The University of the State of New York

The State Education Department
State Review Officer
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No. 19-061

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which dismissed the parent's claims related to the 2015-16 school year as barred by the IDEA's statute of limitations and further denied the relief sought by the parent to remedy respondent's (the district's) failure to provide her son with an appropriate educational program for the 2016-17, 2017-18, and 2018-19 school years. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student had received diagnoses of pervasive developmental disorder-not otherwise specified (PDD-NOS), attention deficit hyperactivity disorder (ADHD), and oppositional defiant disorder (ODD) (Parent Exs. Y at pp. 2, 4, 14-15; OO at p. 2).

The student had reportedly begun to use "some words" at age 12 months, but subsequently lost his language skills (Parent Ex. OO at p. 1). The student's sibling had been diagnosed with pediatric autoimmune neuropsychiatric disorders associated with streptococcal infections (PANS) and the student's infection levels for this condition were reportedly elevated in recent bloodwork (Parent Ex. OO at pp. 1-2; QQQ at p. 2).

The student received early intervention (EI) services from the age of two years old including applied behavioral analysis (ABA), speech-language therapy, physical therapy (PT), and occupational therapy (OT) (Parent Ex. Y at p. 2). At age three, the student transitioned to preschool and continued to receive special education services (Parent Ex. Y at p. 2). By this time, the student had begun to show improvements in functioning, including reduced head banging and improved speech (Parent Ex. FF at pp. 2-3).

A functional behavioral assessment (FBA) was conducted and a behavioral intervention plan (BIP) was developed on April 20, 2015 when the student was in prekindergarten (Dist. Exs. 12; 14). The April 2015 FBA identified the targeted problem behavior as physical and verbal aggression and identified triggers for the behavior such as nonpreferred and turn-taking activities (Dist. Ex. 14 at pp. 1-2). The functions of the behaviors were identified as getting adult attention and gaining access to preferred activities (id. at p. 3). The FBA indicated that the student demonstrated "significant social skill delays," low impulse control, and low frustration tolerance (id.). In addition, the student reportedly lacked the ability to appropriately express his thoughts, feelings and experiences (id.). The April 2015 BIP recommended that the student be provided a small, structured classroom environment and visual aids to allow the student to express himself by pointing (Dist. Ex. 12 at p. 2). In addition, the April 2015 BIP recommended that the student be provided "rote instruction of appropriate behavior with modeling" and role playing (id.). Further, the BIP specified that the student "should be provided immediate reinforcement" "based upon the length of time he can be successful" (id.). The BIP also recommended verbal prompts to not engage in problem behavior, close supervision, reminders to "'count' to calm himself down," removal to a quiet area when presenting a danger to himself or others, prompts to use his "inside voice," and a "visual schedule to assist in decreasing his frustration and agitation" (id. at pp. 2-3). The April 2015 BIP delineated an eight-week progress monitoring schedule (id. at pp. 3-4).

When the student transitioned to kindergarten, he was placed in a 6:1+1 special class and was provided with a one-to-one paraprofessional, counseling two times per week, speech-language therapy five times per week, OT three times per week, and PT two times per week (Parent Ex. Y at p. 2). In this placement the student experienced frustration and exhibited severe temper outbursts on a daily basis (id.). The student was transferred to a more appropriate classroom and he made "slow yet steady improvements" in behavioral and academic functioning, and his outbursts decreased to two to three per week (Parent Exs. Y at p. 2; FF at p. 3).

A November 2, 2015 BIP was developed when the student was in kindergarten (Parent Ex. K). The November 2015 BIP identified the targeted problem behavior as aggression, such as screaming, hitting, throwing himself on the floor and kicking (Parent Ex. K at p. 1). The November 2015 BIP identified antecedents for the aggressive behaviors such as a new or difficult task and having a preferred item either not provided or taken away (id.). The maintaining consequence consisted of redirection, sustaining the demand or removal to another area of the classroom, and the function included avoiding work and gaining his preference (id.). The November 2015 BIP included presetting with a visual schedule, a "first/then" board reminding him of incentives after work completion, and "UDL symbols" presented throughout the day (id. at p. 2). The replacement behaviors included appropriate volume for verbal requests, continuation of work demand, and transitioning without behavior incident (id.). Response strategies included verbal praise for appropriate behavior, "visual counting of breathing/calming techniques," redirection and distraction, "prompting of first/then" and "UDL symbols" (id.).

Notes between the district and the parent dated from February 26, 2016 to April 21, 2016 indicated that the student's behavior on his bus had become difficult to manage, and consequently a bus aide was recommended and added to the student's April 2016 IEP (Parent Exs. L at p. 9; N at p. 6).

A. Due Process Complaint Notice

In a due process complaint notice dated August 14, 2018, the parent sought an impartial hearing and asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16, 2016-17, 2017-18, and 2018-19 school years (Parent Ex. B at pp. 1-4). On October 22, 2018 and on October 23, 2018, the parent amended her due process complaint notice to withdraw a request for the student to be placed in a specific program, add additional facts, and supplement her requested relief (Parent Ex. A at pp. 32-34).[1]

The parent alleged that the two-year statute of limitations should not apply to her claims because the district's CSE misled the parent with false information that prevented her from recognizing violations of the IDEA, denied her meaningful participation in the development of the student's IEPs, and ultimately prevented the parent from seeking due process until August 2018 (Parent Ex. A at pp. 3-5, 7-9, 10, 11-12, 16-18, 32).

Beginning with the 2015-16 school year, the parent alleged that the CSE engaged in a pattern of conduct to prevent the student from attending an appropriate program in the least restrictive environment (LRE) (Parent Ex. A at pp. 4-6, 8). The parent also contended that she was misled by the CSE as to the meaning of "[a]lternate [a]ssessment" and what impact such a recommendation would have on the student's program and placement (id. at pp. 5, 8-10, 14-15, 16, 18). The parent further alleged that she was manipulated into accepting placement in a special class in a specialized school for the student based on representations by the CSE members that district specialized schools provided applied behavior analysis (ABA), and employed board certified behavior analysts (BCBA) and licensed behavior analysts (LBA) (id. at pp. 7-8).

For the 2016-17, 2017-18, and 2018-19 school years, the parent alleged that the district failed to recommend an appropriate program and placement in the LRE (Parent Ex. A at pp. 16-32). As relief, the parent requested a Functional Behavioral Assessment (FBA), a Behavior Intervention Plan (BIP) and BIP progress monitoring including any necessary adjustments to be conducted by the parent's private evaluator at a total cost of $4,500, 20 hours per week of home and school-based ABA for the 2018-19 school year at an enhanced rate of $150 per hour, an updated neuropsychological evaluation, 2,760 hours of compensatory ABA services at an enhanced rate of $150 per hour to remedy the four-year denial of a FAPE to the student,

[1] The parent's first amended due process complaint notice is an undated one-page document that was transmitted to the district by email dated October 22, 2018. The October 22, 2018 amended due process complaint notice was not marked as an exhibit. The parent amended her request for relief, and it is unclear whether IHO 2 was aware of the change given that she addressed the parent's original request in her final decision (IHO 2 Interim Decision dated May 28, 2019 at p. 1, IHO 2 Decision at p. 2). For the purpose of this decision, the parent's amended due process complaint notice dated October 22, 2018 will be cited as SRO Ex. 2.

reimbursement for privately obtained social programs in the amount of $1,795, and reimbursement for professional transcription services in the amount of $1,096 (id. at pp. 32-34).

B. Impartial Hearing Officer Decision

A prehearing conference was held on September 19, 2018 (Tr. pp. 1-10). As indicated above, the parent amended her due process complaint notice on October 22, 2018 (SRO Ex. 2) and again on October 23, 2018 (Parent Ex. A). The parties entered into a resolution agreement dated November 9, 2018, which was executed by the parent on November 14, 2018, and countersigned by the district on December 5, 2018 (SRO Ex. 1). By email dated February 27, 2019, the district submitted a motion to dismiss the parent's claims related to the 2015-16 school year (SRO Ex. S at p. 1). In its motion to dismiss, the district argued that the parent's claims were barred by the IDEA's two-year statute of limitations and that no exception to the statute of limitations applied (SRO Ex. 3).[2] The parties proceeded to an impartial hearing before IHO 1 on February 28, 2019 (Tr. pp. 11-197). The district conceded that it failed to offer the student a FAPE for the 2016-17, 2017-18 and 2018-19 school years (Tr. pp. 26-27, 37, 613). On March 24, 2019, IHO 1 issued an interim decision denying the parent's request to present evidence that had not been disclosed to the district within five business days of the hearing (IHO 1 Interim Decision at p. 1).[3] The parties next convened before IHO 1 for two additional hearing dates (Tr. pp. 198-586). IHO 1 recused herself on or about April 15, 2019 (SRO Ex. P at p. 2).

On or about May 2, 2019, IHO 2 was appointed and the parties reconvened for one additional hearing date on May 9, 2019 (Tr. pp. 587, 596).[4] On this hearing date the parent submitted a written objection to the district's motion to dismiss (Tr. pp. 832-841).[5] On May 17, 2019, the district responded to the parent's opposition to its motion to dismiss, rearguing that the parent's claims related to the 2015-16 school year were time-barred (SRO Ex. 4 at p. 9).[6] By email dated May 24, 2019, the parent requested that IHO 2 recuse herself due to an alleged professional

[2] The district's motion to dismiss was not marked as an exhibit or paginated. The district's motion to dismiss is a six-page document, which consists of a cover and five additional pages. For the purpose of this decision, the district's motion to dismiss will be cited as SRO Ex. 3.

[3] IHO 1 did not include page numbers in her March 24, 2019 interim decision, which is a four-page document without a cover (IHO 1 Interim Decision). For the purpose of citation, the pages have been numbered one through four.

[4] IHO 2 incorrectly reports the hearing dates over which she presided as May 10, 2019 (IHO 2 Interim Decision at p. 1), and May 15, 2019 (IHO 2 Decision at p. 5). The one hearing date that IHO 2 held was May 9, 2019 (Tr. p. 587).

[5] The parent's opposition to the district's motion to dismiss was not included in the hearing record submitted to the Office of State Review.

