



The University of the State of New York

The State Education Department
State Review Officer
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No. 19-066

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:

Cuddy Law Firm, PLLC, attorneys for petitioner, by Jason H. Sterne, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Hae Jin Liu, 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 a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2018-19 school year were appropriate. 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 received occupational therapy (OT), physical therapy (PT), speech-language therapy, and instruction using applied behavioral analysis (ABA) through the Early Intervention Program, due to his "significant developmental delays" and his then-current diagnosis of a pervasive developmental disorder (Parent Ex. H at p. 2). During preschool, the student received OT, PT, and speech-language therapy through the Committee on Preschool Special Education (CPSE) (id.).

Turning to the student's transition to kindergarten, according to a March 2018 neuropsychological evaluation report, a CSE determined that the student was eligible for special education as a student with autism (Parent Ex. H at pp. 2-3). The report indicated that, for kindergarten, the student attended a general education class at a parentally-selected charter school and received special education teacher support services (SETSS), OT, PT, and speech-language therapy (Tr. pp. 403-04; Parent Ex. H at pp. 2-3).¹ During kindergarten the student performed below grade level academically, exhibited social/emotional difficulties related to peer interactions, demonstrated sensory processing difficulties, and behaviorally "shut[] down" when challenged academically (Parent Ex. H at p. 3).

The student repeated kindergarten at the charter school during the 2015-16 school year, where he was in a general education classroom and received SETSS on a daily basis, as well as OT, PT, and speech-language therapy (Parent Ex. D at pp. 1-2, 6). In April, May, and June 2016, the district conducted a classroom observation, a speech-language evaluation, a functional behavioral assessment (FBA), and an assistive technology trial with the student, and developed a behavioral intervention plan (BIP) (Parent Exs. K; M; N; U; X; see Parent Ex. II). These reports generally indicated that the student exhibited receptive and expressive language delays and difficulty maintaining focus and attention as well as initiating a task promptly following verbal directions (Parent Exs. M; N at p. 1; U at p. 1; X at p. 1). At the conclusion of the assistive technology trial period, the special education coordinator for the charter school reported that, when using the laptop in class during reading and writing activities, the student's quality and quantity of work decreased (Parent Ex. K at pp. 9-10). Reports from the end of the student's second year of kindergarten indicated that he was approaching kindergarten level skills academically, although the parent and charter school staff expressed their belief that the student would benefit from 1:1 paraprofessional services due to his inattentive behaviors, difficulty implementing his BIP, and safety concerns (Parent Ex. D at pp. 3-7).

The CSE convened on June 8, 2016 to develop the student's IEP for the 2016-17 school year (first grade) (Parent Ex. D at p. 14). The CSE recommended that the student attend a district school and receive integrated co-teaching (ICT) services in academic subjects, OT, PT, and speech-language therapy, and that the parent receive parent counseling and training (id. at pp. 12, 14).² Following discussion at the meeting, the CSE did not recommend that the student receive 1:1 paraprofessional services (id. at pp. 4-5, 7, 12).

During the 2016-17 school year, the student continued at the charter school in a general education classroom where he received SETSS in English language arts (ELA) and math, OT, PT, and speech-language therapy services, and his BIP was implemented (Parent Ex. B at pp. 1-4). In March 2017, the district reviewed the FBA and, in April 2017, reviewed the BIP (compare Parent Exs. U; X, with Parent Exs. T; V). In April 2017, the CSE convened pursuant to an order from an

¹ The student's eligibility for special education as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

² ICT services are defined in State regulation as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" in a classroom staffed "minimally" by a "special education teacher and a general education teacher" (8 NYCRR 200.6[g]).

IHO resulting from a prior impartial hearing regarding the student, and, for the remainder of the 2016-17 school year and the 2017-18 school year through April 2018, the CSE recommended that the student attend a district school and receive ICT services in academic subjects, OT, PT, speech-language therapy, parent counseling and training, as well as the services of a 1:1 paraprofessional, a laptop computer, and implementation of a BIP (Parent Ex. B at pp. 1, 5, 9, 11-12).³ The CSE also recommended the 12-month services of OT and speech-language therapy (id. at p. 10; see Parent Ex. G).

During the 2017-18 school year (second grade), the student attended the charter school in a general education "co-taught" class and received SETSS in ELA and math, OT, PT, speech-language therapy, parent counseling and training, assistive technology, and 1:1 paraprofessional services (Parent Ex. C at pp. 1-2).⁴ According to the parent, the student also received home-based "tutoring" twice weekly for approximately 1.5 hours to work on homework and address academic needs, as well as OT and PT one day per week "outside of school" (Parent Ex. I at p. 1).

In October 2017, the parent requested that the student be reevaluated and provided consent for a social history update, neuropsychological evaluation, and classroom observation (Parent Exs. E at p. 1; F).⁵ On October 26, 2017, a hospital audiology center conducted an audiological evaluation of the student; results indicated generally normal hearing in the right ear, and a mild sensorineural hearing loss to "poorer limits of normal hearing" in the left ear (Parent Ex. J). In November 2017, a district social worker conducted a social history update with the parent, in which the parent expressed her concerns about the student's academic skills and need for an FM unit (Parent Ex. I; see Parent Ex. F at p. 1).

In February 2018, a clinical neuropsychologist conducted a neuropsychological evaluation of the student (Parent Ex. H). On April 16, 2018 the district school psychologist conducted a classroom observation of the student at the charter school in his second grade classroom (Parent Ex. Y).

On April 24, 2018 the CSE convened to develop the student's IEP for the remainder of the 2017-18 school year, and the 2018-19 school year through April 2019 (Parent Ex. C). The resultant IEP reflected that a district school psychologist who also participated as the district representative

³ The IHO decision arising from the prior proceedings was not introduced into evidence at the impartial hearing in the present matter. According to the parent, she filed a due process complaint notice on September 23, 2016, alleging that the district failed to offer the student a FAPE for the 2016-17 school year, and an IHO issued a decision dated March 16, 2017, which ordered the district to provide the student with a 1:1 paraprofessional, an updated FBA and BIP, parent counseling and training twice monthly, and 100 hours of SETSS, and remanded the matter to the CSE to consider assistive technology for the student (Parent Ex. A at p. 2).

⁴ The special education coordinator testified that the charter school does not provide ICT services, rather, it appears that two regular education teachers provided instruction in the student's class at the charter school (Tr. p. 192; see Tr. p. 74).

⁵ The document entitled "Assessment Planning" indicated that speech-language, educational, and assistive technology evaluations, as well as a classroom observation of the student had been conducted in May 2016 (Parent Ex. E at p. 2).

and a district social worker attended the meeting; the parent, as well as the student's SETSS provider, regular education teacher, paraprofessional, and special education coordinator for the charter school, participated by telephone (*id.* at p. 18). According to the school psychologist and the CSE meeting minutes, the CSE considered and reviewed a social history, the neuropsychological evaluation report, an audiological evaluation report, a classroom observation report, "progress reports and updated data" from the charter school teachers and his related service providers, a BIP, and the April 2017 IEP (Tr. pp. 69, 166; Dist. Ex. 1 at p. 1; *see* Parent Exs. B; H; I; J; W; Y; AA; BB; CC; DD; *see also* Parent Ex. P).⁶

According to CSE meeting minutes and the April 2018 IEP, the CSE discussed at length the student's academic, social, physical, attention, and audiological skills and needs (Parent Ex. C at pp. 2-7; Dist. Ex. 1 at pp. 1-4). For the remainder of the 2017-18 school year and the 2018-19 school year until April 2019, the CSE recommended for the student a 12:1 special class placement with the related services of OT, PT, speech-language therapy, and hearing education services (Parent Ex. C at pp. 12-13). The CSE also recommended that the student be provided with an FM unit for daily use, testing accommodations, and 12-month services consisting of OT and speech-language therapy (*id.* at pp. 13-14).⁷ For the remainder of the 2017-18 school year the CSE recommended that the student continue to receive 1:1 paraprofessional services; however, it determined that, due to the "programmatic learning and behavioral supports" available in the 12:1 special class, the 1:1 paraprofessional services were not recommended to continue into the 2018-19 school year (Parent Ex. C at p. 13; Dist. Ex. 1 at p. 4).⁸

A. Due Process Complaint Notice

By due process complaint notice dated August 28, 2018, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 and 2018-19 school years (*see* Parent Ex. A at pp. 1, 5, 9). Specific to the 2017-18 school year, the parent asserted that the CSE failed to develop annual goals for the student related to the student's use of a laptop computer and, as a result, the student was "deprived of any meaningful benefit from the laptop computer" (*id.* at p. 6).

The parent also asserted that the district failed to conduct a neuropsychological evaluation of the student in a timely manner after the parent requested it and that the district failed to conduct evaluations of the student in the areas of speech-language, PT, and OT (Parent Ex. A at p. 6). Specific to the April 2018 CSE, the parent alleged that the CSE predetermined that it would remove the services of a 1:1 paraprofessional from the student's program and, thereby, denied the parent

⁶ The district school psychologist took notes during the April 2018 CSE meeting, which she later recorded on a document entitled "Conference Agenda Sheet" (Tr. pp. 86-87; Dist. Ex. 1). Since the document provides detail as to what occurred at the CSE meeting, rather than setting forth an agenda per se (*see* Tr. pp. 46-49), for purposes of this decision, the document is referred to as the April 2018 CSE meeting minutes.

⁷ In June 2018, the student began to receive tutoring services from a reading specialist (Parent Ex. Z).

