The University of the State of New York

The State Education Department
State Review Officer
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No. 18-144

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Rockville Centre Union Free School District

Appearances:
Gina DeCrescenzo, PC, attorneys for petitioners, by Gina DeCrescenzo, Esq.

Ingerman Smith, LLP, attorneys for respondent, by Susan M. Gibson, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the cost of their son's attendance at Fit Learning (Fit) for the 2016-17 and 2017-18 school years. Respondent (the district) cross-appeals from that portion of the IHO's decision which found that the parents were entitled to reimbursement for the cost of a private psychological evaluation. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

As an infant the student had torticollis and received physical therapy (PT) services through the Early Intervention Program (EIP) from 6 to 18 months of age (Parent Ex. A at p. 1; Dist. Ex. 9 at p. 1). The student was evaluated by a speech pathologist prior to being discharged from PT services, was diagnosed with apraxia of speech, and began receiving speech therapy services using the Prompts for Restructuring Oral-Muscular Phonetic Targets (PROMPT) technique, which continued through EIP and preschool (Tr. pp. 1237-38; Parent Ex. A at p. 1; Dist. Exs. 9 at p. 1;

12 at p. 2).[1] The student also began receiving special instruction in September 2011 (Dist. Ex. 9 at p. 1). Based on the outcomes of December 2011 assessments, the student was approved for both PT and occupational therapy (OT) and began receiving services in April 2012 and January 2012 respectively (id.). As the student prepared for transition from the EIP to the Committee on Preschool Special Education (CPSE), in April 2012 the district arranged for a psychological evaluation of the student to help determine eligibility for CPSE services, and in May 2012 a diagnostic psychological evaluation of the student using autism assessments was conducted (Parent Ex. A at pp. 1-2; Dist. Exs. 9 at pp. 1-6; 10 at pp. 1-5).[2]

The student began attending preschool in a 10:1+2 special class but transitioned to an 8:1+2 special class placement that provided additional individualized attention and used discrete trials to increase the student's progress (Tr. p. 1240; Parent Ex. A at p. 2). The preschool initially provided the student with an augmentative communication device but found it not to be helpful, so it was not utilized (Parent Ex. A at p. 2). According to his preschool staff the student was progressing slowly and needed the support of special education throughout the day (Dist. Ex. 3 at p. 2). The parents also obtained private speech therapy and OT services (Tr. p. 1244).

In March 2013 the parent obtained a speech-language PROMPT consultation and shared the report with the district to review before an upcoming annual review (Dist. Ex. 12 at pp. 1-5). The parents, seeking clarification regarding the student's diagnosis as well as educational and therapeutic recommendations, obtained a private neurodevelopmental evaluation in October 2013 (Dist. Ex. 13 at pp. 1-7).

During summer 2014 a frenectomy was performed which enabled the student's tongue to move more freely to execute tongue-tip sounds (Dist. Ex. 26 at p. 4).

The student attended a district school for kindergarten (2014-15 school year) and first-grade (2015-16 school year) and received special education and related services as a student with a speech or language impairment (Parent Ex. A at p. 2; Dist. Ex. 3 at p. 1-2). During that time, he received integrated co-teaching (ICT) services twice daily and the related services of speech-language therapy, OT, and PT (Parent Ex. A at p. 2; Dist. Ex. 3 at p. 1-2).[3] In addition, the student attended a social skills group and speech therapy, OT and PT sessions after school and the parent

[1] The March 2013 speech-language PROMPT consultation report explained that PROMPT is a tactile-kinesthetic-language based method used to assist in reorganizing the muscles for individual and connected speech sounds with specific tactile cues applied to the muscles of the face, jaw, mylohyoid region (under the chin), as well as the structures for voicing and nasality (Dist. Ex. 12 at p. 3).

[2] The May 2012 diagnostic psychological evaluation included administration of an autism diagnostic observation schedule (ADOS) and according to the evaluator the results were "not quite sufficient for the diagnosis of an autism spectrum disorder," yet "significant limitations in social communication" were evident, which was "strongly suggestive of a pervasive developmental disorder-not otherwise specified" (PDD-NOS) (Dist. Ex. 10 at pp. 3, 4).

[3] The June 2017 psychological evaluation report and the May 2015 CSE meeting comments indicated that during the 2014-15 school year the student also received counseling services for social skills (Parent Ex. A at p. 2; Dist. Ex. 3 at p. 1).

noted that these private services continued into first grade (2015-16 school year) (Tr. pp. 1245-47).

As part of spring 2015 "triennial" testing the district conducted a March 2015 OT triennial evaluation, a March 2015 PT evaluation, a March 2015 psychological evaluation, a March 2015 social history, and an April 2015 speech-language triennial evaluation (Dist. Exs. 24 at pp. 1-2; 26 at pp. 1-4; 27 at pp. 1-3; 28 at pp. 1-7; 29 at pp. 1-9). The parents also obtained a private motor speech assessment of the student (Dist. Ex. 25 at pp. 1-6).

In December 2015 a CSE convened for a requested review, discussed the student's need for additional support and staff requests for a 1:1 aide, determined that the district's behavioral consultant would conduct a functional behavioral assessment (FBA) in order to obtain more data on the student's needs and how the inclusion staffing was meeting his needs, and agreed to reconvene upon completion of the evaluation (Dist. Ex. 4 at p. 1). In February 2016 a "Functional Behavioral Assessment-Behavior Intervention Plan" (FBA-BIP) was completed to determine if the student would benefit from the assistance of a 1:1 aide in the classroom (Parent Ex. A at pp. 2-3; Dist. Exs. 4 at p. 1; 30). [4]

In March 2016 a CSE convened to review the FBA-BIP and the student's need for a 1:1 aide and recommended that the student receive the support of a 1:1 aide for two periods daily (Dist. Ex. 5 at pp. 1, 11). Also, and in response to the parent's request for additional support at home to reinforce learning, the March 2016 CSE added one 60-minute session per week of educational services in the home to the student's IEP (Tr. p. 76; Dist. Ex. 5 at pp. 1, 11).

In May 2016 a CSE convened to conduct the student's annual review and to develop an IEP for the 2016-17 school year (Dist. Ex. 6 at pp. 1-15). Finding that the student remained eligible for special education and related services as a student with a speech or language impairment the May 2016 CSE recommended two 40-minute sessions per day of ICT services, four 30-minute sessions per six-day cycle of individual speech-language therapy (pull-out), two 30-minute sessions per six-day cycle of speech-language therapy in a group of three (push-in), three 30-minute sessions per six-day cycle of OT in a group of three, one 30-minute session per six-day cycle of PT in a group of three, one 30-minute session per six-day cycle of counseling in a group of three, and one hour session per week of individual educational services in the home (id. at pp. 1, 12-13). In addition, the May 2016 CSE recommended a 1:1 aide for two periods per day, refocusing and redirection, preferential seating, directions explained, checks for understanding, and 12-month services of two 30-minute sessions per week of speech-language therapy in a group of two and two 30-minute sessions per week of OT in a group of three (id. at pp. 13-14). The May 2016 CSE meeting comments stated that while the student was eligible for 12-month services, the parents informed the CSE that the student would attend a private program for the summer and would not be utilizing the related services offered by the district (id. at p. 2). The student began

[4] At the hearing it was noted that the date on the FBA-BIP was incorrect and that the correct date was February 2016 (Tr. pp. 15-16, 72).

attending Fit in June 2016, attending four days per week over the summer 2016 (Parent Exs. A at p. 3; D; E).

Initiated by parent request, the student repeated first grade in the 2016-17 school year (Tr. pp. 79-81, 124, 1189; Parent Ex. A at p. 2). The CSE chairperson stated that neither she nor the teachers and staff were in agreement that the student should repeat first grade because they felt, if the student was retained, he would get the same support through special education that he would receive in the next grade level and she also noted that he was making progress (Tr. pp. 81, 164, 166).

In fall of 2016 the parent picked up the student from school three days per week at 12:00 p.m. to attend Fit from 1:00 to 3:00 p.m., and the student continued at Fit during the 2016-17 school year (Tr. pp. 1262-63; Parent Exs. A at p. 3; D; E; L; M; O; P).

In September 2016 the district arranged for speech-language pathologists from a Board of Cooperative Educational Services (BOCES) to conduct an augmentative and alternative communication evaluation to determine if the student was a candidate for a speech generating device (SGD) to allow for greater independence in functional intelligible communication (Dist. Ex. 31 at pp. 1-9).

In November 2016 a CSE convened to review the September 2016 augmentative and alternative communication evaluation report and recommended that the student utilize a Dedicated Plus NovaChat 8 (NovaChat 8) (Dist. Exs. 7 at pp. 1-2; 31 at p. 8). In January 2017 an augmentative communication device was made available at school and in the home for a trial period, however according to the parent, it was seen to serve more as a distraction than an assistive device tending to discourage the student from using his developing language skills to speak and was thus discontinued after the trial period ended (Parent Ex. A at p. 2).

In February 2017 the parents obtained a private auditory processing evaluation (Dist. Ex. 33 at pp. 1-8).

In March 2017 a BOCES speech-language pathologist observed the student at school and prepared an augmentative and alternate communication addendum to determine if the student continued to exhibit communicative behaviors that warranted a SGD (Dist. Ex. 32 at pp. 1-3). The evaluator found that the student had exceeded the projected trial period goals and accuracy levels set for him and determined that the NovaChat 8 continued to be the most appropriate communication device for the student (id.).

Also in March 2017 the district conducted a PT evaluation in which the therapist reported that after "careful discussion" with the parent, it was decided that PT services would be discontinued in second grade (2017-18 school year), because it was determined that he would be better served remaining in the classroom to focus on learning, communication, and peer interaction (Dist. Ex. 34 at pp. 1-4).

In May 2017 a CSE convened to conduct the student's annual review and to develop an IEP for the 2017-18 school year (Dist. Ex. 8 at pp. 1-15). Finding the student remained eligible

for special education and related services as a student with a speech or language impairment, the May 2017 CSE recommended for the student the same program, services, and accommodations from the prior year with the exceptions that PT and the home educational services were discontinued (compare Dist. Ex. 6 at pp. 12-14, with Dist. Ex. 8 at pp. 1-2, 13-15).[5] At the May 2017 CSE meeting the parents stated that they intended to continue with Fit and noted that they would not be accepting the 12-month services offered for summer 2017, and that the student may miss two afternoons for 2017-18 school year (Dist. Ex. 8 at pp. 1-2).

In May 2017, after the May 2017 CSE meeting was held, a Fit annual comprehensive language, behavior and academic progress report (190 hours) and Fit language and academic readiness assessments were completed (Parent Exs. B pp. 1-9; N at pp. 1-8).[6]

In June 2017 a psychologist completed the report of her private psychological evaluation of the student conducted in March and April 2017, which assessed the student's cognitive, academic, and social/emotional functioning (Parent Ex. A at pp. 1-14).

During summer 2017 the student attended Fit and in addition the parent employed a private math tutor in the home because she was told by the district staff that the student had "missed a lot of math" in the past year (Tr. pp. 1264-65; Parent Exs. O; P; Q; R).

Evidence arising from events that occurred after the commencement of the impartial hearing will be discussed where relevant below.

A. Due Process Complaint Notice

By due process complaint notice dated July 17, 2017, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 and 2017-18 school years (Dist. Ex. 1).

Initially, the parents alleged that the district failed to properly evaluate the student, specifically noting problems within an FBA conducted by the district (District Ex. 1 at p. 9). The parents alleged that the district failed to offer methodologies or strategies in the student's IEPs based upon peer-reviewed research (id.). Next, the parents asserted that the student's progress at Fit during summer 2016 should have triggered the CSE to re-convene and update the May 2016 IEP for the student's 2016-17 school year (id.). Relatedly, the parents asserted that the May 2016 IEP was not reasonably calculated to enable the student to make progress because its recommendations repeated past programs that had failed to permit the student to make adequate progress (id. at p. 10). With respect to the student's part-time attendance at Fit during the 2016-17 school year, the parents assert that although the CSE did not revise the May 2016 IEP to reflect

[5] While May 2017 CSE meeting comments attached to the IEP noted that PT services were discontinued for the 2017-18 school year, the May 2017 IEP continued to list PT as a recommendation (Dist. Ex. 8 at pp. 1, 13).

[6] The evaluator recommended continued "enrollment for at least 6 hours per week; however, a full day placement or modified school day is recommended to maximize his progress" (Parent Ex. B at 8).

the student's attendance at Fit, the district's cooperation with the modified school day was a "tacit acknowledgement" of the inadequacy of the IEP and the appropriateness of Fit for the student (id.).

The parents also alleged that the May 2017 IEP failed to provide the student a FAPE, because, despite the "weight of evidence favoring the approach used by Fit," the May 2017 CSE failed to adopt the "Fit Learning approach" or otherwise draft an IEP that took into account the "new, relevant evidence" and instead continued the services and supports of the prior IEP (Dist. Ex. 1 at p. 10). The parents next asserted that the May 2017 IEP incorporates Fit to the extent that it tacitly endorses or acknowledges that the parents intended to continue removing the student from his public school placement for "two afternoons" during the 2017-18 school year to attend the private program at Fit, and that the IEP therefore failed to provide a FAPE "because it depends on an element, namely, Fit Learning, which is at the [p]arents' expense" (id. at pp. 7, 10). The parents alleged that the May 2017 IEP "improperly did not consider" the student's progress and success at Fit, and that the student requires Fit to perform at or near grade level because no other approach provides the student with a "'substantively adequate program [that is] appropriately ambitious in light of his circumstances'" (id. at p. 10).

Lastly, the parents contended that to the extent their arguments above are procedural in nature, a FAPE was denied because the parents were significantly impeded from participating in the development of the student's IEPs and the student was deprived of educational benefits (id. at p. 10). For relief, the parents requested reimbursement for the cost of a June 2017 private psychological evaluation, a finding that the student was not provided a FAPE during the 2016-17 and 2017-18 school years, a finding that the district's procedural violations impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE and caused a deprivation of educational benefits, an order directing the district to provide an IEP with 3 hours of 1:1 applied behavioral analysis (ABA) instruction provided by Fit, 5 days per week, for a 12-month school year (including transportation to and from Fit), an order directing the district to provide tuition reimbursement and the costs of transportation for Fit "from April 2016 to the present," and, finally, an award of compensatory services providing the student with "additional hours of 1:1 tutoring at Fit" (id. at p. 11).

In a July 27, 2017 written response to the parents' due process complaint notice, the district argued that it developed programs calculated to provide the student a FAPE for the 2016-17 and 2017-18 school years, variously admitted and denied the parents' particular factual assertions, and contended that the parents were not entitled to any of the requested relief (Dist. Ex. 2).

B. Impartial Hearing Officer Decision

The parties convened for an impartial hearing on October 11, 2017, which concluded on April 11, 2018, after seven hearing days (see Tr. pp. 1-1592).[7] In a decision dated November 8,

[7] After presiding over the first five hearing days in this matter, the IHO initially assigned to the matter (IHO 1) recused himself from the remainder of the impartial hearing, and a second IHO (IHO 2) was appointed to preside over the impartial hearing and conducted the final two hearing days (see Tr. pp. 3, 229, 395, 674, 676, 813, 1084, 1086, 1366, 1368). At the close of the impartial hearing, IHO 2 issued the decision in the matter, and citations to the decision will be to "IHO Decision at p. #" (see IHO Decision at p. 31).