[6] The district's response to the parent's opposition to its motion to dismiss was not marked as an exhibit. For the purpose of this decision, the district's response to the parent's opposition to its motion to dismiss will be cited as SRO Ex. 4 (see SRO Ex. 4 at pp. 1-9).

conflict of interest (SRO Ex. B). In an interim decision dated May 28, 2019, IHO 2 denied the parent's request for recusal (IHO 2 Interim Decision at p. 2).[7]

In a final decision dated June 3, 2019, IHO 2 acknowledged that the district had conceded FAPE for "two years prior to the hearing" (IHO 2 Decision at p. 3).[8] IHO 2 initially remarked that the parent's complaint advanced many combined allegations that were difficult to separate (id. at p. 8). IHO 2 appears to have organized her decision chronologically by IEP date and the resultant claims beginning with the April 20, 2015 IEP and the district's motion to dismiss (id.). IHO 2 noted that the parent objected to the district's motion to dismiss as untimely, unfounded, lacking credibility and further argued that the parent had been prevented from timely requesting an impartial hearing due to specific misrepresentations made by the district (id. at pp. 8-9). IHO 2 determined that the district's motion was not untimely, the parent's claims related to the 2015-16 school year occurred more than two years prior to the date of the due process complaint notice and that the parent's credibility argument was unsubstantiated (id.). With regard to the specific misrepresentation exception to the statute of limitations, IHO 2 found that the parent was not new to special education and had actively participated in every CSE meeting since March 26, 2015 (id. at p. 9). IHO 2 further found that the parent had engaged the services of an advocate on January 12, 2016 and had received a procedural safeguards notice from the district (id. at pp. 9-10). Additionally, IHO 2 found the parent's testimony that she was unaware of her due process rights and that her advocate never advised her about impartial hearings was not credible (id. at p. 10). IHO 2 then determined that the parent was aware of her due process rights (id.). Addressing the parent's specific misrepresentations exception argument, IHO 2 found that the parent was satisfied with the program offered by the district and that there was no evidence that the parent was prevented from requesting an impartial hearing due to specific misrepresentations made by the district (id.). With regard to the April 20, 2015 IEP, IHO 2 found the parent's statements in her due process complaint notice lacked credibility and were contradictory at times (id. at pp. 10-11). IHO 2 then determined that the parent's claims related to the 2015-16 school year accrued on April 20, 2015 (id. at p. 11).

IHO 2 next determined that the parent's claims related to alternate assessment were unsupported by the hearing record given the content of a February 26, 2015 psychoeducational evaluation (IHO 2 Decision at pp. 11-12). IHO 2 also found that there was no evidence to support the parent's claim that the CSE had violated State or federal regulations or law (id. at p. 12). Turning to the April 15, 2016 IEP and the parent's request for behavioral analysts, IHO 2 first found that the hearing record did not support the parent's claim that the April 2016 CSE misrepresented the functioning levels of the students in the recommended 6:1+1 special class, and further credited the testimony of the assistant principal at the student's school site that a teacher employed at an alternate district site was a BCBA and had developed strategies for the student (id.

[7] IHO 2 did not include page numbers in her May 28, 2019 interim decision or her June 3, 2019 final decision. The May 28, 2019 Interim Decision consists of two pages without a cover and has been numbered pages one through two (IHO 2 Interim Decision). The June 3, 2019 Findings of Fact and Decision consists of a cover page and 22 additional pages which has been numbered pages one through 23 (IHO 2 Decision).

[8] IHO 2 amended her June 3, 2019 final decision to include the list of exhibits admitted into evidence (IHO 2 Decision at pp. 23-35).

at pp. 12-13). Regarding the parent's request for an LBA on staff, IHO 2 found no evidence to support this request and determined that this request was time-barred (id. at p. 13).

IHO 2 noted that the district conceded that the August 10, 2016 IEP did not offer the student a FAPE, stating that "[t]he district conceded FAPE for all the school years within the [s]tatute [of l]imitations," and considered the parent's request for compensatory educational services (IHO 2 Decision at pp. 13-14). IHO 2 found that the district failed to conduct an FBA as requested by the parent, however a program was in place to address the student's behavior (id. at p. 16). Concerning a neuropsychological evaluation completed in November 2017, IHO 2 opined that the parent failed to disclose that the student had been prescribed medication for his behavior in February 2017 and that the evaluator may have made different findings or recommendations had she been aware the student had taken or was taking medication at the time of the testing (id. at pp. 16-17). IHO 2 also indicated that the CSE was unaware that the student had been or was taking medication (id. at p. 17). IHO 2 then determined that there was no evidence that the student was denied a meaningful education or failed to make progress during the 2016-17 school year and that the hearing record did not support an award of compensatory education (id.).

Next addressing the May 22, 2017 IEP, IHO 2 noted that there was no indication on the IEP that the parent had informed the school that the student was or had been taking medication since May 15, 2017 and that the parent's failure to inform the CSE prevented the district from appropriately addressing the student's behavior (IHO 2 Decision at p. 18). IHO 2 found that the parent's inequities were "considerable" (id.). IHO 2 also noted that the May 2017 IEP reflected that the parent was pleased with the student's academic progress and further found that there was no basis to award compensatory educational services for the "2016-17 school year" (id.).[9]

With regard to the April 30, 2018 IEP, IHO 2 found that the parent stated no objections to the recommendations on the IEP and determined that there was no basis to award compensatory education (IHO 2 Decision at p. 19).[10] IHO 2 found that the student's paraprofessional was trained in ABA methods and that the parent's private evaluator testified that the student's classroom was appropriate for him (id.). IHO 2 denied the parent's request for an 8:1+1 special class in a community school (Horizon program) (id.).[11]

The parent requested that her private evaluator develop a new FBA, and BIP or BIP training (IHO 2 Decision at pp. 19-20). IHO 2 found no support in the hearing record for the parent's requests and denied each of them (id. at pp. 19-21). IHO 2 also denied the parent's requests for 20

[9] The May 22, 2017 IEP had an implementation date of June 1, 2017 and indicated that the student was to receive the same special education programming in the summer and during the academic school year (Parent Ex. DD at pp. 1, 15-16, 17, 20).

[10] IHO 2 did not specify the school year she was addressing. In its closing brief, which was not marked as an exhibit, the district conceded that the student had been denied a FAPE "for the school years that fell within the statute of limitations" including 2016-17, 2017-18, and 2018-19 school years (SRO Ex. 5).

[11] The parent withdrew this request in her October 22, 2018 amended due process complaint notice (SRO Ex. 2). The October 23, 2018 due process complaint notice also omitted this request, however IHO 2 addressed the parent's original request for relief in her final decision (IHO 2 Decision at p. 19; compare Parent Ex. B at p. 32, with Parent Ex. A at pp. 32-34).

hours per week of home and school-based ABA for the 2018-19 school year, for reimbursement of privately obtained social programs, and failed to address the parent's request for reimbursement for professional transcription services (id. at p. 21). Although addressed in an interim decision, IHO 2 reiterated her denial of the parent's request for recusal (id. at pp. 21-22). Finally, the IHO ordered the district to convene an IEP meeting within 30 days of her decision (id. at p. 23).

IV. Appeal for State-Level Review

The parent appeals IHO 2's denial of her requested relief and argues that IHO 2's decision should be reversed. The parent alleges that IHO 2: (1) had a conflict of interest and should have recused herself; (2) failed to make rulings; (3) denied the student a FAPE; (4) violated her due process rights; (5) ignored evidence and expert witness testimony instead basing her rulings on the testimony of witnesses who had limited interaction with the student; (6) shifted the burden of proof to the parent but denied her the opportunity to present her case; (7) denied the parent the opportunity to cross examine the author of documentary evidence relied on by the IHO 2; (8) was arbitrary and biased in her conduct of the hearing; (9) ignored procedural violations during the 2015-16, 2016-17, 2017-18, and 2018-19 school years; (10) committed procedural violations during the hearing; (11) committed errors that must be corrected to make a clear hearing record; (12) denied reimbursement of transcription ordered by IHO 1; and (13) failed to award relief for the three year FAPE violation and ruled on relief that was not requested. The parent requests that IHO 2's ruling which determined that the parent's claims related to the 2015-16 school year were barred by the statute of limitations be reversed. The parent further requests: an award of 20 hours per week of home and school-based ABA for the 2018-19 school year at an enhanced rate of $150 per hour; an award of $3,000 for a doctoral level BCBA (BCBA-D) to develop a BIP, train paraprofessionals and related school staff, and provide progress monitoring; an updated neuropsychological evaluation; 2,760 hours of compensatory ABA services for a four-year denial of a FAPE at an enhanced rate of $150 per hour; reimbursement for privately obtained social programs in the amount of $1,795; and reimbursement for professional transcription services ordered by IHO 1 in the amount of $1,096. The parent has submitted hearing exhibits excluded by IHO 2, as well as additional exhibits including correspondence between the parties and between both IHOs that was omitted from the hearing record as additional evidence and requests that it be considered as part of her appeal.

In an answer, the district responds with admissions and denials and argues that IHO 2's decision should be upheld. Although the district conceded that the student had been denied a FAPE for the school years falling within the statute of limitations including 2016-17, 2017-18, and 2018-19, the district alleged that the parent's claims related to the 2015-16 school year were time-barred and also challenged the appropriateness of the parent's requested relief. The district also argues that it agreed to provide 150 hours of special education teacher support services (SETSS) as compensation for the deprivation of a FAPE for the three years at issue pursuant to a resolution agreement. The district agrees that the parent is entitled to reimbursement for the cost of transcription services ordered by IHO 1. The district has submitted the parties' resolution agreement with its answer for consideration as additional evidence (SRO Ex. 1). Finally, the district alleges there was no evidence of IHO bias and that the IHO acted within her proper discretion.

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 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations

omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[12]

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).

[12] 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).

VI. Discussion

A. Preliminary Matters

1. Scope of Review

In view of the district's concession of a denial of FAPE for the school years within the statute of limitations period including 2016-17, 2017-18, and 2018-19 and the parties' partial resolution agreement, the parent's challenge to IHO 2's dismissal of her claims related to the 2015-16 school year and the denial of her requested relief remain to be addressed in this appeal.

2. IHO Bias and Conduct of Hearing

The parent alleges that IHO 2 was arbitrary and biased in the manner in which she conducted the hearing. Specifically, the parent argues that IHO 2 failed to familiarize herself with the prior hearing dates held by IHO 1 and failed to notify the parties in advance that she would not be following IHO 1's written rules, prior agreements between the parties, or holding more than one hearing date. Additionally, the parent contends that IHO 2 demonstrated bias by assisting, and making rulings favorable to, the district. The parent further alleges that IHO 2 failed to consider her evidence, shifted the burden of proof to the parent, relied on testimony from witnesses with limited knowledge of the student, denied the parent the opportunity to present her case, denied the parent the opportunity to cross examine a witness, violated the parent's due process rights, denied the student a FAPE, and made many factual errors that must be corrected. The parent also argues that IHO 2's determination on the district's motion to dismiss her claims arising from the 2015-16 school year on statute of limitations grounds violated due process and was not in accordance with the law. The parent also contends that IHO 2 had a conflict of interest and should have recused herself.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 19-055; Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 19-055; Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see

Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

On review, the hearing record does not support a finding that IHO 2 demonstrated bias. The hearing record suggests that IHO 2 generally exhibited patience in conducting the hearing and interacting with the parties and allowed the parent adequate time to respond to the district's motion to dismiss. IHO 2 indicated that she would accept the parent's October 23, 2018 due process complaint notice as testimony in the form of an affidavit (Tr. p. 599). IHO 2 then explained her rationale for limiting the testimony of the parent as well as other proposed witnesses (Tr. pp. 599-604). The parent's disagreement with the conclusions reached by IHO 2 does not provide a basis for finding actual or apparent bias by IHO 2 (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994]; Application of a Student with a Disability, Appeal No. 13-083). Further, the IHO's rulings fell within her broad discretion (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *7-*8 [S.D.N.Y. Mar. 30, 2017]). As discussed further below, I reach a different conclusion in this matter on the issue of relief, however this difference hardly rises to the level of establishing bias by IHO 2.