⁸ At the meeting, the parent and school staff expressed disagreement with the recommendation to discontinue 1:1 paraprofessional services (Dist. Ex. 1 at p. 4).

the opportunity to meaningfully participate in the development of the student's IEP (id. at pp. 7-8).

Turning to the recommendations in the April 2018 IEP, the parent argued that the CSE "failed to consider and recommend an appropriate class setting" and specifically alleged that the CSE failed to explain how a 12:1 special class would satisfy the student's need to attend a classroom with students who did not present with "behavioral problems or impairing autistic presentations" (Parent Ex. A at p. 7). The parent asserted that the CSE "should have only considered" a recommendation for a general education classroom placement with ICT services or "an outside placement in a therapeutic setting" (id.). Next, the parent alleged that, notwithstanding that the district had "long been aware" of the student's need for 1:1 paraprofessional support and despite the opinions of staff from the student's charter school and the parent that the student should continue to receive such support, the CSE discontinued the service (id. at pp. 6-7). The parent alleged that the district "failed to conduct an appropriate and comprehensive FBA before it discontinued the Student's paraprofessional" and noted that the most recent 2017 FBA, as well as the 2018 neuropsychological evaluation, recommended that the student continue to receive the support of a 1:1 paraprofessional (id.).

In addition, the parent alleged that the April 2018 CSE recommended an insufficient amount of parent counseling and training services (Parent Ex. A at p. 7). The parent also alleged that the district "failed to conduct an appropriate and comprehensive [assistive technology] evaluation before it discontinued the Student's laptop" (id. at p. 6). Next, the parent claimed that, notwithstanding the student's need for an evidence-based teaching methodology, the CSE failed to consider whether the student would benefit from a particular methodology "such as applied behavior analysis [ABA]" (id. at p. 8). In summary, the parent alleged that the May 2018 IEP was not reasonably calculated to enable the student to make progress in light of his circumstance (id.).

As a final issue, the parent alleged that the district failed to respond to her request for an independent educational evaluation (IEE) in the form of an FBA and BIP (Parent Ex. A at p. 8).

The parent requested a determination that the April 2017 IEP constituted the student's then-current placement for purposes of the pendency (stay put) provision (Parent Ex. A at pp. 8-9). As relief for the district's alleged failure to offer the student a FAPE for the 2017-18 and 2018-19 school years, the parent requested that the district be required to conduct evaluations of the student, including a classroom observation, social history, physical examination, OT evaluation, PT evaluation, assistive technology evaluation, and a new psychoeducational evaluation (id. at p. 9). The parent also sought an IEE in the form of an FBA and BIP by a provider of the parent's own choosing at public expense (id.). The parent requested that the district be required to reconvene the CSE in order to review such evaluations and that the CSE be required to refer the matter to the central based support team (CBST) to locate a placement for the student in a State-approved nonpublic school (id.). The parent requested that the IHO order the district to "immediately provide a full-time individual paraprofessional to the Student," as well as a laptop computer with particular software or features "[i]f warranted by the [assistive technology] evaluation" and an FM device (id.). Also for relief, the parent sought compensatory education for the student "at an enhanced rate" (id. at p. 10).

B. Impartial Hearing Officer Decision

On September 28, 2018, the parties proceeded to an impartial hearing, which concluded on May 2, 2019, after six days of proceedings (see Tr. pp. 1-647). At the hearing date held on September 28, 2018, the parties presented their respective positions as to the student's pendency (stay put) placement and services (see Tr. pp. 5-14). In an interim decision, dated October 28, 2018, the IHO found that, consistent with the parties' agreement at the September 2018 impartial hearing date, the student's pendency placement and services were based on the April 2017 IEP; therefore, the IHO ordered the district "to provide funding for the related services, and assistive technology and 1:1 paraprofessional and placement at the . . . Charter School," as well as twice monthly parent counseling and training in a group (Interim IHO Decision at pp. 1-3; see Tr. pp. 6-7; Parent Ex. B).⁹

In a final decision dated June 13, 2019, the IHO found that the district offered the student a FAPE for the 2018-19 school year (see IHO Decision at p. 10).¹⁰ The IHO found that, although the district did not conduct evaluations to assess the student's needs in the areas of speech-language therapy, OT, and PT, the CSE had progress reports detailing the student's needs in these areas, which were sufficient to support the CSE's determination to continue the student's related services mandates (id.). The IHO determined that the program set forth in the April 2018 IEP, including a 12:1 special class in a community school with related services, "was competent to provide the student the opportunity to acquire academic skills and make progress," particularly in contrast to the "previous placement at a charter school," which the IHO characterized as "inappropriate and at the insistence of the Parent" (id.). Further, noting documentation that "the Parent agreed that the student was not benefiting from the laptop," the IHO found that the CSE's determination to remove provision of a laptop from the student's IEP did not "in and of itself" result in a denial of a FAPE (id.).¹¹

As a final matter, the IHO found that the district failed to promptly implement his interim order setting forth the student's pendency placement (IHO Decision at p. 10). Accordingly, the IHO ordered the district to provide the student with a 1:1 paraprofessional "as compensation for services missed" (id.). The IHO ordered that the student receive the 1:1 paraprofessional services

⁹ Neither the IHO's interim decision nor his final decision is paginated. For purposes of this decision, citations to the IHO's decisions shall refer to the consecutive pages, with each of the cover pages as page one (see IHO Decision at pp. 1-14; Interim IHO Decision at pp. 1-4).

¹⁰ The IHO indicated that, during the impartial hearing, the parent withdrew her claim that the district denied the student a FAPE for the 2017-18 school year (IHO Decision at pp. 5, 10).

¹¹ While set forth under the heading "The Parent Case," the IHO also appeared to make additional findings (IHO Decision at p. 7). For example, the IHO indicated that the parent's claim regarding the untimely neuropsychological evaluation "fail[ed]" since the neuropsychological evaluation was available to the April 2018 CSE (id.). The IHO also appeared to set forth additional reasoning in support of the determinations that the lack of related services evaluations and the removal of the laptop from the student's IEP did not amount to a denial of a FAPE (id. at pp. 7-8).

from September through December 2019 "at the assigned community school 12:1 special class placement . . . which the student will attend" (id.).

IV. Appeal for State-Level Review

The parent appeals, seeking to overturn the IHO's determination that the district offered the student a FAPE for the 2018-19 school year.¹² Specifically, the parent alleges that the April 2018 CSE predetermined its decision to remove paraprofessional support from the student's IEP based on district policy regarding categories of paraprofessionals, rather than on the student's needs. The parent also argues that the evidence in the hearing record demonstrates that the student "require[d] a paraprofessional, irrespective of class size" and the student's BIP could not be implemented without such support. The parent also claims that the April 2018 CSE's removal of assistive technology (a laptop computer) from the student's IEP denied the student a FAPE. In addition, the parent takes issue with the CSE's failure to ensure that the student "would receive small-group reading services employing a methodology such as Orton-Gillingham or Wilson." Finally, the

¹² State regulation provides that a request for review shall set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2]). Here, the request for review sets forth two numbered issues, titled "Denial of FAPE for 2018/19" and "Denial of Relief" (Req. for Rev. at pp. 7, 8). This articulation of issues is not in compliance with State regulation (see 8 NYCRR 279.8[c][2]; see also 8 NYCRR 279.4[a]). As summarized above, the IHO's decision addressed discrete issues, including the sufficiency of evaluative information before the April 2018 CSE, the placement and related services recommendations, and the removal of assistive technology support from the student's IEP (see IHO Decision at p. 10). In the request for review, although the numbered paragraphs under the first "Issue" labeled "Denial of FAPE for 2018/19" reference some of these issues reached by the IHO, as well as others, they are not numbered as separate issues as required by regulation and are phrased in terms of district error or student need, rather than referencing the IHO's decision and his "precise rulings, failures to rule, or refusals to rule" (see Req. for Rev. ¶¶ 41-48; 8 NYCRR 279.8[c][2]). Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "[failure] to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]). In this instance, given that the district was able to respond to the allegations raised in the request for a review in an answer and there is no indication that the district otherwise suffered any prejudice, I decline to exercise my discretion to dismiss the request for review on these grounds (see Application of a Student with a Disability, Appeal No. 18-053; Application of a Student with a Disability, Appeal No. 17-101). However, counsel for the parent is reminded to review the requirements of Part 279, as amended and effective January 1, 2017, and is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's or practitioner's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 19-021).

parent asserts that the April 2018 CSE's failure to recommend transitional support services denied the student a FAPE.

For relief, the parent requests that the district be required to conduct an assistive technology evaluation of the student and to fund an IEE in the form of an FBA and BIP. The parent also requests that the district be required to develop an IEP for the student to include a 1:1 paraprofessional, an evidence-based reading program, and ABA services. Further, the parent requests that the district be required to place the student at a particular State-approved nonpublic school. The parent also seeks compensatory education, including 165 hours of academic tutoring and 10 hours of parent counseling and training, to be delivered by providers trained or certified in ABA at a specified rate.¹³

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.

