to a change in the student's medications—the student was not involved in any disciplinary incidents.

With respect to the IHO's determination that the district inappropriately did not conduct a speech-language evaluation or provide speech-language therapy to the student, the district asserts that the CSEs addressed the student's social skill needs through annual goals and counseling services and that the student exhibited progress in this area. The district argues that, in finding that the student never mastered a goal regarding his relations with peers, the IHO erred because a FAPE is not evidenced by mastering goals. Further, the district asserts that the IHO improperly assigned speech-language therapy as the mechanism by which to address the student's social communication issues.

Lastly, the district asserts that the IHO erred in failing to consider the applicable "gross violation" standard when ordering compensatory education for a student who has graduated.

In an answer, the parents respond to the district's allegations and generally argue in favor of upholding the IHO's determinations that the district failed to offer the student a FAPE.²⁴ As a cross-appeal, the parents argue that the IHO erred by failing to find additional grounds to support a finding that the district failed to offer the student a FAPE for the 2015-16, 2016-17, and 2017-18 school years. The parents appeal the IHO's "fail[ure] to consider" the following issues. First, the parents allege that the IHO should have considered that the CSEs were convened in an untimely manner. The parents also assert that the IHO should have considered that the CSEs impeded the parents' right to participate in the student's education, further alleging that the district failed to evaluate the student for many years, thereby preventing the parents and the district from understanding the student's needs, and that the CSEs engaged in impermissible predetermination of the student's programming by drafting IEPs in advance of meetings and, at the September 2016 CSE meeting by singularly focusing on the STAR program and failing to discuss the rest of the student's educational program, including the student's present levels of performance and individualized goals. Turning to the IEPs, the parents allege that the IHO should have considered that the student's present levels of performance in the IEPs were inappropriate because they did not include recent evaluative information or information about the student's hospitalizations and because the information about the student's social functioning was inaccurate. The parents also assert that the IHO erred in failing to consider that the annual goals contained in the IEPs were selected from a drop-down menu and failed to address all of the student's needs. In addition, the parents assert that the IHO erred in failing to consider that the transition services contained on the IEPs were inappropriate because the goals were copied and pasted year to year, the IEPs failed to indicate how the student would achieve the specified postsecondary goals, and the district failed to provide vocational testing or vocational counseling for the student.

²⁴ The parents object to consideration of the additional evidence offered by the district with its request for review.

With respect to the issue of compensatory education services, the parents assert that the IHO erred in failing to award compensatory education services in the areas of OT, tutoring, and transition services programming, along with associated transportation costs.²⁵ The parents also assert that the IHO improperly ordered the district to conduct evaluations of the student after the impartial hearing convened and erred in failing to order the IEEs requested by the parents. The parents seek the relief as stated in their due process complaint notice.

In its answer to the parents' cross-appeal, the district responds to the parents' allegations and notes that, although the parents allege that the IHO failed to consider identified issues, the IHO actually made determinations on several of the cited issues, finding no merit to the parents' claims. The district also asserts that, in their cross-appeal, the parents requested a year of transitional programming, which was not requested in their due process complaint notice and is, therefore, an improper remedy. The district also asserts that the parents are precluded from making claims that are now moot, as the student graduated with a Regents diploma in June 2018.

In a reply, the parents respond to the district's stated "affirmative defenses." In particular, with respect to the district's argument that they raised a request for new relief on appeal (that is, a request for transition services), the parents assert that their proposed relief was sufficiently raised in the due process complaint notice, is within the "broad authority" of "courts . . . to craft appropriate relief," and, in any event, the district "opened the door" to the issue when it did not object to the parents' direct examination of the private neuropsychologist on the topic of this form of relief and it cross-examined the same witness with respect to the witness' evaluation and recommendations. In addition, the parents assert that, given their request for compensatory educational services, their claims are not moot as a result of the student's graduation.

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. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir.

²⁵ In response to the district's assertion about the legal standard applied by the IHO in evaluating the award for compensatory education, the parents assert that the gross violation standard is not relevant in this matter because the timeline stopped with the filing of the due process complaint notice, and the IHO issued her decision prior to the student aging out or graduating.

2014]; 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. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). 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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). 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 Endrew F., 137 S. Ct. at 1001 [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"]; 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]), 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]).²⁶

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

1. Additional Evidence

The parents object to the additional evidence included with the district's request for review, asserting that it "retroactively raises an issue" that was not presented during the impartial hearing.

Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

In this case, the district submits a copy of the student's final transcript, showing that the student graduated on June 30, 2018 (Req. for Rev. Ex. 2). The document could not have existed prior to the IHO rendering a decision, as the school year had yet to conclude, and the document is necessary to fully consider the parties' arguments in this appeal. Therefore, I will consider the document for the purposes discussed below.

²⁶ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

2. Scope of Review

Before turning to the merits of the parties' arguments, it is necessary to note the limited scope of the issues presented on appeal, as neither party appeals several of the IHO's determinations.

The IDEA provides that "any party aggrieved by the findings and decision" of an IHO "may appeal such findings and decision to the State educational agency" (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). State regulation provides that a request for review or a cross-appeal "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate" the relief sought by the appealing party (8 NYCRR 279.4[a], [f]). Further, it has long been held that a memorandum of law is not a substitute for a pleading, which is expected to set forth the appealing party's allegations of the IHO's error with appropriate citation to the IHO's decision and the hearing record (8 NYCRR 279.8[c][3]; [d]; see, e.g., Application of a Student with a Disability, Appeal No. 15-070). An IHO's decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see 8 NYCRR 279.8[c][4] ["Any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]).

As summarized in detail above, the IHO made determinations with respect to the timing of the student's placement in an IAES, the sufficiency of the evaluative information available to the CSEs (other than the lack of FBA and speech-language evaluation), the appropriateness of the eligibility classification of emotional disturbance, the necessity for the CSEs to specify a methodology on the student's IEPs, and the appropriateness of the placements and programs recommended on the student's IEPs, including the therapeutic support program, the STAR program, and the related services (see IHO Decision at pp. 46, 49-51, 53-54).²⁷ The parents did not challenge these determinations in their cross-appeal. In their memorandum of law, the parents raise some of these arguments, including allegations about the sufficiency of evaluative information and the appropriateness of counseling services; however, as noted above, a memorandum of law may not substitute for a pleading (Parent Memo. of Law at pp. 13-18, 21-22).²⁸ Likewise in their memorandum of law—in the context of their argument that the district

²⁷ With respect to the IHO's determinations explicitly raised in the parents' cross-appeal, the extent to which the parents sufficiently challenged the IHO's findings related to parent participation, present levels of performance, and annual goals, will be discussed further below.