The parent requested that IHO 2 recuse herself due to an alleged conflict of interest. The parent asserted in her October 23, 2018 due process complaint notice that the recommendations of the April 30, 2018 CSE were overridden by the school psychologist's supervisor. The parent alleged that this supervisor—who is unnamed in the due process complaint notice—coauthored a book with IHO 2. The parent argued that IHO 2's past professional relationship with the coauthor of the book created a conflict of interest that warranted recusal. IHO 2 denied this request in an interim decision and reiterated her denial in her final decision, as noted above. Initially, I note that there is no corroborative information in the hearing record that the school psychologist's supervisor and the coauthor of the book are the same person. Although a personal relationship with an employee of the district does not necessarily create an impermissible conflict, it can create the appearance of impropriety. In this instance, there is no evidence in the hearing record of any personal relationship other than the parent's advocate's allegations. As IHO 2 correctly noted, the coauthor of the book was not a witness and had no association with the impartial hearing. The IHO also noted in her interim decision that "upon information and belief" the individual was "not an employee" of the district. In situations where an IHO is familiar with a witness, the IHO should advise the parties of any relationship to avoid any unnecessary perceptions of impropriety, but that is not the case in this instance. The hearing record does not include any evidence of actual bias, and the parent has not set forth any genuine basis to support a finding that IHO 2 exercised any bias, unfairness, or impartiality. IHO 2 did not demonstrate the appearance of or an actual conflict of interest. The parent's request was based on nothing more than conjecture and IHO 2 correctly denied her request.

Regarding the parent's claims that IHO 2 violated her due process rights, denied the student a FAPE, ruled on relief she did not request, and made many factual errors that must be corrected,

those claims do not present any cognizable claims for relief, and it is therefore unnecessary to address them on the merits.

The parent also contends that IHO 2 shifted the burden of proof to her and prevented her from presenting her case. In her decision, IHO 2 found that the record did not support, or specifically stated that the parent provided no support for, her requested relief (IHO 2 Decision at pp. 12-13, 17, 18, 19, 20, 21). At the hearing, the district representative explained the district was conceding a denial of a FAPE for the 2016-17 and 2017-18 school years but challenged the appropriateness of the parent's requested relief (Tr. pp. 612-613).[13] IHO 2 then stated on the record that the parent had "the burden" (Tr. p. 612).

IHO 2's decision indicates in one part that the burden of proof is on the district, but elsewhere placed that burden on the parent and she failed to hold the district accountable to its burden to craft compensatory educational relief as a result. This was error. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85; see also Application of a Student with a Disability, Appeal No. 18-015; Application of a Student with a Disability, Appeal No. 18-058; Application of a Student with a Disability, Appeal No. 16-028; Application of a Student with a Disability, Appeal No. 11-091).

IHO 2's misplacement of the burden of proof clearly informed her decision to deny the parent any relief for a three-year denial of a FAPE. The parent's entitlement to some of her requested relief will be addressed below.

3. Additional Evidence

Both parties have submitted additional documentary evidence with their pleadings for consideration on appeal. As noted above, the parent attached in excess of 300 pages of documents and photographs with her request for review. The district also submitted the parties' resolution agreement for consideration with its answer (SRO Ex. 1). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). However, several of the documents included with (or, in one case, referenced in) the parent's request for review were or should have been included as part of the hearing record

[13] As indicated above, the district conceded the student was also denied a FAPE for the 2018-19 school year (Tr. pp. 26, 27; SRO Ex. 5).

or attached to IHO 2's decision and, therefore, do not represent additional evidence presented for the first time on appeal. Those documents are: (1) IHO 1's prehearing directive on hearing rules (SRO Ex. L); (2) the parent's opposition to the district's motion to dismiss (never received); (3) the parent's October 22, 2018 amended due process complaint notice (SRO Ex. 2); (4) the transcript requested by IHO 1 (SRO Ex. G); (5) the districts' closing brief (SRO Ex. 5); and (6) the parent's closing brief (SRO Ex. 6). In addition, correspondence between the parties and the IHOs on matters relevant to the impartial hearing are deemed part of the hearing record (SRO Exs. B, C, K, O, P, Q, S).

State regulation specifically requires that, in addition to exhibits and the transcript of the proceedings, "the due process complaint notice and any response to the [due process] complaint," "all briefs, arguments or written requests for an order filed by the parties for consideration by the [IHO]," as well as "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" are part of the hearing record (8 NYCRR 200.5[j][5][vi][a], [b], [c], [e]-[f]).

Further, State regulation requires the IHO to "attach to the decision a list identifying each exhibit admitted into evidence," identifying "each exhibit by date, number of pages and exhibit number or letter" (8 NYCRR 200.5[j][5][v]). Here, IHO 2's decision did not attach the required exhibit list however, she amended her decision to include an exhibit list with handwritten notes describing whether an exhibit was merely identified or admitted into evidence. Nevertheless, the list also included cross-outs and rewrites with no indication of the final status of the exhibit. In two instances, IHO 2's list of admitted exhibits is not consistent with the transcript of admitted exhibits. According to IHO 2's list, Parent Exhibits G and H appear to have been admitted into evidence, although this was unclear (compare IHO 2 Decision at p. 25 [notations], with IHO 2 Decision at p. 28 [notation for Ex. PP]). The transcript reflects that the parent's advocate thought they were admitted, but a thorough review of the transcript reveals that they were not. The district also sought clarification from IHO 2 regarding the exhibits admitted into evidence. In response, IHO 2 assigned responsibility for the development and maintenance of the hearing record to the parties and the impartial hearing office. Notwithstanding the above, a review of the hearing record as a whole, including verification against the transcript of the proceedings and the various versions of certifications of the record and exhibit lists, provides a sufficient record of the exhibits received into evidence during the impartial hearing. Parent Exhibits G and H are referenced in IHO 2's final decision, therefore, her intent to admit them into evidence can be discerned and they will be considered part of the hearing record (IHO 2 Decision at p. 9). Based on the foregoing, except to the extent the exhibits accompanying the request for review are duplicative of documentation already in the hearing record or not relevant, they have been considered as documentation required to be a part of the hearing record.

With regard to the resolution agreement, the district attempted to introduce the agreement into evidence. IHO 2 refused to accept it (Tr. pp. 815-816). Although available at the time of the hearing, I find that the parties' agreement to 150 hours of compensatory services is necessary in order to render a decision on the amount of compensatory educational services to which the parent remains entitled. As such, I will exercise my discretion and accept the district's additional evidence (SRO Ex. 1).

B. Statute of Limitations

The parent alleges that IHO 2 erred by finding that her claims for the 2015-16 school year were barred by the IDEA's two-year statute of limitations and for determining that no exceptions to the limitations period applied (20 U.S.C. § 1415[b][6][B], [f][3][C]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]).

In this case, the parent's initial due process complaint notice is dated August 14, 2018 (Parent Ex. B), and her claims that the student was denied a FAPE for the 2015-16 school year accrued just prior to or contemporaneously with the April 20, 2015 CSE meeting. The parent argues that IHO 2 made several errors in dismissing her claims for the 2015-16 school year, among them the failure to identify accrual dates. Although IHO 2 did not specifically term her finding an accrual date, reviewed in context, it is apparent that IHO 2 determined that the parent's claims accrued on April 20, 2015 (IHO 2 Decision at pp. 8-11). The hearing record reflects that the parent attended the April 20, 2015 CSE meeting (Parent Ex. H at p. 13) and received a copy of prior written notice dated May 26, 2015 (Parent Ex. I). Consistent with IHO 2's determination, the parent's claims concerning the 2015-16 school year were not within the two-year statute of limitations when the parent filed the due process complaint after the commencement of the 2018-19 school year, on August 14, 2018, and she will not be able to pursue them further unless one of the exceptions to the statute of limitations applies.

1. Specific Misrepresentations

The parent alleged that the district's motion to dismiss was untimely, unfounded and not credible. IHO 2 addressed each of these in turn and found none of them persuasive (IHO 2 Decision at pp. 8-9). The parent argues that the CSE misled her or lied to her about specific recommendations, and her belief that the CSE was "following the rules" prevented her from requesting a due process hearing (Parent Ex. A at p. 4).

The "specific misrepresentations" exception to the timeline to request an impartial hearing applies "if the parent was prevented from requesting the hearing due to . . . specific misrepresentations by the [district] that it had resolved the problem forming the basis of the complaint" (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]; Bd. of Educ. of N. Rockland Cent. Sch. Dist. v. C.M., 2018 WL 3650185, at *3 [2d Cir. 2018][noting that the district's refusal to accede to the parents requests formed the basis of the complaint and that the district did not misrepresent that it had resolved the problem]; R.B. v. Dept. of Educ. of City of New York, 2011 WL 4375694, at *4, *6 [S.D.N.Y. Sept. 16, 2011]; see D.K. v. Abington Sch. Dist., 696 F.3d 233, 245-46 [3d Cir. 2012]; Sch. Dist. of Philadelphia v. Deborah A., 2009 WL 778321, at *4 [E.D. Pa. Mar. 24, 2009], aff'd 422 Fed. App'x 76 [3d Cir. Apr. 6, 2011]; Coleman v. Pottstown Sch. Dist., 983 F. Supp. 2d 543, 569 [E.D. Pa. 2013] [holding that negligent misrepresentations will not trigger application of the exception]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *6 [E.D. Pa. Nov. 4, 2008]; C.H. v. Northwest Ind. Sch. Dist., 815 F. Supp. 2d 997, 985 [E.D. Tex. 2011] [identifying that the parent, with the benefits of hindsight, "might consider the district's assessment of the [student] to be wrong, but that does not rise to a specific misrepresentation triggering" the exception, and that if "inadequate assessments were sufficient to warrant application of the statutory exception, the exception would swallow the rule"]; see also Application of a Student with a Disability, Appeal No. 13-215).