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

¹³ With the request for review, the parent submits an exhibit, which the parent asserts was received into evidence during the impartial hearing as Parent Exhibit MM (Req. for Rev. ¶¶ 10-11). Review of the hearing record supports the parent's characterization (see Tr. p. 332), and, in the answer, the district concurs that the document was admitted into evidence at the impartial hearing (Answer ¶ 11 n.2). Notwithstanding that the document was labeled at the impartial hearing as Parent Exhibit MM, it appears that there was subsequent confusion with another exhibit (see Tr. pp. 452-54). Ultimately, the document was included with the hearing record submitted to the Office of State Review; however, the exhibit designation was changed, and the document was labeled as IHO Exhibit III. Accordingly, Parent Exhibit MM, as submitted with the parent's request for review is unnecessary as it was already part of the hearing record (see 8 NYCRR 279.9[a]). For purposes of this decision, the January 2019 affidavit from the director of Kid Success, Inc., shall be cited as IHO Exhibit III.

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]).¹⁴

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

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

VI. Discussion

A. April 2018 CSE—Predetermination

The parent alleges that the April 2018 CSE predetermined the decision to remove paraprofessional support from the student's IEP based on district policy, which provides for only five categories of paraprofessionals (crisis management, health, orientation and mobility, bilingual, and classroom).

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of

¹⁴ 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).

Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dept. Of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P., 2015 WL 4597545 at *8, *10; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192).

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

The alleged district policy, on which the parent bases her assertion of predetermination, provided that only five categories of paraprofessionals were available in district programs. The district school psychologist testified that categories of paraprofessionals "that are part of the programs and services . . . available in the [district]" included crisis management, health, orientation and mobility, bilingual, and classroom (Tr. pp. 144-45). She indicated that she did not know whether it was possible for other paraprofessionals to be assigned to a student if required by an IHO decision (Tr. p. 145). Neither the IDEA nor federal or State regulations establish subspecialties for paraprofessionals (see 8 NYCRR 80-5.6, 200.1[hh]).¹⁵ As discussed more below, State regulation and guidance from the State Education Department's Office of Special

¹⁵ The term "paraprofessional" is used throughout the hearing record. For purposes of this decision, in addition to the term "paraprofessional," the terms "supplementary school personnel" and "aide" are used, as they are the terms set forth in State regulation (see 8 NYCRR 80-5.6, 200.1[hh]; 200.4[d][3][vii]; see also "'Supplementary School Personnel' Replaces the Term 'Paraprofessional' in Part 200 of the Regulations of the Commissioner of Education," at p. 1, VESID Mem. [Aug. 2004], available at <http://www.p12.nysed.gov/specialed/publications/policy/suppschpersonnel.pdf>).

Education specifies that a 1:1 aide should only be considered based upon a student's individual needs and in light of the available supports in the setting where the student's IEP will be implemented (see 8 NYCRR 200.4[d][3][vii]; "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. [Jan. 2012], available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>).

To the extent that the parent's claim amounts to an argument that the district's adherence to policy is a systemic violation, an impartial hearing under the IDEA is limited to issues "relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child" (34 CFR 300.507[a][1]; see 20 U.S.C. § 1415[b][6]). Generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. School Dist., 2009 WL 261470, at *9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]).

As to the student in this matter, the hearing record demonstrates that, beyond simply applying the purported policy, the April 2018 CSE discussed and considered the student's needs in reaching the determination to recommend a program and placement for the student that did not include the support of a 1:1 paraprofessional; whether the evidence in the hearing record supports the CSE's recommendation is discussed separately below. According to the district school psychologist, the April 2018 CSE "reviewed [the student's] behaviors as well as the criteria for a crisis paraprofessional" and determined that the student "was not exhibiting any crisis behaviors or aggression or otherwise unsafe behaviors" to warrant a crisis-management paraprofessional (Tr. p. 80). The special education coordinator for the charter school similarly testified that the CSE considered whether the student met "the two criteria for" recommending a 1:1 paraprofessional, specifically, whether the student was "in crisis" or needed "a medical para[professional]," but found that the student did not engage in disruptive or violent behavior and did not have medical needs (Tr. pp. 237-38). However, the school psychologist also testified that the CSE considered the student's attention-related needs and his lack of progress during the 2017-18 school year despite the support of a 1:1 paraprofessional and decided to change the recommendation from a general education classroom with ICT services and a 1:1 paraprofessional to a more restrictive 12:1 special class setting without a 1:1 paraprofessional, opining that the student would receive more support in the 12:1 special class from the classroom teacher (Tr. pp. 80-81, 84-86; see Dist. Ex. 1 at pp. 3-4). Indeed, the April 2018 CSE meeting minutes reflect that the determination to discontinue 1:1 paraprofessional services was based on the student's "behavioral presentation" and "the recommendation for a more appropriate and supportive classroom setting" (Dist. Ex. 1 at p. 4). Further, according to the evidence in the hearing record, including the testimony of the special education coordinator, the student's need for a 1:1 paraprofessional was discussed at the April 2018 CSE meeting, the CSE agreed to continue the paraprofessional through the end of the 2017-18 school year, and the student's teachers and providers from the charter school, as well as the parent, had the opportunity to voice their disagreement with the decision to discontinue the paraprofessional recommendation into the 2018-19 school year (Tr. pp. 164-65, 235-39; Parent Ex. C at p. 13; Dist. Ex. 1 at p. 4).

In light of the above, the evidence in the hearing record does not support a finding that the removal of the 1:1 paraprofessional from the student's program was predetermined; rather the CSE members discussed the student's need for a paraprofessional and some members of the CSE

disagreed with the determination. The CSE appeared willing to listen to the parent and the staff from the charter school and actually recommended a 1:1 paraprofessional for the student for a portion of the time during which the April 2018 IEP was intended to be implemented (the end of the 2017-18 school year). Further, that the parent disagreed with the proposed IEP and the CSE's recommendation does not amount to predetermination by the district or a denial of the parent's meaningful participation in the development of the program (see E.H. v. Bd. of Educ. of the Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F., 2013 WL 4495676, at *17; DiRocco, 2013 WL 25959, at *18-*20; P.K., 569 F. Supp. 2d at 383; Sch. for Language & Comm'n Dev., 2006 WL 2792754 at *7). Thus, the evidence in the hearing record supports a finding that the district and the CSE possessed the requisite "open mind" with respect to the student's program for the 2018-19 school year; although, the merits of its determination that the student did not require a 1:1 paraprofessional during the 2018-19 school year in order to receive a FAPE remains to be examined, and it is to that question that I next turn.

B. April 2018 IEP

1. Special Factors

A CSE may be required to consider special factors in the development of a student's IEP (8 NYCRR 200.4[d][3]; see 20 U.S.C. § 1414[d][3][B]; 34 CFR 300.324[a][2]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380).

a. Additional Supplementary School Personnel

The parent argues that the district failed to offer the student a FAPE because the "preponderance of the evidence at the hearing, and at the April 2018 meeting, demonstrated that [the student] require[d] a paraprofessional, irrespective of class size," and that the student's "BIP could not be implemented in the absence of a paraprofessional." The district asserts "that the special education teacher in the 12:1 special class would be responsible to implement the BIP." Contrary to the district's assertion and the IHO's finding, the hearing record supports the parent's claim that the information considered by the April 2018 CSE showed that the student required more individualized adult support to address his attention needs than what was offered in the April 2018 IEP.

While not set forth as a special factor in the IDEA or federal regulation, State regulation includes as a special factor a CSE's consideration of "supplementary school personnel (or one-to-one aide) to meet the individualized needs of a student with a disability" (8 NYCRR 200.4[d][3][vii]; see 20 U.S.C. § 1414[d][3][B]; 34 CFR 300.324[a][2]). A CSE must consider a number of factors before recommending a 1:1 aide on a student's IEP, including: the student's management needs, goals for reducing the need for 1:1 support, the specific support the 1:1 aide would provide, other supports or accommodations that could meet the student's needs, the extent

(e.g., portion of the day) or circumstances (e.g., transitions between classes) the student needs the 1:1 aide, staffing ratios,¹⁶ how the support of a 1:1 may enable the student to be educated with nondisabled peers, any potential harmful effect of having a 1:1 aide, and training and support that will be provided to the aide to help the aide understand and address the student's needs (8 NYCRR 200.4[d][3][vii]). Further, a State guidance document, dated January 2012, contemplates that a "goal for all students with disabilities is to promote and maximize independence," and provides examples of student needs that may require a CSE to consider a recommendation for the services of a one-to-one aide, including: the student "presents with serious behavior problems with ongoing (daily) incidents of injurious behaviors to self and/or others or student runs away and student has a functional behavioral assessment and a behavioral intervention plan that is implemented with fidelity"; the student "cannot participate in a group without constant verbal and/or physical prompting to stay on task and follow directions"; the student "needs an adult in constant close proximity for direct instruction," "requires individualized assistance to transition to and from class more than 80 percent of the time," and "needs an adult in close proximity to supervise social interactions with peers at all times" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Field Advisory [Jan. 2012], at p. 1 & Attachment 2, available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>).

As noted above, the April 2018 CSE considered and reviewed a social history, the neuropsychological evaluation report, an audiological evaluation report, a classroom observation report, "progress reports and updated data" from the charter school teachers and his related service providers, a BIP, and the April 2017 IEP (Tr. pp. 69, 166; Dist. Ex. 1 at p. 1; see Parent Exs. B; H; I; J; W; Y; AA; BB; CC; DD; see also Parent Ex. P).