2018, IHO 2 concluded that the district offered the student a FAPE for the 2016-17 and 2017-18 school years and denied the parents' requests for specific findings and orders, denied the request for tuition reimbursement, and denied the request for compensatory education (IHO Decision at pp. 16-31). However, IHO 2 granted the parents' request for reimbursement for the cost of a private psychological evaluation (id. at p. 31).

In reaching the conclusion that the district offered the student a FAPE, IHO 2 rejected the parents' argument that the student's IEPs at issue were inappropriately predetermined and determined that the district was merely educating and informing all similarly situated parents of the availability of ABA services through private insurance, and he noted that staff from Fit participated in the November 2016 CSE meeting and were therefore available to participate in CSE meetings and interpret data generated by Fit as needed (IHO Decision at pp. 21-22). Next, IHO 2 determined that the annual goals in the student's IEPs for the 2016-17 and 2017-18 school years were adequate because they were reasonably related to the student's educational deficits, had appropriate mastery criteria, and the student had made appropriate progress in achieving the goals within a school year (id. at pp. 22-25).[8] IHO 2 declined to address the parents' contentions that the CSE lacked sufficient behavioral data and information, and the IEPs contained insufficient behavioral interventions, after finding that the parents raised these arguments for the first time in their post hearing brief and were therefore beyond the scope of the impartial hearing (id. at pp. 25-26).

With respect to the 2016-17 school year, IHO 2 described the contents of the May 2016 IEP and the program as implemented, determined that the student had received the mandated special education and related services, and found that the program was reasonably calculated to confer meaningful educational benefit (id. at pp. 26-27). With respect to the 2017-18 school year, IHO 2 described the contents of the May 2017 IEP and the program as implemented, determined that the student had received the mandated special education and related services, found that the student had made progress during the school year, and found that the program was reasonably calculated to confer meaningful educational benefit (id. at pp. 27-29). With respect to the parents' contention that the district knowingly failed to implement the student's IEPs when the parents removed the student during school hours to attend Fit, the IHO found that the district's providers appropriately delivered as much of the services as possible during the morning, and tried to make-up any missed work (id. at pp. 28-29).

Having determined that the district offered the student a FAPE during the 2016-17 and 2017-18 school years, IHO 2 found that there was no need to reach the issues of the student's entitlement to compensatory additional services or the appropriateness of the unilateral placement at Fit (IHO Decision at p. 29).

[8] The IHO found that during the 2016-17 school year, the student was able to expand his sentence length and speak more words by the end of the year, and that the student's 2017-18 report card showed that he was meeting standards (IHO Decision at p. 25). The student's performance over the course of the 2016-17 school year would be relevant information for prospective educational planning for the 2017-18 school year; however, the 2017-18 progress would be impermissibly retrospective under R.E. with respect to planning for the 2017-18 school year (R.E. v. New York City Dep't of Educ., 694 F.3d 167, 186-87 [2d Cir. 2012]).

Lastly, with respect to the parents' request for reimbursement for an independent educational evaluation (IEE), IHO 2 found that when the district received the July 2017 due process complaint notice, which requested reimbursement for the June 2017 private psychological evaluation, the district thereafter failed to either promptly ensure the evaluation was provided at public expense or initiate a hearing to defend its evaluation. IHO 2 also found that the proper forum for the district to have raised the defense that the parents did not object to any specific district evaluation, would have been a separate hearing that the district initiated (id. at p. 31).

IV. Appeal for State-Level Review

The parents appeal and assert as an initial matter that IHO 2 erred in applying a Burlington/Carter tuition reimbursement analysis in his decision, rather than a "straightforward FAPE analysis" because the parents did not remove the student from the district, and further that this error caused IHO 2 to disregard important information about the student's potential, progress, and programming needs. Next, the parents assert that IHO 2 erred in finding that the parents did not allege the inadequacy of behavioral data and programming in their due process complaint notice because first, their due process complaint contained those arguments, and second, the district "opened the door" to the allegations when it entered evidence and testimony concerning the student's behavioral data and programming in its case in chief. The parents allege that the evidence shows that the district collected insufficient behavioral data and that the IHO and the CSE ignored evidence of rigorous data collection by the student's provider at Fit. The parents next contend that the student's programs for the 2016-17 and 2017-18 school years were predetermined in that the CSE refused to consider adding ABA to the student's IEPs and failed to collect any information from Fit about the student's program there. Relatedly, the parents contend that their participation in the development of the student's IEPs was significantly impeded in that the district failed to obtain sufficient behavioral data, and gave the parents erroneous legal advice that ABA was only available through insurance or the medical field, and that the CSE was not obligated to offer it. The parents contend that cumulatively, these procedural violations by the CSE—failing to gather necessary information, failing to collaborate with the private ABA providers at Fit, withholding information and misleading the parents about the availability of ABA through an IEP, and predetermining that the student's IEPs would not offer ABA—form a "pattern of indifference" and caused a denial of a FAPE.

The parents next allege that the annual goals in the IEPs were inadequate and insufficiently ambitious. They also argue that the student's FBA was "invalid" and that he required a Behavior Intervention Plan (BIP), but one was not developed. According to the parents, the district failed to prove that it offered "consistent research-based instruction" because the student's IEPs should have included ABA. Lastly, the parents contend that the district has admitted that it failed to properly implement the student's IEPs during the 2016-17 and 2017-18 school years because the IEPs contemplated "split time between the [district elementary school] and private ABA program," but district witnesses noted they did not deliver all of the student's services.

For relief, the parents request that the undersigned find that the student was denied a FAPE for the 2016-17 and 2017-18 school years; conclude that the district's failures and violations significantly impeded their participation and caused a deprivation of educational benefits; determine that Fit provided appropriate ABA services; order the district to provide an appropriate

IEP with 1:1 ABA instruction to be delivered by a board certified behavior analyst (BCBA) in conformity with the data, progression of teaching and goals of Fit; order reimbursement for the parents' cost for services at Fit for the 2016-17 and 2017-18 school years and reimbursement for the parents' cost of transporting the student to and from Fit; order the district to provide compensatory hours of 1:1 ABA instruction at Fit for the denial of a FAPE during the 2016-17 and 2017-18 school years and; order the district to provide 3 hours per day of ABA at Fit over a 12-month school year, speech-language therapy, and parent training to be delivered by a BCBA.

In an answer with cross-appeal, the district generally responds to the parents' claims with admissions and denials. Specifically, the district cross-appeals from that part of the IHO decision which found that the district was required to reimburse the parents for the cost of the June 2017 private psychological evaluation as an IEE. The district contends that requesting reimbursement for a private evaluation in a due process complaint notice does not trigger the IEE process, and the parents never asserted disagreement with any district evaluation.

With respect to the parents' claims on appeal, the district asserts initially that the IHO properly ruled that the parents' claims in their post hearing brief that the district's behavioral data and interventions were inadequate were beyond the scope of the impartial hearing, because the claims were not in the parents' due process complaint notice and the district did not "open the door" to these claims during the hearing. Next, the district asserts that it followed all the procedural requirements of the IDEA in developing the student's IEPs and denies the parents' asserted procedural violations. The district asserts that it offered the student a FAPE during the 2016-17 school year and that the student made meaningful progress during the year. The district also asserts that it offered the student a FAPE during the 2017-18 school year, and that the IHO's FAPE determinations should be upheld. The district further alleges that the cost of the unilateral program at Fit should not be reimbursed because the district did not agree with the parents' choice to remove the student from his public school placement for part of the school day, because the parents failed to prove that the private ABA services were appropriate, and the progress the student made was attributable to the public school program. Lastly, the district asserts that equitable considerations do not favor reimbursement because, among other reasons, the parents gave no notice to the district of any unilateral placement of the student at public expense for either the 2016-17 or 2017-18 school years.

The district requests that the IHO decision be reversed with respect to its order for reimbursement for the cost of the June 2017 private psychological evaluation, but upheld in all other respects.

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. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90; 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]).[9]

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

Initially, I turn to the parents' contentions that IHO 2 erred in applying a Burlington/Carter tuition reimbursement analysis in his decision, rather than a "straightforward FAPE analysis" because the parents did not remove the student from the district, and throughout the relevant period, the student continued to attend public school. I find the parents' argument unavailing. First, it is clear from the hearing record that the student was removed by the parents from his public school placement before the end of the regular school day on multiple days per week for the entirety of 2016-17 school year and all of the 2017-18 school year up to the close of the impartial

[9] 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).

hearing, to attend a private, parentally-selected program at Fit (Tr. pp. 104, 115-117, 247-251, 312, 622, 1262-63, 1269, 1441-47; Parent Exs. A at p. 3; D; E; L; M; O; P). Additionally, the hearing record establishes that the district did not consent to this removal (Tr. pp. 90-94, 1285-1291). After Burlington/Carter analyses became prevalent in case law, Congress codified the reimbursement obligations of public agencies for private, parentally selected programs, providing in a subsection entitled "[p]ayment for education of children enrolled in private schools without consent of or referral by the public agency," which provides that

> (i) In general
>
> Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.
>
> (ii) Reimbursement for private school placement
>
> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.
>
> (iii) Limitation on reimbursement
>
> The cost of reimbursement described in clause (ii) may be reduced or denied--
>
> (I) if--
>
> (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
>
> (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(20 U.S.C. § 1412[a][10][C]).

Given that it was the parents, not the district, that elected to place the student at a private school or facility—Fit—and that they removed the student from a portion of his public school placement and thereafter sought retroactive tuition reimbursement for privately obtained services delivered during that removal, I find that the IHO was correct in analyzing the merits of the parents' tuition reimbursement request under the Burlington/Carter framework (see R.B. v. New York City Dep't of Educ., 713 F. Supp. 2d 235, 249 [S.D.N.Y. 2010] [finding that reimbursement was available for only that portion of a private placement that was appropriate special education]; "Makiko D." v. Hawaii, 2007 WL 1153811, at *7–8 [D. Haw. Apr. 17, 2007] [holding that rejecting an IEP and placing the student in a general education private placement with outside related services without district consent constituted a removal and a unilateral placement for tuition reimbursement purposes]; Application of a Student with a Disability, Appeal No. 15-014 [holding that it was not appropriate to apply a Burlington/Carter tuition reimbursement analysis in a matter where the parent had not unilaterally placed the student in a private school or sought reimbursement for her expenses related to services that she unilaterally obtained without the consent of the district]; Application of a Student with a Disability, Appeal No. 14-088, at n. 4 [holding that caselaw in the Second Circuit was clear that where parents seek retroactive tuition reimbursement for a unilateral placement of their child, then the analysis must be conducted under the Burlington/Carter test and cannot sidestep the analysis by identifying their requested relief in the form of compensatory education]; Application of the Dep't of Educ., Appeal No. 13-230 [holding that an IHO erred by failing to apply the elements of the Burlington/Carter analysis by substituting a pendency standard]).[10] That the parents removed the student for only for a portion of his day in the public school did not suddenly transform the removal into a "tacit" agreement or endorsement by the district,[11] nor did it make it any less of a unilateral decision to place the student in a private setting on the part of the parents (and seek reimbursement).[12]

[10] To the extent that the parents assert that IHO 2's use of the Burlington/Carter framework resulted in a failure to consider the student's need for ABA as provided by Fit, this alleged error has been avoided in this analysis of the parents' appeal, given the explicit consideration of the student's need for ABA below.

[11] Contrary to the contentions of the parents that the district agreed that the student needed more services than those offered by the district, the notations on the student's IEPs in no way indicate that the CSE agreed that the student required services at Fit, but instead tend to show that it was a parental decision (see, e.g., Dist. Ex 8 at pp. 1-2, 13-14). While there is no evidence for example, that the district was treating the student as truant when the parents picked him up, the parents' argument that the exact opposite is true—that district personnel believed that the student should attend Fit—appears to be a fabrication on the part of the parents.

[12] The circumstances of this case—a blend of services from a public school and a parentally-selected private school—reminds me to a degree of the dual-enrollment scenario envisioned under State Law, wherein a parent enrolls the student in a private program but also continues seeking services in the form of special educational programs to be provided by the public school district. The Education Law provides parents of students with disabilities who are residents of New York with this State law option that requires a district of location to review a parental request for dual enrollment services and develop an individualized education services program (IESP) under the State's so-called "dual enrollment statute" (see Educ. Law §3602-c). The dual-enrollment statute requires parents who seek to obtain educational services for students with disabilities placed in nonpublic schools to file a request for such services in the district of location where the nonpublic school is located on or before the

Additionally, although many of the parents' arguments, as well as witness testimony, are not specific to a single school year, the alleged procedural violations will be addressed separately for each school year below.

A. CSE Meetings Related to the 2016-17 IEP

1. Evaluative Information

Turning next to the evaluation of the student, as an initial matter, I disagree with IHO 2's conclusion that the parents' claims concerning behavioral data and interventions were outside the scope of the impartial hearing as well as his determination that they were raised for the first time in the parents' post-hearing brief (see IHO Decision at pp. 25-26). In their due process complaint notice, the parents contended that the district had failed to appropriately evaluate the student and alleged that the February 2016 FBA-BIP had erred in measuring the student's abilities, stating therein that it was "difficult to determine [the student's] true capacity," yet the district did not seek out other information to make a more accurate assessment (see Dist. Ex. 1 at p. 9). Further, the parents alleged in the same complaint that the CSE failed to grapple with the "unusual degree of success" the student had achieved at Fit, and modify the student's IEP to reflect the new information (id. at pp. 9-10). Moreover, the district sufficiently "opened the door" to this issue when the district called the district school psychologist and the student's special education teacher as witnesses and elicited direct testimony regarding the FBA-BIP and the student's behavioral needs and in-class accommodations (Tr. pp. 68-74, 110, 280-83, 325; see P.G. v. New York City Dep't of Educ., 959 F.Supp.2d 499, 509 [S.D.N.Y.2013] [concluding that the district "opened the door" to an issue which the parents would have otherwise waived "when it raised the issue in its opening argument and elicited testimony about it from one of its witnesses on direct examination."]). Accordingly, the parents' claims concerning behavioral data and interventions are addressed below.

As to the merits of the issue, the parents contend that IHO 2 erred by disregarding the district's failure to gather adequate data and information necessary to draft effective IEPs and failed to obtain any behavioral data for the student. The district responds that it conducted all necessary

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first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). In this case, however, there is no evidence that the parents actually desired or sought dual enrollment or complied with the statutory requirements. If the parents are genuinely seeking a part-time public/private blended program, they could in theory make a request under the dual-enrollment statute and the CSE would have to consider what public services would be appropriate for the student. While the privately obtained aspects of dual enrollment selected by the parents could be provided at an unapproved school, if they exceed what the district would be required to provide to the student under an IESP they would be at parental expense. All of this is merely to say that some aspects of the blended public-private programing that the parents sought in this case may theoretically be available, but under a different State law framework.

evaluations required by the regulations and that the CSE had sufficient behavioral data to draft appropriate IEPs.