In this case, the parent's due process complaint notices present the opposite situation from the district having misrepresented that it had resolved the problem. The parent details problems with virtually every recommendation the CSE made beginning with the student's first CSE meeting when he turned five. By the parent's own statements in the due process complaint notices, school staff often agreed with her that the student was inappropriately placed. The parent is attempting to construe the language of the statute to include any alleged misrepresentation, rather than a specific misrepresentation that the problem forming the basis of the parent's complaint had been resolved, which it does not. The hearing record further reflects that when the district attempted to resolve a problem—whether or not it formed the basis of the parent's complaint—any positive result was short-lived and the parent immediately brought it to the attention of the district. Based on the foregoing, the specific misrepresentations exception does not apply.

2. Withholding of Information

The "withholding of information" exception to the timeline to request an impartial hearing applies "if the parent was prevented from filing a due process complaint notice due to . . . the [district's] withholding of information from the parent that was required . . . to be provided to the parent (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]. Case law interpreting the "withholding of information" exception to the limitations period has found that the exception almost always applies to the requirement that parents be provided with the written notice of procedural safeguards required under the IDEA (Bd. of Educ. of N. Rockland Cent. Sch. Dist. 2018 WL 3650185, at *3; R.B. 2011 WL 4375694, at *4, *6; see D.K. 696 F. 3d at 246; C.H., 815 F. Supp. 2d at 986; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943-45 [W.D. Tex. 2008]; Evan H., 2008 WL 4791634, at *7]). Such safeguards include the requirement to provide parents with a procedural safeguards notice containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[d]; 34 CFR 300.504; 8 NYCRR 200.5[f]). Under the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, if a parent is otherwise aware of his or her procedural due process rights, the district's failure to provide the procedural safeguards notice will not necessarily prevent the parent from requesting an impartial hearing (see D.K., 696 F.3d at 246-47; R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

It is not entirely clear whether the parent is asserting this exception. The parent alleges that she was unaware of her due process rights and unaware that the student had been denied a FAPE until she began preparing her due process complaint notice in July 2018 (Parent Exs. A at p. 4; B at p. 3). Elsewhere in her due process complaint notice, the parent stated that she secured the services of an advocate during the 2015-16 school year, and during the 2016-17 school year (Parent Ex. A at pp. 12-13, 21, 22, 23, 25-26). The parent further described an October 19, 2017 meeting wherein her advocate "pulled out" a copy of the procedural safeguards notice and advised the district of its two options; to grant her right to an independent educational evaluation (IEE) or for the district to request a due process hearing (Parent Ex. A at p. 26). Based on the foregoing, I see no reason to disturb IHO 2's determination that the parent was aware of her procedural due process rights.

C. Relief

It is next necessary to determine whether the IHO erred in denying the parent's request for compensatory educational services to remedy the district's denial of a FAPE to the student for the 2016-17, 2017-18 and 2018-19 school years. The parent alleges on appeal that IHO 2 erred by ordering the CSE to reconvene and failing to order any of her requested relief after the district had conceded that the student was denied a FAPE for three years. The parent requests an award of 20 hours per week of home and school-based ABA for the 2018-19 school year at an enhanced rate of $150 per hour, an award of $3,000 for a BCBA-D to develop a BIP, train paraprofessionals and related school staff, and provide progress monitoring, an updated neuropsychological evaluation, 2,760 hours of compensatory ABA services for an alleged four-year denial of a FAPE at an enhanced rate of $150 per hour, reimbursement for privately obtained social programs in the amount of $1,795, and reimbursement for professional transcription services ordered by IHO 1 in the amount of $1,096. The district argues that the 150 hours of SETSS it agreed to provide pursuant to a resolution agreement was sufficient to compensate the student for a three-year denial of a FAPE.

Regarding IHO 2's refusal to award compensatory education to the student, case law instructs that compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom. Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the

educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory education services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

In this matter, the district conceded that it failed to provide the student with a FAPE for three consecutive school years, 2016-17, 2017-18 and 2018-19, and in the absence of any clarification of the scope of its concession and for purposes of fashioning relief related to the denials of a FAPE, I will in this instance presume that the district intended to admit every deficiency alleged by the parents in the due process complaint notice to the extent not contradicted by the hearing record (see Application of a Student with a Disability, Appeal No. 19-038; Application of a Student with a Disability Appeal No. 15-050; Application of a Student with a Disability, Appeal No. 15-011; Application of a Student with a Disability, Appeal No. 14-079). This approach is particularly appropriate given that the district is required under the due process procedures set forth in New York State law to address its burdens by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Doe, 790 F.3d at 457; Reid, 401 F.3d at 524). Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district, it is not an SRO's responsibility to craft the district's position regarding the appropriate compensatory education remedy. The district did not alternatively assert any arguments or provide evidentiary support on the issue of what, if any, compensatory education award would be appropriate to remedy its denial of FAPE to the student for three years, despite having a full and fair opportunity to be heard at the impartial hearing and, instead, merely asserts that the 150 hours of SETTS it agreed to provide to the student pursuant to a resolution agreement with the parent is sufficient.

Nonetheless, while the parent is entitled to a presumption as to the truth of the asserted facts underlying her IDEA claims in light of the district's concession, she is not necessarily entitled

to "default" relief.[14] Indeed, an outright default judgment awarding compensatory education—including any and all of the relief requested by the parent without further inquiry—is a disfavored outcome even in cases where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]). Indeed, an award ordered without considering the nature of the FAPE violation to be remedied and the impact of the award on the child's educational needs could ultimately do more harm than good for a student (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017] ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). Accordingly, in order to decide whether the IHO erred in failing to award the parent's requested compensatory education, it is necessary, upon my independent review of the hearing record on appeal, to ascertain the scope and nature of the FAPE deprivations at issue and to determine whether the evidence adduced at the impartial hearing supports an award of compensatory education to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first instance.

The hearing record shows that the district identified the student's behavioral needs, as well as strategies to address them, prior to the start of the 2016-17 school year in an IEP developed on April 15, 2016 (Parent Ex. N at pp. 4-7). The IEP was subsequently revised on August 10, 2016 (Parent Ex. S). The August 10, 2016 IEP indicated that the student demonstrated a high level of impulsivity and had a low tolerance for frustration (id. at p. 5). The IEP suggested that, in an attempt to cope with or express his feelings of frustration, the student may throw tantrums and/or engage in physical and verbal aggression which included throwing himself to the floor for extended periods, yelling, screaming, cursing, hitting, and kicking adults or sometimes hitting peers (id. at pp. 3-4). According to the IEP, the student would tantrum in response to non-preferred tasks, transitions, and firm limit-setting (id. at p. 5). The IEP noted that attempting to converse with the student while he was displaying aggressive behavior served to intensify the behavior; further the student had difficulty employing self-calming techniques during aggressive episodes (id.). The IEP indicated that in response to the student's aggressive behaviors, adults who were present would "remove attention from the behavior" and model appropriate behavior until the aggression de-escalated; an adult would then try to talk to the student in a calm soothing voice, inquire as to what was wrong, and ask the student what he wanted (id.). In addition to aggressive behaviors, the IEP noted that the student was easily distracted, engaged in self-stimulatory behavior, and had difficulty following directions (Parent Ex. S at pp. 2-3, 6). However, the IEP also indicated that the student had made significant gains in his coping skills and noted improvement in the student 's ability to follow directions with assistance and guidance, transition

[14] Summary disposition procedures akin to those used in judicial proceedings are permissible under the IDEA; however, they should be used with caution and are only appropriate in instances in which the parties have had a meaningful opportunity to present evidence and the nonmoving party is unable to identify any genuine issue of material fact (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 68 [2d Cir. 2000]. Accordingly, any notion of default relief in this matter would be disfavored in light of the authorities requiring fact-specific inquiries when fashioning equitable relief such as compensatory education.

from task to task, and attend to a preferred task for a longer period of time (Parent Ex. S at p. 4; see Parent Ex. S at p. 5).

The August 2016 IEP noted that the student needed or benefitted from frequent breaks, encouragement to persist and remain focused, redirection, repetition, support during transitions, verbal cues, a visual schedule, a token board, modeling of appropriate behavior, and speech-language therapy to improve his ability to express himself verbally in order to decrease negative behaviors (Parent Ex. S at pp. 2-5). In response to screaming, the student responded best to ignoring coupled with gentle reinforcement of coping strategies (id. at p. 5). The August 2016 CSE recommended that the student be provided a 1:1 crisis management paraprofessional and indicated that the student required a BIP (id. at pp. 8, 9). In addition to special education, a 1:1 paraprofessional, and related services, the August 2016 CSE also recommended a small structured environment, positive reinforcement, use of auditory and visual cues, employment of a multisensory approach, simplification and repetition of information, questions and directions repeated, the provision of immediate feedback and opportunities for success, a structured learning environment, and use of manipulatives during instruction to address the student's management needs (id. at pp. 7-8). The IEP included a goal that targeted the student's classroom coping skills (id. at pp. 11-12).

Although the student's August 2016 IEP indicated that he required a BIP, it is not clear if the district developed or implemented one prior to the end of the 2016-17 school year (Parent Ex. S at p. 8). While the district had developed a BIP for the student in November 2015, the student had since transferred schools (Parent Exs. K; T).

Shortly after the 2016-17 school year began, in a letter dated August 10, 2016, the parent requested that the district conduct a neuropsychological evaluation of the student followed by an FBA (Parent Ex. T). The parent noted that the student had a "brief FBA" in February 2016 while attending a different school and further noted that the student was transferred shortly after the data for that FBA was collected (id.). The parent asserted that the student's then-current behaviors were not consistent with his behaviors at the prior school (id.).

The hearing record shows that by email dated September 16, 2016, the school psychologist responded to the parent's request for a neuropsychological evaluation, but not an updated FBA (Parent Ex. W). The school psychologist advised the parent that neuropsychological evaluations "[we]re not completed at the school-based level by a school based-team" (id.).

The student was evaluated as part of a study over four days between September 26, 2016 and November 17, 2016 (Parent Ex. Y at p. 1). The resultant evaluation report included the parent's assertion that since moving to a new classroom setting in September 2016 the student had daily "temper" outbursts in response to non-preferred tasks and that such behaviors (crying, yelling, hitting, door slamming) were also present at home when the student was asked to work on homework assignments or when he was denied preferred activities (id. at pp. 2, 3). Notably, teacher responses to a behavior questionnaire administered as part of the assessment indicated "borderline range impairment in the domain of aggressive behaviors" (id. at p. 11). The evaluators offered the following diagnoses of the student: autism spectrum disorder with accompanying language impairment and intellectual impairment; oppositional defiant disorder (moderate); and attention deficit/hyperactivity disorder, predominantly hyperactive/impulsive presentation (id. at

p. 15). The evaluators suggested that continued use of behavioral strategies and plans may be used in conjunction with medication to manage the student's activity level and help him focus on tasks (id.). Among other things, the evaluators recommended parent management training, student participation in a social skills group, and consideration of medication as a treatment option (id. at p. 16). In addition, the evaluators noted that the student was at "elevated risk for harm to self and others given his aggression and impulsivity" and recommended that the student be denied access to household items such as knives, cleaners and medications that could be of harm (id. at pp. 17-18). The evaluators further recommended that if firearms were present in the home that they be removed and stated that there should be a low threshold to activate 911 or call the local mobile crisis hotline if the student expressed thoughts or behaviors to harm himself or others (id. at p. 18). The parent reported that she shared the research report with the district on December 2, 2016 (Parent Ex. A at p. 20).

The parent reported that during the 2016-17 school year the student's problematic behaviors persisted and increased and that she received frequent phone calls (3-4 times per week) regarding the student's behavior (Parent Ex. A at p. 19). She indicated that she brought her request for an FBA to the attention of the school administration but was told that an FBA conducted during the prior school year was "fine" (id.). There is no evidence in the hearing record that the district conducted an FBA in response to the parent's repeated requests, provided the parent with prior written notice of its refusal to conduct an FBA or requested an impartial hearing to defend any existing FBA.[15]

The parent sought outside help for the student's behaviors. In February 2017 the parent brought the student to a developmental pediatrician for assistance in managing the student's behavioral problems (Parent Ex. BB). In a summary of the visit, the developmental pediatrician indicated that, when frustrated, the student was hyperactive and aggressive with his mother and grandmother (id. at p. 1). The pediatrician noted, based on parent report, that the student had difficulty staying seated and focused in school, often refused to do his classwork, and the student's teachers were expressing concern that the student's behavior was interfering with his performance in class (id.). Consistent with the results of the study, a questionnaire completed by the parent was positive for ADHD and ODD and indicated several behaviors in the ASD behavioral cluster (compare Parent Ex. BB at p. 2; with Parent Ex. Y at p. 15). The pediatrician prescribed medication for the student (Parent Ex. BB at p. 2). However, the parent reported that the pediatrician cautioned her that "medication alone would not resolve [the student's] behavioral issues and that [the parent] would need to be persistent in getting the school to at the least conduct a new FBA" (Parent Ex. A at p. 20). According to the parent, while the medication improved the student's ability to focus it did not decrease his disruptive and maladaptive behaviors (id.). The parent reported that she shared the pediatrician's report with the district in late February 2017 (id.).

According to the parent, in March 2017 the student's behaviors were increasing in school, on the bus and at home; she continued to receive frequent phone calls from the school and the student was returning home with bruises and scratches from being restrained (Parent Ex. A at p. 20). The parent opined that the scratches and bruises confirmed that the BIP was not working and

[15] Although there is a November 2015 BIP in the hearing record, there is no related FBA from that time period in the record.

that a new FBA needed to be conducted before the student was seriously injured (id. at pp. 20-21). The parent stated that in April 2017 the student's behaviors increased in severity, duration, and frequency (id. at p. 21).

In a letter dated May 15, 2017, the student's pediatrician explained that the parent brought her the student's IEP for review in anticipation of an upcoming IEP meeting (Parent Ex. CC at p. 1). He noted that the parent's "major and continuous concern" was the student's behavior (id.). The pediatrician noted that the parent had been using a pharmaceutical approach to address the student's ADHD and while there had been a slight improvement in the student's focusing, his ODD continued and the student continued to exhibit aggressive behaviors (id.). The pediatrician cited the parent's request for a neuropsychological evaluation and updated FBA at the student's last IEP meeting and suggested that the student's behavior was the "sole reason" the student could not be placed in a less restrictive environment (Parent Ex. CC). The pediatrician opined that he saw no other alternative than to treat the student's ODD with ABA (id. at p. 1). He recommended that the student receive 20 hours per week of ABA at home and at school as the ODD was severely restricting the student from making educational progress (Parent Ex. CC). The parent reported that the district received this letter on May 16, 2017 (Parent Ex. A at p. 22).

The student's May 2017 IEP suggested that the district employed a school-wide behavior plan to address the student's behaviors and assertions made by the student's mother suggested that a BIP had been implemented (Parent Exs. A; DD). According to the parent, on May 22, 2017, the CSE convened to review the evaluations that she had submitted to the district (Parent Ex. A at p. 22). During the meeting the parent's advocate "made it clear" to the district that the CSE was out of compliance with regard to the parent's request for a neuropsychological evaluation and updated FBA (id.). Based on the parent's summary of the meeting, the district claimed to have held BIP progress monitoring meetings (without the parent) but could not produce the data her advocate requested that it produce from these meetings (id.). The May 22, 2017 IEP indicated that the student followed a school-wide behavior management program monitored by a point system (Parent Ex. DD at p. 1). The IEP stated that according to the school-wide behavior management program, the student had shown some improvement in his ability to interact with his peers in regard to initiating play during free choice time (id. at p. 5). In addition, the student would employ self-regulating strategies to cope with stressful situations and to maintain appropriate physical boundaries with adults and peers (id.). The IEP indicated that BIP progress monitoring collection for April 2017 confirmed the continued need for a 1:1 crisis management paraprofessional and an FBA/BIP (Parent Exs. DD at pp. 1, 5; GG at p. 2; see Parent Ex. DD at p. 9). The IEP, which was to be implemented beginning June 1, 2017, included a goal that targeted the student's ability to improve his self-regulating skills to decrease outbursts and develop positive interactions (Parent Ex. DD at p. 13).

Immediately following the meeting, the parent submitted a second handwritten request for an FBA to the school psychologist (Parent Ex. A at p. 22). Between May 24, 2017 and June 2, 2017 district staff filled out ABC charts on the student's behavior for one or two periods per day (Parent Ex. FF at pp. 9-11). The district subsequently completed an FBA dated June 7, 2017 (id. at pp. 1-9). The district also developed a BIP dated June 7, 2017 (id. at pp. 12-16).

The June 2017 BIP identified the student's targeted problem behavior as "intense aggressive behaviors" when nonpreferred activities were requested or limit setting was

implemented (Parent Ex. FF at p. 12). In terms of baseline measurement, the BIP stated that the student presented the behavior 8 times with 7 different individuals across the span of 10 days (id.). The BIP further stated that the student displayed the targeted behavior an average of 1 time in 30 minutes (id.). The BIP characterized the intensity of the student's behavior as moderate to severe and indicated that the duration of the behavior ranged from 5-15 minutes for each episode (id.). According to the BIP, staff always needed to immediately intervene in response to the target behavior as it presented a danger to the student and others (id.). The BIP listed the consequence/function of the student's behavior as adult attention/escape, correction, obtaining preferred item and task avoidance (id.). The BIP identified antecedent strategies, behavior teaching strategies, and consequence strategies to be employed and indicated that the effectiveness of the plan would be measured in 10-week intervals (id. at p. 15). The hearing record did not indicate whether the BIP was implemented during the remainder of the 2016-17 school year.

The parent reported that on June 13, 2017 she found a fully written FBA, dated June 7, 2017 in the student's backpack (Parent Ex. A at p. 23). According to the parent, the behavior analyst who provided the student's Medicaid waiver services suggested that the FBA's description of the student's behavioral triggers and patterns of behavior were very different than how the student presented at home or in the community (id.).

Because the district conceded Prong 1 for the 2016-17 school year, there is scant evidence regarding its attempts to address the student's interfering behaviors during that school year, or the student's response to its attempts. Based on the hearing record, it is not clear if the district used the November 2015 BIP in addition to the class-wide behavior management plan to address the student's behavior during the 2016-17 school year. The district did not respond to the parent's request for an updated FBA or her suggestion that the November 2015 BIP was no longer appropriate because the student had switched schools. Moreover, documents generated during the 2016-17 school year do not include a description of the class-wide behavior management system, other than to describe it as a point system, nor is there any written record of the student's performance in relation to the management plan. Likewise, if the district was employing the November 2015 BIP to address the student's behavior, written documentation of the student's performance under the plan is lacking, and the only reference to monitoring the plan is the April 2017 progress monitoring found in the May 2017 IEP, as noted above (Parent Exs. DD at p. 5; GG at p. 2). The district did however, provide the student with a 1:1 crisis management paraprofessional as recommended in the April and August 2016 IEPs and the district's behavior specialist reported that during this school year she worked in conjunction with the district BCBA to address the student's behaviors (Tr. pp. 512-14; Parent Exs. N at p. 14; S at p. 9).

Turning to the 2017-18 school year, the hearing record shows that the district developed several BIPs for the student, however its data collection with respect to the student's behavior was flawed. The district approved IEEs as requested by the parent and attempted numerous intervention strategies to address the student's interfering behaviors; however, the interventions were mostly unsuccessful. In addition, the parent reported that during the 2017-18 school year the CSE recommended ABA services for the student, but the recommendation was overruled by the psychology supervisor. The district behavior specialist indicated that she and the district BCBA worked with the student during second grade (2017-18 school year) (Tr. pp. 512-14).

The parent reported that on July 17, 2017 she attended a BIP development meeting with her advocate (Parent Ex. A at p. 23). Once again, the parent questioned the district's data, noting that her advocate asked the district for the data used "to create" the FBA and further noting that the data provided by the district in response did not match the FBA description of the data collected (id.). Specifically the parent explained that the data presented at the meeting showed that only three days of data had been collected prior to the development of the FBA (versus 10 days of data noted on the FBA) and that all of the data sheets were in the same handwriting (when the FBA indicated that eight different people had collected data) (Parent Ex. A at p. 23; see Parent Ex. FF at p. 5).[16] According to the parent, she and her advocate also pointed out to district staff that the suggested interventions listed in the FBA were the same unsuccessful interventions employed by the district the previous school year (Parent Ex. A at p. 24). The parent reported that she asked the district to collect a sufficient amount of data so that the parent and district could "develop a proper FBA and a successful BIP" (id.). The parent also reported that she offered the services of her behavior therapist to the district for free to assist it with interpreting data and identifying strategies, but the district never accepted her offer (id.).

By email dated September 6, 2017, the parent sent the district an assessment of its June 2017 data sheets, FBA, and BIP, written by her private behavior therapist (Parent Ex. LL). The behavior therapist made numerous observations/recommendations regarding the district's paperwork, notably: the ABC chart showed that in every instance recorded the student's consequence led to exactly what he wanted – escape from task and attention; according to the FBA the data proved that the consequence of the student's behavior was gaining an item or activity and/or escape from adults or tasks, yet the BIP recommendations fed into this behavior; the ratio between identified triggers and the target behavior needed to be calculated to help determine how extreme a particular behavior was; for difficult tasks reinforcement should be contingent on task completion and not behavior; a preference assessment for reinforcers needed to be completed daily; and the plan needed to identify the circumstances under which each consequence would be employed (id. at pp. 3-6). The behavior therapist acknowledged that working in the public school system it would be very hard to spend the time needed to adopt all of her recommendations for the student's BIP (id. at p. 6). However, she cautioned that if the student's BIP was not introduced, implemented, and enforced consistently by all parties involved with the student that his ability to succeed would "start[] at an extremely low percentage rate and that the [BIP] may be counter-effective and only cause more aggressive and maladaptive behaviors" (id.). The behavior therapist opined that if the student's crisis paraprofessional was not fully prepared and trained to deal with the behaviors the student exhibited that "even the best BIP would not ensure success and behavior progress" and suggested that it was "worth the school[']s time and money" to provide the paraprofessional with training (id.).

The parent reported that the CSE convened on October 19, 2017 for what she thought was a meeting to develop a "proper" FBA for the student; instead the district informed her that there would be "no new FBA" or revised BIP, that it did not feel that the school could meet the student's needs, that it wanted to defer the student's case to the central-based support team for placement in

[16] The ABC charts included in the proposed FBA show that data was collected for seven days prior to the development of the FBA, including four days on which there were "no issues" observed (Parent Ex. FF at pp. 9-11).

an approved non-public school, and that the district would wait to formally recommend a NPS placement until the evaluation of the student was complete (Tr. pp. 950-51; Parent Exs. A at p. 25, NN at pp. 1-5; Dist. Ex. 4 at p. 2). The parent stated that she was advised the change was necessary because "[the student] was still not making progress on his behaviors…and the school had tried everything" (Parent Ex. A at p. 26). The parent opined that the school had not tried everything as it had not conducted a new FBA and she told the district that she wanted it to contract with either a BCBA or LBA and to develop a proper FBA and a new BIP for the student (id.). According to the parent, the district responded that it did not have the resources to hire a private contractor and therefore the student needed to leave the school (id.). On the advice of her advocate, the parent "took out [her] pen and paper" and wrote a letter to the district requesting an IEE in the form of an FBA conducted by a BCBA-D (Parent Exs. A at p. 26; MM; see Dist. Ex. 4 at p. 4).

Also, during the 2017-18 school year, the district authorized an independent neuropsychological evaluation and an FBA, initially requested by the parent a year earlier (Parent Exs. T; JJ at p. 2; Dist. Ex. 4 at pp. 1-2). An independent neuropsychological evaluation was conducted on November 7 and 14, 2017 (Tr. p. 850; Parent Ex. OO at p. 1; see Parent Ex. JJ at p. 2) The evaluator recorded her observations of the student during testing, noting that during the initial intake session the student was fixated on watching videos on his mother's phone and became very agitated and yelled when the videos didn't work (Tr. p. 858; Parent Ex. OO at p. 2). The evaluator characterized the student's mood as restless and irritable and his affect as varied (Parent Ex. OO at p. 2). According to the evaluator, during the first testing session the student was oppositional and defiant toward his mother and the examiner, however, during the second testing session the student was more attentive and cooperative (Tr. pp. 858, 861; Parent Ex. OO at p. 2). The evaluator assessed the student's social and emotional functioning using the Behavior Assessment Scale for Children – Third Edition (BASC-3) (Parent Ex. OO at p. 4). To assess the student's behavior at home, his mother completed the BASC-3 parent rating scale (id. at pp. 2, 4). According to the evaluator, "the student's mother reported clinically significant hyperactivity, as well as at-risk aggression, conduct problems, attention problems, and adaptive skills" (id. at p. 4). To assess the student's functioning at school, his classroom teacher, OT, and speech-language therapist completed BASC-3 teacher rating scales (id. at p. 5). The teacher/therapist responses suggested clinically significant hyperactivity, aggression, conduct problems, and atypicality, along with at-risk anxiety, depression, adaptability, and functional communication (Parent Ex. OO at p. 5; see Tr. pp. 882-83). The evaluator concluded that the student required specialized, intensive behavioral interventions including an FBA and BIP developed by a certified BCBA (Parent Ex. OO at p. 5). She opined that the student required intensive ABA therapy at home and school (20 hours per week), as well as additional training for his parents and teachers to generalize skills across settings (Tr. pp. 853-56, 876; Parent Ex. OO at pp. 5-6). The evaluator stated that it was essential for the FBA to be conducted by an appropriately trained practitioner "as [the student's] behaviors ha[d] not been effectively managed by trained professionals within his classroom, suggesting the need for a more highly trained provider" (Tr. p. 853; Parent Ex. OO at p. 6). The evaluator recommended that the student "remain in his current setting with appropriate behavioral supports" rather than being moved to a more restrictive placement (Tr. pp. 851, 871-72, 874; Parent Ex. OO at p. 5). She testified that the student's behaviors were "situational and varied" and that a change in placement was not warranted; rather the student needed intensive behavioral support in his then-current placement (Tr. pp. 853, 871-72). The psychologist testified that at the time she saw the student in November 2017, to her knowledge the student was not receiving behavioral supports (ABA) in the classroom (Tr. pp. 871, 887). She clarified that she was recommending

behavioral support services to be provided in addition to the services the student was already receiving and explained that they should be integrated into his then-current program (Tr. p. 876).

On or around February 26, 2018 a BCBA-D completed a written FBA of the student as part of an approved IEE (Parent Ex. UU; see Tr. pp. 215, 675-708; Parent Ex. 4 at p. 2). The resultant FBAs indicated that the district had numerous supports and interventions in place during the 2017-18 school year to address the student's behaviors among them a token system, school-based PBIS system, a 1:1 paraprofessional (Parent Ex. UU at pp. 9, 19). The BCBA-D testified that at the time of the February 2018 FBA, the classroom was using a token system, which had been beneficial for the student (Tr. p. 244). The independent BCBA-D also indicated that the district BCBA had suggested the use of "social stories" to address the student's behavior problems, but that his teacher did not know how to use them (Tr. p. 245). The BCBA-D developed two separate FBAs, one to address the student's "control behavior" and the other to address the student's "escape behavior" (Tr. pp. 226-27; Parent Exs. A at p. 27; UU at pp. 1, 2, 12). The first FBA identified the student's targeted problem behavior as a response class[17] of behaviors (control behavior) that included whining, cursing, yelling, crying and aggression (Parent Ex. UU at pp. 2, 8, 12). The FBA identified various situations/events that triggered the student's problem behavior including a demand of or request to the student, difficult tasks, non-preferred activities, non-preferred social interactions, transitions from preferred to non-preferred activities, changes in routine, and environmental conditions (Parent Ex. UU at p. 5; see Tr. p. 231). The FBA indicated that based on data collected, the target behavior occurred throughout the day but at a higher frequency in the morning and spiked between 10-11 a.m. (Parent Ex. UU at p. 5). Consequences of the targeted behavior varied and included adult attention, limited peer attention; "asked to calm," "asked to use soft voice" and reassured he will get what he wants; reminded of rules/manners; planned ignoring; asked to speak nicely to friends; allowed to engage in the desired activity in a modified way; able to fix the situation; and breaks (Parent Ex. UU at p. 5; see Tr. p. 231). Baseline data indicated that the student engaged in the targeted behaviors 32 times in 10 days (3.2 instances per day), with an average duration of five minutes and an average intensity of 2.98 out of five (Parent Ex. UU at p. 6). The BCBA-D noted discrepancies in the district's data collection (Parent Ex. UU at p. 6).[18] The FBA included a functional hypothesis which suggested that when the student encountered a non-preferred social situation he would engage in control behaviors which resulted in attention from adults and peers and a desired action (id. at pp. 2-3, 6). In addition to the above, the February 2018 FBA identified supports for the student which were previously tried with limited success including a classroom-wide and alternate token system, school-wide positive behavior interventions and supports (PBIS), verbal redirection and reminders, planned ignoring, change of seating, and leadership opportunities (Parent Ex. UU at pp. 9; see Tr. p. 207). The BCBA-D indicated that that the use of breaks and social stories were reported, but not observed (Parent Ex. UU at p. 9). The FBA identified a variety of reinforcers to be provided when the student engaged in replacement behaviors such as expressing himself using an appropriate tone of

[17] The report defined a response class as a category of behaviors followed by a list of specific behaviors which occur under similar circumstances or antecedents with the same outcome or function (Parent Ex. UU at p. 2).

[18] The evaluator noted that the frequency/duration/intensity/latency data collected by the school did not correspond with the ABC data (Parent Ex. UU at p. 6).

voice, demonstrating increased flexibility, verbally asking for attention, understanding reward contingencies and learning to self-monitor behavior in order to receive reward, tolerating unexpected situations, and improving social skills (id. at p. 10). The FBA called for rewarding appropriate behavior, attention and praise for following rules, verbal modeling, consistent use of the token system, and differential reinforcement of alternative behavior (id. at pp. 11, 20-21).

The second FBA completed by the BCBA-D in February 2018 addressed the student's escape behavior (Parent Ex. UU at pp. 12-21; see Tr. pp. 234-35). In addition to the target problem behaviors identified in the first FBA, the second FBA examined the students task refusal, defined as "verbally or physically protesting or refusing to complete a task, destroying or throwing task materials" (Parent Ex. UU at p. 12). The second FBA identified different setting events and antecedents for the student's behavior and the functional hypothesis suggested that when the student encountered a non-preferred demand he would engage in escape behaviors in order to avoid the task presented (id. at pp. 18-19). The second FBA also identified replacement behaviors and teaching strategies (id. at pp. 20-21). The BCBA-D who conducted the FBA testified that at that time, the student needed ABA to decrease certain behaviors and, in turn, increase other, appropriate behaviors (Tr. p. 648-49).

Among other strategies used to address the student's behavior during the 2017-18 school year, the district also employed a sensory diet. An April 2018 sensory profile completed by the student's teacher described the student's responses and needs related to interpreting sensory input (Parent Ex. BBB at pp. 9-16). A resultant sensory diet identified a variety of "coregulation techniques" such as sitting on a beanbag, "heavy work activities," chair pushups, use of a weighted vest, taking a walk, eating crunchy foods, sweeping the floor and wiping down desks to use with the student as a "response after problem behaviors occur[ed]" (id. at pp. 8-10). The independent BCBA-D testified that she was unaware of any research which showed that providing sensory stimulation after a problem behavior occurred was effective for reducing the behavior and opined that if staff provided the items contingent on problem behavior, it could increase the behavior (Tr. p. 301).

On April 30, 2018, the CSE convened to review the student's program (Parent Exs. E; CCC). The district developed a BIP based on the FBAs created by the independent BCBA-D (Parent Ex. BBB; see Parent Ex. UU). Similar to previous BIPs the April 30, 2018 BIP identified the student's problem behaviors including whining, task refusal, cursing, yelling, crying and aggression in response to nonpreferred demands, transitions and being corrected (Parent Ex. BBB; Dist. Ex. 13; see Tr. pp. 532-33). The April 2018 BIP recommended strategies to reduce and prevent the behaviors from occurring such as a 1:1 paraprofessional, a sensory diet, counting to ten, deep breathing, visual cues, presetting, modified work, and assistive technology for writing tasks (Parent Ex. BBB at p. 7). The April 2018 BIP recommended using one-on-one instruction to teach the student flexibility, turn taking and alternative responses to feeling anxious, social stories and role playing to practice handling unexpected events, and a consistently followed token system to reward positive social behavior (id.). In addition, the April 2018 BIP recommended consequences to the problem behavior consisting of redirection, and role playing (id. at p. 8). The April 2018 BIP also included the use of "coregulating techniques such as a sensory diet" (id.). Progress monitoring of the BIP was expected to occur every four weeks with review meetings every month (id.).

Upon reviewing the BIP, the BCBA-D opined that the BIP needed revision because two different functions of the problem behaviors were combined into one plan, "some of the information [wa]s in the wrong areas," and the BIP needed to clarify who would implement the plan (Tr. pp. 290, 296-98; see Parent Ex. BBB). She also testified that the response to the behaviors was incomplete and the replacement behaviors needed to be made clearer "based on function" (Tr. p. 299). The district behavior specialist testified that in the beginning the plan was effective with the student but that by May or June the strategies were no longer effective (Tr. pp. 533-39). She reported that staff met with the parent at progress monitoring meetings and would try to come up with different ideas (Tr. p. 535). Despite consistent reports that the student continued to exhibit behaviors that significantly interfered with learning, the April 2018 IEP indicated that between September 2017 and April 2018 the student averaged 31 out of a maximum of 40 points a day on his school-wide PBIS sheet (Parent Ex. CCC at p. 2).

Correspondence form the school, dated May 29, 2018, informed the parent that the student had struck another student for no apparent reason and was frequently verbally and physically inappropriate towards other students and staff (Parent Ex. DDD at pp. 1-3). The district requested that the student be evaluated by a psychiatrist to assess his behavior (Parent Exs. A at pp. 28-29; DDD at p. 1). In an email dated that same day, the parent informed the district that she wanted to meet sooner than the scheduled June 12, 2018 BIP review because the student's behaviors were escalating, and it was "clear the BIP [wa]s not effective" (Parent Ex. DDD at p. 4). In a May 30, 2018 email, the parent informed the assistant principal of the "mini" building that at the recent CSE meeting, the team had recommended that the student be provided ABA by the contracted BCBA-D, but that recommendation was overruled by the school psychologist's supervisor (id. at p. 6). In another May 30, 2018 email, the parent stated she was told the student's behaviors on the bus were "outrageous again today" and asked whether there was any plan to address it (id. at p. 8). The assistant principal responded that the bus aide had been "given" the strategies to use in response to the student's negative behavior (id. at p. 9).

During the 2018-19 school year, the district changed the student's classroom; allowed the parent's Medicaid BCBA to observe the student at school, consult with district staff, and develop a token system for the student; and contracted with the BCBA-D to perform a second FBA.

According to the parent, the parties met on August 9, 2018 for a six-week BIP review (Parent Ex. A at p. 29). The parent reported that team members agreed that the student's frustrations in school were caused by the lack of academic rigor in his classroom, as well as a lack of exposure to peers with whom he could socialize (id. at pp. 29-30). In an attempt to provide the student with more socialization, the district transferred the student to a classroom in the "main building" of the school in the hope that increased opportunities for socialization would improve the student's behavior (see Tr. pp. 539-40, 943-44). The parent indicated that the student was moved to the new building without a transition plan and the unexpected change "exacerbated his maladaptive behaviors" (Parent Ex. A at p. 30). She reported that once the student transitioned, she was immediately contacted by his guidance counselor who informed her that the BIP that was developed for the student in the "mini" building was "completely ineffective and useless in the new environment" (id. at p. 31). The parent stated that she requested an FBA for the new setting, but she was told a new FBA was not necessary and that the school would figure out "informally" what was going on and change the BIP (id.). The principal confirmed that the parent requested a

new FBA and BIP when the student entered the main building in September 2018; however, it was not until January 2019 that the district agreed to do them (Tr. p. 84).

As requested by the district in May 2018, the student was evaluated by a psychiatrist on or around October 2, 2018 (Parent Exs. DDD at p. 1; NNN). The evaluating physician reported that the student was seen for a psychiatric evaluation and opined that the student's aggressive behavior could be related to his developmental issues (Parent Ex. NNN at p. 1). The physician indicated that there was "no emergency" for the student to be on psychotropic medication at that time (id.).

The student subsequently underwent a developmental behavioral pediatric evaluation on November 6, 2018 (Parent Ex. QQQ at p. 1). The developmental pediatrician indicated that based on the student's profile he would benefit from a structured behavior therapeutic program such as ABA (id.).

The district behavior specialist testified that the district BCBA observed the student on January 18, 2019 and offered strategies for his paraprofessional to put in place (Tr. pp. 522-23; see Tr. p. 509). The resultant notes included suggestions for shaping more appropriate behaviors for the student (Tr. pp. 523-24; Dist. Ex. 17 at p. 1). The notes, which the district BCBA had typed up, indicated that the student was unable to implement self-regulation strategies due to an inability to communicate or identify his emotional state (Dist. Ex. 17 at p. 1; see Tr. p. 522). The notes also indicated that the student required "desensitization strategies" to help him tolerate situations that normally caused agitation (Dist. Ex. 17 at p. 1). Further, the notes stated that, at times, the student demonstrated repetitive physical actions which indicated that a negative behavior was imminent and should be deescalated before he became aggressive (id.). According to the notes, the student enjoyed interacting with adults and peers but could be impulsive, and physically and verbally attack others if he was feeling threatened or overstimulated (id.). The notes stated that the student benefitted from sensory input such as "deep muscle input" in his arms, shoulders, and back, which should be provided intermittently during the day (id.). In addition, the notes endorsed a "thick reinforcement schedule" which meant providing reinforcement every time the student engaged in a correct response (id. at p. 2). The notes identified the expected positive behaviors to be recognized by staff such as the student sitting with both feet on the floor, raising his hand, staying in his seat, participating in a group, speaking nicely to others, attempting and completing tasks, communicating appropriately, and waiting appropriately (id.). The notes identified prompts and sensory input to be used such as sitting near the student and providing him with sensory input, use of an overcorrection procedure, use of humor, providing frequent directions, attempting not to frustrate the student and providing ample attention (id.). The notes indicated that the student displayed several "'tell'" signs and that staff should be aware of the student's body language and recognize when he became over stimulated or frustrated (id. at p. 3). The notes also suggested teaching the student to identify emotions through using social stories, rewards, modeling and role playing and included additional strategies for keeping the student positive and teaching replacement behaviors (id.). Finally, the notes indicated that the student should be removed "outside the room" for de-escalation and that progress would be demonstrated by a decrease in the amount of time the student needed to self-regulate (id. at p. 4).

In or around January 2019 the BCBA-D began her second FBA of the student (Tr. pp. 237).

Incident reports from July 1, 2018 to February 1, 2019 indicated that the student engaged in numerous episodes of problem behaviors during this time period (Tr. pp. 94-95, 97; Dist. Ex. 6; see also Dist. Ex. UUU). These episodes were described in the district's reporting system and included occurrences of swearing, screaming, work and request refusal, and severe aggression such as hitting, punching, biting, kicking, slapping, pushing, and threatening staff and students (Dist. Ex. 6 at pp. 4-7). Staff response to these behaviors were documented and included restraining, verbal redirection, removal, and parent contact (id.). Although the district utilized a "student support room" for students to deescalate, the parent reportedly objected to the use of the room with her son because it was not part of the student's plan (Tr. pp. 69, 76, 153, 180). Despite the student's incidents of aggression, the Medicaid BCBA opined that the student was appropriately placed (Tr. p. 355). He believed that the student's aggression could be handled properly as it occurred and that it should decrease significantly when the appropriate contingencies were implemented (id.).

On February 6, 2019 the district conducted a classroom observation of the student (Parent Ex. JJJJ). The observer reported that the student copied an invitation by hand and again by using his laptop (id. at pp. 1-2). The observer indicated that the student responded appropriately to teacher directions and corrections but became unusually agitated when his paraprofessional provided the same directions and corrections (id.). According to the observer, when the student was agitated, his teacher and paraprofessional were able to redirect him back to work (id. at p. 2). The observer noted that the student transitioned appropriately to speech therapy and with the assistance of his paraprofessional exhibited some appropriate interactions with peers during lunch (id.). Based on his review of the classroom observation, the student's Medicaid BCBA testified that he would have provided the student with more rewards for positive behaviors including attempts at writing and in the beginning focus on the behavioral aspects (versus correction) (Tr. pp. 318-20, 322).

District witnesses testified about the behavior strategies used to address the student's interfering behaviors as well as their belief that the student required an approved non-public school placement. Although the bulk of the district witnesses' testimony appears to relate to the 2018-19 school year, at times their statements appear more global, and it is difficult to ascertain the time period they are referring to.

The principal testified that the main reason students were in her school was due to their behavior (Tr. pp. 63. 135). She explained that the school was known for doing "really good things" with behavior management and that staff at the school tried to teach students strategies to respond to different situations in a more positive way (Tr. pp. 63-64, 80). The school employed PBIS, as well as a "Power of Choice" program in which students could earn points/rewards (Tr. pp. 64, 65-66). In addition, the principal attempted to get staff trained in therapeutic crisis intervention (TCI) and it had behavior management specialists on staff (Tr. pp 64-65). According to the principal, many students in the school had behavior management paraprofessionals because their behaviors required more intense layers of structure (Tr. p. 67). The school had a "safe" or support room staffed by two crisis intervention teachers for when students were having a difficult time (Tr. pp. 69, 76). The school also had access to a teacher who was a certified BCBA (Tr. pp. 70, 127).

The principal stated that she had participated in a progress review meeting for the student in January 2019, to review the data which had been collected related to the student's BIP (Tr. p. 83). At the time of the meeting, the principal realized that the student's severe and violent

behaviors had not abated (Tr. p. 83-84). She stated that the team agreed that the student needed a new FBA and BIP and decided to "rework everything" (Tr. pp. 84, 171). At the time of the hearing, the principal had concluded that the student was not appropriately placed in his current educational setting due to lack of progress in reducing the aggressive and violent behaviors (Tr. p. 86-87). She testified that the student's behaviors were "beyond … the scope of what we do" (Tr. pp. 86-87; see Dist. Ex. 6; 100-101).

The assistant principal testified that he had met with the parent at several progress monitoring meetings (Tr. p. 427). He explained that at the meetings, which were scheduled for every four weeks, staff reviewed "charts and graphs" of the student's behaviors and whether they had become more or less intense and frequent (Tr. p. 428). He reported that at the progress monitoring meeting in January 2019 the student's FBA was ruled inappropriate although he did not know by whom (Tr. pp. 485, 489). He was aware that insufficient data was collected (Tr. p. 487).