Review of the April 2017 IEP reflects that the CSE discussed charter school reports that indicated the student's distractibility affected his ability to read words fluently, he was often distracted in class and off task, and that he focused on an assignment independently for approximately 30 seconds (Parent Ex. B at p. 3). The IEP further indicated that "even when sitting next to a teacher, [the student] struggle[d] with completing assignments" (id.). Results of an FBA reflected in the IEP indicated that the student "was able to independently focus for at most 12 seconds," and that a BIP focused on improving his ability to follow directions and independently engage in a task for a certain amount of time (id.). According to the IEP, teacher reports indicated that the student was reminded "at least 10 times during a 45 minute period" to focus, he struggled to work independently, and due to his high level of distractibility, navigated stairs unsteadily, bumped into walls, and veered when walking (id.). Management needs provided in the April 2017 IEP included prompting, reminders not to rush, repetition of questions and directions, check-ins to monitor comprehension and attention, frequent verbal and physical reminders to stay on task,

¹⁶ In a Question and Answer document—published subsequent to the promulgation of the provision in State regulation requiring CSEs to consider certain factors before offering a student 1:1 aide services—it was further explained that "[i]n classrooms that have a high staff-to-student ratio, or students with fewer needs, existing staff may be able to support a student with increased needs, and a one-to-one aide may not be necessary" ("Amendment of Sections 200.4, 200.16 and 200.20 of the Commissioner's Regulations Relating to Recommendations for One-to-One Aides for Preschool and School-Age Students with Disabilities and Preschool Special Education Programs and Services: Questions and Answers," at p. 1, Office of Special Ed. [June 2016], available at <http://www.p12.nysed.gov/specialed/publications/documents/q-and-a-preschool-regs.pdf>).

verbal cues, and "[c]onstant one-on-one support to engage in lesson" (*id.* at pp. 4-5). The November 2017 social history reflected the parent's concern that the student exhibited difficulty focusing, and that he "may wander off if he's not supervised" (Parent Ex. I at p. 2).

In February 2018, a neuropsychologist conducted a parent interview, review of the student's records, behavioral observations, cognitive, academic achievement, and language testing, and completion of behavioral, adaptive functioning, and autism symptom questionnaires (Parent Ex. H at pp. 1-11). In a report dated March 14, 2018, the neuropsychologist reported that the student's overall intellectual functioning was in the extremely low range, with strengths in visuospatial and visual reasoning abilities, and weaknesses in processing speed (*id.* at p. 12). According to the neuropsychologist, the student's reading and writing skills were within or below the first grade level, his math skills were at a first to second grade level, and his receptive and expressive language functioning was "generally problematic" (*id.*).

Specific to attention skills, during the evaluation the neuropsychologist reported that the student's attention was "highly variable" and he displayed the need for frequent repetition of testing directions and significant redirection to task due to "significant distractibility" (Parent Ex. H at p. 4). The student's performance on the working memory index of the Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V) was in the extremely low range (*id.* at pp. 7-8). According to the report, the student "was unable to engage in any tasks that measure executive functioning due to significant attention limitations and behavioral difficulties," and the neuropsychologist did not attempt to administer tasks measuring learning and memory for the same reasons (*id.* at pp. 8, 10). Additionally, the neuropsychologist reported that the student exhibited "episodes of staring off in a daze," he was "notably fidgety and impulsive," and his processing speed was "highly problematic" during the evaluation (*id.* at pp. 2, 12). Administration of the Conners-3 questionnaire to the parent and the student's teacher—which measured, among other things, attention, learning, and executive functioning problems—yielded scores in the clinically significant range for inattention (*id.* at p. 10). The parent also reported scores in the clinically significant range for hyperactivity/impulsivity, learning problems, and executive functioning domains (*id.*). The student's teacher reported scores within normal limits for hyperactivity/impulsivity, and mildly elevated in learning problems and executive functioning domains (*id.*). Results of an administration of the Behavior Assessment System for Children, Third Edition (BASC-3) to the student's teacher indicated that her scores for school and attention problems were in the mildly elevated range, and her scores for learning problems were in the clinically significant range (*id.* at pp. 10-11). Additionally, the teacher's scores for the problem solving and attentional control indices were "'elevated'" (*id.* at p. 11). The neuropsychologist concluded that the student continued to meet the criteria for diagnoses of an autism spectrum disorder and an attention deficit/hyperactivity disorder (ADHD), and now also met the criteria for a specific learning disorder with impairments in reading and writing (*id.* at p. 13).

School-based recommendations provided in the neuropsychologist's evaluation report related to the student's attention needs included that the student be "placed in a class size of no more than 12 students," and that he "continue to receive a one-to-one paraprofessional aide who is trained in working with individuals with [autism] to help him throughout the day according to BIP

recommended interventions" (Parent Ex. H at pp. 13-14).¹⁷ The neuropsychologist also indicated that "[h]aving an aide will be paramount in helping [the student] maintain motivation, decreasing effects of distractibility on his learning, providing encouragement to engage appropriately in his less-preferred academic activities, and helping to implement his BIP" (*id.* at p. 14). The report provided a number of management needs related to the student's "significant inattention and hyperactivity," including: opportunities to reduce excessive energy using "regularly scheduled breaks" whereby the student would be accompanied by his paraprofessional to allow him to walk around, stretch, fidget, etc.; providing frequent redirection to task; repeating instructions and checking for understanding; helping the student stay organized; using rewards/positive reinforcement for good behavior; and providing warnings before transitions occur (*id.* at pp. 14-15).

Progress reports prepared by the student's occupational and physical therapists and speech-language pathologist in spring 2018 referred to his attention difficulties, distractibility, impulsivity, and need for 1:1 supervision (Parent Exs. BB at pp. 1-2; CC; DD). Specifically, the OT progress report reflected that the student was distractible with a short attention span, exhibited decreased handwriting skills when unsupervised, and required reminders from his paraprofessional to "slow down and chew his food" during meals (Parent Ex. BB at pp. 1-2). The student achieved his goal to focus for a minute or more in the classroom "due to the support he receive[d] from his paraprofessional" who redirected and reminded him to stay on task (*id.* at p. 2). The PT report indicated that, due to the paraprofessional's input about the speed with which the student negotiated stairs and his need for verbal prompts, the goal of PT during the school year was to safely ascend and descend stairs at a normal pace (Parent Ex. CC). According to the April 2018 speech-language progress report, the student's "ability to attend [was] highly inconsistent" and he often tried to "change the topic of conversation when he los[t] focus and must be asked to stay on topic and stop changing the subject" (Parent Ex. DD). The report also indicated that the student required auditory, visual, and tactile cues to stay on task (*id.*). Additionally, an audiological evaluation and follow-up letter indicated that the student experienced a mild hearing loss, for which an FM "device" was recommended to improve his "hearing in a classroom setting" (Parent Exs. J; P).

In an April 2018 teacher progress report, the student's teachers described how, although his "focus and investment" had grown during the 2017-18 school year, the student continued to complete math classwork at a much slower rate than his peers, he needed "heavy prompting to stay motivated," and "a lot of prompting and reminders to complete his work" (Parent Ex. AA at p. 2). The report indicated that the student was reminded "at least 10 times in a 45 minute period" to make eye contact, look at his book, and keep his eyes on his own paper (*id.* at p. 3). According to the teachers, the student sustained his focus more in small group than whole group settings; however, in a small group he still only maintained focus for approximately 40-50 percent of the time with reminders (*id.*). The report also noted that the student's lack of focus affected his ability to appropriately respond to peer interactions (*id.*). In an April 2018 classroom observation of the student conducted by the district school psychologist, she reported that, although the student sat at

¹⁷ The neuropsychologist recommended that in the smaller, self-contained class, the student should not be grouped with "individuals who are suffering from behavioral disorders or significantly impairing [a]utistic presentations, as this would not be suitable for [the student] given his [autism] condition and significant distractibility" (Parent Ex. H at p. 14). Rather, she indicated that "whenever possible, participation with other students without disabilities" was strongly recommended (*id.*).

the front of the group in close proximity to the teacher, he was "very frequently distracted and the teacher redirected him several times to sit up straight, track the speaker, or repeat back a response" (Parent Ex. Y). The student "immediately and enthusiastically responded to" the prompts; however, the school psychologist indicated that "his attention span was brief" (id.). The observation report provided other examples of the student's difficulty with attention: requiring a physical prompt from a peer to respond; initiating off-topic conversation; and needing five or more prompts from the paraprofessional to focus on his paper (id.). The school psychologist concluded that the student "presented as extremely distractible and having a very limited attention span," although he responded well to redirection, verbal praise, tangible reinforcers, physical prompts, and modeling of correct responses (id.).