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 (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 (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). 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 May 2016 IEP indicates that the CSE had available a long list of evaluative information and reports including April 2016 achievement testing, a February 2016 FBA-BIP, an April 2015 speech-language evaluation report, a March 2015 social history update, and a March 2015 psychological evaluation report (Dist. Ex. 6 at pp. 4-5).

The February 2016 FBA-BIP report stated at the outset that the student "does not engage in disruptive or aggressive behavior and as such, this is not a traditional FBA/BIP in which behaviors are targeted for reduction" (Dist. Ex. 30 at p. 1). The February 2016 report included parental input that the student was "an easy child at home," and that he followed one-step directions, enjoyed reading, and had recently expressed interest in other students (id.). The student reportedly presented with oral motor weakness, expressive language skills that were significantly below age expectancy, hypotonia, and cognitive delays of approximately 50 percent (id.). The February 2016 report identified one of the student's most significant challenges in the school setting as following classroom activities independently and noted that the student often needed multiple prompts to engage in writing, math or other activities throughout the day (id. at p. 2). The report further indicated that at times the student "behave[d] in a self-directed manner" (id.). In addition, the February 2016 report noted that there were several instances since the beginning of the year of the student "wandering" and included examples of the student wandering into a far corner of the classroom and into a neighboring classroom when staff was unable to provide 1:1 supervision (id.). The February 2016 report also noted that the student presented with very significant language deficits which impacted his ability to answer questions, interact with his peers

and teachers, and make his needs and wants known (id.). The February 2016 report stated that the student was prompt dependent and struggled to work independently, and that observations revealed that he initially responded well to prompts but then engaged in self-directed activities (e.g., gaze distractedly at another part of the room, laugh or speak to himself, sniff objects nearby, stand up, wander around the class) if the teacher did not continually provide prompts (id.). The February 2016 report indicated that the student's schedule had been manipulated by staff so that he was in a 1:1 setting for as much of his day as possible (id.). The February 2016 report also included input from the student's mother that she was conflicted about the student having a 1:1 aide, concerned about creating an environment where the student was unable to achieve a greater level of independence, and that this level of service would decrease his time with more qualified teachers (id.).

The stated purpose of the FBA-BIP, as identified within the February 2016 report, was to help determine the student's need for a 1:1 aide during the school day (Dist. Ex. 30 at p. 2). The February 2016 FBA-BIP further explains that strategies to increase the student's ability to communicate his wants and needs, stay focused, and remain within visual proximity of his teachers would continue to be addressed at school (id. at p. 1). The February 2016 report identified "[T]arget behaviors to increase" (use of appropriate communication skills, time on task, remaining in visual proximity), related setting events which may make challenging behaviors more likely to occur (student is not feeling well, is tired, is frustrated others do not understand him), assessments used to determine the primary functions of the behaviors (teacher and parent reports, direct observations and interventions with the student, medical and psychological evaluations), the primary functions of the challenging behaviors (self-stimulatory, task avoidance, to obtain desired objects), reinforcers and proactive strategies (use of positive behavior support strategies including reading books, taking breaks, jumping on a trampoline or riding a scooter; use of prompt hierarchy to facilitate independence in classroom), and evaluation procedures to assess progress (staff will monitor and communicate progress in off-task and wandering behaviors, continue to identify, maintain, and implement strategies which facilitate adaptive behavior, complete data sheets as necessary to maintain a record of increase or decrease in target behaviors) (id. at pp. 3-4).

According to the April 2015 district speech-language evaluation report, the evaluator noted that the student was non-verbal and identified previous diagnoses of verbal apraxia, mild proximal hypotonia, and associated motor planning and coordination difficulties (Dist. Ex. 26 at p. 1). As part of the April 2015 evaluation the student was assessed in the areas of expressive and receptive vocabulary, auditory comprehension, expressive communication, and articulation (id. at pp. 1-3). The evaluator found that the student exhibited severe receptive and expressive language deficits (id. at p. 4). The evaluator reported that in tests evaluating the student's concept development, the student's understanding of vocabulary necessary for kindergarten was at the low average level, while the remaining subtests were at the delayed or very delayed level (id. at p. 2). In tests assessing the student's receptive and expressive abilities the student scored at the second percentile and the first percentile, respectively, and in tests assessing articulation the student scored in the first percentile (id. at pp. 2, 3). The evaluator elaborated in explaining that the student could not produce a four to five-word sentence, was not able to describe objects with or from modifiers, could not answer questions logically or use possessives, and that his significant articulation errors were evident and contributed to severe unintelligibility (id. at p. 3).

The March 2015 social history update included information from the parent regarding the student's relationships (e.g., "gets along with everyone," "language is severely impacting on his social life") and behavior/temperament (e.g., "happy," "loving personality," "self-confident, independent," "goes with the flow," seems overly energetic, requires a lot of parental attention) (Dist. Ex. 29 at pp. 1, 3-4).

The March 2015 psychological evaluation that was conducted by a school psychologist included in the resultant report behavioral observations from the student's classroom (e.g., is easily distracted by external and internal stimuli, requires continual refocusing and redirection throughout the day), cognitive testing, achievement testing and social/emotional functioning assessments which included parent and teacher input (Dist. Ex. 28 at pp. 2-5). The evaluator found that the student's nonverbal skills, especially his ability to problem solve and understand relationships between items, were relative strengths for the student while his visual spatial, processing speed, and working memory scores fell in the borderline range and his verbal comprehension composite score fell in the extremely low range (id. at p. 5). The evaluator reported that academic achievement assessments revealed that with the exception of two scores, the student's scores in reading and writing were above grade expectancy; one math score fell within the average range and the other score fell below-grade expectancy (id. at p. 5). Regarding social/emotional functioning the evaluator reported that overall in both the home and school settings, the student's behaviors were similar with at-risk levels of atypicality and social skills, while in the school setting, he also demonstrated at-risk levels of withdrawal and attention problems, and at home he demonstrated at-risk levels of adaptability and functional communication (id. at p. 6).

While not specifically included with the evaluative information and reports listed on the May 2016 IEP, information about the student's progress toward his IEP annual goals during the 2015-16 school year was available to and discussed by the May 2016 CSE (Dist. Ex. 10 at pp. 1-2, 4-10; see Tr. pp. 82-83; Dist. Ex. 35 at pp. 1-9). According to the 2015-16 progress report, at the March 2016 marking period the student was making satisfactory progress in annual goals involving greeting friends; reading fluency; comprehending verbally presented material; ascending and descending stairs; and grasping, manipulating and molding putty for strength, control and endurance (Dist. Ex. 35 at pp. 2-8). The student was progressing gradually toward annual goals involving refocusing, writing, producing tongue tip sounds, displaying an awareness of others, interacting with peers, participating in and following classroom routines and activities with greater independence, and hopping (id.). The 2015-16 progress report also shows that as of March 2016 the student was making inconsistent progress toward annual goals involving participating in verbal exchanges, using three to four-word phrases, completing upper body strength exercises, recognizing similarities and differences in pictures, and independence in dressing and undressing (id. at pp. 5-9).

Reviewing the evaluative information available to the May 2016 CSE, I find that the CSE obtained sufficient evaluative information with which to develop a program for the student's 2016-17 school year.[13] Because the student did not begin attending Fit until June 2016, after the May

[13] The substantive adequacy of the FBA-BIP and IEP behavioral interventions, independent of the evaluative

2016 CSE meeting, the district members of the CSE could not have improperly failed to reach out to the student's providers or considered input offered by the parents regarding the student's experiences at Fit (Parent Exs. A at p. 3; D; E).

2. Predetermination and Parent Participation

The parents claim that the district withheld information and gave false information to the effect that ABA was not available from the district as a part of a FAPE and could only be obtained privately, therefore predetermining that ABA would not be on the student's IEPs and depriving the parents of meaningful participation. The parents contend that the CSE chairperson admitted to erroneously advising them that ABA was "only" available through the medical field and that the CSE was not obligated to offer it, and that the district advised the parents to seek 1:1 ABA programming outside of the student's IEP and that it would not provide ABA.

The district argues that it did not mislead the parents with "erroneous legal advice" and that it distributed information to all parents relating to additional resources and services, including ABA services, available through other agencies and private insurance. The district claims that at all times it considered the parents' concerns, yet contends that it was under no obligation to coordinate and work with the providers of privately obtained services, especially the services the district believed to be inappropriate, unnecessary and counterproductive.

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P., 2015 WL 4597545, at *8-*9; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development

information available to the CSE, is discussed below.

of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192).

"[T]he IDEA only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

According to the testimony of the student's mother recounting past events during the impartial hearing, in the beginning of the student's kindergarten year (2014-15 school year) the student's special education teacher told the parent that the student "needs more" and "discussed autism laws" and that the parents should get an autism diagnosis so that insurance would cover the cost of more services (Tr. pp. 1243-44). The student's mother testified that the special education teacher mentioned the possibility of ABA in the home and said that the district would not cover the cost as it was only responsible for the school day (Tr. pp. 1244-45). The student's mother stated that she "got more therapy for him" and enrolled the student in a social skills group (Tr. p. 1245).

The parent testified that at the "very beginning of the year" (first grade 2015-16 school year) she met with the then-current school psychologist who told her that the student needed ABA; however, according to the parent the school psychologist did not suggest holding a CSE meeting to discuss ABA and told the parent there was "no money in the district" (Tr. pp. 1247, 1250).

During testimony at the impartial hearing, the CSE chairperson acknowledged that there was a new law in the area of mental health, which provided some relief for the school district and allowed for health insurance coverage for some services for those with a medical diagnosis of autism (Tr. pp. 78, 133).[14] The CSE chairperson stated that the district was "educating" parents in

[14] Although there is no citation to the amendment in the New York Insurance Law described by various individuals in the impartial hearing and the pleadings herein, the references are most likely to Chapters 595 and 596 of the Laws of 2011 which amended New York Insurance Law sections 3216; 3221 and 4202(ee) to require insurance coverage of services for the diagnosis and treatment of Autism Spectrum Disorders (ASD) when they are determined "medically necessary" by a licensed physician or licensed psychologist.

the district about this, explaining to parents that students could receive ABA or speech services through health insurance and that parents should "explore this with [their] doctor" (Tr. p. 78).

When asked on cross examination what would happen if insurance did not cover the cost of ABA, the CSE chairperson stated that she would not "educate parents about it" (Tr. pp. 140-41). When asked what would happen if the parents went to their insurance and the insurance was not going to cover ABA services, the CSE chairperson responded, "[t]hey wouldn't receive it. How would I know? It's the medical field. I'm giving them information about what they could receive." (Tr. p. 141).

A review of the evaluative information before the May 2016 CSE, as detailed above, and of the comments from the May 2016 CSE meeting, does not reveal any explicit recommendations for in-school ABA services (Dist. Ex. 6 at pp. 1-5).

One report, a neurodevelopmental evaluation report from October 2013, stated that intensive speech-language therapy was imperative and recommended services with a PROMPT trained/certified therapist (Dist. Ex. 13 at pp. 1, 6-7). In addition, the evaluator recommended that the student receive five hours of ABA or special instruction outside of school to teach concepts and to increase attention to language, joint attention, eye contact, and pragmatic and language skills in order to help with the generalization of skills between home and school (id.). However, another early evaluation which had been obtained by the parent in May 2012 showed a contrary point of view, and offered recommendations which shunned discrete trial methods, and encouraged implementation of a "mix of naturalistic, behaviorally-based teaching strategies" (Dist. Ex. 10 at pp. 1, 4). The May 2012 diagnostic psychological evaluation report included the recommendation that emphasis needed to be on facilitating the initiation of communication rather than training response to adult prompts, with great care taken to avoid prompt dependence and that discrete trial methods were neither indicated nor recommended and "should be used judiciously if at all" (id.).

The parent testified that at the May 2016 CSE meeting she informed the district that the student was going to attend Fit and that they were "not looking for [the district] to pay for it" (Tr. p. 1290; see Dist. Ex. 6 at p. 2). The CSE chairperson testified that at the May 2016 CSE meeting the parent declined the recommended 12-month services and said they were "going to do something different" with the student (Tr. p. 89). The CSE chairperson stated that she received a call mid-summer 2016, in which the parent stated that the student was in a program called Fit Learning, was making "really good progress" and was learning, and that the parent "loves it" (Tr. p. 90). According to the CSE chairperson, the parent shared her intention to pull the student out of school part-time during the 2016-17 school year three afternoons per week to take the student to Fit and asked if she could "do part-time" (Tr. p. 90).

The CSE chairperson stated that according to the assistant superintendent there was no mechanism for a student to attend school part-time and asked the parent if this service could be provided later in the day (Tr. pp. 92-93). The CSE chairperson described the parent's reaction as "very frustrated" and stated that the parent was "very much against" having the services later in the day because of the long commute and availability of the services (Tr. pp. 93-94). The CSE chairperson testified that she told the parent that the district did not support this plan; however, the parent continued with her plan during the 2016-17 school year and picked the student up from

school to attend Fit (Tr. p. 104). The chairperson testified that she was not of the opinion that the student required ABA "therapy" or that he would benefit from ABA therapy (Tr. p. 141). The CSE chairperson stated that when she spoke to the parent in July 2016, the parent indicated that she did not want "anything from the district" and was not asking for the district to pay for Fit or transportation (Tr. p. 122).

While the student's mother acknowledged in her testimony that she asked the CSE or the CSE chairperson if she would "be on board with" helping the parent take the student out of school early, she also testified that that she did not, at any point, go to the CSE and ask for ABA services because she did not feel that it was her job (Tr. p. 1285). The parent also admitted during her testimony that she did not ask the CSE to recommend Fit on the student's IEP and did not, at any time, ask the CSE to provide additional services other than what the student was receiving on his IEP (Tr. pp. 1285-86). The parent testified that she felt the student had a great year in 2016-17 (Tr. p. 1294).

During the impartial hearing, the parent stated that in the six weeks the student was at Fit during summer 2016 they saw "such a difference" in the student at home; his articulation had improved, he was saying more, his response time was faster, and he was more aware (Tr. pp. 1254-56). The parent acknowledged that some people still couldn't understand the student, but she felt he was more understandable because Fit targeted certain letters and sounds that he had had difficulty with (Tr. p. 1257). According to the parent the student's teachers and providers had reported that the student was doing very well and were in support of Fit and thought Fit was "great" (Tr. pp. 1263-64).

The student's special education teacher for both the 2016-17 and 2017-18 school years, testified that she did not think she had ever said she was supportive of Fit and stated that she did not have any information from Fit (Tr. pp. 232, 332). The special education teacher stated that she did receive an "overview e-mail" and a "few videos" that the parents had sent, yet she did not reach out to Fit (Tr. p. 332). The special education teacher stated that the parent spoke positively about Fit and that the parent also voiced how happy she was with the team at school and the progress the student was making (Tr. p. 312). The special education teacher stated that she did watch the videos of the student at Fit that were sent by the parents and described what she saw as "[s]imple ABA," although the special education teacher acknowledged that she did not have any ABA training (Tr. pp. 332-35). The special education teacher further explained that in school they did not always work 1:1 and that the student was surrounded by more "distraction" and so typical things that would work at Fit in a 1:1 setting did not always transfer into a classroom (Tr. p. 333).