²⁸ Although the parents allege in the cross-appeal that they were denied meaningful participation as a result of the district's failure to evaluate the student for many years, thereby preventing the parents and the district from understanding the student's needs, they do not allege that the IHO erred in finding that the district had sufficient evaluative information about the student aside from the lack of a speech-language evaluation and an FBA (IHO Decision at pp. 53-54).

committed a gross violation of the IDEA and that the student should receive compensatory education services—the parents allude to an alleged failure of the district to provide the student with counseling services during the time the student attended the IAES and throughout the disputed school years (Parent Memo. of Law at pp. 12, 19-23); however, the IHO did not make a determination about implementation and the parents did not allege that the IHO erred in failing to make this finding (see IHO Decision).²⁹

Accordingly, as neither party has appealed these determinations, they are final and binding on the parties and will not be further discussed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Additionally, neither party challenged the IHO's determination regarding the statute of limitations (see IHO Decision at pp. 41-42). The IHO found that claims that accrued on or before August 29, 2015 were barred by the statute of limitations (id. at p. 41). This determination is also final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Accordingly, any of the parents claims pertaining to the May 2015 CSE or resultant IEP fall outside of the actionable timeframe. While the date of the CSE meeting may not be determinative for statute of limitations purposes where the parent challenged the implementation of the IEP (K.P. v. Juzwic, 891 F. Supp. 703, 716-17 [D. Conn. 1995]; accord G.R. v. Dallas Sch. Dist. No. 2, 823 F. Supp. 2d 1120, 1130-35 [Or. 2011]), as noted above, for the 2015-16 school year—with the exception of the parents' claims relating to the April 2016 behavioral incident and subsequent disciplinary occurrences—the parents' claims all relate to the development of the May 2015 IEP and its recommendations, not to implementation of that IEP (see Parent Ex. A at pp. 8-11, 15-19).³⁰ While the IHO indicated that the application of the statute of limitations still "allow[ed] examination of the student's education in the 2015-2016, 2016-2017, and 2017-2018," she specifically referenced the May 2015 CSE as having occurred prior to "the relevant time period" (id. at pp. 41-42).³¹

3. Mootness

In its answer to the parents' cross-appeal, the district argues that the parents' claims are moot because the student graduated. A dispute between parties must at all stages be "real and live," and not academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51

²⁹ Prior to seeking a remedy, it is necessary to raise the issue of the underlying alleged denial of a FAPE.

³⁰ Even assuming that the due process complaint notice sufficiently raised an issue pertaining to implementation of mandated related services (see Tr. pp. 1666-70; Parent Ex. A at p. 16), the IHO did not discuss it and the parents' have not pursued such a claim in their cross-appeal (Answer & Cr.-App. ¶¶ 27-36).

³¹ The IHO did subsequently make some determinations, which she specified were applicable to all three school years; however, it does not appear that the IHO intended these findings to apply to claims relating to the May 2015 IEP. In any event, even if some of her determinations could be interpreted as relating to the May 2015 IEP, these are either final and binding or do not result in a different outcome in this instance for largely the reasons discussed below.

[2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). However, in most instances, a claim for compensatory education will not be rendered moot (see Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215, 219 [N.D.N.Y. 1993] [demand for compensation to correct past wrongs remains as a live controversy even if parents are satisfied with student's current placement]; see also Toth, 720 Fed. App'x at 51).

According to the additional evidence submitted with the district's request for review, the student graduated on June 30, 2018, receiving a Regents diploma (Req. for Rev. Ex. 2). However, as the parents argue in their reply, their request for compensatory education prevents this matter from being deemed moot despite the student's graduation.

B. May 2016 Manifestation Determination Review—Functional Behavioral Assessment and Behavioral Intervention Plan

As noted above, the student was involved in a physical altercation in April 2016, resulting in injury to other students (Parent Ex. X; see Dist. Ex. 41 at p. 1). The district held an MDR and found that the student's behavior was a manifestation of his disability (Dist. Ex. 41 at p. 1). The district asserts that the IHO erred in determining that the district should have conducted an FBA and created a BIP for the student following the manifestation team's determination that the student's conduct was a manifestation of his disability. The district characterizes the April 2016 incident as "aberrant" and asserts that it was caused by a change in the student's medication.

Within 10 school days of any decision to change the placement of a student with a disability because of a violation of a code of student conduct, the manifestation team must review all relevant information in the student's file including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine if: "(1) the conduct in question was caused by or had a direct and substantial relationship to the student's disability; or (2) the conduct in question was the direct result of the school district's failure to implement the IEP" (8 NYCRR 201.4[c]; see 20 U.S.C. § 1415[k][1][E]; Educ. Law § 3214[3][g][3][vii]; 34 CFR 300.530[e][1]). The IDEA and federal and State regulations provide that any student removed from his or her current placement "shall . . . receive, as appropriate, a[n] [FBA] [and] behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur" (20 U.S.C. § 1415[k][1][D][ii]; 34 CFR 300.530[d][1][ii]; 8 NYCRR 201.2[k][2]).

Additionally, if the result of an MDR is a determination that the student's behavior was a manifestation of his or her disability, the CSE is required to conduct an FBA and implement a BIP or, if the student already has a BIP, review the BIP and modify it as necessary to address the behavior (20 U.S.C. § 1415[k][1][F][i]-[ii]; 34 CFR 300.530[f][1][i]-[ii]; 8 NYCRR 201.3).

State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to:

the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]; see 8 NYCRR 201.2[h]). According to State regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student's record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (R.E., 694 F.3d at 190).

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

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

(8 NYCRR 200.22[b][1]). If the CSE determines that a BIP is necessary for a student, the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]; see 8 NYCRR 201.2[a]).

As with the failure to conduct an FBA, the district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

It is undisputed that the district did not conduct an FBA or develop a BIP for the student at any time contemporaneous with or after the May 2016 MDR in contravention of the requirements of the IDEA and State and federal regulations (20 U.S.C. § 1415[k][1][F][i]-[ii]; 34 CFR 300.530[f][1][i]-[ii]; 8 NYCRR 201.3).³² Accordingly, it is only necessary to consider whether, in the present circumstances, this "serious procedural violation" (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]; R.E., 694 F.3d at 190; see L.O., 822 F.3d at 113; see also Fitzgerald v. Fairfax County Sch. Bd., 556 F. Supp. 2d 543, 551 [E.D. Va. 2008]; Farrin v. Maine Sch. Admin. Dist. No. 59, 165 F. Supp. 2d 37, 51 [D. Me. 2001] [holding that the delay in conducting an MDR meeting under the circumstances did not result in harm]). As noted above, this would generally be accomplished by reviewing the student's IEP to determine whether it otherwise addressed the student's behaviors (see R.E., 694 F.3d at 190). Here, the May 2016 MDR did not result in an IEP document; however, a summary page with meeting information was generated (Dist. Ex. 41).

The notes from the May 2016 MDR meeting reveal that the manifestation team considered factors that may have contributed to the April 2016 incident, which included that the student's school counselor was absent on the day of the incident, the student's private therapist and psychiatrist were changing at that time, and the student's medication had been changed immediately prior to the incident (Tr. pp. 269-70; Dist. Ex. 41 at pp. 1-2).³³ Further, a review of

³² According to the evidence in the hearing record, the only FBA of the student was conducted in September 2013 (Parent Ex. U). The district does not cite this FBA as being sufficient to satisfy its obligations arising from the MDR determination.

³³ The student's school counselor indicated that another counselor was available in school to cover his absence (Dist. Ex. 41 at p. 1).

the MDR notes shows that the student's then-current counselor discussed the student's history since the eighth grade, including how and when the student became stressed (Dist. Ex. 41 at p. 1). According to notes from the May 2016 MDR, the student's counselor indicated that the student could be coherent and responsible in school, but at times he decompensated to a degree that necessitated hospitalization (id.). The May 2016 MDR meeting notes also indicated that the parent communicated with the school regarding family stressors that could impact the student, the program continually monitored the student's stress level, and at times the student needed to go home (id.). In contrast, according to the MDR notes, the BOCES program supervisor noted that the student had been, overall, doing well in the program, and neither the program supervisor nor the student's counselor noted any other behavioral issues outside of this one incident (id. at pp. 1-2; see Tr. p. 261).

Even assuming that the incident was isolated or, as the district characterized it, "aberrant," the evidence in the hearing record does not establish that the district understood the student's behavior underlying the incident or otherwise made accommodations for his behavior or social/emotional needs during his suspension. Indeed, absent from the document generated from the MDR, or from any documentation included in the hearing record, was a record of the CSE's determination identifying an appropriate IAES for the student (20 U.S.C. § 1415[k][2]; 34 CFR 300.531; 8 NYCRR 201.7[e][1]; 201.10[d]; see also Parent Ex. QQ at p. 4). There is also almost no information about what instruction or services the student received during his suspension (see 20 U.S.C. § 1415[k][1][D][i]; 34 CFR 300.530[d][1]; 8 NYCRR 201.10[d]).