According to the meeting minutes, during the April 2018 CSE meeting, the teachers discussed that the student's "biggest challenge at school [was] his distractibility," that he had a "very short attention span and need[ed] constant redirection" (Dist. Ex. 1 at p. 3). Also, the CSE discussed that the student benefitted from frequent brain breaks, positive reinforcement, and a consistent BIP, which at that time was implemented by his paraprofessional (id.). Specifically, the BIP reflected that, on a daily basis, the student's teachers and paraprofessional were tasked with implementing behavior teaching strategies such as: having discussions with the student about the prompts he would receive; following a very specific series of directions with verbal and physical prompts; providing role-play opportunities; and rewarding on-task behavior with stickers and verbal praise (Parent Ex. W at pp. 3-5). Additionally, the BIP reflected that, when the student displayed the target behavior, he should receive small and large stickers—ultimately resulting in the receipt of an incentive of his choice—following a specified procedure (id. at pp. 3-4). During times the student did not exhibit the target behavior, the BIP provided an extremely detailed process for providing prompts at specified time intervals (id. at p. 4).¹⁸ The meeting minutes further reflected that the CSE discussed that, "[a]ccording to progress monitoring data, [the student had] improved his ability to sustain his attention from 7 seconds to 15 seconds on average," and that "[he had] also improved in his ability to follow a direction within 5-7 seconds, though this [was] still not meeting this goal on average 12 times during an observation session" (Dist. Ex. 1 at p. 3; see Parent Ex. W at p. 6). According to the meeting minutes, charter school staff "noted the need for [the student] to receive constant adult support and redirection, which [was] currently being provided by his 1:1 paraprofessional" (Dist. Ex. 1 at p. 4).¹⁹

The hearing record shows that the April 2018 CSE declined to recommend 1:1 paraprofessional services for the student for the 2018-19 school year because he had not made

¹⁸ For example, according to the BIP, if the student did not begin his work within 7 seconds with two physical/verbal prompts, then his time to initiate his work could be increased to 10-15 seconds with three verbal or three physical prompts from the staff working with him (Parent Ex. W at p. 4). The BIP indicated that, when successful, the student should receive one sticker, and, after receiving three stickers, he should receive one large sticker; after receiving three large stickers, the student would be provided an opportunity to exchange his stickers for other incentives based upon his interests or a large prize of his choosing (id.).

¹⁹ As discussed above, the hearing record reflects that, at the April 2018 CSE meeting, the parent and charter school staff disagreed with the recommendation to not continue paraprofessional services for the 2018-19 school year (Tr. pp. 164-65; Dist. Ex. 1 at p. 4).

appropriate progress in his then-current program with a paraprofessional, and due to its opinion that the "new" recommendation for a 12:1 special class with the "programmatically learning and behavioral supports in that setting" would be sufficient to address his needs (Tr. pp. 80-81, 84-86, 104-08, 162-68; Dist. Ex. 1 at p. 4).²⁰ However, as detailed above, the information available to and reviewed by the CSE amply supports the conclusion that, due to his significant attention difficulties, the student required consistent, 1:1 adult support to benefit from instruction regardless of the size of the setting (see, e.g., Parent Exs. B at pp. 3-5; H at pp. 2, 4, 12-14; I at p. 2; Y; AA at pp. 2-3; BB at pp. 1-2; CC; DD). Also, the specificity of the student's BIP, which the district developed and which contemplated more than one teacher/staff member to implement, supports a finding that the student required individualized adult support in addition to that provided by the special education teacher in the 12:1 special class (Tr. pp. 167-68; Parent Ex. W; see Tr. p. 162).²¹

Given all these factors, the failure of the April 2018 CSE to recommend 1:1 adult support in the student's IEP for the 2018-19 school year resulted in a denial of a FAPE in this instance.

b. Assistive Technology

On appeal, the parent asserts that the district failed to offer the student a FAPE because the CSE removed assistive technology—specifically, the laptop computer—from the student's April 2018 IEP "without an AT evaluation or consideration of alternatives." Additionally, in her memorandum of law, the parent focuses on the lack of evaluation or discussion by the April 2018 CSE regarding how the student's new diagnosis (specific learning disability) might be addressed via the use of assistive technology such as text-to-speech or speech-to-text software. The district argues that the IHO correctly determined that the removal of the laptop did not result in a denial of a FAPE, as the parent and school staff agreed it was distracting to the student, and the April 2018 IEP otherwise addressed the student's reading deficits, albeit without assistive technology.

One of the special factors that a CSE must consider is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121).

²⁰ State regulation provides that a 12:1 special class placement is intended to address the needs of students "whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]).

²¹ When asked about the amount of individualized, direct 1:1 instruction and educational support the student would receive in the 12:1 special class, the school psychologist testified that, in addition to the special education teacher, the student's related service providers would provide that support (Tr. pp. 104-05). However, according to the April 2018 IEP, all but one of the student's related service sessions were to be provided in a separate location "[o]utside of the classroom" (Parent Ex. C at p. 13).

The hearing record shows that in March 2016 the parent referred the student for an assistive technology evaluation due to concerns about the student's academic difficulties, fatigue with handwriting, and difficulty maintaining attention (Parent Ex. L at p. 1). The purpose of the evaluation was to determine whether the student required an assistive technology device to help him stay on task and complete assignments and writing tasks (*id.* at pp. 1-2). After gathering information about the student's prior computer use and specific academic, speech-language, physical, and attention skills and needs, in early May 2016, the evaluator recommended a trial period of a laptop equipped with SOLO CoWriter and Adobe Acrobat Pro applications (Parent Ex. K at pp. 1-7; *see* Parent Ex. L at p. 1). The assistive technology trial period plan indicated that the student would be provided with the laptop "in class during writing and reading activities," and that a goal for the student was that he would "be able to produce 1 sentence in response to a guiding reading question" (Parent Ex. K at p. 9). At the end of the trial period, the student's teacher reported that, although the student's perception of the assistive technology was positive, he required direct one-to-one support, and his quality and quantity of work decreased, as did his rate of written production (*id.* at pp. 1, 9-10).

On June 14, 2016, the student, his teacher, the special education coordinator, and two occupational therapists/assistive technology evaluators participated in a "follow up visit" to determine if the student was able to use the "loaner laptop with word prediction and auditory feedback application to improve legibility of written responses and expand on writing assignments" (Parent Ex. L at p. 2).²² The June 14, 2016 addendum to the assistive technology evaluation report indicated that "[e]xpectations of an [a]ssistive [t]echnology device [were] to help [the student] focus on assigned tasks and complete writing tasks" (*id.* at pp. 1-2). The occupational therapists who conducted the assessment concluded that "[u]pon review of the work completed during the trial period, as well as interview with staff it was evident that [the student] did not benefit from [the] use of assistive technology" (*id.* at p. 2). Specifically, both the student's teacher and the special education coordinator reported that the student required "maximal 1:1 assistance" to use the device to complete written work, and that the student produced more written work with less assistance using a pencil and paper (*id.*). During the follow-up visit, the occupational therapists provided the student with the opportunity to use the device, upon which he created—with maximal assistance—a three-word partial sentence in 20 minutes (*id.*). According to the evaluators, the student's attention waned, he played with the track pad, looked around the room, and required "constant" redirection to restart his work (*id.*). Additionally, the student consistently hit the enter key repeatedly to receive auditory feedback and "type[ed] gibberish onto the screen despite multiple prompts to attend to the task presented" (*id.*). Due to reports from school staff, the evaluators' observations, the student's need for maximal prompting, and the failure to successfully achieve the trial period goal, the evaluators concluded that the device was not able to offer the student a "less restrictive mode to access the curriculum" and at that time was determined to be "not appropriate" (*id.* at p. 3). The evaluators declined to recommend assistive technology for the student, and the report indicated the staff present were in agreement with that finding (*id.*).

Subsequently, the student was provided with a laptop during the 2017-18 school year (Parent Exs. B at p. 9; BB at pp. 1-2). According to the March 25, 2018 OT annual progress report,

²² While it is unclear whether the April 2018 CSE reviewed the June 2016 assistive technology addendum (Parent Ex. L), the April 2017 IEP reflects that the CSE considered it at that meeting (Parent Ex. B at p. 4).

the student's weaknesses included distractibility with a short attention span and difficulty following directions (Parent Ex. BB at p. 1). Despite graphomotor deficits, the student's handwriting improved from "illegibl[e]" at the beginning of the school year, to being legible 75 percent of the time with support from his paraprofessional (id. at pp. 1-2). Regarding typing skills, the occupational therapist reported that the student was "a poor candidate for typing/keyboarding" as in class he "fixate[d] on the screen and type[d] fewer than four words per minute," and he was unable to "complete even a small fraction" of his classwork when typing or use his left hand adequately to type (id. at p. 2). Additionally, the occupational therapist reported that the student lacked the level of hand dexterity needed for typing, and exhibited difficulty shifting his attention from the screen to the keyboard (id.). For these reasons, the occupational therapist recommended "postponing typing classroom assignments for another year" (id.).

According to information from the April 2018 CSE meeting, participants discussed the "significant progress" the student had made regarding handwriting legibility, and that the OT progress report "corroborate[d] teacher and parent concerns with [the student's] use of his [assistive technology device]" due to his struggle to type and track from the screen to the keyboard efficiently and because, when using it, he worked slowly and became distracted, taking away from the content of what he was producing (Dist. Ex. 1 at p. 3). The district school psychologist who attended the April 2018 CSE meeting testified that the CSE did not recommend assistive technology for the student for the 2018-19 school year based on information in reports and discussion at the meeting from the charter school teachers, the parents, and the occupational therapist (Tr. pp. 78-79). She further testified that the student "was struggling to use the recommended device efficiently and independently, he was not benefitting from using it, and he was actually making more progress and doing better when he was writing by hand" (Tr. p. 79).