The student's first-grade classroom teacher stated that "many years ago" she received training from an ABA specialist and had worked with ABA consultants, that she was familiar with discrete trials and had used it with other students in the past, yet she did not use discrete trials during the 2016-17 school year with the student (Tr. pp. 409-10). The first-grade teacher indicated that she did not think that the student needed both Fit and school at the same time and did not determine that the student needed Fit (Tr. p. 546). In response to why she did not ask for an assessment to determine whether ABA would be "good" for the student, the first-grade teacher stated that she did not think the district had an ABA specialist that would be able to deliver those

services (Tr. p. 533). The first-grade teacher added that she hadn't used ABA for refocusing, redirection and attention (Tr. p. 533).

The first-grade teacher also stated that early in the 2016-17 school year she asked the parent for information about Fit and what they were working on with the student (Tr. p. 498). She did not recall the parent ever asking her to speak to the people at Fit (Tr. p. 500). The first-grade teacher stated that she was familiar with Fit through the materials she received from the parents (an email about the program and videos) and also that she "looked up the [w]ebsite" (Tr. pp. 407-08).

The student's speech-language pathologist explained that she remembered that staff received an email from the parent regarding Fit, but she also stated that she had never seen any data from Fit regarding the student's progress (Tr. pp. 573, 696-97).

According to district staff, the Fit director attended the November 2016 CSE meeting via telephone and offered input regarding the NovaChat 8 device; however, she did not provide the CSE with any data or reports from Fit nor did she recommend ABA or Fit for the student (Tr. pp. 101-02, 433-34; Dist. Ex. 7 at pp. 1-2). The CSE chairperson acknowledged that the Fit director was not asked to give reports, but she stated she always says, "Is there anything to add?" (Tr. p. 101).

Further, as detailed above, the student's parents obtained extensive after-school services for the student in addition to Fit—he attended a social skills group, speech-language therapy, OT, and PT sessions after school in kindergarten to first grade—and, per the parents' request for additional support, the CSE added educational services in the home (Tr. pp. 76, 1245-47; Dist. Ex. 5 at pp. 1, 11).

The student's mother testified that "we have always given him more even when he was in preschool. He always had more speech after school, OT after school" (Tr. p. 1244). The parent stated that she did the best she could for the student to give him "every therapy imaginable" in the hopes one day he would be a "productive independent man" because "I wasn't going to just leave it to the school because I didn't think that that was enough" (Tr. p. 1246). The parent noted that she always looked at what else she could give the student after school and stated, "I will do it for the rest of my life until he is where he needs to be" (id.). The student's mother acknowledged that while she informed the district that she planned to take the student out of school early for the 2016-17 and 2017-18 school years to attend Fit, she did not provide the district with written notice of her intention to do so, nor did she provide the district with notice of her intention to seek tuition reimbursement (Tr. pp. 1286-87, 1289, 1291, 1300, 1302-03).

If I were to employ a standard such as viewing the testimony of the student's mother in a light most favorable to parents' position, a fact finder could have theoretically concluded that the district's communications with the parents had convinced the student's mother that the district would, under no circumstances, provide the student with ABA on an IEP. However, that is not the standard, and IHO 2 was in the best position to assess the testimony of the parents. Upon weighing the evidence regarding predetermination he declined to find that the evidence in the hearing record indicated predetermination and, upon my independent review, the evidence is

insufficient to disturb IHO 2's predetermination determinations. The hearing record indicates that the district held timely CSE meetings throughout the time period at issue, and drafted IEPs that reflected the latest evaluative information with respect to the student's needs and abilities. There is no indication that the CSE was refusing to consider any information actually proffered by the parents.

Although the parents contend that the CSE should have re-convened after learning of the student's progress under ABA at Fit, the parents ignore the fact that the CSE did reconvene in November 2016 after the start of the 2016-17 school year to amend the student's IEP (Dist. Ex. 7). At that time the student had been receiving ABA services from Fit for approximately six months, and the director of Fit participated in the meeting by telephone (Tr. pp. 94-98, 255-260, 430-33, 603-606; Dist. Ex. 7 at p. 1). Although willing to point the finger at the district after the fact, the hearing record demonstrates that the parents did not raise their concerns to the CSE, request that ABA or Fit be added to the student's IEP, or offer data from Fit's ABA program, and, consequently there was no reason to discuss the ABA that the student was receiving at Fit at the November 2016 CSE meeting (Tr. pp. 335-36, 696, 1285-86).

In this appeal, the parents point to a case decided by the Sixth Circuit Court of Appeals, Deal v. Hamilton Cty. Bd. of Educ., which they contend supports their position on predetermination; however, I disagree. The pertinent section of Deal reads as follows:

> The facts of this case strongly suggest that the School System had an unofficial policy of refusing to provide one-on-one ABA programs and that School System personnel thus did not have open minds and were not willing to consider the provision of such a program. This conclusion is bolstered by evidence that the School System steadfastly refused even to discuss the possibility of providing an ABA program, even in the face of impressive results. Indeed, School System personnel openly admired and were impressed with [the student's] performance (presumably attained through the ABA program), until the Deals asked the School System to pay for the ABA program (footnote omitted).Several comments made by School System personnel suggested that they would like to provide [the student] with ABA services, i.e., they recognized the efficacy of such a program, but they were prevented from doing so, i.e., by the School System policy. The clear implication is that no matter how strong the evidence presented by the Deals, the School System still would have refused to provide the services. This is predetermination.

Deal v. Hamilton Cty. Bd. of Educ., 392 F.3d 840, 858 (6th Cir. 2004).

In contrast to the facts in Deal, here the existence of an "unofficial policy" is uncertain at best; the district did not refuse to discuss the possibility of ABA, evidence of the opinions of district personnel with respect to ABA is mixed, the weight of the evidence does not support that school personnel were prevented from offering ABA, and the parents did not present the CSE with particular concerns that the student would not make adequate progress with the district's proposed programing. Accordingly, I decline to overturn IHO 2's finding on this matter, and I find no procedural violation stemming from

predetermination on the part of the May or November 2016 CSEs and no indication that the parents' participation in the decision-making process was significantly impeded. Instead, the evidence shows that to the extent that the parents had concerns, they tended not to avail themselves of the opportunity to raise them during the CSE meetings.

3. Cumulative Procedural Violations

The parents argue that failing to gather evaluative information, misinforming the parents about the lack of availability of school-based ABA, and predetermination that the IEP would not include ABA formed a "pattern of indifference" and that the cumulative impact of the district's violations denied the student a FAPE for the 2016-17 school year. Under some circumstances, the cumulative impact of procedural violations may result in the denial of a FAPE even where the individual deficiencies themselves do not (L.O. v. New York City Dep't of Educ., 822 F.3d 95, 123-24 [2d Cir. 2016]; T.M., 752 F.3d at 170; R.E., 694 F.3d at 190-91 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541 [2d Cir. 2017] [noting that it will be a "rare case where the violations, when taken together," rise to the level of a denial of a FAPE when the procedural errors do not affect the substance of the student's program]). As noted above, none of the alleged violations constituted a procedural violation and, as such, there is no basis on which to find that they cumulatively rose to the level of a denial of a FAPE (see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *18 [S.D.N.Y. Feb. 14, 2017]).

B. CSE meeting for the 2017-18 school year

1. Evaluative Information

Turning to the parents' claims as they relate to the CSE for the 2017-18 school year, in addition to the evaluative information and reports that were available to the May 2016 CSE, the May 2017 CSE had for its review a March 2017 PT evaluation report, February 2017 progress summaries, and a September 2016 augmentative and alternative communication evaluation report (Dist. Ex. 8 at p. 4; see Dist. Exs. 31; 33-36).[15, 16]

[15] Although the May 2017 IEP included the February 2017 private auditory processing evaluation in its list of evaluations and reports available to the CSE, the chairperson of the May 2017 CSE meeting stated that the February 2017 evaluation report was forwarded to the CSE after the May 2017 annual review and that the May 2017 CSE did not review the report (compare Tr. pp. 117-19, with Dist. Ex. 8 at pp. 1, 4). Thus, as discussed in detail below, it appears that the May 2017 CSE was not informed of the recommendations within this evaluation report.

[16] In March 2017, the BOCES evaluator prepared an augmentative and alternate communication addendum to her September 2016 report (Dist. Ex. 32). Although the evaluator found that the student had exceeded the projected trial period goals and accuracy levels set for his use and determined that the NovaChat 8 was the most appropriate communication device for the student, the CSE did not review the addendum at the May 2017 meeting because according to the CSE chairperson, the parents had returned the device and informed her they did not want to use it (Tr. pp. 102-03; Dist. Ex. 32 at pp. 1-3).

The May 2017 comments in the meeting information attached to the IEP indicated that during the meeting CSE members discussed the student's functioning across all areas, including that he was making progress in reading comprehension, speech, OT, and PT; complied with non-preferred writing activities; and was a "wonderful decoder and speller" (Dist. Ex. 8 at p. 1). Specifically, with respect to reading, the May 2017 IEP reflected reports that the student had shown improvement in his ability to go back into the text and find evidence to answer questions (id. at p. 8). The May 2017 IEP acknowledged that the student was able to read at a higher level, but struggled to answer questions about the text; noting that currently he was reading on a level H and could answer comprehension questions at this level (id.). Regarding writing, the May 2017 IEP stated that the student's handwriting and letter formation had greatly improved and that he was improving in his ability to generate ideas related to topics of discussion (id. at p. 9). In the area of mathematics, the May 2016 IEP written a year earlier noted that the student was able to tell time to the hour and had significant difficulty understanding and solving word problems, whereas the May 2017 IEP indicated that the student was able to tell time to the hour and half hour, was able to distinguish between basic addition and subtraction word problems, and could solve more complex word problems with assistance (compare Dist. Ex. 6 at p. 8, with Dist. Ex. 8 at p. 9). Also, a year earlier, the May 2016 IEP noted that the student's ability to attend to a task was greater when working 1:1 and that he required adult assistance with most activities; however, the May 2017 IEP stated that while the student required adult assistance to begin most tasks, he could complete tasks independently with moderate assistance throughout (compare Dist. Ex. 6 at p. 8, with Dist. Ex. 8 at p. 8).

Turning to information available to the May 2017 CSE regarding the student's communication skills, the May 2017 IEP stated that the student's ability to communicate his wants and needs had improved (Dist. Ex. 8 at p. 8). Speech-language pathologist reports included in the IEP indicated that the student demonstrated steady improvement in expanding his sentence structures and mean length utterances (MLU) (id.). The IEP also reflected reports of progress in the student's clarity of speech in a controlled setting and noted that his ability to produce target vowel sounds in single words and phrases had developed during structured tasks (id.). In addition, while the May 2016 IEP's present levels of performance indicated that the student had difficulty following directions without intensive prompting, that he primarily communicated in single word or two to three word phrases, and that his comprehension for simple "wh" questions was inconsistent as text length increased; the May 2017 IEP noted that the student was able to respond to a variety of basic "wh" questions correctly and that minimal prompts were needed for him to echo answer and generate a complete sentence (compare Dist. Ex. 6 at p. 8, with Dist. Ex. 8 at p. 8). With respect to the student's physical development, the May 2017 IEP noted the student was stronger, more coordinated, and demonstrated improved self-help skills when given verbal prompts; demonstrated the biggest gains in his fine motor development and writing; and had shown improvement in his ball skills, balance, and endurance (Dist. Ex. 8 at p. 10).

Within the March 2017 PT evaluation report the physical therapist observed that the student was able to navigate safely in the hallways and up and down stairs, and that he followed simple one to three step commands (Dist. Ex. 34 at p. 1). In addition, the therapist noted that the student's active and passive range of motion of his upper and lower extremities was within the functional limits and his upper and lower extremity strength was fair; he could navigate the playground

equipment independently; and he tended to be self-directed in gym class and did not always follow along with the activities (id. at pp. 1-2). In terms of service recommendations, the physical therapist stated that after "careful discussion" with the parent, it was decided that PT services would be discontinued for the 2017-18 school year, because it was determined that he would be better served in the classroom to focus on learning, communication, and peer interaction (id. at p. 4). Among the factors taken into consideration with this decision, the physical therapist noted that the student already had many pullouts for services and left school early three afternoons per week to attend another program (Fit) and that "[f]unction wise (physically)" the student was able to access his school environment independently (id.).

In September 2016 two BOCES speech-language pathologists conducted an augmentative and alternative communication evaluation (Dist. Ex. 31 at pp. 1-9). The evaluation report was considered by the November 2016 CSE and remained available to the May 2017 CSE as it developed the IEP for the 2017-18 school year (see Dist. Exs. 7 at p. 1; 8 at p. 4). The September 2016 augmentative and alternative communication evaluation report found that the student was a "good candidate for an alternate communication system as his ability to communicate via verbal expression" did not meet his communication needs (Dist. Ex. 31 at p. 3). The speech-language pathologists found that the student was functioning below his chronologically aged peers in regard to social and communication skills and shared from provider reports that he exhibited "poor eye contact," that his attention span was "poor," that he was easily distracted during therapy sessions, and that he required prompting to establish and maintain eye contact and in following group directions (id. at p. 4). The speech-language pathologists recommended the student utilize the Dedicated Plus NovaChat 8 to communicate in all his naturally occurring language environments (id. at p. 8). Among the recommendations offered by the speech-language pathologists, the September 2016 report called for training for school staff and family in the care and use of the device and introducing the device during activities that were highly motivating to the student; and noted that research stated that students who use speech generating devices should be afforded the opportunity to communicate via making requests and commenting 200 times a day (id. at p. 8).

With regard to the parents' allegations that the district ignored the student data collected by the private ABA providers at Fit, I note that the student's first-grade regular education teacher during the 2016-17 school year testified that early in the school year she asked the parent for information on Fit and what they were working on with the student (Tr. pp. 398-99, 498). She did not recall the parent ever asking her to speak to the people at Fit, or an "eagerness for Fit [l]earning techniques to be used in my classroom" (Tr. pp. 500-02). The first-grade teacher stated that she was familiar with Fit through materials she received from the parents (an email about the program and two videos of the student during ABA sessions) and also that she "looked up the website" (Tr. pp. 407-09). The student's special education teacher stated that she, and other district staff, watched the videos of the student at Fit that were sent by the parent and described what she saw as "[s]imple ABA," with regard to taking data and providing reinforcement, although the special education teacher acknowledged that she did not have any ABA training (Tr. pp. 332-35).[17]

[17] Other than a reference to "last year" made by the student's teacher in October 2017 (Tr. p. 333), the hearing record does not indicate at what point in time the district staff reviewed the information the parent sent to them about Fit.

Additionally, a Fit representative participated in the November 2016 CSE meeting (Tr. p. 505; Dist. Ex. 7 at p. 1).