The PPS director testified that the district did not consider conducting a new FBA when the student was receiving instruction in the library during his suspension (Tr. pp. 452-53). Instead, the manifestation team agreed to reconvene in July to discuss the student's status "as far as treatment and stability" (Dist. Ex. 41 at p. 2). The PPS director testified that "there was a question as to whether or not this was an isolated incident or the beginning of . . . a pattern of new behaviors" and that "BOCES was hoping to be able to speak to the private provider about that" (Tr. p. 284). The CSE meeting held in July 2016 was insufficient to remedy the failures in the MDR procedures in May 2016.

Ultimately, there is insufficient evidence in the hearing record to find that, in the absence of the required FBA and/or BIP, the district sufficiently addressed the student's behavior violation so that it did not reoccur (see Shelton v. Maya Angelou Pub. Charter Sch., 578 F Supp 2d 83, 99 [D.D.C. 2008] [finding that the failure to conduct an FBA and BIP following a student's suspension and expulsion denied the student a FAPE]). Accordingly, the evidence in the hearing record supports a finding that this violation denied the student a FAPE at least until the September 2016 CSE convened and recommended a program supportive of the student's behavioral needs, as discussed below.

C. September 2016 IEP

1. Special Factors—Interfering Behaviors

The district asserts that the IHO erred in finding that it should have conducted an FBA and developed a BIP for the student, arguing that the student did not exhibit behaviors that impeded his learning or that of others. Additionally, the district argues that the program recommended in the September 2016 IEP sufficiently addressed the student's behavioral needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). In addition to the requirements relating to the MDR, State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). The applicable requirements attendant to FBAs and BIPs are as set forth above.

The May 2016 manifestation team agreed to reconvene in July to discuss the student's status "as far as treatment and stability" (Dist. Ex. 41 at p. 2). The PPS director testified that "there was a question as to whether or not this was an isolated incident or the beginning of . . . a pattern of new behaviors" and that "BOCES was hoping to be able to speak to the private provider about that" (Tr. p. 284). The student's private therapist submitted a letter to BOCES, dated July 14, 2016—which the July 2016 CSE considered—that stated that, although "a new transition may be difficult for [the student] academically, socially and emotionally, if the school district fe[lt] a more therapeutic school setting would be more beneficial for him, that may be appropriate" (Dist. Ex. 10; see Tr. pp. 285-87). Staff from the therapeutic support program at BOCES also indicated that they had been in contact with the private therapist and had received the private psychiatric evaluation of the student (Dist. Ex. 3 at p. 1; see Parent Ex. W).³⁴ With respect to the student's behaviors, the private psychiatric evaluation report noted the student's previous hospitalizations and suicidal ideations and indicated that the student exhibited "impulsive and aggressive behavior when angry" (Parent Ex. W at p. 6).

The CSE convened in July 2016 for the student's annual review and discussed concerns regarding whether the student's mental health prognosis was changing, whether the BOCES program was supportive enough to meet the student's needs, and whether a more therapeutic school setting was necessary, and concluded that a more therapeutic setting was appropriate (Tr. pp. 1003-

³⁴ According to the PPS director, she reviewed the private psychiatric evaluation report prior to the CSE meeting and its omission from the list of "Evaluations/Reports" on the July 2016 IEP was "a clerical omission" (Tr. pp. 453, 455; Dist. Ex. 3 at p. 3).

07; Dist. Ex. 3 at pp. 1-2). The PPS director testified that the July 2016 CSE discussed obtaining consent to update evaluations and the need for a more therapeutic program (Tr. pp. 456-57, 462).

Subsequent to the May 2016 MDR and July 2016 CSE, the district conducted additional evaluations of the student, which were available to the September 2016 CSE (see Dist. Ex. 2 at p. 3; see also Parent Ex. Y; Dist. Ex. 9).

The July 2016 psychoeducational evaluation included an assessment of the student's academic achievement and social/emotional functioning (Parent Ex. Y). The student scored in the average range on the Woodcock Johnson Tests of Achievement-Fourth Edition (WJ-IV) in all areas of academic achievement, except for academic fluency, which was in the low average range (id. at pp. 2-3). Parent responses on the Behavior Assessment System for Children-Third Edition (BASC-3) suggested that the student was functioning typically for his age across most composite areas in the home environment, except for at-risk ratings in depression and withdrawal, which suggested the student could at times be sad, lethargic, and seemingly alone and struggling to make friends (id. at p. 4).³⁵ Student self-report ratings also reflected average scores in most areas, except for at-risk ratings on the social stress, anxiety, and depression scales, and clinically significant scores on the interpersonal relations and self-esteem scales (id. at pp. 3-5).

An updated social history report was also conducted in August 2016 (Dist. Ex. 9). The social history discussed the student's history of hospitalizations "due to ongoing psychiatric issues," as well as the treatments he was receiving for anxiety and depression (id. at p. 2). The social history indicated that, although the student had in the past "been described as a hardworking, motivated, helpful, and positive individual," lately he exhibited a lack of motivation and a tendency to "become[] easily upset when asked to do something," behaved in a "willful" manner, and "want[ed] to do things his way" (id.). The report also noted that the student "create[d] excuses for his behavior instead" of taking responsibility for his actions (id.).

According to the present levels of performance section of the September 2016 IEP, the student enjoyed conversation and engaging with peers and staff, contributed intelligently to class discussions, and could be very insightful in his interpretations of literature (Dist. Ex. 2 at p. 4). The September 2016 IEP also indicated that the student was smiling and showing more emotional variety, exhibiting more emotional maturity in a mainstream class, and he appeared to be enjoying and benefitting from the social aspects of school (id. at pp. 4-5); however, the PPS director testified that this information was added to an IEP for the student's annual review, which was usually held in late spring, but that, because of the incident resulting in the student's suspension, the annual review occurred later and the information was "probably" no longer accurate "based on that one incident" (Tr. pp. 457-58). The September 2016 IEP acknowledged that the student continued to demonstrate significant emotional and behavioral challenges and needed to improve his level of patience and tolerance of others with differing opinions or ideas (Dist. Ex. 2 at pp 4-5). In addition,

³⁵ The district school psychologist who conducted the evaluation testified that teacher ratings were not included because the evaluation was conducted over the summer and teachers were unavailable (Tr. p. 734).

the IEP indicated that the "student's disability ma[de] it difficult for him to control his need for self-injurious behaviors" (id. at p. 5).

The September 2016 IEP indicated that the student required strategies and supports, including positive behavioral interventions, to address behaviors that impeded his learning or that of others, as well as a BIP that focused on seeking out the help of support staff when he felt like hurting himself (Dist. Ex. 2 at p. 5). However, the PPS director testified that need for a BIP was marked "yes" on the student's IEP in error for several years and should have been taken off the student's IEP when he was placed out of district in eighth grade (Tr. pp. 184-86).³⁶

Based on the information known to the September 2016 CSE—including the student's history of hospitalizations for self-injurious behaviors, the incident preceding the disciplinary action, and information from the district evaluations and the student's private therapist that the student exhibited behavioral needs—the September 2016 CSE should have recommended an FBA and a BIP for the student. However, the evidence in the hearing record does not support a finding that this procedural violation denied the student a FAPE.