Although the parent alleges that the assistive technology (laptop) was "removed" from the student's IEP without an "evaluation," she cites no authority to support her position that an evaluation is a condition precedent for such a change. Rather, State guidance advises that a determination regarding whether a student needs assistive technology in order to receive a FAPE should be "student-focused and purposeful" and based upon inquiries about the student's needs, such as "What can the student do now with and without assistive technology devices and services?" ("Assistive Technology for Students with Disabilities," at pp. 2-3 [Office of Special Educ. Mem. Apr. 2017], available at <http://www.p12.nysed.gov/specialed/documents/assistive-technology-for-students-with-disabilities.pdf>). The information available to the April 2018 CSE answered this and other questions regarding the student's needs and whether or not he would continue to benefit from the laptop. Specifically, information in the hearing record indicates that an evaluation of the student's assistive technology needs had been conducted within two years of the April 2018 CSE meeting and the April 2018 CSE had contemporaneous information about the student's difficulty using the laptop; accordingly, the CSE's conclusion to not recommend that particular assistive technology device for use during the 2018-19 school year is amply supported by the hearing record (Parent Exs. C at pp. 3-4, 6; K; L; BB at pp. 1-2; Dist. Ex. 1 at p. 3). Further, as discussed in more detail below, the student's needs related to his reading and writing deficits were addressed in the April 2018 IEP through: management needs including "multisensory, evidence-based phonics instruction," multi-modal instructional tools (e.g. markers, whiteboard, special pens), modified writing prompts, sentence stems, word banks, graphic organizers, etc.; reading, written language, and graphomotor annual goals; 10 periods per week of 12:1 special class instruction in ELA; and two 30-minute sessions per week of individual OT (Parent Ex. C at pp. 6-12).

The parent now asserts that, due to the student's receipt in March 2018 of a diagnosis of a specific learning disorder with impairments in reading and writing, the student may benefit from "software" to address those needs (Tr. pp. 139-41; Parent Ex. H at pp. 1, 13). When warranted by the student's needs, the district must assess the student's "functional capabilities" and whether they may be "increase[d], maintain[ed], or improve[d] through the use of assistive technology devices or services (34 CFR 300.5; 8 NYCRR 200.1[e]; see 34 CFR 300.6; 8 NYCRR 200.1[f]). "The evaluation should provide sufficient information to permit the [CSE] to determine whether the student requires assistive technology devices or services in order to receive FAPE" (Letter to Fisher, 23 IDELR 656 [OSEP 1995]). The neuropsychologist recommended that the student use assistive technology "as a tool for earning rewards through his BIP" and also due to his diagnosis of a learning disability (Parent Ex. H at p. 14). Additionally, during the impartial hearing, the district school psychologist agreed that "a new assistive technology evaluation would need to be conducted" in order to determine if using software to address the student's reading and writing disorder would be "helpful" to the student (Tr. pp. 140-41). Therefore, unless it has already been completed, I will order the district to conduct an assistive technology evaluation of the student to be completed within 30 days of this decision.

2. Methodology

The parent alleges on appeal that the information available to the April 2018 CSE showed that the student required "small-group reading instruction employing a methodology" such as Orton-Gillingham or the Wilson Reading System (Wilson) to make progress in reading, and that the failure of the April 2018 CSE to include this on the student's IEP denied the student a FAPE. The district asserts that the IEP reading annual goals were drafted in large part by a certified Wilson reading specialist and addressed the student's reading needs.

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including in a special class or as a related service ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>). In addition, the guidance specifies that the CSE should "consider what prior instructional methods and strategies have been utilized with the student to avoid reinstituting programs that have not proven effective in the past" and further indicates that "[i]nstructional methodology may be discussed at the [CSE] but is not specified on an IEP" (id.).

Further, in general a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014], aff'g 2011 WL 12882793, at *16 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred

by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [indicating the district's "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]. As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs" (34 CFR 300.39[a][3]), the omission of a particular methodology is not necessarily a procedural violation (see R.B., 589 Fed. App'x at 576; R.E., 694 F.3d at 192-94 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]; R.B., 589 Fed. App'x at 576; A.S., 573 Fed. App'x at 66 [finding that it could not "be said that [the student] could only progress in an ABA program"]).

In her March 2018 evaluation report, the neuropsychologist indicated that the student exhibited "significant difficulty" identifying and producing rhyming sounds and the beginning sounds of words, which were phonemic awareness skills needed for word decoding and oral reading fluency (Parent Ex. H at p. 12). She further determined that the student's reading skills were "within or below the first-grade" level, and that, with regard to reading, he was not progressing at the same level as his peers (*id.*). Due to the student's "significant phonological difficulties and being significantly behind his same-grade peers in reading and writing while showing stronger visuospatial skills, auditory comprehension with contextual cues, and mathematics skills," the neuropsychologist determined that the student met the criteria for a specific learning disorder in reading (*id.* at p. 13). According to the neuropsychologist, the student required a "multisensory curriculum" and she recommended that he receive "evidence-based academic instruction in small classes" using methods such as Orton-Gillingham or Wilson (*id.* at pp. 13-14). She further indicated that instructors should use the student's areas of strength (visual perception and reasoning) and that the student required "explicit and organized explanation" of decoding and spelling rules (*id.* at p. 14). The April 2018 IEP described in detail the student's reading performance, including his difficulty accurately identifying all letter sounds, decoding words, and applying decoding strategies (Parent Ex. C at pp. 2-4). Additionally, the student's slow reading rate hindered his ability to comprehend what he had read (*id.* at p. 3). The IEP indicated that the student needed to "improve his phonological awareness and decoding skills," sight word recognition, reading fluency, and basic understanding of stories (*id.* at p. 4).

According to the April 2017 IEP, the student began receiving "a decoding intervention program" in kindergarten, which continued through first grade (Parent Ex. B at p. 1). The April 2018 teacher progress report prepared by the student's second grade charter school teachers indicated that he received five 45-minute sessions per week of small group reading intervention targeting decoding, encoding, and fluency skills using Wilson (Parent Ex. AA at p. 1). At the April 2018 CSE meeting, the teachers reported that the student had "made very limited progress over the last few years" and that, since September 2017, he had "only moved up two units (2.1 to 2.3) in his Wilson intervention group" (Dist. Ex. 1 at p. 1). Although the CSE discussed that the student had moved up to a "STEP 5" reading level, his teachers opined that this was an "inflated measure" as the student was provided with adult assistance to answer questions and the fluency/accuracy criteria was not met (*id.*).

The parent is correct that the April 2018 IEP does not specify either Orton-Gillingham or Wilson as a method of instruction that teachers would be required to use with the student (see Parent Ex. C). However, the present levels of academic performance in the IEP indicated that teachers should "use multi-sensory, evidence-based programs, especially for phonics instruction," "incorporate many visuals, multi-sensory and multi-modal instructional tools into their teaching" and "differentiate work to [the student's] level" (*id.* at p. 4). The IEP further reflected that the student should be provided with "small group and individualized instruction" and that teachers "must prompt [the student] to read accurately" (*id.*). To this end, management needs recommended in the IEP included multisensory, evidence-based phonics instruction, small group and individualized instruction, visual supports, multi-modal instructional tools, and prompting to read accurately and answer questions (*id.* at p. 6). Review of the student's reading annual goals shows that they address decoding, fluency, and comprehension skills, and recognition of sight words, and on appeal the parent does not assert the annual goals are inappropriate (Tr. pp. 111-15; Parent Ex. C at pp. 8-9; see Req. for Rev.).²³ Therefore, as there is no dispute regarding the April 2018 IEP's description of the student's reading needs, and the IEP addresses those needs via specific annual goals and recommendations for the use of multisensory, evidence-based programs that incorporate visual support and small group instruction—recommendations consistent with those from the neuropsychologist—the evidence in the hearing record does not support a finding that the absence of a recommendation for Orton-Gillingham or Wilson methodology on the IEP rises to the level of a denial of a FAPE (compare Parent Ex. C at pp. 2-4, 6, with Parent Ex. H at pp. 13-14).²⁴

3. Transitional Support Services

On appeal, the parent argues that, because the recommended 12:1 special class may have included students with disabilities other than autism, State regulation required the CSE to recommend transitional support services on the student's IEP. The district argues that the services were not required since the April 2018 CSE recommended a more restrictive placement than the student's class at the charter school that he attended for the 2017-18 school year and that, in any event, the lack of transitional support services did not deny the student a FAPE.

Before reaching the merits, an initial observation regarding the parent's claim pertaining to transitional support services is warranted. Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]). In this instance, the parent—as the party requesting the impartial hearing—had the first opportunity to identify the range of issues to be addressed at the impartial

²³ The special education coordinator testified that she is a certified Wilson reading specialist, and that she collaborated with the CSE during the development of the student's reading goals (Tr. pp. 204, 320-23).

²⁴ This is especially true here, as the parent requests on appeal that the SRO award as relief placement in a specific nonpublic school that uses ABA, Fountes & Pinnell, and "Foundations" methods to address students' learning disabilities in reading (Tr. pp. 495-96).

hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b], 300.508[a]; 8 NYCRR 200.5[j][1]; Application of a Student with a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141). Upon review, I find that the parent's due process complaint notice cannot reasonably be read to include challenges to the appropriateness of the April 2018 IEP based upon the lack of transitional support services (see generally Parent Ex. A). Moreover, a review of the hearing record shows that the district did not agree to expand the scope of the impartial hearing, and the parent did not seek to amend the August 2018 due process complaint notice.²⁵ Nevertheless, out of an abundance of caution, the merits of the parent's claim will be addressed, with the understanding that the lack of a fully developed hearing record on the issue is likely attributable to the parent's failure to raise the claim.²⁶

Transitional support services are required by State regulation to be included on a student's IEP when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement," and consist of "a special education teacher with a background in teaching students with autism [who] shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Elsewhere in State regulations, transitional support services are defined as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]).