In addition, the speech-language pathologist stated that she spoke with the director of Fit on May 1, 2017, just before the CSE meeting and that they had a brief conversation "so that we could have a shared focus and plan for next year" (Tr. pp. 574-75). The speech-language pathologist further explained that she wanted to see what Fit was doing with the student for the next year and what they projected they were going to be working on so the two had a "common theme" to "help him as best as possible" (Tr. p. 575). The speech-language pathologist stated that she had not seen any assessments or data from Fit (Tr. pp. 623, 696-97).

In light of the evidence above, I find that the May 2017 CSE continued to possess sufficient evaluative information about the student's needs and abilities with which to develop an IEP for the student for the 2017-18 school year. The district personnel reviewed the information about the student's programming at Fit that was provided by the parents and the district speech-language pathologist, responsible for the therapy addressing one of the student's most pressing needs, proactively reached out to Fit to coordinate speech goals and therapy objectives.

2. Predetermination and Parent Participation

Here, for the 2017-18 school year, the parents again argue that IHO 2 disregarded that the district predetermined that it would not provide ABA to the student and disregarded that the CSE chairperson admitted to giving the parents erroneous legal advice regarding that ABA was "only" available through the medical field and that the CSE was not obligated to offer it. The parents also claim that the district repeatedly advised them to seek 1:1 ABA programming outside of the student's IEP and that it was unwilling and unable to provide ABA.

At the May 2017 CSE meeting the parents informed the district of their intention to continue with the student's program at Fit (Dist. Ex. 8 at p. 1). According to both the CSE chairperson and the student's mother, the parents did not request that the CSE consider recommending ABA instruction or Fit on the IEP at the May 2017 CSE meeting (Tr. pp. 116-17, 1286).

At the impartial hearing, the special education teacher testified that she did not recall anytime during the May 2017 CSE meeting any conversations about Fit, getting the student ABA outside of the school day or about the need for ABA, and did not remember the parents asking the CSE to consider Fit to be on the student's IEP (Tr. pp. 310-11, 335). The special education teacher stated that she could not speak to the progress the student had made at Fit because she had not seen anything from Fit (Tr. p. 328).

In response to a question posed at the impartial hearing regarding why, as a member of the CSE, she never suggested conducting an assessment to determine whether ABA would be "good for this" student, the student's first-grade teacher stated that she didn't think that the district had an ABA specialist that would be able to deliver those services (Tr. p. 533).

The February 2017 private auditory processing evaluation report included recommendations for ABA, ongoing involvement at Fit, and consideration of extending the student's attendance in a program such as Fit through the school week (Dist. Ex. 33 at pp. 6-8). However, the evidence shows that the CSE would not have been able to consider the February 2017 private auditory processing evaluation report because, according to the CSE chairperson, the parents forwarded the privately-obtained report to the CSE after the annual review had been conducted in May 2017 (Tr. pp. 117-19). The evidence post-dating the May 2017 meeting then weighs heavily against the parents' participation and predetermination claims. At the October 11, 2017 hearing date which occurred early in the 2017-18 school year, the CSE chairperson was asked if the CSE had reviewed the February 2017 private auditory processing evaluation report (Tr. pp. 1, 117-18; Dist. Ex. 33 at p. 1). She testified that the evaluation report was not forwarded to the district until after the annual review in May 2017, and the CSE had not yet met to review the report (Tr. pp. 117-19). She also testified that the student's mother had requested an "FM [system] evaluation," which was subsequently completed by BOCES, but that the CSE had not met to review that evaluation report either (Tr. pp. 118-19). She stated that the CSE had scheduled meetings to do so, but there were, "scheduling issues. There were two cancelations from the parents" and that "[w]e keep postponing the meetings to another different day. The parents are requesting to move the meeting to a different day" (Tr. p. 119). The CSE chairperson also stated that there was no currently scheduled CSE meeting to review the FM evaluation and the private auditory processing evaluation reports because, "[t]he one that was scheduled was—the parents called yesterday to try and postpone it" (Tr. pp. 119-20).

The evidence above shows that the parents, once again, did not make a request for the student to receive ABA services during the May 2017 CSE meeting and, although the parents may have had other matters to attend to, they have subsequently declined to participate in an additional CSE meeting that was offered by the district to further review the student's IEP. Under the circumstances presented in this case, these facts as described above do not support a finding that the district significantly impeded their participation in the development of the student's programming in this instance. The facts also support the conclusion that the district members of the CSE were willing to consider additional changes to the student's IEP. In light of the above, I find that the district and the CSE possessed the requisite "open mind" with respect to the student's program for the 2017-18 school year, that the evidence does not support that there was impermissible predetermination of the student's program, and that the parents were provided with ample opportunity to offer input and participate in the development of the student's IEP for the 2017-18 school year.

3. Cumulative Procedural Violations

As was the case for the 2016-17 school year, none of the alleged violations concerning the 2017-18 school year constituted a procedural violation, and as such there is no basis on which to find that such alleged violations cumulatively rose to the level of a denial of a FAPE (see C.M., 2017 WL 607579, at *18).

However, the May 2017 CSE meeting took place under circumstances wherein the student had been removed from the public school for a portion of the regular school day to attend an ABA program for most of the 2016-17 school year. This extended time period of the student receiving

ABA instruction outside of school without any discussion at the CSE meeting about the student's need for that methodology is some way along the path to a "pattern of indifference" that could result in a cumulative procedural violation and a finding of a denial of a FAPE. Although the parents bear some responsibility to discuss at a CSE meeting what they believe is an appropriate methodology to use with the student—notwithstanding the parent's testimony as to her belief that it was not her "job" to ask the CSE to provide the student with ABA services (Tr. p. 1285)—this potential indifference by the CSE of the student's need for a particular methodology contributes to my order to the parties to explicitly consider the need for ABA services in the student's program at the next annual review as set forth below.

C. Deficient IEP Claims

Moving on to claims that the IEPs created by the CSEs resulted in a denial of a FAPE to the student, I address claims concerning annual goals, methodology, and behavior interventions discretely for each school year, although I note many of the arguments and much of the testimonial evidence is not specific to a particular school year.

1. Annual Goals for the 2016-17 School Year

The parents argue that IHO 2 erred in finding that the student had been making progress and that the CSE's measurements of progress were meaningful. They further argue that the student's IEP was not calculated for him to make progress because the annual goals and objectives were inappropriate and insufficiently ambitious. In addition, the parents argue that the IHO disregarded that the student could not sit still or sustain eye contact and therefore many traditional academic goals were not meaningful without first addressing his school-readiness skills.

The IDEA requires that an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

According to the progress report for the end of the 2015-16 school year, the student had achieved 6 of his 17 IEP annual goals including goals involving refocusing, greeting friends, reading fluently and accurately, comprehending verbally presented information, displaying an awareness of others, and ascending and descending stairs (Dist. Ex. 35 at pp. 1-9). The student was making satisfactory progress toward, and was expected to achieve, three additional annual goals including goals involving grasping, manipulating and molding putty for strength; recognizing similarities and differences in pictures; and hopping a distance of six feet (id.). The remaining annual goals included notations that the student was making inconsistent progress, less than anticipated progress, or that the goal would continue to be addressed next year (id.).

The student's May 2016 IEP contained 15 annual goals including one annual goal each in the areas of reading, mathematics, speaking/listening, social/emotional behavior and daily living skills; four speech-language annual goals; and six motor skill annual goals (Dist. Ex. 6 at pp. 11-12). The May 2016 IEP reveals that the annual goals included the requisite evaluative criteria (e.g., 3 out of 5 trials on 3 consecutive occasions, 80 percent success over 4 weeks), evaluation procedures (e.g., recorded observations, work samples, behavior charting), and schedules to measure progress (e.g., end of each marking period) (id.). The record further reflects that these annual goals were designed to address the student's identified needs (compare Dist. Ex. 6 at pp. 11-12, with Dist. Ex. 6 at pp. 8-10).

The CSE chairperson stated that when reviewing the student's annual goals for the May 2016 IEP, the teachers and providers shared that the student was making progress, albeit his progress was slow (Tr. pp. 80, 82-83; see Dist. Ex. 6 at p. 1). The student's first-grade teacher acknowledged, as indicated on the student's May 2016 IEP, that the student had made slow progress in the 2015-16 school year (Tr. p. 480; see Dist. Ex. 6 at p. 1).

The student's speech-language pathologist stated that all the activities she conducted during her sessions with the student were based on his goals (Tr. pp. 590-91). The speech-language pathologist stated that she knew the student had achieved his goals because she had progress monitoring notes and maintained a plan book (Tr. pp. 599-600, 703). The occupational therapist indicated that she also kept track of the student's progress with her daily notes and monitoring the student's progress using those notes on a monthly and quarterly basis (Tr. pp. 751-52). The occupational therapist also testified that she reported progress to the parent during informal and team meetings, and sent the parent pictures and videos of the student to show progress (Tr. pp. 752-54).

With respect to the parents' concern with and the lack of an eye contact annual goal for the 2016-17 school year, the special education teacher, on cross examination, stated that skill was something they were continuously working on, but that she did not feel it was a necessary goal and that she tried to limit goals to academics (Tr. pp. 353-54). The special education teacher stated that to address the student's lack of eye contact the staff implemented visual and verbal prompts and although by the end of the school year a visual prompt was still needed, the student had moved from the need for a verbal prompt which she testified was "more intensive" (Tr. pp. 268-70). Notwithstanding, the May 2016 IEP included annual goals involving gaining the attention of peers and asking a question as well as orienting and looking when an object is presented (Dist. Ex. 6 at p. 11).

With respect to school readiness and sitting still, the May 2016 IEP included annual goals involving completing exercises which require upper body strength (e.g., hands, forearms, shoulders, core) to assist the student in being able to complete desk work independently; maintaining balance in static and dynamic challenges to improve the student's skills in his educational setting; and grasping, manipulating, and holding specified objects with control and endurance to complete classroom activities (Dist. Ex. 6 at pp. 11-12).

By arguing on the one hand that the annual goals were insufficiently ambitious while on the other hand arguing that the IEP lacked school readiness goals such as "sitting still," the parents

paint too narrow a target that the CSE must achieve to overcome the claim that the annual goals denied the student a FAPE, because an IEP must be reasonably calculated to enable a student to receive educational benefits, but it does not need to maximize a student's potential or be "prescient enough" to achieve perfect results (see M.P. v. Carmel Cent. Sch. Dist., 2016 WL 379765, at *5 [S.D.N.Y. Jan. 29, 2016]). I note that the annual goals addressed some of the student's core needs directly. For example, the occupational therapist stated that she recommended for the student an annual goal involving exercises which require upper body strength because she felt "increasing his core, shoulders, and his arms were imperative to the fine motor success…and his ability to sit upright" (Tr. p. 748-50; see Dist. Ex. 6 at p. 12). Likewise, the speech-language pathologist also recommended for the student a daily living skills annual goal to increase the student's independence, which she noted was a "big focus" for the student (Tr. p. 759).

Additionally, to the extent that the parents' school readiness claim relates to the student's inattentiveness and distractible behaviors, the May 2016 IEP provided the services of a 1:1 aide for two periods per day in the classroom, refocusing and redirection, and preferential seating; supports and services provided to address this need (Dist. Ex. 6 at p. 13). Furthermore, where the goals are overall appropriate to offer the student a FAPE, an IEP does not need to identify annual goals as the vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE. (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]; see also, P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 (E.D.N.Y. 2011), aff'd, appeal dismissed, 526 F. App'x 135 [2d Cir. 2013] [noting the general reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress]).

Accordingly, I find that the May 2016 CSE developed the student's annual goals based on his needs, and the hearing record supports a finding that the annual goals were appropriate and measurable. To the extent that additional goals could have been drafted for the student, any lack thereof did not rise to the level of denying the student a FAPE.

2. Annual Goals for the 2017-18 School Year

According to the 2016-17 progress report, by the end of the school year the student had achieved 10 of his 15 IEP annual goals, including goals involving solving addition and subtraction word problems, expanding utterances and responses, gaining attention of peers, responding to simple "wh" questions, orienting and looking at a presented object, completing exercise requiring upper body strength, maintaining balance, hopping a distance of eight feet, grasping/manipulating/holding specified objects, and demonstrating improved writing of letters and numbers (Dist. Ex. 36 at pp. 1-9). The student was making satisfactory progress toward, and was expected to achieve, the five remaining annual goals including goals involving answering "wh" questions, comprehending verbally presented information, correctly producing vowels in all positions, performing jumping jacks independently, and dressing and undressing (id.).

A review of the May 2017 IEP's annual goals reveals that the IEP included 13 annual goals—one each in the areas of study skills, reading, writing, mathematics, and daily living skills and two social/emotional/behavioral annual goals, two motor skills annual goals, and four speech-language annual goals (Dist. Ex. 8 at pp. 11-12). In addition, the annual goals included the

requisite evaluative criteria (e.g., 80 percent success with moderate assistance on 3 consecutive occasions, 75 percent success over 4 weeks), evaluation procedures (e.g., writing samples, recorded observations), and schedules to measure progress (e.g., end of each marking period, every 4 weeks) (id.). The record reflects that it included annual goals to address the student's identified needs (compare Dist. Ex. 8 at pp. 8-10, with Dist. Ex. 8 at pp. 11-12).

The May 2017 CSE meeting comments reported that the student was making progress in reading comprehension, often using pictures or visuals which "help him greatly" (Dist. Ex. 8 at p. 1). The May 2017 comments also stated that writing was not a preferred activity for the student but that he did "comply" and that he was a "wonderful decoder and speller" (id.). The May 2017 comments stated that the student was making progress in the areas of speech, OT, and PT (id.). The student's special education teacher stated that at the May 2017 CSE meeting, the committee discussed the student's progress and the annual goals for the next year (Tr. pp. 297-98).

The special education teacher stated that in working with the student on comprehension annual goals she used short passages, broke down the text and used visuals (Tr. p. 263). The special education teacher stated that the graphs accompanying the annual goals on the progress report indicated the student's scores and were used to monitor his progress (Tr. p. 264; see Dist. Ex. 36 at pp. 2-4). With regard to the 2016-17 school year the student's first-grade teacher stated that in her opinion the student made progress in reading comprehension, math addition and subtraction problems, and some progress in social skills (Tr. pp. 469-70).

With respect to the parents' concerns that the annual goals were insufficiently ambitious, as described above, the IEP need not maximize the student's every potential. In addition to academic goals, social/emotional and activities of daily living goals, I note that the student's providers included annual goals to address the student core deficits, for example, the speech-language pathologist stated that she included in the May 2017 IEP an annual goal involving using "an appropriate phrase to comment, request, or question" so as to improve the student's social pragmatic language skills and felt this was important for him to communicate with both peers and adults, engage with others, and be social (Tr. p. 615). She added that she included 70 percent success criteria because she wanted the student to be successful (id.). The occupational therapist stated that she recommended for the student an annual goal involving "ball skills" and noted the goal included many steps and required visual attention (Tr. p. 772).