The assistant principal testified that he did not believe that the student was appropriately placed because his aggressive behaviors were "tremendously different" from the rest of students and he could be very violent (Tr. p. 429). The assistant principal opined that the school did not have the tools to help the student (Tr. pp. 429, 477). He noted that although staff had seen incremental improvements in the student's behavior, they were short-lived (Tr. p. 429).

The district behavior specialist indicated that, at the time of her testimony in March 2019, she was working with staff in the main building regarding the student's intensive behavior (Tr. p. 512). The behavior specialist testified that the school employed various behavior supports, depending on students' needs, including token economies, visual supports, a PBIS program, social stories, proximity control and sensory diets and that the school had a very high rate of success with its students (Tr. pp. 515-16). However, with respect to the student's specific behaviors, the behavior specialist reported that his behaviors "fluctuated" and that the effectiveness of the strategies they used varied (Tr. p. 517). She explained that the student required an "intense amount of support from the staff" (Tr. p. 517). According to the behavior specialist, the district's BCBA had been observing the student once a week for the past few months (prior to March 2019) and offering the staff advice (Tr. pp. 519-20). She reported that district staff provided the student with a thick rate of reinforcement, which worked for a while (a week) but then the student would indicate he didn't want it any more (Tr. pp. 520-21). The behavior specialist reported that the district had used 12-15 different techniques to address the student's behavior and noted some success with changing the student's seat (Tr. p. 521). The "soothing room" helped the student on some occasions and escalated his behavior on others (Tr. p. 522). The behavior specialist opined that the student's behavior, although still "intense," had improved since he moved into the main building (Tr. p. 544). The behavior specialist reported that the student's response to "recognition of positive behaviors was not consistent" (Tr. p. 526). The behavioral specialist testified that based on the amount of personal and professional time the staff and parent had put into "specific situations" she did not feel the student's then current placement (2019) was appropriate (Tr. p. 539). She opined that given the student's intensive behaviors a community school would not be good for him (Tr. p. 540).

The outside BCBAs who observed and evaluated the student detailed some of the reasons that the district's attempts at reducing the student's interfering behaviors were unsuccessful. The

Medicaid BCBA testified that he had met with the student's teachers and paraprofessionals at the school, provided phone consultations, observed the student, provided feedback, attended progress meetings, and helped to develop a "very specific plan" which included a token board for positive behaviors, as well as a "big" reward at the end of the week (Tr. pp. 312-14). He stated that when he subsequently met with the teacher, there was "some confusion" regarding "how to implement" the token board (Tr. p. 314). The Medicaid BCBA testified that in January 2019 he attended progress monitoring meeting at the student's school (Tr. pp. 322-326, 327). He reported that the meeting members did not have "very good data on even making a judgement of what was going on" (Tr. p. 326). He indicated that the data did not make clear the function of the student's behaviors (Tr. p. 326). The Medicaid BCBA testified that there was discussion at the meeting that a proper FBA should be done, and he agreed with that (Tr. pp. 358-59). The Medicaid BCBA reported that there was further discussion whether there was conflict between the student's individualized behavior plan and the school-wide behavior plan (Tr. p. 328). According to the Medicaid BCBA, although there was initial acceptance of his plan for the student, district staff began to mention that it would be unfair to the rest of the class for the student to receive more rewards and that use of the individual reward plan would create a bad situation in the classroom (Tr. pp. 329-30, 333-34, 373). The Medicaid BCBA did not have the opportunity to review the schoolwide behavior plan in detail, but opined that at least one part that he was aware of was punitive (Tr. p. 335-36). He stated that with punishment people learned what not to do, but not what to do (Tr. p. 336-39). The Medicaid BCBA confirmed that at the January 2019 meeting he recommended that the safe room be used with the student (Tr. p. 362). His impression was that the room was being used with the student occasionally, but he did not know when or how or under what circumstances (Tr. p. 362). He stated that he believed the parent was open to using a safe room if it was used appropriately (Tr. p. 363-64, 371).

The BCBA-D testified that the parent contacted her to perform a second FBA, authorized by the district in 2019 (Tr. p. 237). She reported that the student had changed since the prior year, that he had more language and that although he still had problem behaviors, they had decreased in frequency but not in intensity (Tr. pp. 238-39). The BCBA-D reported that the intervention strategies were working, particularly at home, and that now it was a matter of bringing the strategies from home into the school and training school staff (Tr. p. 239, 241). She opined that the student's then current paraprofessional was appropriate for the student and that he had some ABA training (Tr. pp. 240-41). She reported that the student's classroom was a lecture style classroom and the student needed skills broken down and his response reinforced in order to make progress (Tr. p. 241-42). The BCBA-D also reported that the token system the school was using with the student was beneficial for him but that the school-wide point system was less meaningful for the student because the reinforcement was so delayed (Tr. p. 244).The BCBA-D opined that the district BCBA provided the teachers with strategies to use but not necessarily clear directions on how to use them, something that was typical in schools (Tr. p. 245). Psychologists would offer suggestions but not stay with the student or model the behavior (Tr. p. 246).

In contrast to district staff, the BCBAs who observed and evaluated the student felt that he was appropriately placed and should remain in the district classroom but receive ABA and the support of a behavior analyst in the classroom.

The Medicaid BCBA opined that the student's current classroom was an appropriate setting if his aggression was handled correctly, and that it should decrease "significantly" given

implementation of appropriate contingencies (Tr. p. 355) He did not believe that the student required a full-time ABA program, rather he believed that a behavior analyst in the student's current program for two to three hours a day would be "perfectly sufficient" (Tr. pp. 366, 377-78).

The independent BCBA testified that the student "absolutely" needed components of ABA in his education, that he was making progress, and that the current placement was appropriate if the staff was provided support to manage his behavior (Tr. pp. 276-77). She stated that the student's current paraprofessional was trained in ABA methodology, that the student's ABA support within the home was "really working for him" and that it needed to be carried over into school (Tr. pp. 277, 660). Specifically, she stated that when something unexpected happened or the student was corrected, he engaged in an "intense tantrum" and the staff at school did not know how to respond (Tr. p. 278). She noted that the home-based teacher (behavior specialist) was using a "flexible card" and a "flexibility social story," which taught the student to "be flexible" and stay calm when something unexpected happened (Tr. pp. 278-79). The BCBA-D recommended using desensitization, by "exposing" the student to triggers and "rewarding him for working through them appropriately" (Tr. p. 281). The BCBA-D testified that the student's current classroom was appropriate for him and that the student needed at least a paraprofessional trained in ABA (Tr. pp. 655-56). She further opined that the student required a BCBA to go into the school to train staff and help them manage the student's behavior plan (Tr. pp. 657, 661-62). She reported that the student's current class did not have a behavior analyst to guide it and staff reported feeling very scattered and pulled in different directions (Tr. p. 658). She opined that part of the student's instruction needed to be discrete trials (Tr. pp. 663-64). The BCBA-D also suggested that the student required additional hours of ABA at home (Tr. p. 657).

As described above the record shows that during the course of the 2016-2017, 2017-2018, and 2018-19 school years, the district attempted to provide numerous interventions to address the student's behaviors, such as a small class with a 1:1 paraprofessional, related services, sensory diet, breaks, redirection, support during transitions, verbal cues, visual schedule, token board, modeling, positive reinforcement, multisensory approach, simplification and repetition of information, immediate feedback, structured environment, limit setting, breaking down tasks, choices, opportunity to be leader, presetting, social stories, active ignoring, preferential seating, decreased workload, and removal from the environment. In addition, numerous behavior specialists and consultants intervened on the student's behalf during this time to provide suggestions, revisions and hands-on support. Some of the strategies such as deep breathing, counting to ten, and rewards were briefly effective but became ineffective over time. Further, some strategies exacerbated his behaviors. The hearing record also shows that the student's BIPs, as written, did not address the behaviors in such a way as to decrease them, that the student's aggressive and noncompliant behaviors were inconsistently handled, that data collection related to the implementation of the BIPs was inconsistent, and that overall the student's behaviors had not improved but had become more severe in certain respects. Although there is global information about the strategies used by the district in the hearing record, there is limited specific information to show how the student responded to different behavioral interventions and strategies on a day-to-day basis and no record of progress monitoring meetings. Despite the varied efforts of the district to address the student's admittedly complex, intense and challenging behaviors, the BIPs it utilized were not precise enough or implemented consistently enough with adequate training, oversight and methodology to provide the student with a FAPE. Although the district conceded that it deprived the student of a FAPE for the three years in question, it did not utilize the impartial hearing to develop a record

concerning its view of an appropriate compensatory award, but rather asserted, in wholly conclusory terms, that the student was not appropriately placed at a district school and instead should attend an unspecified approved nonpublic school. By way of contrast, the hearing record, particularly the testimony of the Medicaid BCBA and private evaluating BCBA-D, does support some aspects of the parent's requested relief, including school-based ABA services and a dedicated BCBA to develop an appropriate BIP and provide training and progress monitoring.

Given the district's concession that it failed to offer the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years and accepting the parent's due process complaint claims that the district failed to appropriately address the student's behavior as admitted by the district, the IHO erred by declining to award any compensatory education sought by the parent to remedy the FAPE denials at issue. Recognizing that the objective of compensatory education is to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA, I find that the hearing record supports he parent's request for a BCBA-D to develop an appropriate BIP and to provide training and progress monitoring and ten hours per week of compensatory school-based ABA at a rate not to exceed $150 per hour for 1,260 hours. However, the parent is not entitled to additional home-based ABA services as the district has already agreed to provide 150 hours of home or agency-based SETSS. Additionally, the record does not support reimbursement of the $1,795 expended by the parent for social programs. The parties agree that the parent is entitled to reimbursement for the cost of professional transcription services ordered by IHO 1 in the amount of $1096.

VII. Conclusion

Based on the foregoing, I find that IHO 2 erred by failing to award any compensatory educational services for the district's failure to offer the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years. I further find that IHO 2 erred by failing to reimburse the parent for professional transcription services.

I have considered the parent's remaining contentions and find it unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that IHO 2's decision dated June 3, 2019 is modified by reversing those portions which placed the burden of proof on the parent and denied compensatory education relief; and

IT IS FURTHER ORDERED that the student is awarded 1,260 hours of compensatory ABA services to be delivered in school by a BCBA or LBA in the amount of 10 hours a week until the 1,260 hours is exhausted and at a rate not to exceed $150 an hour; and

IT IS FURTHER ORDERED that the district shall reimburse the parent $1,096.00 for the cost of professional transcription services; and

IT IS FURTHER ORDERED that the district shall fund as compensatory education the cost of a BIP developed by a BCBA-D in an amount not to exceed $3,000, and shall also separately fund one hour of staff training a week and bi-weekly progress monitoring, both of which shall be provided by a BCBA-D for the 2019-20 school year.

Dated: **Albany, New York**
September 6, 2019

CAROL H. HAUGE
STATE REVIEW OFFICER