The parent and the special education coordinator for the charter school testified that the April 2018 CSE did not recommend transitional support services to accompany the CSE's recommendation that the student move from the charter school to a 12:1 special class in a district non-specialized school (Tr. pp. 273-74, 513-14). However, the April 2018 CSE recommended a more restrictive environment (a special class) relative to the general education class the student attended at the charter school during the 2017-18 school year, and therefore, the transitional support services, as defined in 8 NYCRR 200.1(ddd), would not have been required. Even assuming that there is merit to the parent's broad interpretation of the requirement applicable to students with autism (8 NYCRR 200.13[a][6]) in terms of what transitions would trigger the requirement for such services—i.e. as the parent implies in this case, anytime the proposed placement would include students with disabilities other than autism,²⁷ notwithstanding that the student would be moving from an environment with students that did not have autism, specifically a general education environment with nondisabled students, to a more restrictive educational

²⁵ Nor could it be deemed that the district opened the door to this issue as the only discussion of transitional support services during the impartial hearing arose during the parent's attorney's direct examination of the charter school special education coordinator and the parent (Tr. pp. 273-74, 513-14; see M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018], appeal dismissed [2d Cir. Aug. 16, 2018]).

²⁶ I also note that, in its answer, the district did not raise the scope of review as a ground to dismiss the parent's claim relating to transitional support services.

²⁷ There is no evidence in the hearing record regarding the disabilities of the other students that attended the classroom to which the district assigned the student to attend for the 2018-19 school year.

setting²⁸—the failure to include transitional support services on the student's April 2018 IEP would not rise to the level of a denial of a FAPE.

The special education coordinator for the student's charter school testified that "a change to a new environment would be very unsettling for [the student] and that, therefore, "some level of a transition plan would be appropriate for him" (Tr. p. 280). The director of Kid Success, Inc., also testified that she had concerns about the student transitioning to a new placement "without the support needed" (Tr. pp. 352-53, 367). Likewise, the parent expressed her belief that the student should have a plan in place for "how he transition[s] into the next place" (Tr. p. 520). However, the only testimony as to what such transition support or plan might entail for this student related to the student's need for a paraprofessional (Tr. p. 353), which is a service delivered directly to the student (and is discussed in detail above), not a transitional support service as defined in State regulation, which is a service delivered to the student's teacher (8 NYCRR 200.1[ddd]; 200.13[a][6]).²⁹

Thus, even assuming the parent raised the claim regarding transitional support services as an issue to be resolved at the impartial hearing, the parent does not prevail on this issue as, even if they were required, the hearing record presents no justification why the absence of such services in the IEP was so significant as to deny the student a FAPE in this case (A.M., 845 F.3d at 539-40, citing R.E., 694 F.3d at 195).

C. Relief

1. Compensatory Education

The parent seeks compensatory education in the form of additional tutoring services and parent counseling and training as a remedy for the CSE's failure to recommend a 1:1 paraprofessional on the student's IEP for the 2018-19 school year. Specifically, the parent seeks

²⁸ During the impartial hearing, the parent's attorney articulated her understanding that, for a student with autism, the CSE was required to include transitional support services on the IEP "when there's a change in placement from one school to another, one classroom to another, or from special ed[ucation] to gen[eral] ed[ucation], or vice versa" (Tr. p. 273). This description is patently broader than the requirements set forth in State regulations (8 NYCRR 200.1[ddd]; 200.13[a][6]).

²⁹ There is additionally some evidence in the hearing record regarding the student's ability to transition from activity to activity or from room to room (see Tr. pp. 275-76 [the student doesn't "necessarily" have difficulties with transitions from place to place or activity to activity]; Parent Ex. FF at p. 1 [the student transitions appropriately to speech-language therapy]), which may further support a finding that the lack of transitional support services did not deny the student a FAPE (A.M., 845 F.3d at 540 [finding that, because the student "had made significant progress in his ability to transition between classroom settings without resulting in any notable problems, the failure to specify transitional support services in the IEP for [the student's] teacher could not have deprived [the student] of a FAPE"]; see also E.E. v. New York City Dep't of Educ., 2018 WL 4636984, at *5 [S.D.N.Y. Sept. 26, 2018]). And, while the April 2018 IEP did not include transitional support services, it set forth the types of supports from which the student might benefit in anticipation of a transition (i.e., "[w]arnings before transitions" and "use of a timer") (Parent Ex. C at p. 5).

165 hours of academic tutoring and 10 hours of parent counseling and training, all with a provider qualified to employ ABA.³⁰

Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see 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 Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student "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"])).

The parent points to the affidavit from the director of Kid Success, Inc., as the basis for her calculation of the requested compensatory ABA tutoring and parent counseling and training (IHO Ex. III). The director of Kid Success, Inc., based her opinion that the student required 165 hours of compensatory ABA tutoring on her conclusion that the student "should have received 8.25 hours per week of ABA instruction"; she later confirmed in testimony that her "recommendation was based on [what the student] wasn't provided for the 2018/19 school year" (Tr. p. 288; IHO Ex. III at ¶¶ 29-30). As for her recommendation for compensatory parent counseling and training, she based it on her opinion that "[t]he parent's component is a very crucial component to an ABA program" and that the student's IEP should include an "increased mandate" of parent counseling and training services (IHO Ex. III at ¶ 32). However, although the parent alleged in her due process complaint notice that the April 2018 CSE failed to consider whether the student would benefit from a particular methodology such as ABA (Parent Ex. A at p. 8), she only pursued her

³⁰ While the parent's request for compensatory education relief is denied for the reasons articulated herein, it does not go unnoticed that the district failed to set forth—at the impartial hearing or in its answer to the parent's request for review—any position with regard to a compensatory award. 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).

methodology argument on appeal with respect to Wilson or Orton-Gillingham reading instruction, as discussed above (see generally Req. for Rev.). Likewise, although the parent alleged in her due process complaint notice that the April 2018 CSE recommended an insufficient amount of parent counseling and training services (Parent Ex. A at p. 7), she did not continue this allegation in her request for review (see generally Req. for Rev.). Further, the finding herein that the district denied the student a FAPE does not pertain to the CSE's recommendation or lack thereof for ABA services or parent counseling and training. On the contrary, the determination herein that the district failed to offer the student a FAPE is based on the April 2018 CSE's failure to include more individualized adult support on the student's IEP to address his attention-related needs. As such, there is no clear nexus between the requested award of compensatory ABA tutoring and parent counseling and training and the basis for the finding that the district denied the student a FAPE for the 2018-19 school year.

During her testimony at the impartial hearing, the director of Kid Success alternatively indicated that her recommendation for compensatory ABA tutoring "was based on the fact that [the student] ha[d] not had a paraprofessional with him for the 2018/'19 school year" (Tr. pp. 364-65). This rationale may have been more persuasive in this case to the extent the compensatory tutoring may have served to remedy the student's inability to access instruction due to the lack of a 1:1 paraprofessional. However, for 2018-19 school year, the district was obligated, pursuant to the IHO's October 2018 interim decision, to deliver as the student's pendency placement and services all of the student's related services, assistive technology, and 1:1 paraprofessional services at the charter school (Interim IHO Decision at pp. 1-3). Further, in his final decision, the IHO found that the district failed to implement the 1:1 paraprofessional services for a portion of the 2018-19 school year and, accordingly, ordered the district to provide the student with a 1:1 paraprofessional from September through December 2019 "as compensation for services missed" (IHO Decision at p. 10). Neither party appealed the IHO's pendency determination or his order of compensatory education pertaining to the district's failure to implement the 1:1 paraprofessional services; accordingly, these determinations have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).³¹ Based on the student's receipt of 1:1 paraprofessional services during the 2018-19 school year pursuant to pendency and the standing compensatory award for the lapse in pendency services, there does not appear to be a further "need for education 'restor[ation]'," and it appears the student "may be deemed 'whole'," making further award of educational services unnecessary (Smith v. Cheyenne Mtn. Sch. Dist. 12, 2018 WL 3744134, at *6 [D. Colo. Aug. 7, 2018], quoting G.L. v Ligonier Val. Sch. Dist. Auth., 802 F.3d 601, 625 [3d Cir. 2015]). A request for compensatory education "should be denied when the deficiencies suffered have already been mitigated" (N. Kingston Sch. Comm. v. Justine R., 2014

³¹ The IHO ordered that the compensatory 1:1 paraprofessional services be delivered "at the assigned community school 12:1 special class placement . . . which the student will attend" (IHO Decision at p. 10). It is unclear why the IHO believed that the student would attend a 12:1 special class in a community school for any portion of the 2019-20 school year since there is no indication in the hearing record that the CSE convened as of the date of the IHO decision to conduct the student's annual review or, if it had, that it continued the recommendation that the student attend a 12:1 special class in a community school. As noted, neither party has appealed this aspect of the IHO's decision; however, hopefully the parties will be able to agree that the ordered compensatory services be implemented at whatever placement the student attends for the 2019-20 school year in the event it is not a 12:1 special class in a community school as the IHO described.

WL 8108411, at *9 [D.R.I. Jun. 27, 2014], report and recommendation adopted, 2015 WL 1137588 [D.R.I. Mar. 12, 2015] see Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]). Accordingly, the parents' request for compensatory ABA tutoring and parent counseling and training is denied.

2. IEP Amendments and Prospective Placement in a Nonpublic School

The parent also requests that the CSE be required to develop an IEP for the student going forward that includes provision of ABA as a service or methodology, a 1:1 paraprofessional, and small group reading instruction employing an evidence-based methodology such as Orton-Gillingham or Wilson. The parent further indicates that the student has been accepted at a particular State-approved nonpublic school, and the parent requests that the CSE be required to place the student at such school until the district can provide a 12:1 program with a 1:1 paraprofessional that can deliver the aforementioned methodologies.