Accordingly, I find that the May 2017 CSE developed the student's annual goals, based on his needs, that were sufficiently ambitious in light of his circumstances, and that the hearing record supports a finding that the annual goals were appropriate and measurable to the degree that they did not deny the student a FAPE.

3. Need for Specified Methodology for the 2016-17 School Year

Turning next to the parties' dispute over whether the student's IEP should have specified ABA methodology and the related issue of whether the IEP was based upon peer-reviewed research to the extent practicable in the absence of ABA, the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't

of Educ., 589 F. App'x 572 , 575-76 [2d Cir. 2014]; A.S. v. New York City Dep't of Educ., 573 F. App'x 63, 66 [2d Cir. 2014]; K.L. v. New York City Dep't of Educ., 530 F. App'x 81, 86 [2d Cir. 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94).

However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). If the evaluative materials before the CSE recommend a particular methodology, there no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implanting the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194).

Additionally, State and federal regulations require, in part, that an IEP must include a "statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child" (34 CFR 300.320[a][4]; see 8 NYCRR 200.4[d][2][v][b]). According to the Official Analysis of Comments to the federal regulations, the IDEA

> requires special education and related services, and supplementary aids and services, to be based on peer-reviewed research to the extent practicable. States, school districts, and school personnel must, therefore, select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available. This does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child's IEP Team based on the child's individual needs.

(Statement of Special Education and Related Services, 71 Fed. Reg. 46664-65 [Aug. 14, 2006]; see 20 U.S.C. § 1414[d][1][A][i][IV]).

While recognizing the IDEA's requirements regarding peer-reviewed research, courts have generally declined to find an IEP or a recommended program was not appropriate on the sole basis

that it violated this provision of the IDEA (see Ridley Sch. Dist. v. M.R., 680 F.3d 260, 275-79 [3d Cir. 2012]; Joshua A. v. Rocklin Unified Sch. Dist., 319 Fed. App'x 692, 695 [9th Cir. Mar. 19, 2009] [finding that "[t]his eclectic approach, while not itself peer-reviewed, was based on 'peer-reviewed research to the extent practicable'"]; A.G. v. Bd. of Educ. of Arlington Cent. Sch. Dist., 2017 WL 1200906, at *9 [S.D.N.Y. Mar. 29, 2017] [rejecting the parents' arguments that the Wilson Reading System must be used "with fidelity" or exclusively in order to provide a FAPE and finding that the incorporation of aspects of Wilson instruction as part of a balanced literacy program was permissible]; see also Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F. Supp. 2d 1213, 1230-32 [D. Or. 2001] [rejecting an argument that a district's proposed IEP was not appropriate because it provided for an eclectic program and holding that the district's offer of FAPE was appropriate notwithstanding its refusal to offer an ABA approach]). The parents' argument that the district's program is not sufficiently based upon peer-reviewed research is also entwined with their argument that the district failed to use "consistent researched based instruction" when compared to the "rigorous, data-driven ABA program[ing]" or methodology that they preferred. This argument is similarly styled to the one in in C.S. v. Yorktown Cent. Sch. Dist., wherein the Court noted that "the New York regulations require that an IEP 'shall, to the extent practicable, be based on peer-reviewed research.' 8 N.Y.C.R.R. § 200.4(d)(2)(b). But, the IEP need not identify a specific 'educational methodology' to satisfy the IDEA (C.S. v. Yorktown Cent. Sch. Dist., 2018 WL 1627262, at *16 [S.D.N.Y. Mar. 30, 2018]).[18]

In this case the hearing record does not include a "clear consensus" regarding a specific teaching methodology. First, with regard to the May 2016 CSE meeting and its resultant IEP, the large majority of evaluations and reports, available to the May 2016 CSE, did not include mention of or recommendations for ABA instruction (see Dist. Exs. 6 at pp. 4-5; 12 at pp. 1-5; 14; 15; 16; 17 at pp. 1-9; 18; 19 at pp. 1-4; 20 at pp. 1-4; 21 at pp. 1-3; 22 at pp. 1-3; 23 at pp. 1-3; 26 at pp. 1-4; 28 at pp. 1-6; 29 at pp. 1-9; 30 at pp. 1-4).

Contrary to any clear consensus, the May 2012 diagnostic psychological evaluation report, obtained by the parent when the student was two years of age, included the recommendation that emphasis needed to be on facilitating the initiation of communication rather than training response to adult prompts, with great care taken to avoid prompt dependence and that discrete trial methods were neither indicated nor recommended and should be used judiciously if at all (Dist. Ex. 10 at

[18] The IDEA expresses a preference that educational services be based on peer-reviewed research, but it is far less clear that if a student's educational program is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances, that the lack of peer-reviewed research will nevertheless result in a denial of a FAPE. As one court recently stated of the requirement "To the contrary, the IDEA explicitly says 'to the extent practicable,' which in and of itself suggests that peer-reviewed research is not always required (E.M. v. Lewisville Indep. Sch. Dist., 2018 WL 1510668, at *10 [E.D. Tex. Mar. 27, 2018]; see also Bd. of Educ. of Albuquerque Pub. Sch. v. Maez, 2017 WL 3278945, at *7 [D.N.M. Aug. 1, 2017]; J.S. by Solorio v. Clovis Unified Sch. Dist., 2017 WL 3149947, at *10 [E.D. Cal. July 25, 2017], aff'd sub nom. Solorio v. Clovis Unified Sch. Dist., 748 F. App'x 146 [9th Cir. 2019] [noting that there is no absolute requirement that an IEP be supported by peer-reviewed research, but only that it be supported to the 'extent practicable.']; Damarcus S. v. D.C., 190 F. Supp. 3d 35, 51 [D.D.C. 2016][rejecting the student's claim that an IEP that failed to specify the research-based, peer-reviewed instruction resulted in a denial of a FAPE]).

pp. 1, 4). In addition, the May 2012 report recommended using a total communication approach incorporating augmentative communication (id. at p. 5).

The March 2013 speech-language PROMPT consultation report indicated that the student had significant trouble moving his articulators for most sounds but had finally learned to produce a limited amount of syllables consistently (Dist. Ex. 12 at p. 2). The March 2013 report recommended SLP/PROMPT therapy to intensify and include 45-minute sessions daily (id. at p. 4). Within the March 2013 speech-language PROMPT consult report, the evaluator stated that the student was receptive to PROMPTs and that the oral tension that was present six months ago was not present at the time of the March 2013 consult (id.).

As discussed previously, an October 2013 neurodevelopmental evaluation was conducted when the student was four years of age (preschool), and the report stated that intensive speech-language therapy was imperative and recommended services with a PROMPT trained/certified therapist (Dist. Ex. 13 at pp. 1, 7). In addition, the evaluator recommended the student receive "5 hours of ABA or [s]pecial [i]nstruction outside of school" to teach concepts and to increase attention to language, joint attention and eye contact, and pragmatic and language skills in order to "help with [the] generalization of skills between home and school" (id. at p. 7). Several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]). As described previously in this decision, the student was making progress during the 2015-16 school year, albeit perhaps not at as fast a rate as the parents may have found ideal, and the recommendation in the October 2013 neurodevelopmental evaluation report that the student should receive either ABA or special instruction outside of school falls short of the clear consensus that the student must have ABA methodology placed on his IEP in order to receive a FAPE.

The April 2014 preschool speech-language progress report stated that strategies which helped the student to achieve optimal performance included PROMPT therapy, visual and verbal models, repetition and task analysis (Dist. Ex. 21 at pp. 1-2). An April 2014 preschool progress report stated that the student benefitted from a 1:1 direct teaching approach and that during discrete trial sessions, a token economy was used so the student could "work for" a reinforcer (Dist. Ex. 22 at pp. 1-2). The April 2014 CPSE speech-language screening report stated that PROMPT techniques had been incorporated into the student's therapy, but that other approaches were also used, for example, visual schedules, group activities, and "eight individual modules set-up with ABA goals posted for each student which are practiced for approximately 2 1/2 hours/daily" (Dist. Ex. 23 at pp. 1-2). Again, while the provider exercised the discretion to incorporate ABA in 2014, other methods of instruction were also implemented, and these facts in no way support the notion that there was a clear consensus during the May 2016 CSE meeting that the student's IEP should depart from the general rule that methodology should be left to the discretion of the teachers and providers and that ABA should have been mandated by the student's IEP.

Finally, an April 2015 speech-language triennial evaluation report from the student's kindergarten school year indicated that the speech-language pathologist had utilized PROMPT during daily speech-language sessions (Dist. Ex. 26 at p. 1). The evaluator stated that while weakness was still evident, gradual improvement had been observed and that extended breaks from school had affected the student's transitions back to his school schedules and performance (Dist. Ex. 26 at p. 4).

As stated above, this evaluative information does not amount to a clear consensus that the student required ABA in order to obtain a meaningful educational benefit. Rather, it shows that recommendations were sometimes in conflict and the student was effectively educated under a variety of methodologies and techniques, including PROMPT, as well as 1:1 instruction and elements of ABA such as discrete trials. Accordingly, I do not find that the student was denied a FAPE by the explicit omission of ABA instruction from the May 2016 IEP.

4. Need for Specified Methodology for the 2017-18 School Year

As detailed above, and risking further repetition of evidence that has previously been described, the May 2017 CSE convened after the student had received ABA instruction from Fit for nearly a full year, having begun attendance at Fit in June 2016. In addition to the evaluative information and reports available to the May 2016 CSE, a February 2017 private auditory processing evaluation and Fit data reports—dated earlier than May 2017—could potentially have been available to the May 2017 CSE, but they were not (Dist. Ex. 8 at pp. 1, 4; see Parent Exs. H; I; J; K; Dist. Ex. 33).

As relevant to what might have been made available to the CSE on the issue of methodology, the February 2017 private auditory processing evaluation report included recommendations for ABA instruction, ongoing involvement at Fit, and consideration of extending the student's attendance in a program such as Fit through the school week (Dist. Ex. 33 at pp. 6-8). However, according to the CSE chairperson, the parent forwarded the February 2017 private auditory processing evaluation report to the district only after the May 2017 annual review had been conducted by the CSE (Tr. pp. 117-19). Consequently, the CSE chairperson stated that the CSE did not review the report in May 2017, but that the CSE attempted to reconvene and was unable to do so due to "scheduling issues" and two cancellations from the parents (Tr. pp. 118-19). According to the CSE chairperson at the time of her testimony in early October 2017, there was not a meeting scheduled to review the February 2017 report, and she testified that recently the parents had called to postpone a scheduled meeting (Tr. pp. 119-20).

In addition, while the dates of the Fit reports in the hearing record indicate that some would have been available to the May 2017 CSE, according to district staff, the Fit reports were not provided to the staff or CSE (Tr. pp. 101-02, 125, 332, 623, 696-97; see Parent Ex. H; I; J; K).

Although I will not speculate as to their respective motivations, neither party seemed especially curious insofar as that with the exception of the speech-language pathologist (see Tr. pp. 574-75), the district did not happen to ask about Fit or seek out any information regarding the student's work there, and the parents and Fit staff did not seem to find it important to share any data with the district or even engage in a discussion at CSE meetings about the student's program

at Fit, with the student's mother expressing the opinion later during the hearing that it was not her job to ask for ABA services or placement at Fit (Tr. p. 1285). Thus, this was hardly a model for the cooperative process envisioned by Congress. Despite this unusual circumstance, I will, bearing in mind the prospective analysis that is required by R.E. v. New York City Dep't of Educ., 694 F.3d 167, move on and examine both the evidence in the hearing record that supports the argument that the student needed ABA programming at Fit and the evidence which supports a finding that the district was not required to offer ABA in order for the student to receive a FAPE.

When asked at the impartial hearing whether the student would "benefit" from Fit, the Fit director replied, "any human would benefit from instructional interventions based in the science of learning" and further testified that "every human" would benefit from Fit (Tr. pp. 860-61, 899). As it relates to FAPE, however, the question is not whether the student would benefit from Fit, but rather, whether the student would be likely to receive educational benefits without Fit.

The private educational consultant, who observed the student at Fit in or around March 2018—long after the May 2017 CSE meeting—stated that the student required a lot of intensive 1:1 instruction and also stated that she did not feel that the student's deficits could be remediated by a methodology other than ABA (Tr. pp. 1175, 1187, 1211).[19] The educational consultant testified that the data indicated that the student mastered skills at Fit (Tr. p. 1225). She also testified that she had not seen the student in the home or in his school placement, nor did she speak with any of his in-district teachers or providers and did not know if the student had generalized those skills in another environment (Tr. pp. 1209, 1225-26). Regardless, this input would not have been available to either the May 2016 or the May 2017 CSEs.

In June 2017, a clinical psychologist prepared a report from a private psychological evaluation of the student conducted during March and April 2017 (Parent Ex. A at pp. 1-14). At the impartial hearing, the private clinical psychologist testified that after conducting her observations and testing, her recommendation was that the student needed ABA instruction (Tr. p. 1113). She testified that while there were other programs "gaining some traction" the "gold standard" for children with presentations such as the student was ABA, and further stated that ABA was the recommendation of the American Academy of Pediatrics (Tr. p. 1115). In her June 2017 report—developed after the May 2017 CSE meeting and before the commencement of the impartial hearing—the clinical psychologist recommended for the student consistent individualized support, the continued structure and individualized attention provided through an ABA-based program, extensive speech-language therapy, as well as OT and PT, social skills training, and parent training (Parent Ex. A at pp. 11-12). The clinical psychologist further testified during the impartial hearing that she felt that the student required a full-time program at Fit, although she did not include this as a recommendation in her June 2017 report (Tr. p. 1115; see Parent Ex. A at pp. 11-12). The clinical psychologist stated that she did not observe the student in his school placement or with other private providers of the student (Tr. pp. 1127-1133).

[19] This evidence would be retrospective regarding whether the student's IEP was appropriate, but it would be permissible to rely on it in assessing the extent to which Fit was an appropriate unilateral placement.

The private clinical psychologist testified that in the discussion with the student's special education teacher, her impression was that the special education teacher felt that ABA instruction should be provided and that the student required that level of support (Tr. pp. 1104-05). According to the clinical psychologist, the special education teacher also stated that she felt that the student's performance had improved since he had been attending Fit (Tr. p. 1106; see Parent Ex. A at p. 4). Within her June 2017 psychological evaluation report the clinical psychologist stated that the special education teacher reported that the student benefitted from ABA-based interventions (Parent Ex. A at p. 4). However, contrary to testimony from the clinical psychologist, the student's special education teacher stated that she did not report that the student benefitted from ABA-based interventions or that she felt the student's performance in school had improved since the student had been attending Fit, that she did not report that the student required ABA or that he would do much better with ABA, and that she did not report on whether the student made progress at Fit (compare Tr. pp. 1104-06 with, Tr. pp. 1432, 1436-37, 1440-41).

Additionally, although the private clinical psychologist recommended that the student receive ABA instruction in her June 2017 report and in her testimony during the latter portion of the impartial hearing, it does not appear that information was available to the CSE. According to the CSE chairperson, despite her request during the resolution meeting for a copy of the private psychological evaluation report, the parents had not provided a copy, and therefore the CSE had not reviewed the report (Tr. pp. 125-26). The hearing record reflects that the CSE chairperson first saw the June 2017 private psychological evaluation report on October 11, 2017, and the clinical psychologist testified on March 15, 2018 (Tr. pp. 3, 25, 125, 1086-90).