The September 2016 CSE discussed the student's placement for 2016-17 school year and recommended a 12:1+1 special class in the STAR program with social/emotional and behavioral goals and opportunities for mainstreaming and weekly individual and group psychological counseling services (Dist. Ex. 2 at pp. 1, 4, 6-7, 9). As support for the student's management needs, the September 2016 IEP indicated that "[t]he student needs to improve his level of patience and tolerance to others whom may have differing opinion[s] or ideas" (id. at p. 5). The annual goals specified that the student would "identify behavioral triggers . . . and explain how th[o]se triggers impact[ed] on his behavior or on the behavior of others" and "identify and appropriately use a coping skill . . . to maintain acceptable school behavior" at times "[w]hen the student expresses a negative emotion at school" (id. at p. 6). Additionally, the IEP provided for communication between the school and the student's home and outside therapists (id. at p. 7).

The PPS director stated that the district addressed the student's self-injurious behaviors by placing him in a therapeutic setting with a high clinical ratio and a low student-to-staff ratio, as well as attempting to work in conjunction with private providers (Tr. p. 437). The STAR program coordinator described the STAR program as a therapeutic support program that provided academic and therapeutic supports to students working towards Regents diplomas in a high school program

³⁶ The PPS director further testified about the CSE's decision that the student did not require a BIP and referenced the "check and connect" plan—an accommodation listed on several of the student's IEPs—as "part of a behavior plan" (Tr. p. 1057; Dist. Exs. 1 at p. 7; 2 at p. 7; 3 at p. 7; 4 at p. 7; 5 at p. 6; 37 at p. 6; 39 at p. 7; 40 at p. 7). The PPS director testified that, when the student was first classified (in eighth grade), he was in a school with 1,000 students and two clinicians, so the "check and connect" plan was put in place to try to ensure his safety; however, when the student transitioned to a therapeutic program, the CSE determined the BIP was no longer needed (Tr. pp. 1056-57). It appears by this testimony that, in addition to checking the BIP box on the student's IEP for several years in error, the CSEs also did not intend to continue the "check and connect" accommodation for the student.

(Tr. pp. 486-87). The program coordinator explained that therapeutic counseling support was provided in group sessions using the DBT model, which involved teaching skills primarily centered on social literacy, as well as in individual sessions, which provided staff an opportunity to determine whether the students were applying their lessons effectively in real life situations and also whether they were benefitting from the group lessons (Tr. pp. 488-90).³⁷ The STAR program also provided short term "as-needed" support to assist students with emotionally challenging situations (Tr. pp. 490-92). The program coordinator stated that the STAR program promoted positive behavior by having a monthly director's challenge for students to work towards and a general program called "rocks tickets" that reinforced positive student behavior (Tr. pp. 532-33).

According to notes from the September 2016 CSE meeting, after visiting the program, the parents were pleased with the program, and the STAR program coordinator opined that the program would meet the student's needs (Dist. Ex. 2 at p. 1). The student's counselor at STAR for the 2016-17 school year testified that she spoke to the student's outside therapist before he entered the program to obtain information about the student, the problems he experienced, and the triggers for his problems (Tr. pp. 919-20).

Based on all of the foregoing, even considering the CSE's determination that the student did not require an FBA or a BIP as a serious procedural violation, in this instance, it does not rise to the level of a denial of a FAPE or otherwise contribute to such a finding because the September 2016 CSE had sufficient information regarding the student's behaviors and the September 2016 IEP adequately identified and recommended supports for the student's behavioral needs (see R.E., 694 F.3d at 190).

2. Speech-Language Therapy

The district asserts that the IHO erred when she held that the district committed a procedural violation when it did not conduct a speech-language evaluation of the student and offer him speech-language services to address his social communication issues. The district further asserts that the IHO erred when finding that the student was not provided with a FAPE because he never mastered a goal regarding relations with his peers. The parents deny that the student's social weaknesses were best addressed in counseling as opposed to speech-language therapy and allege that the social skills groups that the student participated in were insufficient to address the student's pragmatic language deficits and that he required therapy with a speech-language pathologist. The parents assert that the IHO did not err in finding that the district denied the student a FAPE, in part due to its failure to provide speech-language therapy to the student, as evidenced by his failure to achieve his goals related to managing peer interactions due to pragmatic language challenges.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation

³⁷ DBT was described as an evidence-based treatment model that helps students reframe their perspective on themselves and rethink how they interact with others and that provides alternative ways of behaving to produce more positive outcomes (Tr. pp. 169, 924).

(see 34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (20 U.S.C. § 1414[a][2][b][i]-[ii]; 34 CFR 300.303[b][1]-[2]; 8 NYCRR 200.4[b][4]). Pursuant to State regulation, a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability (see 8 NYCRR 200.4[b][4]). The reevaluation "shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services' needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

The school psychologist at the BOCES therapeutic support program reported that, among other things, during the 2015-16 school year, he worked with the student on building friendships and that the 2015-16 school year was a very good year for the student; "[i]t was [the student] coming out of his shell" (Tr. pp. 815-16). The psychologist explained that social skills groups were part of the BOCES therapeutic support program and addressed "how to be successful in the mainstream," making friends, and opening social circles (Tr. p. 817). The psychologist testified that he was aware that the student had social issues when he was in the BOCES program (Tr. p. 822). He opined that the social skills groups did not need to be run by a speech-language therapist, nor did counseling, as it related to social skills weaknesses, need to be provided by a speech-language therapist (Tr. pp. 822-23). The psychologist testified that he did not see the student as having pragmatic language issues, meaning difficulties with "standard age appropriate expressive and receptive language skills" (Tr. p. 870). He further elaborated, that "[a]s a layperson outside the sphere of speech and language specialist, [he] did not see any pragmatic language issues. [The student] definitely had issues communicating because of his emotional needs, not speech and language needs" (Tr. pp. 872).

With respect to the student's mastery of goals related to peer interactions, the student's social/emotional/behavioral goals for the 2015-16 school year targeted the student's ability to

identify personal attributes and how they might impact his interaction with others, identify behavioral triggers and how they impacted his behavior or that of others, and foster and maintain positive relationships with peers (Dist. Ex. 4 at pp. 6-7). The June 2016 IEP progress report indicated that the student had achieved the goals related to identifying behavioral triggers and using appropriate behavior strategies and fostering and maintaining positive relationships with peers (Dist. Ex. 25 at p. 3).

As discussed above, both the manifestation team and the CSE met to discuss the student several times prior to the start of the 2016-17 school year. The May 2016 manifestation team discussed the incident that led to the student's suspension and whether the student was stable enough to return to the BOCES program (Dist. Ex. 41 at pp. 1-2). The meeting information summary reflects that the manifestation team discussed the student's behavior and social/emotional needs but did not specifically discuss anything related to the student's speech or language (*id.* at p. 1). The CSE convened in July 2016, after receiving information from the student's private therapist with respect to whether or not the BOCES program remained appropriate for the student (Tr. pp. 285-86; 1003-07; Parent Ex. 10). The private therapist weighed in on the student's need for a more therapeutic setting but did not mention the need for a speech-language evaluation or services (Dist. Ex. 10). The PPS director testified the July 2016 CSE discussed the student's need for a "stronger therapeutic program" and that specific recommendations were not made at that time other than to conduct a program search (Tr. pp. 462-63, *see* 463-71).

According to the PPS director, new evaluative data that was available to the CSE when it met in September 2016 included an updated social history and psychoeducational evaluation (Tr. p. 1010; Dist. Exs. 2 at p. 3). While the psychoeducational report described the student's social/emotional functioning, including the student's report of having "substantial difficulty establishing and maintaining relationships with others," the evaluator did not recommend a speech-language evaluation or speech-language therapy (*see* Dist. Ex. 8).³⁸

To the extent the IHO relied upon the fact that the student was classified as a student with a speech or language impairment due to articulation delays and that delays in pragmatic language were observed in elementary school, this historical information is too removed in time to support the determination that the September 2016 CSE (or May 2017 CSE) failed to evaluate the student in the area of speech-language (IHO Decision at pp. 48-49; *see* Parent Exs. B at pp. 1-3; C at pp. 1-4; *see also* Parent Ex. L; HH at pp. 1-2). Further, to the extent the IHO relied on results obtained from the district and private speech-language evaluations—conducted after the CSE meetings at issue and after the parents' due process complaint notice—in order to conclude that the student exhibited pragmatic language needs that the September 2016 CSE (and May 2017 CSE) failed to consider (IHO Decision at p. 49; *see* Parent Ex. XX; IHO Ex. I), information not available to a CSE may not be relied upon to rehabilitate a defective IEP or invalidate a substantively appropriate IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; *see* J.M.

³⁸ A March 2016 intellectual assessment of the student, which is not listed on the September 2016 IEP but which the PPS director testified the CSE should have reviewed, also did not identify any speech-language needs, nor recommend a speech-language evaluation or therapy (*see* Dist. Ex. 13).

v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F.Supp.2d 499, 513 [S.D.N.Y. 2013] [refusing to consider subsequent year's IEP as additional evidence because it was not in existence at time IEP in question was developed]).

Rather, based on the foregoing information, the September 2016 CSE did not have information before it indicating that the student exhibited language delays such that the CSE should have conducted a speech-language evaluation. Instead, the student's social/emotional/behavioral deficits negatively affected his peer interactions and communications, and the September 2016 CSE addressed those deficits by recommending a 12:1+1 special class in a therapeutic support program with weekly group and individual counseling, as discussed above.

D. May 2017 IEP

1. Special Factors—Interfering Behaviors

For the May 2017 IEP, the district's assertions mirror those as set forth above for the September 2016 IEP.

New information available to the May 2017 CSE included the September 2016 psychiatric evaluation report, completed by a consulting psychiatrist for BOCES,³⁹ and a May 2017 annual review summary, completed by the student's social worker from the STAR program (compare Dist. Ex. 1 at pp. 3-4, with Dist. Ex. 2 at pp. 3-4; see Dist. Exs. 6; 7).

The psychiatrist conducted the September 2016 psychiatric evaluation while the student was still suspended from the April 2016 incident and had not yet begun attending the STAR program (Dist. Ex. 7 at p. 1; see Dist. Ex. 6 at p. 1). The psychiatrist summarized information from "school reports" that the student "exhibited outbursts," at times resulting in "inappropriate verbal interactions with other student[s] and/or adults" and struggled with his ability to "modulate emotions in a socially acceptable manner" (Dist. Ex. 7 at p. 2). The psychiatrist noted her impression that the student's "need for social relationships, lack of social skills and rigid pattern of thinking [wa]s likely creating the[] crises at school where his behavior require[d] further administrative attention" (id. at p. 4). However, the psychiatrist did not believe that the student was a danger to himself or others (id.). The psychiatrist also opined that consistency in the student's placement was integral to his success because he did not do well with transitions (id.). The psychiatrist recommended managing the student in a therapeutic school setting with an "enhancement of services" compared to those he was receiving in his then-current placement at the therapeutic support program at BOCES (id. at p. 5). With specific respect to his behaviors, the psychiatrist recommended "[b]ehavioral interventions such as consistent learning," "outpatient

³⁹ The September 2016 psychiatric evaluation report was not received by the district until October 2016 (after the September 2016 CSE meeting) (Tr. pp. 296-97, 477).

ABA work and social skills groups," and a "[m]ultimodal approach involving cognitive behavior modification, medications, [and] parent education" (id.).

According to the student's social worker for the 2016-17 school year, the student attended and participated in weekly individual and group counseling sessions (Dist. Ex. 6 at p. 2). After starting the STAR program and experiencing a few days "without incident," the social worker noted that the student "episodically presented as mildly agitated, pacing, and banging lockers in the hallway" (id. at p. 1). The social worker also described the student's frustrations with achieving satisfying social relationships (id.). For a period of time when the student's medications were inconsistent, the social worker observed that the student experienced "more difficulty modulating his moods, reactions and behavior," exhibited more distracting behavior and rudeness to teachers, and "had an episode of extreme anger and verbal aggression toward a peer" (id.).⁴⁰ The social worker noted that, during counseling sessions, the student often made insightful observations about himself and the group, but that he also exhibited behaviors that resulted in group members feeling alienated and him feeling frustrated (id. at p. 2). The social worker acknowledged the student's social/emotional and behavioral struggles in her annual report, but she also noted that there had been periods of time throughout the school year that his daily functioning and compliance within the program went well, and she recommended that the student return to the program at the beginning of the 2017-18 school year (id.).

According to the meeting information summary attached to the May 2017 IEP, the student actively participated in DBT groups and accessed his counseling sessions regularly (Dist. Ex. 1 at p. 1). Referencing information consistent with the May 2017 annual review summary completed by the student's social worker and noting the increase in behaviors attendant with the lapse in medications, the meeting information notes also indicated that, when becoming angry and agitated, the student "require[d] considerable support to return to baseline" and that, when baseline could not be achieved, the student's father "picked him up" (Dist. Ex. 1 at p. 1; see Dist. Ex. 6 at p. 1). The meeting comments also noted that the student experienced "difficulty accessing coping skills without support" (Dist. Ex. 1 at p. 1).

The present levels of performance included in the May 2017 IEP reflect that the student added interesting and intelligent perspectives to class discussions, was a very creative and imaginative writer who at times lacked the endurance to complete multi paragraph essays, was articulate, and was motivated to improve peer relationships, but could be rude and uncooperative when asked to do something he did not want to do, could become easily stressed over social interactions and misinterpret signals, or behave in a way that was off-putting and then be confused as to why peers rejected him (Dist. Ex. 1 at pp. 4-5). As did the September 2016 IEP, the May 2017 IEP indicated that the "student's disability ma[de] it difficult for him to control his need for self-injurious behaviors" (compare Dist. Ex. 1 at p. 5, with Dist. Ex. 2 at p. 5). And again, in what

⁴⁰ The STAR program director testified the student had one behavioral referral during the 2016-17 school year that involved walking out of class without permission (Tr. pp. 533-38; Dist. Ex. 20). The STAR program director stated that the student struggled more during a three-month period when the student's medications were inconsistent but that the student did not have any discipline reports during that time (Tr. pp. 547-53).

the PPS director characterized as an error, the May 2017 IEP indicated that the student required a BIP that focused on seeking out the help of support staff when he felt like hurting himself (Tr. pp. 184-86; Dist. Ex. 1 at p. 5).

As with the September 2016 CSE, the May 2017 CSE had before it information that the student had behavioral needs such that the CSE should have recommended an FBA and a BIP for the student, most frustrating of which is the IEP document itself which, as with the September 2016 IEP, reflected that the student required an BIP. However, the May 2017 IEP—including the recommended placement at the STAR program—offered sufficient support for the student's behavioral needs such that the district's procedural violation does not, in this instance, rise to the level of a denial of a FAPE.

The May 2017 CSE recommended that, for the 2017-18 school year, the student continue attending the 12:1+1 special class placement in the STAR program along with weekly individual and group counseling (Dist. Ex. 1 at pp. 1, 7, 10). As did the September 2016 IEP, the May 2017 IEP included a support for the student's management needs that "[t]he student needs to improve his level of patience and tolerance to others whom may have differing opinion[s] or ideas" (compare Dist. Ex. 1 at p. 5, with Dist. Ex. 2 at p. 5). The May 2017 IEP included four annual goals, one directed to the student's needs in writing and three directed to the student's social/emotional and behavioral needs (Dist. Ex. 1 at pp. 6-7). In the social/emotional and behavioral realm, the annual goals indicated that the student would "state 3 personal qualities . . . about himself and verbalize how the[] qualities impact his interactions with others," "communicate and interact in a positive manner with peers . . . for 15 minutes," and "interact in a socially acceptable manner with adults . . . across 3 situations" (id. at p. 7). Additionally, the IEP provided for communication between the school and the student's home and outside therapists (id.).

As summarized above, the testimony from the STAR program coordinator described the therapeutic setting of the STAR program, including the behavioral supports built into the program and the delivery of therapeutic counseling using the DBT model (see Tr. pp. 437, 486-92, 532-33).

Based upon the foregoing, including the legal standard set forth above with respect to the May 2016 MDR and the September 2016 IEP, the evidence in the hearing record supports a finding that, even considering the CSE's determination that the student did not require an FBA or a BIP as a serious procedural violation, it would not rise to the level of a denial of a FAPE or otherwise contribute to such a finding because the May 2017 CSE had sufficient information regarding the student's behaviors and the May 2017 IEP adequately identified and recommended supports for the student's behavioral needs (see R.E., 694 F.3d at 190).

2. Speech-Language Therapy

With respect the student's speech and language needs leading up to the development of the May 2017 IEP, the district states that the student's progress in this area during the 2016-17 school

year was demonstrated by progress made in counseling, noting the use of the DBT model that school year.⁴¹

As noted above, new evaluations available to the May 2017 CSE included the September 2016 psychiatric evaluation and the May 2017 annual review summary (Dist. Exs. 6, 7). While the evaluating psychiatrist described the student's difficulties with social interactions and recommended that his IEP include a goal to enhance verbal and non-spoken communication, she diagnosed the student as having an autism spectrum disorder—mild to moderate, without intellectual or language impairment (Dist. Ex. 7 at p. pp. 1-4).⁴² The annual review report from the social worker at STAR described the student's frustration with respect to his lack of satisfying social relationships (Dist. Ex. 6 at p. 1). The social worker provided numerous examples of how the student's difficulty reading social cues/situations caused him problems and recommended that the student return to the STAR program in September 2017, receive individual and group counseling and continue with his outside treatment (*id.* at pp. 1-2). Neither professional recommended a speech-language evaluation or speech-language therapy for the student (*see* Dist. Exs. 6 at p. 2; 7 at pp. 4-5).

With respect to the psychiatrist's goal recommendation, the PPS director testified that the only issues raised at the meetings she chaired regarding the student's verbal and non-spoken communication capabilities related to social skills and not academics, however, she indicated that when the student was younger there were concerns regarding his articulation (Tr. pp. 301-02). The PPS director responded to a claim by the psychiatrist that the student had not received any structured treatment for communication skills by noting that the student had received group counseling in school from eighth grade on (Tr. pp. 303-04; *see* Tr. pp. 304-06). The PPS director testified that, with respect to the student's communication skills, he was demonstrating performance deficits instead of skill deficits, and she opined that group counseling provided an opportunity for the student to learn how to apply his good language skill set in a group setting (Tr. p. 1061).

The PPS director testified that the May 2017 CSE discussed that the student was motivated to improve his peer relationships and ways in which the student was off-putting to peers, but that there was no discussion about a speech-language evaluation or developing pragmatic language goals (Tr. pp. 1032-35). She confirmed that the CSE did not discuss the need for a speech-language evaluation or goals in response to the September 2016 psychiatrist's report (Tr. pp. 1045-46).

The STAR program coordinator testified that he could not recall any discussion of speech-language services at the May 2017 meeting, nor could he recall reviewing any speech-language evaluation for the student (Tr. p. 596). When asked if the student had decreased pragmatic language abilities, the program coordinator stated that he would "characterize [the student's]

⁴¹ The district also points to progress during the 2017-18 school year, but this is retrospective.

⁴² The psychiatrist also diagnosed the student as having a major depressive disorder – moderate to severe, without psychosis (Dist. Ex. 7 at p. 4).

presenting issues differently” (Tr. 597). He explained that although the student "certainly ha[d] challenges in his interactions with peers" he did not know that "the origin or source of those difficulties [we]re pragmatic language concerns" (Tr. pp. 597-98). The program coordinator testified that he had "never longed for additional evaluations" because he viewed the student's social deficits "to be of a clinical etiology" (Tr. pp. 599-600). He stated that the STAR program viewed the student's challenges through a lens "and the lens is that he has clinical needs" (Tr. p. 600). The program coordinator explained that STAR provided the student with "clinical supports, counseling supports, in the DBT model toward the goal of improving social skills" (Tr. pp. 599-600).

With respect to the student's mastery of goals related to peer interactions, the student's social/emotional/behavioral goals for the 2016-17 school year targeted the student's ability to identify behavioral triggers and how they impacted his behavior or that of others, and, when expressing a negative emotion at school, identify and appropriately use a coping skill to maintain acceptable school behavior (Dist. Ex. 4 at pp. 6-7). The June 2017 IEP progress report indicated that, although the student made less than anticipated progress toward his social/emotional/behavioral goals during much of the 2016-17 school year, by the end of the year, he was progressing satisfactorily and expected to achieve the goals (Dist. Ex. 25 at p. 3).

A speech-language pathologist who testified for the parents opined that working on pragmatic language skills in a social skills group setting was "entirely different . . . as far as the background and who is addressing the skill" (Tr. p. 1199).⁴³ She described a social skills group as "surface level" and stated that "a trained speech-language pathologist, which is a professional, will be able to appropriately address the social linguistic component of the deficit, rather than just introducing students together to interact and have conversations. They're not going to work on the clinical skills that are required to do that" (Tr. p. 1199). She further explained that there was methodology and hierarchies involved and "a specific skill that a clinician would work on, rather than just running s social skills group" (Tr. p. 1200).

The speech-language pathologist acknowledged that a mental health clinician could address some social skill issues, "but they might address how [the student] can cope when he's faced with an interaction that he is getting upset by" (Tr. p. 1200). She noted that coping strategies may be taught by a mental health clinician but that the speech-language therapist could teach the student linguistically how to use the language (*id.*). She opined that the professionals could target the same genre with different interventions (Tr. p. 1201).

Notwithstanding the expert testimony of the speech-language pathologist regarding the distinction between the delivery of speech-language pathology and counseling services, as summarized above, the information available to the CSE tended to indicate that the student exhibited social/emotional needs that could be addressed through counseling and did not

⁴³ The speech-language pathologist who testified conducted the privately-obtained November 2017 speech-language evaluation (*see* Parent Ex. XX).

underscore speech-language deficits necessitating evaluation or recommendation for services. Further, the speech-language pathologist did not participate in the CSE meetings; accordingly, the CSEs cannot be faulted for failing to consider her views (see C.L.K., 2013 WL 6818376, at *13). In addition, the May 2017 CSE considered information that included descriptions of the student's behaviors and addressed the student's behavioral and communication needs in the IEP and, as such, may be afforded some amount of deference (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at *16 [S.D.N.Y. June 28, 2016], aff'd 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]).

Based on the foregoing information, the student did not exhibit language delays such that the CSE should have conducted a speech-language evaluation. Rather, the student's social/emotional/behavioral deficits negatively affected his peer interactions and communications, and the May 2017 CSE addressed those deficits by recommending a 12:1+1 special class in a therapeutic support program with weekly group and individual counseling.

E. Parents' Cross-Appeal

Initially, as alluded to above, the parents cross-appeal the IHO's "fail[ure] to consider" their claims pertaining to the timing of the CSE meetings, parent participation, present levels of performance, annual goals, and transition services. However, the IHO did specifically consider and make determinations regarding most of the issues raised by the parents in their cross-appeal, finding that the parents' claims were without merit (IHO Decision at pp. 52, 54). Specifically, the IHO rejected the parents' claims pertaining to parent participation and the present levels of performance and annual goals in the IEPs (*id.*).⁴⁴ As a consequence of the parents appeal of the IHO's purported failure to consider issues, rather than "identifying the precise rulings, failure to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2]), the parents have failed to "clearly specify the reasons for challenging the [IHO's] decision" (8 NYCRR 279.4[f]). Instead, the parents' cross-appeal reargues the claims set forth in the due process complaint notice, at times reframing the issues compared to the manner they were presented during the impartial hearing.

For example, as for the parents' claim pertaining to parental participation, the IHO found that the parents participated in the CSE meetings, and that their participation was noted on

⁴⁴ In addition, with respect to the parents' claim about the timeliness of the CSE meetings, the IHO specifically cited that claim as it related to the May 2015 CSE meeting as being outside the applicable statute of limitations (IHO Decision at p. 42).

successive IEPs, as were their objections to the recommended placement (IHO Decision at p. 54). On appeal, the parents do not take issue with the IHO's determinations, alleging instead that the district impeded the parent's participation by predetermining programming for the student, drafting goals before meetings without parental input, and preventing the parents from understanding the student's needs as a result of failing to evaluate the student.⁴⁵

Likewise, the IHO determined that, with respect to the present levels of performance and annual goals contained within the IEPs, the IEPs addressed the "predominant issues facing the child," his social/emotional/behavioral needs, and that the student did not need "goals in English or other core subjects" (IHO Decision at p. 52). On appeal, the parents did not grapple with the IHO's determination and argue, instead, that the CSEs selected "goals from a drop-down menu, not tailored to [the student's] individual needs" and, without elaboration, that the goals did not address all of the student's needs (Req. for Rev. ¶ 31). The parents did not include further argument on these topics in their memorandum of law.

It is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Hawaii Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).

Moreover, to the extent the claims raised by the parents are allegations that the district committed procedural violations, the parents have not articulated how the alleged violations, singularly or cumulatively, (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]; see 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

⁴⁵ The parents' due process complaint notice did not allege predetermination or that they were deprived participation as a result of the advance drafting of annual goals (see Parent Ex. A). Further, as indicated above, although the parents alleged in their due process complaint notice and on appeal that the district deprived them of an opportunity to participate due to the lack of sufficient evaluative information (see id. at p. 16), the parents did not appeal the IHO's determination that (other than the procedural errors the IHO found related to the FBA and the speech-language evaluation) the CSEs had sufficient evaluative information about the student (see IHO Decision at pp. 53-54). Without challenging this underlying determination, the parents may not claim their lack of participation as a result.

170; R.E., 694 F.3d at 191 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also E.E. v. New York City Dep't of Educ., 2018 WL 4636984, at *4, *7 [S.D.N.Y. Sept. 26, 2018]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *10 [S.D.N.Y. Mar. 31, 2014]; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 434 [S.D.N.Y. 2014] [noting that multiple procedural violations may not result in the denial of a FAPE when the "deficiencies . . . are more formal than substantive"] [ellipses in original], quoting F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 586 [S.D.N.Y. 2013]). As the answer and cross-appeal lacks any guidance from the parents indicating the significance of the claims raised therein, I will not sift through the due process complaint notice, the hearing record, and the IHO decision for the purpose of asserting claims on their behalf (see Application of a Student with a Disability, Appeal No. 12-069; Application of a Student with a Disability, Appeal No. 12-032; Application of the Dep't of Educ., Appeal No. 12-022; Application of the Dep't of Educ., Appeal No. 11-127).

For example, with respect to the timing of the CSE meetings, the parents assert without elaboration that "as a contributing factor to the denial of FAPE," the CSE meetings were held "more than one year subsequent to the [student's] prior IEP meeting" (Req. for Rev. ¶ 28). The parents cite the July 2016 IEP and one transcript page which includes the IHO's reference to the July 2016 annual review as being "more than a year after the last IEP" (Tr. p. 464; Parent Ex. H). The parents do not state what, if any, harm resulted from the alleged untimeliness, and, again, the parents do not broach this topic in their memorandum of law. Likewise, although there is some merit to the parents' assertion that the transition plans in the September 2016 and May 2017 IEPs lacked detail (Dist. Exs. 1 at pp. 6, 8-9; 2 at pp. 6, 8-9), it has been found that "a deficient transition plan is a procedural flaw" that will only rise to a denial of a FAPE if it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. of Tp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]; see F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *8-*9 [S.D.N.Y. June 8, 2016]; C.W. v City Sch. Dist. of the City of New York, 171 F. Supp. 3d 126, 134 [S.D.N.Y. 2016]; J.M. v New York City Dep't of Educ., 171 F. Supp. 3d 236, 247-48 [S.D.N.Y. 2016]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11 [S.D.N.Y. Mar. 19, 2013]).⁴⁶ The parents make no such allegation but

⁴⁶ Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). In addition, State regulations require districts to conduct vocational assessments of students age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]). An IEP must also include the transition services needed to assist the student in reaching those goals (id.). Transition services must be "based on the individual child's needs, taking

cite to the March 2018 private neuropsychological evaluation, which states in summary fashion that, after completing the STAR program, the student should be placed in a post-secondary program to help him "transition to independent living, vocational skills, and higher education" as "compensation for [the student] being inappropriately placed from sixth through tenth grade" (Parent Ex. ZZ at p. 16). The private evaluation is insufficient to describe what harm came to the student as a result of the alleged deficiencies with the transition plans.

In sum, the parents alleged no substantive harm arising out of the violations appealed, either individually or cumulatively, and the evidence in the hearing record reveals none. On appeal, the parents have not challenged the appropriateness of the placement or related services for the 2016-17 and 2017-18 school years and the student attended and received benefit from the recommended placements. Specifically, as discussed below, the student made progress in the STAR program during the 2016-17 and 2017-18 school years and has since graduated.

F. Compensatory Education

Based on the above determinations, it is now necessary to examine what relief, if any, is appropriate to remedy the district's denial of a FAPE arising out of its failure to conduct an FBA or develop a BIP for the student after the May 2016 MDR. In addition, based on the above finding that the IHO erred in finding that the district committed a procedural violation by failing to conduct a speech-language evaluation or recommend speech-language therapy, the IHO's award of compensatory speech-language therapy must be reversed. Further, the parties disagree over the correct legal standard to apply.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147, 151 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the 10-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2,

into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]).

113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration, Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

While the parents assert that the gross violation standard should not apply because, at the time of the IHO's decision, the student had not yet graduated, the student's receipt of his diploma is not determinative (T.M. v. Kingston City Sch. Dist., 891 F.Supp.2d 289, 294-95 [N.D.N.Y. 2012] [finding that earning sufficient credits and passing Regents exams was the equivalent of earning a Regents diploma, thereby terminating a student's entitlement to a FAPE], citing Educ. Law § 3202[1], and 8 NYCRR 100.5[b][7][iii]).⁴⁷ Here, while the student had yet to be physically handed his diploma at the time of the IHO's decision, the student had satisfied his graduation requirements by passing all his Regents exams in June 2015, 2016, and 2017 (see Req. for Rev. Ex. 2) and receiving enough credits to graduate prior to the IHO rendering her decision (see e.g., Tr. pp. 5, 31-32, 310, 1546).

Accordingly, in this instance, the student graduated from high school and, consequently, was no longer statutorily eligible for special education programs or related services. Neither party disputes that the student met the requirements to graduate. Given the fact that graduation and receipt of a high school diploma are generally considered to be evidence of educational benefit (Pascoe v. Washington Cent. Sch. Dist., 1998 WL 684583, at *4, *6 [S.D.N.Y. Sept. 29, 1998]; see also Rowley, 458 U.S. at 207 n.28; Walczak, 142 F.3d at 130), the receipt of which terminates a student's entitlement to a FAPE (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; 200.4[i]), when taken together with the Second Circuit's standard requiring a gross violation of the IDEA during the student's period of eligibility (see Garro v. State of Conn., 23 F.3d 734, 737 [2d Cir. 1994]; Mrs. C., 916 F.2d at 75), it is a rare case where a student will graduate with a high school diploma and yet still qualify for an award of compensatory educational services (see, e.g., Application of a Student with a Disability, Appeal No. 16-079; Application of a Student with a Disability, Appeal No. 13-215; Application of a Student with a Disability, Appeal No. 13-110; Application of a Student with a Disability, Appeal No. 11-159).

The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E. Lyme Bd. of Educ., 790 F.3d at 456; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also 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

⁴⁷ The parent also asserts that the "timeline stopped when the Parent[s] filed the [due process complaint notice]" but cites no authority for this proposition.

F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"). Accordingly, an award of services 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. of Fayette County 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"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

Putting aside the application of the gross violation standard applicable to the facts of this case, a review of the district's failure arising out of the lack of an FBA or BIP after the May 2016 MDR—and even assuming the violations raised in the parents' cross-appeal had merit—the support and services the student actually received during the 2016-17 and 2017-18 school years and the student's achievements show that the student benefitted from instruction to the extent that an award of compensatory educational services would not be an appropriate form of relief.

The student's 2016-17 report card reflected passing grades and teacher comments that ranged from "a pleasure to have in class", "takes initiative/motivated, conscientious, cooperative", and "good understanding of concepts", to "has difficulty staying on task", "has ability to do better", and "does not use time productively" (Dist. Ex. 19). The STAR program director testified the student had one behavioral referral in 2016-17 that involved walking out of class without permission (Tr. p. 533-38; Dist. Ex. 20). According to the student's 2016-17 progress report, by the end of the school year, the student had progressed from making inconsistent and/or gradual progress to satisfactory progress on his social/emotional goals (Dist. Ex. 22 at p. 1).

As for the 2017-18 school year, the student's first quarter report card reflected passing grades and generally positive teacher comments ("participates in class," "good understanding of concepts," "imaginative/creative thinker") (Dist. Ex. 49). The STAR program director testified that, during the 2017-18 school year, the student did not have any behavioral referrals, there were no observations of self-injurious behaviors, and the student's grades were more reflective of his intellectual ability (Tr. pp. 493, 533, 600, 604). The STAR program director stated that the student was an active participant in the classroom and in group counseling, interacted with peers during

unstructured times during the school day, and was involved in extracurricular activities (Tr. pp. 512-14, 522-24).

In summary, notwithstanding the district's failure to conduct an FBA of the student after finding that his behavior was a manifestation of his disability, the student ultimately received educational benefit during the 2016-17 and 2017-18 school years and earned his diploma, thereby achieving one of the major goals and milestones that the IDEA is intended to support—that place being graduation (see Reid, 401 F.3d at 518). In other words, no compensatory education is required for the district's denial of a FAPE, since the deficiencies were already mitigated in a substantial way (see Phillips v. District of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]).

G. Independent Educational Evaluations

At the end of the second day of the impartial hearing, the IHO ordered the district to conduct speech-language and OT evaluations of the student, while denying the parents' request for IEEs (see Tr. pp. 614-30). The parents now cross-appeal the IHO's order that the district conduct specific evaluations of the student during the impartial hearing process. Additionally, the parents assert that the IHO erred in failing to require the district to fund the cost of IEEs of the student.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as an "individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Informal guidance from the United States Department of Education's Office of Special Education Programs indicates that if a parent disagrees with an evaluation because a student was not assessed in a particular area, the parent has the right to request an IEE to assess the student in that area (Letter to Baus, 65 IDELR 81 [OSEP 2015]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency

conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

Additionally, it is within an IHO's authority to order an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. Roberts, 2016 WL 6831122, at *7 [E.D. Pa. Oct. 27, 2016] [noting that an IHO "is permitted, and in some cases required, to order an [IEE] at public expense"], on reconsideration in part, Luo v. Owen J. Roberts Sch. Dist., 2016 WL 6962547 [E.D. Pa. Nov. 28, 2016], aff'd, 2018 WL 2944340 [3d Cir. June 11, 2018]; Lyons v. Lower Merion Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010] [noting that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process"]; see also S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at *9 n.9 [D.R.I. Jan. 14, 2014] [acknowledging opinion that the regulation empowers hearing officers to solicit independent expert opinions but disagreeing that the regulation gives an IHO "the inherent power to make up remedies out of whole cloth"], aff'd, 773 F.3d 344 [1st Cir. 2014]). Furthermore, IHOs are "granted broad authority in their handling of the hearing process and to determine the type of relief which is appropriate considering the equitable factors present and those which will effectuate the purposes underlying IDEA" (Warren Consolidated Schs., 106 LRP 70659 [LEA MI 2000]).

Here, presumably in order to inform the hearing record, the IHO ordered the district to conduct speech-language and OT evaluations of the student, rather than order the district to publicly fund the requested IEEs (Tr. pp. 614-30). The IHO's rationale was that "there are different ways that evaluations can be ordered in a hearing" and that the "legal standard ha[d] [not] yet been met for an [IEE]" (Tr. p. 618). Contrary to the IHO's reasoning, while the regulations do not explicitly address an IHO's authority to order the district to conduct evaluations as part of the hearing, they are specific with regard to an IHO's authority to order IEEs in this context (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]). Indeed, when the level of distrust between the parties is high, the better course is to direct that evaluations be conducted by independent persons not affiliated with the district (Application of the Dep't of Educ., Appeal No. 12-033; K.I. v. Montgomery County Bd. of Educ., 109 LRP 75160 [SEA AL 2009]).

Ultimately, however, the IHO did not foreclose the possibility of also ordering IEEs at the time (Tr. p. 621). Instead, the IHO later denied the parents' requests for IEEs because the evidence did not indicate that the parents had objected to district evaluations and for equitable reasons based on the parents' actions and those of their attorney (IHO Decision at pp. 55-56).

The parents have not grappled with the IHO's equitable findings on this issue, arguing instead that the district was required to defend their evaluation or lack thereof and failed to do so. However, based on the discussions set forth above with regard to the final and binding status of the IHO's determination about the sufficiency of the evaluative information (with the exception of the FBA and speech-language evaluation) and the lack of evidence supporting a need for a speech-language evaluation, even if the parents objected to the district's failure to conduct evaluations, IEEs would not be warranted on the grounds cited by the parent. Accordingly, under these circumstances, there is insufficient reason to disturb the IHO's denial of an award of reimbursement for the privately-obtained evaluations.

VII. Conclusion

Based on the foregoing, the evidence in the hearing record establishes that the district failed to offer the student a FAPE subsequent to the May 2016 MDR through the date of the September 23, 2016 CSE based on its failure to conduct an FBA or develop a BIP. However, a review of the hearing record supports the conclusion that the district did not commit a violation by failing to conduct a speech-language evaluation of the student, and that the district's failures to conduct an FBA during the 2016-17 and 2017-18 school years—either individually or cumulatively with each other or any other alleged violations—did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause 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]). Additionally, notwithstanding the district's failure to offer the student a FAPE subsequent to the May 2016 MDR, the evidence does not support an award of compensatory educational services as relief. I have considered the parties' remaining contentions and find them unnecessary to address in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated June 13, 2018, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2015-16, 2016-17, and 2017-18 school years, except to the extent that the district failed to offer the student a FAPE subsequent to the May 19, 2016 MDR through the date of the September 23, 2016 CSE; and

IT IS FURTHER ORDERED that the IHO's decision, dated June 13, 2018, is modified by reversing that portion which ordered the district to provide the student compensatory education in the form of speech-language therapy services.

Dated: Albany, New York
October 4, 2018

CAROL H. HAUGE
STATE REVIEW OFFICER