Relief in the form of IEP amendments and prospective placement of the student in a nonpublic school is not appropriate in this instance as it would tend to circumvent the statutory process, under which the CSE is the entity tasked with reviewing information about the student's progress under current educational programming and periodically assessing a student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). At this point, the 2018-19 school year is over, and, in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to revise the student's program and developed a new IEP for the student for the 2019-20 school year (see Parent Ex. C at p. 1; see also 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). The more appropriate course is to limit review in this matter to remediation of past harms that have been explored through the development of the underlying hearing record. If the parent remains displeased with the CSE's recommendation for the student's program for the 2019-20 school year, she may obtain appropriate relief by challenging the district's determinations regarding that school year in a separate proceeding (see Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).³²

³² The parent borrows language from an exception to the mootness doctrine to argue that, because the challenged conduct by the district is "capable of repetition . . . yet evading review," the programmatic changes to the student's IEP should be considered (Parent Mem. of Law at p. 11, citing Honig v. Doe, 484 U.S. 305, 318-23 [1988]). As this language does not articulate the standard for determining an appropriate remedy—and instead focuses on whether a dispute between the parties is "real and live," and not academic—it has not been applied to the consideration of the relief requested by the parent.

Moreover, for reasons similar to those set forth above with respect to the parent's request for compensatory education, some of the parent's requests for amendments to the IEP (i.e., provision of ABA as a service or methodology and small group reading instruction employing an evidence-based methodology) and prospective placement of the student in a nonpublic school do not align with the ground underlying the determination herein that the district failed to offer the student a FAPE. Nevertheless, as set forth herein, the district will be required to complete an assistive technology evaluation and fund an FBA by an independent evaluator. Once the assistive technology evaluation and the FBA by an independent evaluator are completed, the CSE should reconvene and consider, among other things, whether the student requires assistive technology and/or more individualized adult support (relative to that set forth on the April 2018 IEP) to address his attention needs, particularly the extent to which such support is necessary to implement any BIP developed for the student. After due consideration of the foregoing, the district shall be required to provide the parent with prior written notice on the form prescribed by the Commissioner, specifically indicating whether the CSE recommended or refused to recommend such services on the student's IEP and explaining the basis for the CSE's recommendation therein, as well as describing the evaluative information relied upon in reaching these determinations (8 NYCRR 200.5[a]; see 34 CFR 300.503[b]). Moreover, if the parent so requests, the CSE should consider whether the student requires placement at a State-approved nonpublic school, such as that identified by the parent, in order to receive a FAPE in the LRE, and similarly provide prior written notice of its determination.

D. Independent Educational Evaluation—Functional Behavioral Assessment

On appeal, the parent argues that, despite the parent's August 2018 letter requesting an IEE in the form of an FBA and BIP, the district did not defend its FBA or BIP. For the reasons set forth below, the district is required to fund an FBA by an independent evaluator.

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

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

In this case, the evidence in the hearing record shows that on August 16, 2018 the parent wrote to the principal of the charter school and opined that the student had "not been comprehensively evaluated by the [district]," specifying that she did "not agree that the April 2017 FBA comprehensively evaluated" and "address[ed] [the student's] numerous interfering behaviors that impede[d] his learning" (Parent Ex. JJ). She continued, "[a]s such, [the student had] not been receiving an appropriate education that addresse[d] his individual needs" (*id.*).³³ In response, the district did not agree to fund the requested IEE or initiate an impartial hearing to establish the appropriateness of its FBA (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]).

During the impartial hearing initiated by the parent, the district set forth its position that the student was not in need of an FBA by an independent evaluator because it conducted an FBA of the student in March 2017 and "the original behaviors that [were] outlined in that FBA [we]re still the behaviors that [we]re occurring," it did not "see a need to update the FBA," and that the student's BIP was updated in April 2018 (*see* Tr. pp. 21-22, 24-25, 158).³⁴ The IHO stated that the district "would need to demonstrate in some way that the 2017 FBA [was] still an appropriate document to be relied upon and that its determination to alter the BIP [was] appropriate and obviate[d] the necessity for an updated FBA," a statement with which both parties agreed (Tr. p. 27; *see* Parent Ex. T).

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

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

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

³³ Less than two weeks later, the parent submitted her due process complaint notice in this matter and alleged that the district failed to respond to her request for an IEE in the form of an FBA and BIP (Parent Ex. A at p. 8).

³⁴ The hearing record contains a number of documents entitled "FBA" and/or "BIP" (*see* Parent Exs. Q; R; S; T; U; V; X). The school psychologist testified that exhibits Q, R, and S were not FBAs or BIPs but, rather, were cover pages that attached to other documents (Tr. pp. 147-48, 150-51). Exhibit U is an FBA dated May 2016, and Exhibit T is an FBA dated March 2017 (Parent Exs. T at p. 1; U at p. 1). The school psychologist testified that the CSE did not conduct an FBA of the student in 2018 (Tr. p. 149; *see* Parent Ex. W).

based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

In this case, the hearing record provides little evidence of the appropriateness of the March 2017 FBA. Aside from entering that FBA as an exhibit at the impartial hearing, testimony from the only district witness did not focus on how the FBA was conducted, the content of the FBA, or how it met the regulatory requirements set forth above (see Tr. pp. 149-52; Parent Ex. T). Rather, at the impartial hearing during the district's direct case, the majority of the discussion about the FBAs contained in the hearing record occurred between counsel for the parent, counsel for the district, and the IHO, and did not specifically relate to the substantive appropriateness of the March 2017 FBA (see, e.g., Tr. pp. 83, 147-61). Further, the director of Kid Success testified regarding her critiques of the FBA developed by the district (see Tr. pp. 344-46, 354-57; Parent Ex. T), and the district failed to rebut this testimony.

In its answer, as evidence that the hearing record does not support the parent's request for an FBA and BIP by an independent evaluator, the district points to the March 14, 2018 neuropsychological evaluation report, which indicated that "[the] BIP as written in most recent language appears to reflect ongoing needs for [the student]. According to his mother, his behavior has improved with such interventions. Therefore, [the] BIP remains appropriate and is recommended to be continued as written" (see Parent Ex. H at pp. 1, 14 [emphasis added]; Answer ¶ 20). The district also refers to the school psychologist's testimony that the April 2018 CSE reviewed a BIP, which included updated data, as evidence of its appropriateness (see Tr. p. 166). Regulatory requirements for the contents of a BIP are different than those for an FBA (compare 8 NYCRR 200.1[mmm]; 200.22[a], with 8 NYCRR 200.1[r]; 200.22[b]), and the district points to no legal argument in support of its apparent contention that evidence relating to a BIP supports a conclusion that the March 2017 FBA was appropriate and adequately identified the student's behavioral needs (see generally Answer).³⁵ Finally, the district's implication in its answer that the parent's motives for seeking an IEE has legal bearing on the district's obligation to respond to the parent's request and defend its FBA is misguided (cf. Letter to Thorne, 16 IDELR 606 [OSEP 1990] [stating that there is no requirement that a parent articulate the grounds for disagreement with the district evaluation but that, if a district requests that the parent specify areas of disagreement, it may not deny reimbursement for the parent's failure to so specify]).

Given the foregoing, the parent is entitled to obtain an FBA by an independent evaluator at district expense, which may include a proposed BIP for the student. Consistent with State regulation, the district shall—if requested—provide the parent with a list of independent evaluators from which the parent can obtain IEEs for the student at district expense (8 NYCRR 200.5[g][1][i]). If, however, the parent wishes to obtain evaluation(s) from evaluator(s) whose fee(s) do(es) not fall within the district's cost criteria, the district must provide the parent with an opportunity to demonstrate that unique circumstances justify IEE(s) that do(es) not fall within the district's cost criteria (see 8 NYCRR 200.5[g][1][ii]). As noted above, the district shall be required to convene and consider the independent FBA and any proposed BIP included therewith.

³⁵ The neuropsychologist's report is dated March 14, 2018, which preceded the conclusion of the data collection period for the "updated BIP" on March 27, 2018 (compare Parent Ex. H at p. 1, with Parent Ex. W at p. 6). Therefore, it appears that the neuropsychologist and the April 2018 CSE did not review the same BIP.

VII. Conclusion

The evidence in the hearing record establishes that, because the April 2018 CSE recommended insufficient 1:1 adult support to address the student's attention-related needs, the district failed to offer the student a FAPE for the 2018-19 school year. Despite the district's denial of a FAPE for the 2018-19 school year, no compensatory education is warranted in this matter; however, as set forth above, the district shall be required to conduct an assistive technology evaluation, fund an FBA by an independent evaluator, and reconvene the CSE to consider the results thereof.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated June 13, 2019, is modified by reversing those portions which found that the district offered the student a FAPE for the 2018-19 school year and denied the parent's request for an FBA by an independent evaluator at district expense;

IT IS FURTHER ORDERED that the district shall conduct an assistive technology evaluation of the student within 30 days of the date of this decision;

IT IS FURTHER ORDERED that the district shall fund an FBA of the student by an independent evaluator, consistent with the body of this decision; and

IT IS FURTHER ORDERED that the CSE shall convene upon completion of the assistive technology evaluation and receipt of the FBA to review and consider the completed evaluations.

Dated: **Albany, New York**
 August 23, 2019

SARAH L. HARRINGTON
STATE REVIEW OFFICER