The student's special education teacher also testified that she did not recall any conversations about Fit during the May 2017 CSE meeting, and did not remember the parents asking the CSE to consider adding Fit to the student's IEP (Tr. pp. 294-95, 310-11). The special education teacher stated that she could not speak to the progress the student had made at Fit because she had not "seen anything from Fit" and stated that she "would like to think that the progress he made was due to our hard work and teamwork and effort," noting that she could speak to the progress he had made at the district with his goals and the work staff put in with him (Tr. pp. 328-29). On cross examination the special education teacher stated that she did not think she ever said she was supportive of Fit because she did not have any information from Fit (Tr. p. 332).

The student's speech-language pathologist stated that she did not know enough about Fit to determine if Fit was the "lynchpin" of the student's progress as the parents allege (Tr. p. 625). She further testified that there wasn't a way to attribute the student's progress to an outside agency since he spent more time in school than at Fit, and at school he was "receiving a lot of services and support" (id.).

The student's first-grade teacher stated that she did not believe anyone from Fit was present at the May 2017 CSE meeting, that she had not seen any assessments from Fit, and would not agree with the statement that Fit had been the "lynchpin" of the student's educational progress (Tr. pp. 472-73). Rather, she stated that staff efforts and the program developed for the student in her classroom focused on his needs, and that staff worked "extremely hard" to enable the student to be successful in first grade (Tr. p. 473). When asked about the student's improved reading and math scores during the 2016-17 school year, the first-grade teacher stated that she "would like to think

that the instruction that [the student] received in my classroom" was also a reason as to why his test scores went up (Tr. pp. 461-63). The first-grade teacher acknowledged that it was possible that the student could benefit from ABA (Tr. p. 533).

In response to the student's teacher's concerns about the student missing recess and the "social piece" of school during the 2016-17 school year, the parents arranged for a later pick-up time, at 2:00 p.m., for the 2017-18 school year (Tr. pp. 540-41, 1269, 1273-74). The student's teachers and providers had reported to the parents that during the 2017-18 school year the student was having a tough time with the curriculum, that they had to modify all his work, he needed to be refocused a lot, that he was exhausted, and that he was falling asleep (Tr. pp. 1270-71). The student's mother stated that the student was having a tough time during the 2017-18 school year and acknowledged that the student had long days with many afterschool activities and tutoring, and that some days he does not get home until 6:00 p.m. (Tr. pp. 1262, 1270).

The parent asked the district speech-language pathologist to provide the student with services during summer 2017 because the parent felt the student's articulation was "slipping" (Tr. pp. 1295-96). During the impartial hearing, the student's mother affirmed her belief that the student had a "great year" in 2016-17, yet that he was struggling at that time during the 2017-18 school year, as district staff reported that the work was getting harder and the student could not keep up academically, that it was difficult for him, and that he needed to be redirected a lot (Tr. p. 1294). She also stated that he did not have to be redirected as often at Fit because the student was "pretty focused and on task" there (id.). However, the parent stated that "overall" she was seeing great things from the student at home and out in the world (Tr. 1299).

On balance, I find that the hearing record and specifically the evaluative information available to the May 2017 CSE do not contain a clear consensus that the student required ABA during the 2017-18 school year in order to obtain a meaningful educational benefit. Rather, it shows that the student could be effectively educated using a variety of methodologies and techniques, and that he had made progress towards his IEP annual goals during the 2016-17 school year when the larger part of his instructional week was spent receiving special education and related services from the district (see Tr. pp. 328-29, 461-63, 473, 625; Dist. Exs. 36). Accordingly, I do not find that the student was denied a FAPE during the 2017-18 school year by the explicit omission of ABA instruction from the May 2017 IEP.

Nonetheless, there is a wealth of data and recommendations within the hearing record, albeit much of it never made available to the May 2017 CSE, suggesting that ABA instruction may be valuable to the student, such that it could comprise a necessary part of an IEP that offered a FAPE to the student. There are also rising indications that the student may have been "over-programmed" at the time of the impartial hearing during the 2017-18 school year. This post-May 2017 CSE evidence of the potential need for ABA methodology also contributes to my order to the parties to explicitly consider the need for ABA in the student's program at the next annual review as set forth below.

5. Functional Behavioral Assessment and Behavior Intervention Plan

The parents argue that the CSE failed to obtain any behavioral data for the student, conducted an invalid FBA and failed to create a BIP, that the FBA lacked baselines and offered only qualitative observations, and that the IHO erred and should have found that without a BIP, the student's behaviors significantly impeded his learning.

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 Schenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). 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]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). State regulation defines an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to:

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

(8 NYCRR 200.1[r]).

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

The Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors" (R.E., 694 F.3d at 190; see L.O., 822 F.3d at 112-13). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that, in such instances, substantive review is impaired because it is impossible to know what information an FBA would have provided, and particular care must be taken to determine whether the CSE had sufficient information to appropriately address the student's problem behaviors (R.E., 694 F.3d at 190).

a. 2016-17 School Year

The parent indicated that during the student's first year in first grade (the 2015-16 school year) teaching staff wanted the student to have a 1:1 aide, and that they conducted an FBA "based around that" (Tr. pp. 1261-62). The CSE chairperson stated that at the December 2015 CSE meeting, teaching staff "brought up" the idea of a 1:1 aide and that the parents were "torn" about having someone with the student all the time and "perhaps becoming dependent on that person to always redirect him and to always prompt him" (Tr. pp. 68-69). The CSE chairperson explained that the December 2015 CSE discussed an FBA and BIP, and looked at the student's behaviors and to what extent he needed individualized attention (Tr. pp. 69-70). The CSE chairperson also stated that the purpose of conducting the FBA-BIP was to see if the student required a 1:1 aide (Tr. p. 71; see Dist. Ex. 30 at p. 1).

The CSE chairperson testified that at the time the FBA was conducted, the student did not have any disruptive or aggressive behaviors that would make somebody unsafe (Tr. p. 71). The CSE chairperson described the student's "significant challenges" as being distracted and task avoidant/resistant, and that "he can wander" (id.). During cross examination, the CSE chairperson stated that the student's deficits which required an FBA were that he was "inattentive" (Tr. p. 147). As discussed in detail above, the February 2016 FBA-BIP report stated that the student "does not engage in disruptive or aggressive behavior and as such, this is not a traditional FBA/BIP in which specific disruptive or aggressive behaviors are targeted for reduction" (Dist. Ex. 30 at pp. 1, 2).

Review of the February 2016 FBA-BIP report shows that it addressed some of the regulatory requirements including that it identified the student's "problem behaviors" (student is prompt dependent, struggles to work independently, engages in self-directed activities, wanders) and those behaviors to be increased (use of appropriate communication skills, time on task, remaining in visual proximity) (Dist. Ex. 30 at pp. 1-2). The report reflected the contextual factors that contributed to the behaviors, including the related setting events which made the challenging behaviors more likely to occur (student is not feeling well, is tired, is frustrated others do not understand him) (id. at p. 3). The FBA-BIP report identified the assessments used to determine the primary functions of the behaviors (teacher and parent reports, direct observations and interventions with the student, medical and psychological evaluations), and concluded that the primary functions of the student's challenging behaviors—similar to a hypothesis regarding the probable consequences that serve to maintain behaviors—were self-stimulatory, task avoidance, and to obtain desired objects (id.). Additionally, the FBA-BIP report also provided information about the reinforcers and proactive strategies (use of positive behavior support strategies including reading books, taking breaks, jumping on a trampoline or riding scooter; use of a prompt hierarchy to facilitate independence in classroom), and evaluation procedures to assess progress (staff will monitor and communicate progress in off-task and wandering behaviors, continue to identify, maintain, and implement strategies which facilitate adaptive behavior, complete data sheets as necessary to maintain a record of increase or decrease in target behaviors) (id. at pp. 3-4). The report was prepared by a district school psychologist and a behavior specialist and referenced multiple sources of input including the student's teachers, "staff," and the student's mother (id. at pp. 2-4).

On March 2016 a CSE convened to review the February 2016 FBA-BIP and the presenting issue of whether the student needed a 1:1 aide throughout the school day (Tr. p. 70; Dist. Ex. 5 at p. 1). The March 2016 CSE meeting comments stated that the student did not have overt behaviors that were disruptive to his classmates, yet also noted that the student was prompt dependent and that he needed an adult to facilitate learning, communication, and socialization throughout the day (Dist. Ex. 5 at p. 1). The March 2016 CSE agreed to provide the student the support of a 1:1 aide in the classroom for two periods daily (Tr. pp. 75-76; Dist. Ex. 5 at pp. 1, 11). A positive behavior plan was put in place according to the CSE chairperson, and this was discussed with the parents at the March 2016 CSE meeting (Tr. pp. 148-49).

The evidence described above shows that the district believed that the student needed an FBA in order to determine whether the CSE could support a decision to offer the student a 1:1 aide, a service that the parties appear to believe is a benefit to the student and with which they have not indicated any disagreement.[20] For purposes of determining whether the district offered the student a FAPE, I have little concern with the CSE's decision to offer the student a 1:1 aide or conduct an FBA to support that determination. It is unsurprising that the district would conduct an FBA for this purpose because the appropriate use of 1:1 aides has been questioned in recent years. The State Education Department's Office of Special Education issued guidance to school districts discouraging overuse of 1:1 aides, noting that a general goal for students with disabilities is to maximize independence of students with disabilities ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide" Office of Special Educ. Mem. [Jan. 2012], available at http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf). While a 1:1 aide may be an appropriate intervention for a particular student experiencing significant behavioral challenges, the guidance indicates that this is intended to address "serious behavior problems with ongoing (daily) incidents of injurious behaviors to self and/or others or student runs away and student has a functional behavioral assessment and a behavioral intervention plan that is implemented with fidelity" (id. at Attch. 3).[21, 22] The parents' quarrel in this case is with the

[20] There is no disagreement in this appeal, however, at the time the FBA-BIP was conducted, the parent was concerned that a 1:1 aide would create an environment in which the student would be unable to achieve greater independence and would diminish his time with "more qualified teachers." (Dist. Ex. 30 at p. 2).

[21] The guidance also indicates that one of the factors to consider when contemplating the use of a 1:1 aide is when in the area of instruction a "[s]tudent cannot participate in a group without constant verbal and/or physical prompting to stay on task and follow directions" or to support inclusion in a general education class setting when a "student needs an adult in constant close proximity for direct instruction" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide" Office of Special Educ. Mem. [Jan. 2012], available at http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf), but neither of those circumstances references the need to conduct an FBA or a create a BIP for such a student. The student's circumstances in this case appear to more closely align with these instructional and inclusion considerations.

[22] In 2016, mandatory provisions were promulgated in State regulation to require the CSE's consideration of certain factors before offering a student 1:1 aide services (see 8 NYCRR 200.4[d][3]; see also "Special Education Field Advisory—New Requirements for Special Education Programs and Services" Office of Special Educ. Mem. [Jun. 2012] available at http://www.p12.nysed.gov/specialed/publications/documents/new-regs-for-one-to-one-aides.pdf) however, in a Question and Answer document, the following clarification was provided regarding the provision of 1:1 aides:

adequacy of the FBA, but the student's behaviors in this case are not consistent with those described in the guidance, such as ongoing incidents of injurious behaviors to self and/or others or running away.[23] As the FBA noted at the outset, the evaluators believed it could not be conducted as a "traditional FBA/BIP" because the student did not engage in disruptive or aggressive behaviors (Dist. Ex. 30 at p. 1), whereas State regulations provide that an FBA and, if determined necessary by the CSE, a BIP are to assess and provide strategies to decrease a targeted "problem behavior" (8 NYCRR 200.22[a][3], [b][4][1]).[24] However, in this case the concerns center on inattentiveness and distractibility. There is no uniform approach under IDEA when addressing matters such as a student's inattention and distractibility (see e.g., T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 169 [2d Cir. 2014] [finding that it was not necessary to use an FBA and BIP to address concerns including distractibility, inattentiveness and difficulty remaining on-task, noncontextual vocalizations, finger twirling]; Jack J. through Jennifer S. v. Coatesville Area Sch. Dist., 2018 WL 3397552, at *11–12 [E.D. Pa. July 12, 2018 [finding that where the IEP addressed the student's needs through other means, the school district was not required to conduct an FBA or create a Positive Behavior Support Plan for a student whose behavior consisted of difficulty sustaining attention, blurting out, rushing through work, and frequent fidgeting]; M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, 325 [E.D.N.Y. 2013], [noting that a student's problems with distractibility and attending to tasks did not seriously 'impede' his or other students' instruction so

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> Q: Shouldn't the need for a one-to-one aide be determined by the Committee on Special Education (CSE) or Committee on Preschool Special Education (CPSE), rather than by a predetermined list of considerations?
>
> A: The CSE or CPSE is responsible for determining when a one-to-one aide is appropriate, and this decision should be based on a discussion of the individual needs of the student. The list of considerations will ensure a thoughtful assessment of each unique situation.

(http://www.p12.nysed.gov/specialed/publications/documents/q-and-a-preschool-regs.pdf)

[23] The evaluator noted that the student would wander off behind a shelf to read a book of interest or to use an iPad in a corner (Dist. Ex. 30 at p. 2), but gravitating toward an object of interest is a significantly less serious concern than running away or elopement.

[24] By regulatory definition, a BIP is to be based upon the results of an FBA (8 NYCRR 200.1[mmm]). However, the reverse is not true—a BIP is not required to be created automatically just because a school district decides to assess a student's behaviors using an FBA. Instead, a

> CSE or CPSE shall consider the development of a behavioral intervention plan, as such term is defined in section 200.1(mmm) of this Part, 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;

(8 NYCRR 200.22[b][1] [emphasis added]). Additionally, State regulations expressly contemplate that the CSE may address a behavior without using a BIP, noting that "the CSE or CPSE shall consider strategies, including positive behavioral interventions and supports and other strategies to address that behavior. If a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b](2] [emphasis added]).

as to require a functional behavioral assessment, but also noting that the district created a BIP in any event and that the lack of an FBA did not render the IEP legally inadequate]).[25]

For the 2016-17 school year, the May 2016 IEP addressed the student's self-directed behavior such as gazing distractedly at another part of the room, laughing or speaking to himself, sniffing objects nearby, standing up, and wandering around the class by providing the student with the services of a part-time 1:1 aide, and daily refocusing and redirection, preferential seating, directions explained, checks for understanding, ICT services, and a variety of individual and small group related services (Dist. Ex. 6 at pp. 10-13). Consequently, the May 2016 IEP also indicated that the student needed positive behavioral interventions, supports and other strategies to address behaviors that impede his learning or that of others, but the May 2016 CSE determined that the student did not need a BIP (id. at p. 10).

The student's special education teacher testified that there was no formal behavioral intervention plan in place for the student going into the 2016-17 school year, although there was an informal plan, and that the team discussed the behaviors they were seeing and as a team put into place interventions such as prompts, visuals, checklists, and common language, which the team thought would help the student throughout the day (Tr. p. 338).

Based on all of the foregoing, while it appears that the district's February 2016 FBA-BIP may not have met each and every regulatory requirement regarding the components of an FBA, and even, as the parents allege, if the CSE failed "to obtain any behavioral data for [the student]," it is not clear to me that an FBA was even required given the lack of seriously impeding behaviors in this instance. Even assuming it was a 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 2016 CSE had sufficient information regarding the student's self-directed and inattentive behaviors and addressed those needs in his May 2016 IEP as described above. Further, I agree with the May 2016 CSE's determination that the student's IEP should include behavioral interventions, supports and other strategies to address behaviors that impeded the student's learning or that of others, but that he did not require an independent BIP in this instance. Finally, I find that failing to provide a BIP does not deny the student a FAPE or otherwise contribute to such a finding because the May 2016 CSE had sufficient information regarding the student's behaviors and the May 2016 IEP adequately identified and recommended supports to meet the student's behavioral needs (Dist. Ex. 6 at pp. 10-13; see R.E., 694 F.3d at 190).

b. 2017-18 School Year

With respect to the parents' contention that the district failed to obtain behavioral data about the student during the 2017-18 school year, the student's special education teacher described the student's behavior in class during the 2016-17 school year as "inattentive" and often distracted internally and externally (Tr. p. 278). The special education teacher stated that the staff did not

[25] On the other hand, when a student's distractibility is added in with other concerns such as chewing clothes, hitting and kicking, a CSE is far more likely to use a BIP (see e.g., K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *2 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 F. App'x 81 [2d Cir. 2013]).

collect formal data about the student's inattention because they did not have an attention goal at the time, but they did collect informal data (Tr. p. 353). The evidence shows that the student's special education teacher noted that during the 2016-17 school year, she used positive reinforcement, checklists, motor breaks, and visuals with the student (Tr. pp. 281-82).

Regarding why an FBA was not conducted at the end of the 2016-17 school year, the student's first-grade teacher stated that for the student's behaviors such as stimming, walking in circles, and smelling books and people, teaching staff used "our behavior modification techniques in the classroom," such as redirecting and refocusing to a different task and cards (e.g., "[n]o smelling") with the student and that as soon as she refocused or redirected the student "he would cease" (Tr. pp. 482-83). The first-grade teacher explained that if she felt that it was a behavior that was impacting someone's health, a negative behavior or a self-injurious behavior, she would need to "go further" and come up with a plan that would address those needs (Tr. p. 483). The student's first-grade teacher during the 2016-17 school year stated that although the student's ability to focus and attend might have affected his learning, she felt that the behavior modification techniques she used in her classroom during academic times were able to get the student to participate in the lessons (Tr. pp. 396, 399, 487-88). The first-grade teacher also stated that she had behavioral strategies in place that worked, but that she did not "do a formal collection of data" (Tr. p. 490). Despite this, the first-grade teacher testified that the techniques used modified the student's behavior, and that she knew "for certain" that when she implemented refocusing and redirection with the student he would turn and listen (Tr. p. 531). The first-grade teacher stated that she used behavior modification techniques in the classroom to monitor the student's behavior and to help him access the curriculum so that he could learn (Tr. pp. 530-31). She further stated that if it was a behavior that she felt was negative and impacting on learning, then she would go to the team and talk about doing an FBA (Tr. p. 487). The first-grade teacher testified that she did not think that the student needed a formal BIP because she used such plans for behaviors that were very disruptive in the classroom or sometimes dangerous, and it would be these behaviors that would necessitate a BIP (Tr. pp. 561-62).

The student's special education teacher stated that during the 2017-18 school year "the team" discussed conducting an FBA and that the parents had signed a consent for an FBA (Tr. pp. 1516-17; March 9, 2018 parental consent).[26] In addition, according to the special education teacher, the parents requested that the school psychologist not perform the FBA and that the district find an outside person to conduct the FBA (Tr. pp. 1517, 1546). As of the date of her testimony on April 11, 2018, the special education teacher indicated that an appointment had been scheduled for the previous day to "begin the process" of an FBA, but that the student was absent (Tr. p. 1517). While there appears to have been agreement between the parties to conduct an FBA, it appears to have been reached approximately 10 months after the May 2017 IEP was created. For the reasons I set forth above with regard to the 2016-17 school year and the nature of the student's problems

[26] At my direction, the district was directed in a letter from the Office of State Review dated January 10, 2019 to file as additional evidence any prior written notices issued with regard to the student with respect to the 2016-17 and 2017-18 school years, which documents were subsequently submitted by the district together with consent forms signed by the parents.

with distractibility and inattention, I am not convinced that the May 2017 CSE was required to have another FBA conducted with respect to the student.

To address the student's inattentiveness that she observed in the classroom, the special education teacher testified that she used prompts, refocusing and redirection, visual schedules, checklists, preferential seating, checks for understanding, and explained directions (Tr. pp. 278-81; see Dist. Ex. 6 at p. 13). For the 2017-18 school year the special education teacher said she used the same interventions as the previous year (positive reinforcement, checklists, motor breaks and visuals) (Tr. pp. 282, 325).

The May 2017 IEP again indicated that the student needed strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede his learning or that of others, but that he did not need a BIP (Dist. Ex. 8 at p. 11).[27] The May 2017 IEP continued the services of a part-time 1:1 aide, and also provided for daily refocusing and redirection, preferential seating, directions explained, checks for understanding, ICT services and a variety of 1:1 and small group related services (id. at pp. 11-13).

Although the hearing record does not support a finding that the May 2017 CSE's determination to not recommend a formal BIP for the student denied the student a FAPE during the 2017-18 school year, it is apparent that there is agreement among the parties that an FBA consistent with State regulations should now be conducted for the student. Accordingly, I have ordered the district to do so as set forth below.

7. Implementation of the Student's IEPs

Lastly, the parents contend that the district has admitted that it failed to properly implement the student's IEPs during the 2016-17 and 2017-18 school years because the IEPs contemplated "split-time between the [district elementary] and private ABA program"[28] but district witnesses noted that not all special education services were delivered.

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation

[27] I note that the educational consultant who observed the student at Fit in March 2018 noted that there was not a recommendation for a BIP on the student's May 2017 IEP, and she opined that was "an area that was missing" as she felt he should have had an FBA and BIP (Tr. pp. 1187, 1210-11, 1214). The educational consultant acknowledged that she did not speak to any of the student's teachers or providers in the district and that an observation of the student in district was initially arranged; however, she was informed by the student's mother that the district was no longer allowing the educational consultant to observe the student in school (Tr. p. 1209). Regardless, the educational consultant's input was not available to the May 2017 CSE.

[28] Although the parents contend that the 2016-17 and 2017-18 IEPs "contemplate[ed] split time" between the district's program and Fit, review of the IEPs do not reflect CSE recommendations that the student be removed from the public school to attend Fit (see Dist. Exs. 6 at pp. 12-13; 8 at pp. 1-2, 13). Additionally, the CSE chairperson testified that she had conversations with the parent about the student being removed from school to attend Fit, in which she explained the district would not support that plan (Tr. pp. 104-06).

of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. Appx. 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

When confronted by the parents' determination to accept the program and services recommended by the CSEs for the 2016-17 and 2017-18 school years, but to unilaterally remove the student from the public school for a portion of the regular school day several days per week, I find that the district providers made a reasonable and practical decision to deliver as much of the student's special education services during the morning and other parts of the school day before the student was removed by the parents and taken to Fit. For example during the 2016-17 school year, when the CSE chairperson learned that the parents would continue with their plan to remove the student from school and take him to Fit during the afternoon of some school days, she directed the student's special education teacher and other providers to conduct all of the student's special education services and related services even though the student would be removed for a portion of the school day, because she wanted the student to receive as much support as he could at the public school (Tr. pp. 105-06). Similarly, the student's special education teacher testified that all of the student's services were delivered in the morning, because, "he left for Fit in the afternoon and we wanted to get the services in" (Tr. p. 238). The special education teacher stated that when the student went to Fit, he would miss math, recess, and an occasional special or two (art, music, stellar) (Tr. p. 249).[29] The special education teacher testified that staff met with the parent regarding their concern that the student was missing math and that they explained things such as manipulatives that the parent could work on with the student (Tr. p. 250). The special education teacher stated that the staff kept a folder in the classroom of things the student missed and that right when he got to school or if time permitted, they would try to make up the work (Tr. pp. 251-52). The special education teacher acknowledged that the work didn't always lend itself to making up everything (Tr. p. 252). She stated that she made sure the student's IEP goals were met, but admitted that he missed grade level content (Tr. pp. 343-44).

[29] The special education teacher explained that stellar was "like library" (Tr. p. 249).

The speech-language pathologist stated that there were conflicts when speech therapy fell on an afternoon that the student was at Fit, but that it was not often and she added that she was good at making up sessions, although she did not know if all the sessions were made up and noted that the student may have missed at most one per month (Tr. pp. 601-02).

The CSE chairperson stated that as she did in September 2016, for the 2017-18 school year she also told all providers to make sure that "we service" the student with all his special education and related services even though he would be missing parts of the school day (Tr. p. 179). The CSE chairperson testified that the student was receiving all of his services pursuant to his IEP (id.). In discussing the program as implemented during the 2017-18 school year, the student's special education teacher stated that the student was receiving all of the services she was required to provide (Tr. pp. 308, 315). Although the parents identified witness testimony to the effect that the student had missed academic instruction in the afternoons after being removed to attend Fit (see Tr. pp. 248-51, 427-29, 1265), any such failure to implement any portion of the student's IEPs was entirely the result of the parents' unilateral conduct, and I decline to find that the district failed to provide the student a FAPE on implementation grounds for either school year at issue.

D. Independent Educational Evaluation

The district cross-appeals from that part of the IHO decision which found that the district was required to reimburse the parents for the cost of the June 2017 private psychological evaluation as an IEE (IHO Decision at pp. 29-31; Parent Ex. A). The district contends that requesting reimbursement for a private evaluation in a due process complaint notice does not trigger the IEE process, and the parents never asserted disagreement with any district evaluation. The district is correct on both counts.

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 River 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 child was not assessed in a particular area, the parent has the right to request an IEE to assess the child 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]).

In the parents' July 2017 due process complaint notice, the parents requested reimbursement for the cost of the June 2017 private psychological evaluation, but did not identify any district evaluation that they disagreed with, or identify the reimbursement request as a request for an IEE (see Dist. Ex. 1 at pp. 1-14).

In the district's July 2017 response to the parents' due process complaint notice, the district asserted its position that the parents were not entitled to reimbursement for the cost of the private psychological evaluation (Dist. Ex. 2 at p. 8).

During the impartial hearing, the student's mother confirmed that the parents did not ask the district for an IEE, or ask the district to pay for the June 2017 evaluation conducted by the private clinical psychologist (Tr. pp. 1291-92).[30] Also during the impartial hearing, the private clinical psychologist did not specify which district evaluation the parents disagreed with, or which evaluative information was challenged or at issue (see Tr. pp. 1090-1170). The evaluation report itself states that the student was referred to the evaluator by his parents to assess his cognitive, academic and social/emotional functioning (Parent Ex. A at p. 1).

At the close of the impartial hearing, the parents' closing brief did not address the question of reimbursement for the cost of the private psychological evaluation (see IHO Ex. XIV). However, the district's closing brief asserted that the parents' request for reimbursement of the private psychological evaluation should be denied because where a parent does not evince any disagreement with a district evaluation, no IEE at public expense is warranted, and the hearing record demonstrated that the parents sought the evaluation to obtain additional information to be used in support of the program at Fit at the hearing (IHO Ex. XIII at pp. 25-26).

After the district cross-appealed from that part of the IHO's decision which found that the district was required to reimburse the parents for the cost of the June 2017 private psychological evaluation as an IEE, the parents did not avail themselves of the opportunity to submit an answer to the district's cross-appeal.

Thus, during the time period at issue in this matter, the parents have not expressed disagreement with an evaluation conducted by the district or specifically requested an IEE at district expense. Because the parents did not express disagreement with an evaluation conducted by the district and request that an IEE be conducted at public expense, I find that the district was under no obligation to either ensure that an IEE was provided at public expense without unnecessary delay or initiate an impartial hearing to establish that its evaluation was appropriate (see G.J. v. Muscogee Cty. Sch. Dist., 668 F.3d 1258, 1266 [11th Cir. 2012] [upholding a district

[30] I note that the CSE chairperson testified that she had requested a copy of the June 2017 private psychological evaluation report during the resolution session, but the parents did not provide it, and therefore she had not seen the report until the first day of the impartial hearing (Tr. pp. 3, 125-26).

court that correctly determined that the statutory provisions for a publicly funded independent educational evaluation never "kicked in" because no reevaluation ever occurred]; P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 740 [3d Cir. 2009] [holding that because the parents were not challenging a district evaluation, the district was not responsible for reimbursement]; Application of a Child with a Disability, Appeal No. 06-079).

Moreover, the IHO 2's reasons for granting the IEE at public expense was problematic insofar the authorities he relied upon for the proposition that the district was required to initiate a separate due process hearing to defend its evaluation of the student when the parent first requested an IEE at public expense in her due process complaint in these proceeding do not speak on the issue of whether a district must commence a second proceeding (see, e.g., A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 550-51 [D. Conn. 2002]; R.L., 363 F. Supp. 2d at 235 [finding that the parent was not entitled to an IEE and holding that the district was not required to take the parents to due process over the issue]). In his analysis, IHO 2 also misapplied Application of a student with a Disability, Appeal No. 08-087; in that case the SRO cited the general rule that a district either has to pay for the requested IEE or initiate due process to defend its own evaluations because the IHO had erroneously relied upon Burlington/Carter tuition reimbursement standards to determine whether the parent was entitled to an IEE at public expense. That case was also factual distinguishable insofar as the parents requested an IEE in their due process complaint notice, specifically stating that they disagreed with the evaluations conducted by the public agency, and obtained an evaluation of the student at their own expense which was conducted. In that case, the district's rationale for avoiding paying for the IEE was to blame the parents on an equitable basis under the tuition reimbursement analysis for failing to make records sufficiently available to the district, but the SRO in that case did not accept that as valid reason to deny a request for an IEE at public expense. Thus, for the all of the reasons above, I find that IHO 2 erred in finding that the district should have initiated a second due process proceeding and ordering the district to reimburse the parents for the cost of the June 2017 private psychological evaluation.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE for the 2016-17 and 2017-18 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether Fit was an appropriate unilateral placement for the student (Burlington, 471 U.S. at 370) or that portion of the parents' appeal regarding whether equitable considerations support an award of tuition reimbursement (see M.C. v. Voluntown Bd of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that IHO 2's decision dated November 8, 2018 is modified by reversing that portion which directed the district to reimburse the parents for the private June 2017 psychological evaluation.

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall conduct a functional behavioral assessment of the student in accordance with State regulations.

Dated: **Albany, New York**
February 13, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER