



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-053

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

Appearances:

Harris Beach, PLLC, attorneys for petitioner, by Anne M. McGinnis, Esq.

Cara M. Briggs, Esq., attorney for respondents

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from that portion of a decision of an impartial hearing officer (IHO) which determined that it failed to offer an appropriate educational program to respondents' (the parents') son for the 2016-17 school year and a portion of the 2017-18 school year. The parents cross-appeal from those portions of the IHO's decision which determined that the educational program and related services that the district's Committee on Special Education (CSE) recommended for their son for the 2017-18 and 2018-19 school years were appropriate. The appeal must be sustained in part. The cross-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's early educational history is discussed in detail below and therefore will only briefly be recounted here. The student attended general education classes in a district elementary school from kindergarten through the beginning of second grade (see Tr. p. 181; Parent Exs. 24a; 24c). Throughout that time, the student's teachers expressed concern regarding his behavior and social/emotional development and referred the student to the district's instructional support team (IST) on several occasions (Parent Exs. 35a; 35e; 35f; 43a at pp. 1-70). Based on the recommendations of the IST, district staff attempted numerous interventions to address the

student's academic, behavioral, and social/emotional needs (Parent Exs. 10c-e; 35b; 35d; 35f). During this same time, the student's parents attempted to manage his behavior through private counseling and the use of medication (Parent Ex. 43a at pp. 1, 18, 23, 29, 65; Dist. Ex. 66). At the beginning of second grade the student's behavior problems increased and his teacher referred him to the IST and then the pupil study team (PST) (Parent Exs. 35f; 36a). The PST recommended that the student undergo an evaluation that included psychological, academic, occupational therapy (OT)/sensory, and speech-language testing as well as a functional behavioral assessment (FBA) (Parent Ex. 36a at p. 3).

On November 9, 2017, the district referred the student to the committee on special education (CSE) for evaluation (Parent Ex. 4a at p. 1; see Dist. Ex. 4).

The district subsequently conducted a psychological evaluation, an educational evaluation, a speech-language evaluation, and an OT evaluation of the student (Parent Exs. 7, 8, 9a, 10f; Dist. Ex. 35). The district also conducted observations of the student, measured his off-task and "disruptive" behavior, and conducted an FBA (Parents Exs. 18ai at pp. 1-11; 15; 16; see also Parent Ex. 43a at pp. 83-95, 98-106, 134-37). The FBA indicated that the majority of the student's disruptive behavior was of moderate intensity and consisted of the student shouting out and making loud, unexpected noises (Parent Ex. 15 at p. 3). On January 8, 2018 the district created a behavioral intervention plan (BIP) for the student (Parent Ex. 17a at pp. 1-9). On January 11, 2018 the student was suspended from school for making threats against a student in his class (Parent Ex. 19a).

On January 18, 2018, a CSE convened to conduct an initial eligibility determination meeting and found the student eligible for special education services as a student with an emotional disturbance (Parent Ex. 3a at pp. 1-13; see Parent Ex. 3ai; 6 at pp. 1-3). The CSE developed an IEP in which it recommended the student attend a 12:1+1 special class for two hours and 30 minutes daily and receive related services of one 30-minute session per week of individual counseling, one 30-minute session per six-day cycle of OT in a small group, one 30-minute session per six day cycle of OT in a small group, one 30-minute session per six-day cycle of speech-language therapy in a small group in a special class, and two 15-minute sessions per six-day cycle of speech-language therapy in a small group in the therapy room (Parent Ex. 3a at pp. 1, 10). In addition, the CSE recommended that the student be provided with a 1:1 aide, five hours daily; a BIP; and ten 30-minute behavioral intervention consultations for the team per year (Parent Ex. 3a at p. 11). On January 19, 2018 the parent provided written consent for the initial provision of special education services (Dist. Ex. 9). On or about January 24, 2018 the student began attending the 12:1+1 special class (Tr. p. 178; Parent Ex. 3a at p. 1).

Data collected in March 2018 as part of the student's BIP showed an increase in the student's "severe" behaviors (Parent Exs. 18ai at pp. 12-19; 18c at pp. 55-58; compare Parent Ex. 17a at p. 2 with Parent Ex. 17a at p. 8). In addition, emails exchanged between district staff and the parents indicated that the student engaged in disruptive behaviors in the 12:1+1 special class and at times had to be moved to an empty room with an adult to receive instruction (Parent Ex. 43a at pp. 160-241).

The PST convened on March 14, 2018 for a "six week check" of the student's performance in the 12:1+1 special class (Parent Ex. 36e at p. 2). Team members expressed concern about the student's behavior and questioned whether the 12:1+1 class could provide the student with the

support he needed; the team discussed other placement options for the student including other special class ratios (Parent Ex. 36e at pp. 2, 3; see Parent Ex. 43a at p. 244). The PST ultimately determined that the district should refer the student to BOCES for placement in a 6:1+1 special class and that the hours of the student's paraprofessional should be increased for the remainder of the 2017-18 school year (Parent Ex. 36e at p. 3). The PST also discussed the possibility of providing the student with a 1:1 special education tutor or shortening his school day if another placement was not available (Parent Ex. 36e at p. 3).

In April and May 2018, the student's behavior continued to escalate, and he was suspended on two more occasions (Parent Exs. 19b; 19c). BIP data collected around this time indicated that the student was removed from the classroom setting on average two times per day (Parent Exs. 17a at p. 9; 18ai at pp. 20-26; 18c at pp. 25-28).

On May 11, 2018 a CSE convened to conduct the student's annual review and develop an IEP for his third-grade year (2018-19) (Parent Ex. 3b at pp. 1-13; 3bi at pp. 1-5). Based on the student's struggle to manage his emotions in the 12:1+1 special class, the CSE determined that a referral to 6:1+1 special class with a counseling component was appropriate for the student (Parent Exs. 3bi at pp. 1-4; 4b at p. 1).

The May 2018 CSE amended the student's January 2018 IEP for the remainder of the 2017-18 school year by adding of one hour of individual "special class" tutoring per day and decreasing the time the student spent in the 12:1+1 special class from 2 1/2 hours to 1 1/2 hours per day (Parent Ex. 3ci; see Parent Ex. 3c at pp. 10; 4c). The May 2018 CSE meeting minutes indicated that the tutoring was an interim support that would be provided while the district referred the student to a program with a smaller, 6:1+1 special class with a counseling component (Parent Exs. 3ci; 4c at p. 1). The parents were in agreement with referring to the student to a more supportive program but requested that the district trial the student in an 8:1+1 special class in district before referring him to a 6:1+1 special class out of district (Parent Ex. 3ci at pp. 2-4; 4d). On May 15, 2018 the district sent a referral packet for the student to BOCES (Parent Ex. 32 at pp. 1-48).

The student's final report card for second grade (2017-18) indicated that his social/emotional effort and work habits were mostly "low" or inconsistent (Parent Ex. 24c at p.1). In or around July 2018 the parents obtained a neurofeedback evaluation that indicated the student had dysregulated brain wave patterns and advised the district that the student had begun neurofeedback training sessions (Dist. Ex. 31 at pp. 1, 3-12).

In an informal meeting with the school principal and behavioral consultant in August 2018, the parents expressed their desire to have the student to attend a general education setting "with 1:1" (Parent Ex. 37 at p. 1). The parents reported that they were advised that because they did not want a 6:1+1 special class for the student, the district would recommend that he receive home instruction (Parent Ex. 37 at p. 1).

On August 29, 2018 a CSE convened and recommended that the student attend a BOCES 6:1+1 special class for the 2018-19 school year (Parent Ex. 3e at pp. 1, 11). In addition, the CSE recommended that the student receive related services of one 30-minute session per week of individual counseling, two 30-minute sessions per week of OT in a small group, two 30-minute sessions per week of speech-language therapy in a small group, a BIP daily across all settings, and

20 one-hour behavioral intervention consultations for the team per year across all school settings (Parent Exs. 3e at pp. 1,11; 4d at pp. 1-2). At the CSE meeting the parents disagreed with the recommendation for the student to attend the BOCES 6:1+1 special class at Bird/Morgan and asserted that the district had not done enough to support the student in-district (Parent Ex. 3ei at pp. 2-3). The parents stated that they would not consent to the student attending the BOCES 6:1+1 special class (Parent Ex. 3ei at p. 6; see Parent Ex. 4d).

On August 29, 2018 the parents requested psychological and psychoeducational independent educational evaluations (IEEs) (District Ex. 63). Two days later on August 31, 2018, the parents filed a due process complaint notice with the district (IHO Ex. A).¹

The student was ultimately accepted by BOCES for attendance at its 6:1+1 special class at Bird/Morgan beginning on September 5, 2018 and attended for one day in September 2018 before his parents unilaterally withdrew him (Tr. pp. 1765-66, 1939, 1942, 2143-44).

The parents requested pendency and in a September 13, 2018 email the district confirmed the student's pendency placement would be based on his May 2018 IEP; more specifically the student would be a third grade student in the district elementary school where he would attend a 12:1+1 special class for 1 1/2 hours per day with a 1:1 paraprofessional, and receive 1 1/2 hours per day of 1:1 tutoring, as well as the recommended related services of counseling, OT, and speech-language therapy (Dist. Ex. 68).²

In a September 14, 2018 letter to the parents, the district approved their request for a psychological/psychoeducational IEE (Dist. Ex. 64 pp. 1-2; see Dist. Ex. 65).

A. Due Process Complaint Notice

After withdrawing their August 2018 request for an impartial hearing, the parents again filed a due process complaint notice dated November 2, 2018, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17, 2017-18 and 2018-19 school years (Dist. Ex. 1 at p. 2). Initially, the parents argued that the district failed to evaluate the student in all areas of suspected disability and provide the student with a FAPE in the student's least restrictive environment (LRE) (id. at p. 1).

For all of the school years at issue, the parents argued that the district violated the student's rights and denied him a FAPE under the IDEA and Section 504 of the Rehabilitation Act of 1974 (section 504) (Dist. Ex. 1 at p. 5). Next, the parents alleged that upon finding the student eligible for special education, the CSE inappropriately classified the student as a student with an emotional disturbance when the appropriate classification for the student should have been a student with an OHI (id. at p. 3). The parents also argued that they were deprived of their right to meaningful

¹ The parents' August 31, 2018 due process complaint was withdrawn without prejudice by the parents prior to the commencement of this proceeding (IHO Decision at p. 1; IHO Exs. A; G at p. 1).

² The email noted that although the student's IEP listed one hour of tutoring, it was discussed that 1.5 hours would work better with his third-grade schedule and all agreed that would be appropriate (Dist. Ex. 68). In addition, the email noted that the district would provide home tutoring 2 1/2 hours per day during the "hiring process" of the paraprofessional (Dist. Ex. 68).

participation in the development of the student's IEPs because of the lack of appropriate evaluations, the CSEs failed to appropriately consider their concerns or adequately describe their concerns in the IEPs, and the outcome of the May and August 2018 CSE meetings were predetermined (id. at p. 4). The parents asserted that an occupational therapist did not attend the CSE meetings to discuss the student (id.). Next, the parents contended that the district's psychological and educational evaluations of the student were inadequate and that the OT evaluation was not adequate because it failed to adequately assess the student's sensory needs (id. at p. 4).

The parents alleged that the IEPs failed to accurately describe the student (Dist. Ex. 1 at p. 3). According to the parents the speech-language therapy services and speech-language goal were not adequate in the IEPs at issue (id. at p. 4). The parents also asserted that the student's OT goals were inadequate (id.). Next, the parents contended that the district failed to conduct a sufficient FBA and prepare an appropriate BIP for the student (id.). The parents alleged that the individual counseling services in the student's IEP's were inadequate in light of the student's needs (id.). The parents also contended that the district failed to include group counseling in the student's IEPs (id.). Additionally, the parents argued that the IEPs lacked a goal to teach the student how to transfer social awareness skills learned in counseling to group settings (id.).

The parents also identified more specific allegations applicable to the individual IEPs. Specifically upon finding the student eligible during the 2017-18 school year, the parents alleged that the January 18, 2018 CSE's recommendation to place the student in a 12:1+1 special class was based on inadequate information and without "implementation of behavioral supports" or "attempts at less restrictive options" (Dist. Ex. 1 at p. 2). The parents also alleged that the program and services did not meet the student's social/emotional, management or academic needs and that the student was not grouped with other students with similar needs (id. at p. 5). Next, the parents contended that the FBA was not adequate because it was based on incomplete data and sources of information, failed to appropriately identify contextual factors that contribute to the student's behavior, failed to include information from the student and failed to include relevant information provided by the parents (id. at p. 2). The parents further alleged that the BIP was deficient and ineffective (id. at p. 3). The parents also alleged that the BIP was incomplete in its description of the baseline data, inadequate in its description of strategies to prevent the occurrence of the behavior and to teach individual alternative and adaptive behaviors to the student and inadequate in providing consequences for targeted inappropriate behaviors and alternative acceptable behaviors (id.). Additionally, the parents alleged that no evidence of meaningful progress monitoring was provided to the parent and there is no evidence that revisions to the BIP were ever made to address its ineffectiveness (id.).

For the remainder of the 2017-18 school year and all of the 2018-19 school year, the parents argued that the recommendations in the May 2018 and August 2018 IEP's were not appropriate because the CSE's failed to consider any less restrictive options for the student, including failing to consider a combination of in-district programming and services to meet the student's unique needs (Dist. Ex. 1 at p. 3). Next, the parents argued that the CSE's failed to consider their request for a general education classroom with a teaching assistant for the student (id.). The parents also argued that the CSE's failed to consider or recommend a 12-month program or specialized transportation for the student (id.). Additionally, the parents argued that the CSE's failed to appropriately group the student with peers of similar needs (id.).

With respect to the psychological/psychoeducational IEE for the student, the parents argued that the district agreed to partial reimbursement for the evaluation; but the district improperly placed a "capped" fee at an arbitrary amount that was not consistent with the community rate for such an evaluation (Dist. Ex. 1 at p. 5).

As relief, the parents requested among other things, findings by the IHO the district violated the IDEA and section 504 (Dist. Ex. 1 at p. 5). The parents also sought orders from the IHO directing the district to provide (1) staff training from a qualified expert in advanced ABA in the development and implementation of an appropriate social emotional support plan for the student; (2) staff training from an individual qualified in ABA in the development of a sufficient and effective FBA and BIP and an order directing the district to conduct an appropriate FBA and BIP under the supervision of said qualified individual; (3) reimbursement to the parents for the full cost of the independent psychological and educational evaluation within 30 days; (4) an independent OT evaluation at public expense within 15 days; (5) the parents with the option of choosing to enroll the student in a different school within the Pittsford Central School District or in a private school or neighboring district at the district's expense; (6) compensatory services for the failure to provide the student a FAPE of an amount, type and scope to be determined by the IHO; and, (7) payment of the parents reasonable attorney's fees and expenses (Dist. Ex. 1 at p. 5-6). With regard to preparing an IEP going forward, the parents sought specific changes, requesting that the IHO order the CSE to convene within 10 days of receipt of the independent evaluations and develop an appropriate IEP that: (a) changes the student's classification to OHI; (b) accurately describes the student; (c) addresses the parents' concerns; (d) includes staff and school community training regarding the manner in which the student's disability impacts him in the school environment; (e) includes a program and services that meet the student's unique needs in the LRE with appropriate goals; (f) includes a provision for a combination of 1:1 teaching and classroom learning in an integrated co-teach classroom as part of an overall plan to teach the student the skills needed to gradually transition to full time classroom learning; (g) targeted support for the student to learn to manage anxiety in a school setting and develop the ability to transfer appropriate social skills from an individual to a group setting; (h) a plan for the student to check in with preferred staff upon arrival to school that includes specific strategies to ensure the Student is regulated both emotionally and physically before he enters the classroom; and, (i) includes a provision for a specific plan to support the student's sensory needs throughout the school day (*id.* at p. 6). Lastly, the parents sought to continue to request additional relief based on the recommendations in the forthcoming IEE report as well as transportation costs to and from the school selected by the parents (*id.* at pp. 2, 6).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on February 12, 2019, which concluded on October 4, 2019 after 12 days of proceedings (*see* Tr pp. 1-2436). In a decision dated February 29, 2020, the IHO found that the district violated its child find obligations with respect to the student for the 2016-17 school year until the "belated CSE" referral in November 2017 (IHO Decision at pp. 7-8, 31). The IHO found that the district's child find violations "led to inadequately addressed behavior, anxiety and dysregulation in the classroom" (*id.* at p. 16). The IHO further found that by not comprehensively evaluating the student, the district deprived the student of "potential progress"(*id.*). Ultimately, the IHO found that the district's child violations denied the student a FAPE because although the district's IST procedures and in-school accommodations

were evident, there was a failure to act on a situation that warranted referral to the CSE (*id.* at p. 17). While the IHO noted a child find violation, he also noted that the district had been "attentive to a difficult case and resilient in adapting to a situation that [wa]s dynamic and unresolved" (*id.* at p. 29).³

With respect to the parents' claims regarding the FBA and BIP being inadequate, the IHO found that there were errors, but they were of "relatively small import considering the non-stop, emerging problems and the ongoing efforts to remediate the [student's] behavior problems" (IHO Decision at p. 20). Having found that the district complied with the procedural requirements of the IDEA, the IHO determined that the district's FBA and BIP with errors, did not rise to a level of a denial of a FAPE (*id.*).

Turning to the point at which the student was found eligible for special education during the 2017-18 school year, the IHO found the January 2018 CSE developed an appropriate IEP to address the student's needs (IHO Decision at p. 19). The IHO determined that the January 2018 IEP appropriately reflected the student's present levels of performance as per his abilities and needs as they were known at the time, including summarizing information from all of his evaluations and the concerns of the parents (*id.* at p. 21). The IHO found that the annual goals were measurable, observable, and individualized to the student's needs (*id.* at p. 22). Specifically, the IHO ruled that the student's academic goal in math addressed his needs related to making errors due to a lack of attending and his goal in reading addressed his need to improve his specific sounds and blends (*id.*). The IHO found that the student's speech-language goal addressed pragmatic language and conversational skills, which was targeted to improve his social interactions with peers (*id.*). The IHO also found that the student had three social-emotional goals that addressed his needs related to following directions, working independently, and identifying and addressing his feelings (*id.*). In addition, the IHO determined that the speech-language and social-emotional goals addressed the student's needs related to developing social skills and self-regulation and the student's OT goals addressed completing two-step motor tasks and improving visual perceptual skills. (*id.*). The IHO ruled that "[t]he January 2018 CSE developed an IEP to address the [s]tudent's needs in the LRE" (*id.* at p. 19).

With respect to the May 2018 IEP, the IHO found that the district did not deny the student a FAPE because the CSE modified the existing IEP to add one-to-one tutoring in school which gave the student more intensive instruction (IHO Decision at p. 24). The IHO concluded that although the first two IEPs were not successful, the district continued to provide the student with more intensive instruction and that the parents could not rely on information and events that post-dated the IEPs to justify their argument that the IEPs were inadequate (*id.*). With respect to the 2018-19 school year, the IHO found that the August 29, 2018 CSE had no choice but to explore the out-of-district programs and that the IEP was reasonably calculated to confer educational benefit and a FAPE for the student because the reasoning behind the CSE's recommendation was cogent and based upon a significant amount of direct observation of the student (*id.* at pp. 24-26).

³ It is unclear if the IHO meant that the district was nevertheless attentive to the difficult situation before the student was found eligible for special education, afterwards, or both as he made this point after discussing the subsequent school years.

The IHO made note that the parties decided to change the student's pendency placement by agreement during the course of the proceeding as well as the recommendations from a June 2019 "[s]ummary of [i]mpressions" describing observations of the student (IHO Decision at p. 25; Dist. Ex. 74). The IHO was of the opinion that "no one could get a good grasp on the nature of the student's problems" and that only an independent behavioral consultant in a trial 8:1+1 special class placement that was attempted during the course of the impartial hearing had spent considerable time with the student (IHO Decision at pp. 26-27). For relief, the IHO questioned whether the parents would "consider any award a victory" (*id.* at p. 26). The IHO ordered a placement at a public or state approved non-public school of the parents' choice (*id.* at pp. 8, 31). The IHO explained that at the time of the case, an in-district placement was not appropriate and that he was offering the parents "great latitude" in finding an out-of-district program (*id.* at p. 27). Next, the IHO noted that an updated FBA and BIP were needed and ordered that the district update evaluations from all service providers, including an updated behavioral observation within 60 days (*id.* at pp. 29, 31). The IHO also ordered the remand of the matter to the CSE to consider programming options for the future, including placement at a public or state approved non-public school (*id.*). As noted above, the IHO relied on the recommendations of the independent behavioral consultant and related service providers and offered the parents the opportunity to identify, with the assistance of the CSE, a state-approved, non-public program of choice with accompanying transportation (*id.* at pp. 27-28). Lastly, the IHO directed the district to set-up and maintain a bank of 150 hours of parent counseling and training to be provided by a BCBA, or like credentialed educational expert to be utilized by the parents at their discretion during the next three years (*id.* at pp. 29-31). The IHO noted that the parent counseling and training hours could be used to assist in coordinating evaluations, school interface opportunities, understanding the CSE process or any topic that the parents and the provider deemed appropriate and he ordered that payment shall be upon invoice at the market rate at the time the services were utilized and that any unused hours would expire within 3 years from the date of the IHO decision (*id.* at p. 30).

IV. Appeal for State-Level Review

The district appeals from the IHO's decision and argues that the IHO erred in finding that it violated its child find obligations resulting in a denial of FAPE for the 2016-17 school year until the student's referral in November 2017. The district argues that the IHO provided little explanation for the child find violation and argues that it properly utilized "pre-referral strategies the were successful in supporting the [s]tudent within the general education setting prior to [the student's] CSE referral." The district further argues that the student was supported by the IST in kindergarten and first grade and made progress in the general education setting prior to second grade. Additionally, the district argues that the IHO ignored substantial testimony that the student's performance during the relevant time-period demonstrated that the student did not require a CSE referral or formal evaluations and asserts that there is no evidence in the hearing record that the student's behavioral and social/emotional needs became worse because the student was not referred to the CSE before second grade. The district further asserts that the IHO ignored that the student's diagnoses of ADHD and anxiety were insufficient to demonstrate a need for CSE referral when the student did not demonstrate the potential need for special education services. The district notes that the IHO acknowledged that the student made satisfactory progress within the general education setting prior to CSE referral and that the record demonstrated that the student's

behavioral and social/emotional needs did not become significant enough to warrant a CSE referral until the fall of second grade. The district argues to uphold the IHO's finding that the FBA did not deprive the student a FAPE; however, the district argues that the IHO erred in finding that the FBA did not include all required legal components and asserts that even if the FBA were deficient, any deficiencies would have been remedied during the pendency of the proceedings when the student was in the trial placement.

The district alternatively argues that even if the IHO's child find violation is valid, the resulting relief ordered by the IHO was not appropriate. More specifically, the district contends that there is no rational basis for the IHO to order a "blanket remedy" in which the parents can choose any New York state-approved placement for the student. The district contends that the IHO ignored his own finding that the district offered the student a FAPE by providing appropriate IEP's for the 2017-18 and 2018-19 school years and that the IHO ignored procedural requirements for placing the student in an out-of-district program. The district further contends that the IHO ignored that Bird/Morgan represented the least restrictive setting that was appropriate for the student and that given the IHO's finding it offered appropriate IEP's for the 2017-18 and 2018-19 school years, the IHO erred by ordering prospective placement in a state-approved program of the parent's choice for the 2019-20 school year. Next, the district argues that the IHO's award of updated evaluations is not supported by the record. The district argues that the student's behavioral data and BIP were updated by the parent's independent behavioral consultant, such that additional evaluations were not necessary. The district contends that the IHO erred in ordering compensatory education in the form of 150 hours of parent counseling and training. According to the district, there is no evidence in the record that the district's actions prevented the student from receiving an academic benefit or that the student was in need of compensatory services as the student made progress in the general education setting prior to CSE referral. Alternatively, the district asserts that the award is not appropriate because the parent counseling and training would not provide services directly to the student.

The district contends that the IHO erred in failing to rule that Bird/Morgan was an appropriate placement in the student's LRE. The district asserts that Bird/Morgan is able to provide the student all of the interventions identified by the CSE and the student have similar profiles. Lastly, the district asserts that the IHO erred in continually allowing the parents to amend and expand their due process request by changing their claims and requested relief during the hearing. The district asserts that the IHO erred in failing to order that the parents were limited to the issues and relief within their hearing request, which resulted in the creation of a confusing record and an inappropriate expansion of the hearing request. Additionally, the district contends that in the parents' post-hearing brief, the parents significantly modified their requested relief without providing any notice to the district which put the district at an extreme disadvantage in its ability to demonstrate that it provided the student with a FAPE.

In an answer and cross-appeal, the parents respond to the district's request for review by admissions and denials and argues to uphold the IHO's decision that the district failed to offer the student a FAPE by violating its child find obligations for the 2016-17 school year until the student's referral in November 2017. The parents deny that the district demonstrated that it exhausted all in-district supplementary aids and services and that the district demonstrated that Bird Morgan was an appropriate placement in the student's LRE. Next, the parents argue that the IHO erred in failing to employ a Newington LRE analysis and that the CSE failed to fully consider supplementary aids

and services or program modifications or any less restrictive option in making its decision and failed to group the student with students with similar needs. Next, the parents argue to uphold the portion of the IHO's finding that the FBA and BIP were deficient but deny that deficiencies in the FBA and BIP were remedied during the subsequent temporary trial placement at a different school pursuant to the IHO's Interim Order. Next, the parents deny any amendment or expansion to their due process complaint notice. The parents also argue to uphold the IHO's award of relief and argues that the district argues that the district failed to demonstrate that any other award is appropriate.

The parents cross-appeal from that portion of the IHO's decision which found that the district's denial of a FAPE ended with the CSE's referral in November 2017. The parents contend that the IHO ignored evidence that the deprivation of a FAPE caused by the child find violations was ongoing and caused a denial of FAPE throughout the 2017-18 school year and into the 2018-19 school year. The parents further contend that the IHO erred in failing to address their contention that the district significantly impeded their participation in the development of the student's IEP because the district made determinations regarding the student's educational program without including the parents. The parents also argue that the district unilaterally predetermined the Bird/Morgan placement well in advance of the CSE meeting which significantly impeded their participation. Next, the parents contend that the IHO erred in finding that the IEP's were appropriate and provided the student with a FAPE. With respect to the January 2018 IEP, the parents agreed with the IHO that it "didn't work" but argues that the IHO erred in failing to find that the IEP was inappropriate. With respect to the May 2018 IEP, the parents argue that the IHO erred in finding that the district satisfied its obligation to make changes to the goals or services to enable the student to make progress. Next, the parents contend that the IHO erred in failing to find that the CSE's failed to engage in the required Newington LRE analysis. The parents further contend that the CSE's failed to ascertain the student's present levels of performance, and that the IEP's failed to address the student's sensory, auditory, pragmatic language, social emotional and behavioral needs. The parents also argue that the district placed the student in an overly restrictive settings with dissimilar peers. Next, the parents assert that the district failed to appropriately evaluate the student in all areas of suspected disability and failed to conduct any evaluations regarding the student's auditory processing needs. Although the parents agree with the IHO that the FBA and BIP were deficient, the parents argue that the IHO erred in failing to find that the inappropriate FBA and BIP deprived the student of a FAPE.

With respect to relief, the parents argue that the IHO erred in failing to award additional compensatory services. As indicated in their post-hearing brief, the parents request as relief, among other things, a finding that the facts alleged above violated the parents' right to participate in the decision-making process regarding the provision of FAPE and caused a deprivation of educational benefits. The parents seek an order directing the district to 1) engage the student's doctor as a consultant to provide expertise in development of an appropriate individualized plan that will meet the student's sensory needs at school; 2) engage a particular individual as inclusion consultant for one year to coordinate and support the development of an appropriate program in the LRE for the student in collaboration with the student's educational team, comprised of district staff and consultants, the student and the student's parents, and provide training and on-site support for staff that includes a program and services that meets the students unique needs in the LRE; 3) provide compensatory sensory based PT services; 4) provide compensatory speech language

services; and 5) provide compensatory counseling services of an amount and scope to be determined.

In an answer to the parent's cross-appeal, the district denies the parents' material allegations of wrongdoing, and sets forth the following affirmative defense: that any issues raised in the parents' due process complaint notice not addressed by the IHO and not included within the parents' cross-appeal have been abandoned. This includes the provision of 1:1 instruction, integrated co-teaching, an in-district placement, staff training in applied behavior analysis and conducting appropriate functional behavioral assessments and behavior intervention plans, social skills support in individual and group settings, challenging the student's initial CSE classification, an independent occupational therapy evaluation, and any claims related to section 504 violations.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C.

§ 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew 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 Andrew 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]).⁴

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-

⁴ 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" (Andrew F., 137 S. Ct. at 1000).

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. Preliminary Matters—Scope of Review

As an initial matter, it is necessary to identify which of the parties' arguments are properly before me on appeal. First, the parents raised a number of claims in their due process complaint notice that were not addressed by the IHO and the parents have not specifically cross-appealed from the IHO's failure to address these claims.

In particular, the IHO did not address the parents' claims relating to the CSE inappropriately classifying the student as a student with an emotional disturbance. In addition, the IHO did not address the claim that the occupational therapist did not attend the CSE meetings to discuss the student and that the OT evaluation was not adequate because it failed to adequately assess the student's sensory needs. The IHO also did not address the parents' claim that the district's psychological and educational evaluations of the student were inadequate and that counseling services in the student's IEPs were inadequate in light of the student's needs. Additionally, the IHO did not address the parents' claim that the district failed to include group counseling in the student's IEPs.

The regulations governing practice before the Office of State Review require that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer served within the time permitted by section 279.5 of this Part." "A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[f] [emphasis added]). Furthermore, the practice regulations require that parties set forth in their pleadings "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 further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). Accordingly, the claims set forth above have been abandoned and will not be further discussed below.

With respect to relief, the district argues that the parents seek relief on appeal that was not initially requested in the due process complaint notice. The district is incorrect. In their due

process complaint notice, the parents explicitly sought an order from the IHO "directing the district to provide Compensatory Services for the failure to provide the Student FAPE" (Dist. Ex. 1 at p. 6). It is well settled that where, as here, compensatory education is sought for a denial of FAPE, such relief constitutes an equitable remedy that must be tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). While it is true that a parent should not raise a compensatory education request at an unduly late stage of the impartial hearing, especially for an improper purpose such as evading a finding of mootness, that is not this case (see, e.g., M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). Accordingly, as further discussed below, the salient issue with respect to relief in this matter is whether the hearing record supports the compensatory education awarded by the IHO in light of the nature of the FAPE violation involved. Generally, a determination regarding the appropriate form of compensatory educational services the student should be awarded as a remedy for the denial of a FAPE is not reliant on the specific relief sought by the parent in the due process complaint notice but rather whether the IHO's award comports with equitable principles.

With respect to the parents' alleged violations of section 504, State law does not make provision for review of such claims through the State-level appeals process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parents' claims regarding section 504 and such claims will not be further discussed herein (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]).

B. Child Find—2016-17 School Year Through November 2017

Turning to the merits of the case, the IHO found that the district violated its child find obligation because although the hearing record contained evidence of the IST's processes and the prereferral accommodations and interventions utilized by the district, the student's ongoing behavioral issues which started in kindergarten and continued throughout first grade should have triggered a referral to the CSE. The district argues on appeal that the IHO erred in finding that it violated its child find obligations resulting in a denial of FAPE for the 2016-17 school year until the student's referral in November 2017. The district further argues that the student was supported by the IST in kindergarten and first grade and made progress in the general education setting prior to second grade. Additionally, the district argues that the IHO ignored substantial testimony that the student's performance during the relevant time-period demonstrated that the student did not require a CSE referral or formal evaluations and asserts that there is no evidence in the hearing record that the student's behavioral and social/emotional needs became worse because the student was not referred to the CSE before second grade.⁵

⁵ With respect to child find, the parents argue in their cross-appeal that the IHO erred by finding that the district's child find violation ceased upon referral of the student to the CSE, and contend that the failure to conduct an FBA and create a BIP prior to the CSE referral, as well as the district's failure to evaluate the student in all areas of

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate the student (A.P., 572 F. Supp. 2d at 225, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, and particularly relevant in this case, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if

disability post-referral constituted a continuing child find violation. I note that the IHO's reasoning is correct as a district's child find obligations relate to its identification of students with a disability whereas its post-referral obligations concern the separate categories evaluation, classification and provision of a FAPE to disabled students. Moreover, the parents do not identify any deficiencies in the district's evaluation process other than its failure to conduct an auditory processing evaluation of the student (a claim that was not raised in the due process complaint notice) and its failure to conduct an appropriate FBA and create an appropriate BIP for the student. As a result, the parents claims related to child find and their claims related to post-CSE referral FAPE violations will be considered separately in this decision.

a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]), see also 8 NYCRR 100.2[ii]).

As the student was participating in the district's RtI process for the entire time period during which the parents claim a child find violation occurred, the facts surrounding the student's participation in the district's RtI process are relevant in determining whether the district met its child find obligations (see 8 NYCRR 200.4[a]). Although the parties offered evidence with respect to the student's RtI participation, evidence concerning the district's policies and procedures related to RtI was not developed in the record. Accordingly, it became apparent during review of the hearing record that additional evidence of the district's RtI policy was required to determine whether the district followed the required policies and procedures in deciding whether or when this student should have been referred for an evaluation for special education.

In accord with State regulation providing that a State Review Officer may request additional evidence upon a determination that such evidence may be necessary in order to render a decision (8 NYCRR 279.10[b]), the undersigned directed the district to provide a copy of its written policy called for by State regulation regarding its RtI process in effect during the 2016-17 school year and any information related thereto, and the parties were permitted to present arguments in their respective responsive pleadings as to whether and to what extent the materials requested should be considered and relied upon by the State Review Officer in rendering a decision.

In response to the request, the district provided a copy of its RtI policy and processes consisting of three documents and did not object to consideration thereof (Dist Exs. 78-79, 81).⁶ The parents objected to the SRO's consideration of the material submitted because it would deprive them of their due process rights and that the RtI materials are not necessary for the SRO to render a decision (Apr. 24, 2020 Parent Br.).

As discussed above, I find the district's policy is necessary in order to render a decision on the district's claims in this matter and the policy will be discussed in further detail below (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 15-033; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

Before discussing the parties' arguments over the IHO's child find ruling and the district's written RtI policy, a review of some of the purposes, objectives, and requirements of RtI is in order. According to the United States Department of Education's Office of Special Education Programs (OSEP), "[a] multi-tiered instructional framework such as RTI is a schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and intervention within a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors. OSEP supports State and local

⁶ The district also submitted its local child find policy, which essentially restates the IDEA's child find requirement, noting that the district must locate and identify all children suspected of having a disability residing within the district (Dist. Ex. 80).

implementation of RTI strategies to ensure that children who are struggling academically and behaviorally are identified early and provided needed interventions in a timely and effective manner" (Letter to Zirkel, 62 IDELR 151 [OSEP 2013]). Although leaving the details of particular RtI models to the individual states, according to OSEP the essential components of an RtI framework are:

1. High-quality, evidence-based instruction in general education settings;
2. Screening of all students for academic and behavioral problems;
3. Two or more levels of instruction that are progressively more intense and based on the student's response to instruction; and
4. Progress monitoring of student performance. In evaluating a particular intervention process, OSEP observed, an individual should assess whether all four of those ingredients are present.

(*id.*). RtI timelines and adequate progress issues are left to States or local school districts to establish in accordance with their models because "t]hese decisions are best left to State and local professionals who have knowledge of the instructional methods used in their schools" (71 Fed. Reg. 46,658 [2006]).

With respect to child find and RtI practices at the state and local level, the United States Department of Education's Office of Special Education and Rehabilitative Services (OSERS) has indicated that "it generally would not be acceptable for [a local educational agency] to wait several months to conduct an evaluation or to seek parental consent for an evaluation if the public agency suspects the child to be a child with a disability. If it is determined through the monitoring efforts of the Department or a State that there is a pattern or practice within a particular state or LEA of not conducting evaluations and making eligibility decisions in a timely manner, this could raise questions as to whether the State or LEA is in compliance with the Act" (Questions and Answers on Response to Intervention (RTI) and Early Intervening Servs. (EIS), 47 IDELR 196 [OSERS 2007]). The courts have adopted a similar view of not waiting too long before referring the student for special education evaluation while the RtI approach is used, even if the student is advancing from grade to grade (Avaras v. Clarkstown Cent. Sch. Dist., 2018 WL 4964230, at *10 [S.D.N.Y. Oct. 15, 2018], reconsideration denied, 2019 WL 2171140 [S.D.N.Y. May 20, 2019] [noting that a school district violated child find and denied a FAPE to a student by providing RtI services for seven months in kindergarten as well as nine months in first grade but not following the district policy of 8-week RtI cycles that should have triggered an evaluation of the student for IDEA services]).

With regard to the particular State-level approach to RtI applicable in this case, according to the New York State Education Department's Office of Special Education RtI is the practice of providing high-quality instruction/intervention matched to student needs and using learning rate over time and level of performance to make important educational decisions about an individual student ("Response to Intervention, Guidance for New York State School Districts," Office of Special Educ., at p. 1 [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf>). RtI represents an important educational strategy that has been shown to lead to more

appropriate identification of and interventions with students with learning disabilities (*id.*). Identifying whether a student has a learning disability must be based on extensive and accurate information that leads to the determination that the student's learning difficulties are not the result of the instructional program or approach (*id.*). While reading in the early grades is a primary focus of the RtI process, the State policy also indicates that "the process of databased decision making and the principles of RtI can apply to other content areas as well as to behavioral issues that impact learning" (*id.*).⁷ Under State guidance, the "RtI framework is intended to support both academic and behavioral systems and schools are encouraged to implement both academic and behavioral aspects of an RtI framework" and provides illustrations of a three-tier RtI example ranging from school-wide positive behavioral supports to assessment based interventions for individual students (*id.*).

The State Education Department has established a regulatory policy framework for RtI that requires school-wide screenings, minimum components of RtI programs, parent notification and use of RtI in the identification of students with learning disabilities (8 NYCRR 100.2[ii]). State regulation provides that a school district's process to determine if a student responds to scientific, research-based instruction shall include the application of information about the student's response to intervention to make educational decisions about changes in the student's goals, instruction, services and the decision to make a referral for special education programs or services (8 NYCRR 100.2[ii][1][v]). State regulation further mandates that "[a] school district shall select and define the specific structure and components of the [RtI] program, including, but not limited to, the criteria for determining the levels and types of intervention to be provided to students, the amount and nature of student performance data to be collected and the manner and frequency for progress monitoring" and to set forth the implementation of its RtI process in a written policy (8 NYCRR 100.2[ii][2] [emphasis added]; *see* 200.2[b][7]).

In this matter, an essential question in this case is whether the district followed an RtI policy and procedure that complies with the requirements of State regulation (*compare* Dist. Exs. 78-79, 81, with 8 NYCRR 100.2[ii][1]). The district's RtI policy submitted as additional evidence consists of three components: Policy 7616: Prereferral Intervention Strategies in General Education Prior to a Referral for Special Education (Policy 7616) (Dist. Ex. 78); Regulation 7616: Prevention and Prereferral Strategies in General Education: Approaches to Instruction and Behavioral Support (Regulation 7616) (Dist. Ex 79), and Policy 8452 Responsive Instruction and Intervention (Policy 8452) (Dist. Ex. 81).

Pursuant to Policy 7616, "[t]he District shall establish a plan for implementing schoolwide approaches and prereferral interventions in order to remediate a student's performance prior to referral for special education" (Dist. Ex. 78 at p. 1). In describing what intervention strategies may be utilized by the district, Policy 7616 provides that "the [d]istrict may utilize resources/strategies already in place for qualified students including, but not limited to, services available through Section 504 of the Rehabilitation Act of 1973, and Educationally Related Support Services and Academic Intervention Services as defined in Education Law and/or Commissioner's Regulations

⁷ Similar RtI guidance was provided to parents (*see* "A Parent's Guide to Response to Intervention," Office of Special Educ. [Jun. 2014] available at <http://www.p12.nysed.gov/specialed/RTI/rti-pamphlet.pdf>).

(id.). Further, the district is required to ensure that there is a system in place "with appropriate personnel, for developing, implementing and evaluating prereferral intervention strategies (id.).

In addition, the district "will provide general education support services, instructional modifications, alternative instructional approaches, or alternative program options to address a student's performance prior to a referral to a Committee on Special Education (CSE)." To facilitate these prereferral strategies, the district will utilize "Instructional Support Teams (ISTs)" that will include "representatives from general education with classroom experience, as well as representatives from special education and other disciplines" and work in close "collaboration with parents" (id.). An IST will also "seek collaboration between outside agencies and the school prior to a referral of the student to the CSE in order to address necessary student support services, as appropriate (id.). Further, the district will "ensure that appropriate opportunities exist for collaboration between general educators and special educators, and that consultation and support are available to teachers and other school personnel to assist parents and teachers in exploring alternative approaches for meeting the individual needs of any student prior to a referral to special education" (id.). To support the IST, "the building administrator will further ensure that all staff are familiar with intervention procedures and procedures for operating an IST (id.).

With respect to instructional support plans, such plans "shall be proactive in their strategies to meet the broad range of student needs and to improve student performance" (Dist. Ex. 78 at p. 2). Both "[p]rereferral/[i]ntervention strategies and/or instructional support plans are to be reviewed and evaluated to determine the prevention and/or intervention strategies implemented shall be maintained" (id.). In addition, "should a referral be made to the CSE during the course of implementing prereferral/intervention instructional support services, the CSE is obligated in accordance with law to continue its duties and functions, and must meet mandatory time lines in evaluating the student for special education services and implementation of an individualized education program, if applicable (id.).

With respect to the use of Educational Related Support Services (ERSS) as a prereferral/intervention strategy, Policy 7616 provides "(ERSS) means curriculum and instructional modification services; direct student support team services; assessment and non-career counseling services; special instruction to eligible students with disabilities as defined in Education Law Section 4401, which does not generate excess cost and including related services but excluding transportation and transition" (Dist. 78 at p. 2). ERSS can be "provided to eligible students, individually or in groups, and may include those related consultation services provided to their families and related school personnel in order to enhance the academic achievement and attendance of such students" and "shall also mean speech and language improvement services as defined in Commissioner's Regulations" (id.). Policy 7616 also contemplates the use of academic intervention services (AIS) as an appropriate prereferral intervention strategy (id. at p. 3).

Regulation 7616 sets forth the following standards with respect to

[g]eneral education support services, instructional modifications, alternative instructional approaches, or alternative program[s]" that "are developed to address the student's performance prior to a referral to special education.

- 1) A system is established to support the delivery of prevention and prereferral supports, services and modifications.
- 2) Appropriate opportunities exist for collaboration between general educators and special educators (e.g., time is set aside for this purpose).
- 3) It is based on a collaborative model and provides consultation and support to teachers and other school personnel, to assist parents/persons in parental relation to students and teachers in exploring alternative approaches for meeting the individual needs of any student prior to formal referral for special education. The student's strengths, environment, social history, language, and cultural diversity are considered in addition to the teacher's concerns.
- 4) Innovative ways to utilize existing resources to implement prevention and prereferral supports and services are used.

(Dist. Ex. 79 at p. 1). In addition, in describing the classroom instructional approach to be utilized with respect to prereferral strategies, Regulation 7616 enumerates the following guidelines:

- 1) Set standards are consistent with school-wide proactive approach (positive behavioral supports/discipline, curriculum, and instruction).
- 2) Teach and reinforce positive pro-social behaviors and skills.
- 3) Provide immediate feedback, academically and socially.
- 4) Be proactive to prevent discipline problems.
- 5) Provide engaging instruction and positive behavioral supports to prevent academic and discipline problems before they can escalate.
- 6) Increase home-school communication.

(id.). In addition, Regulation 7616 addresses the formation and operation of ISTs and other school based teams as follows:

- 1) Criteria is established for the selection of (IST) members. Staff have been involved and agree to the selection process.
- 2) (ISTs) include representatives from general and special education as well as other disciplines and include individuals with classroom experience.
- 3) Meetings of the (IST) establish a statement of purpose.
- 4) (ISTs) establish goals for meetings and progress is assessed.
- 5) Members of the (IST) are knowledgeable about students who are in need of educational supports/intervention and/or remediation, and students with disabilities.

(id. at p.2). In addition, ISTs are required to:

- 1) Define the problem.
- 2) Collect academic, achievement, and behavioral data.
- 3) Develop a hypothesis concerning the function of the academic or behavioral difficulty.
- 4) Create a plan using research-validated interventions.
- 5) Implement the plan.
- 6) Evaluate the interventions.
- 7) Modify the support plan as needed.

(id.). In terms of the administration's role in the IST process, Regulation 7616 provides that the school administration facilitates the process as follows:

- 1) A mentoring and consultative system is in place and supported by administration.
- 2) There is accountability to ensure that the recommendations of the (ISTs) are implemented in a timely and quality manner.
- 3) District-wide training for general and special educators is provided.

(id. at pp. 2-3). The role of parents in the development of prereferral strategies is also set forth as follows:

- 1) Parents/persons in parental relation to students are informed of their rights regarding special education.
- 2) Parents/persons in parental relation to students are notified regarding the purpose of the meeting.
- 3) Meetings are convenient and language is appropriate so that parents/persons in parental relation to students can contribute.

(id. at p. 3). Regulation 7616 also provides that school staff have a competent understanding of the CSE referral process (id.).

Finally, with respect to RtI specifically, Policy 8452 provides the following guidance with respect to utilizing a multi-level RtI process:

- a) Scientific, research-based instruction in literacy and mathematics provided to all students in the general education classroom by qualified personnel.

- b) Universal screenings shall be provided to all students to identify those students who are not making academic progress at expected rates. . . . Collaborative inquiry processes will be used at the building to analyze data relevant to student performance.
- c) Scientific, research-based instruction matched to student needs and skills will be provided, with increasingly intensive levels of targeted instruction and interventions for those students who do not make satisfactory progress in their levels of performance and/or in their rate of learning to grade level standards
- d) Progress monitoring of student achievement, which includes curriculum based measures, to determine if interventions are resulting in progress toward grade level and/or specific, targeted goals.
- e) Educational decisions about student goals, instruction and program services will be made on data from interventions. This may include for special education programs, academically responsive programs, services or supports.
- (f) Written notification to the parents including a summary of the student's performance data, and plan for intervention will be provided instruction or interventions go beyond that which is provided within the general classroom. will be of their right to request an evaluation for special education programs and/or services should they suspect that their child has an educational disability, and
- g) [ISTs] in the building will analyze the data concerning a student's response to interventions and make educational decisions about changes in goals, instruction and/or services.

(Dist. Ex. 81 at pp. 1-2).

In analyzing the different components of the district's prereferral and RtI policies, it appears that the district has failed to comply with the State requirements to select and define the specific structure and components of its RtI program, including, but not limited to, the criteria for determining the levels and types of intervention to be provided to students, the amount and nature of student performance data to be collected and the manner and frequency for progress monitoring; and to set forth the implementation of its RtI process in a written policy (8 NYCRR 100.2[ii][2], see 200.2[b][7]). Instead, the district has put into place a general set of principles for prereferral strategies involving RtI which are laudable principles, but the district stopped short on the specific the levels of RtI in its written policy and instead largely relies on an subjective determination of the IST to determine any level or types of interventions that will be utilized, the amount and nature of the data to be collected and how often and in what ways a student's progress under the RtI levels is to be measured. Crucially, there is no set criteria pursuant to which an IST is required to refer a student to the CSE once a student receives RtI services and interventions. In order to make the determination whether a student has made adequate progress in an RtI program—for the purpose of deciding whether or not a student who is receiving RtI services should also be referred for an

evaluation—the district must be able to show that it followed its own RtI process and that its process comports with State regulation. Additionally, RtI is designed to offer temporary support for a student in order for the district to make important educational decisions related to the student, including whether referral to the CSE is necessary (see "Response to Intervention, Guidance for New York State School Districts," at p. 1, Office of Special Educ. [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf>). If a district fails to formalize its own criteria for referral to the CSE in a written policy, and instead in effect leaves such decisions to the discretion of those implementing the RtI supports (in this case the IST), the district runs the risk of utilizing RtI as an open-ended, ongoing general education intervention while failing to refer students whose progress or lack thereof under RtI has not been measured according to the multi-level approach envisioned by State regulation and guidance. While a district is not necessarily bound to utilize the exact Tiers 1, 2 and 3 structure as laid out in the example in State guidance, any RtI policy that a district puts in place must nonetheless explicitly a multi-level RtI plan that formalizes the time spent by the student in RtI, identifies the specific levels of interventions available to the student prereferral, the data to be collected and reporting of that data and the criteria used to determine whether referral of the student to the CSE is warranted. As further described below, upon review of the evidence in this matter, and the additional evidence of the district's own prereferral and RtI policies, it appears that both the district's RtI policies, and the specific application of those policies during the period of time that the student received RtI services prior to referral to the CSE led to a violation of its child find obligations.

1. 2015-16 School Year

Although the parents' claims of a denial of a FAPE start with the 2016-17 school year (first grade), the record contains evidence that the student was receiving RtI strategies during the preceding school year. While I will not make findings for or against either party with regard to that school year, the evidence is relevant as background context to show the degree to which the student had been receiving RtI strategies at the time the 2016-17 school year commenced. Turning to the district's use of prereferral strategies and RtI for the student, the hearing record shows that the student entered a district kindergarten class in September 2015 (see Parent Ex. 24a). On October 13, 2015 the kindergarten teacher referred the student to the school's instructional support team (IST) (Tr. p. 74; Parent Ex. 35a). According to the referral, the student was performing below grade level in written language and listening (Parent Ex. 35a at pp. 1-2). In addition, the student's math abilities were uncertain as he seemed to be at grade level but was easily distracted during counting tasks, which made it seem like he could not do the work (id. at p. 1). By teacher report, the student struggled with attention, following directions, processing information, and anxiety (id. at p. 2). In addition, he had difficulty completing fine motor tasks and did not play with other children at play time (id. at pp. 2, 3). With respect to listening, the teacher noted that the student typically needed directions repeated three or more times before he was able to carry them out and was unable to follow two-step directions (id. at p. 2). The student did "not often give eye contact" and needed reminders to follow class routines while the rest of the class did not (id.). In addition, with respect to "academic/processing" skills, the teacher noted that the student demonstrated "some rote skills" but was unable to apply those skills to kindergarten tasks or make connections between ideas (id.). In terms of fine motor skills, the teacher noted that the student struggled with fine motor tasks including drawing, handwriting, cutting and scissor grip, and self-care skills (id.). The student was unable to write his name legibly and required additional support beyond what was typically needed (id.). The teacher highlighted pencil grip, writing letters and numbers of the

correct size, performing coloring tasks, and drawing a person as particularly challenging for the student (*id.*). Additionally, the teacher explained that the student had trouble with self-care and taking care of his belongings such as packing his backpack, folder, and putting on his jacket (*id.*).

With respect to the student's social behavior, his teacher noted that the student asked excessive questions but did not listen to or was unable to process the answer (Parent Ex. 35a at pp. 2-3). She indicated that the student would ask the same questions about the same subjects usually between three to six times even when the question was answered the first time, and that several conversations with the student did not dissuade him from continuing with repetitive questions (*id.*). The teacher noted that the adults had initiated a "one answer" policy "in an effort to get [the student] to listen to the answers that adults g[a]ve" (*id.*). The teacher reported that during playtime the student played near but not with other children and required many reminders during "partner games" to take his turn or to pay attention (*id.* at p. 3). She noted that there was rarely any interaction between the student and other children during play time or throughout the day (*id.*). According to the teacher, the student was unable to "use social cues" or copy what others were doing and appeared unaware of what was going on around him; he was usually facing in the opposite direction on the rug during calendar and until he received verbal redirection was unaware that he was facing the wrong way (*id.*). Emotionally, the teacher reported that apart from the beginning of the year, when the student cried in the morning for his parents, he seemed mostly contented at school (*id.*). However, the teacher also indicated that she was concerned about the student's anxiety level because the student continued to ask if he could go home, and wore a "watch" that was a device that allowed him to call his parents at the touch of a button (*id.*). The teacher concluded that, academically, the student had the knowledge and skills that a kindergartener required in the fall, but something was "holding him back from being as successful as he" could be (*id.* at pp. 3-4).

In addition to the evidence above, the October 2015 IST referral included a list of interventions attempted by the teacher to address the student's needs including repeating directions, getting the student's attention before giving directions, highlighting, ensuring proper pencil grip, providing 1:1 "name writing practice," drawing the student's attention to his peers for social cues, and answering the student's questions only once (Parent Ex. 35a at p. 4).

The IST met on October 29, 2015 and developed an intervention plan for the student (Parent Ex. 35b).⁸ The stated goal of the plan was to target the student's repeated questions and work independence (Tr. pp. 78-80; Parent Ex. 35b). The intervention plan described the student as kind and hard-working and noted that he had strong rote skills (Parent Ex. 35b). The intervention plan identified "areas of concern" as the student's attention, ability to follow directions independently, fine motor skills, processing ability, and anxiety and included strategies to address them (*id.*). In addition, the plan recommended that counseling services be pushed into the classroom to assist the student with work independence and to observe social interactions, and further recommended that the student undergo speech and OT screenings (*id.*). The IST set a

⁸ The intervention plan indicated that at the time it was developed the student was receiving speech improvement and counseling as support services (Parent Ex. 35b).

follow up meeting for January 14, 2016 (id.). The intervention plan indicated that the classroom team was responsible for its implementation (id. at p. 1).

Consistent with the IST intervention plan, in November 2016, a board of cooperative educational services (BOCES) occupational therapist conducted a screening of the student specific to his fine motor, visual motor, and perceptual skills (Tr. pp. 82-83; Parent Ex. 10a).⁹ With respect to fine motor skills, the occupational therapist reported that the student demonstrated inconsistent pencil control and challenges cutting out curved lines and irregular shapes (Parent Ex. 10a at p. 1). In terms of visual motor skills, the therapist found that the student demonstrated significant difficulty drawing simple pictures by putting together basic shapes, showed adequate letter formation for two of the five letters in his name, showed difficulty with letter formation and the spatial organization of handwriting, and was able to print numbers 1-10 with thirty-percent accuracy (Parent Ex. 10a at p. 1). Lastly the occupational therapist indicated that the student demonstrated average perceptual skills in terms of his ability to recognize upper and lower-case letters, however, he could only identify four of six shapes and the numbers 1-10 but not the numbers 11-20 (id. at p. 2). Based on the results of the screening, the occupational therapist recommended that the student receive short-term OT (approximately six OT sessions, one time per week) to trial and practice strategies to improve his fine motor and visual skills (id. at pp. 2-3). Strategy suggestions included having the student use a "thumbs up" scissor hold and providing him with verbal reminders when cutting and having the student use a consistent visual sequence for drawing a person, the same formation sequence to draw shapes, a box and dot format to practice numbers and letters, and encouraging the student to write his name "the school way" using an uppercase letter at the beginning followed by lowercase letters (id.). The occupational therapist indicated that she would provide final recommendations at the end of the diagnostic sessions (id. at p. 2).

The IST reconvened on January 21, 2016 and revised the student's intervention plan (compare Parent Ex. 35b, with Parent Ex. 35d). The revised plan indicated that the student continued to receive speech improvement and counseling as support services (Parent Ex. 35d). The goal of the plan was modified; targeting the student's repeated questions was dropped, targeting the student's attention/anxiety and writing were added, and targeting the student's work independence remained (compare Parent Ex. 35b, with Parent Ex. 35d). "Completing morning routine" was added to the list of concerns (id.). The "intervention plan identified strategies to address the areas of concern including providing the student with visuals for his morning routine and for "best work," conducting a language screening, continuing diagnostic OT sessions, providing the student with box and dot papers and continuing a "Friday play incentive"(Parent Ex. 35d). The IST scheduled a follow-up meeting for March 10, 2016 (Tr. pp. 84-87; Parent Ex. 35d at p. 1).

In a note dated March 9, 2016 the occupational therapist who evaluated the student in November 2015 provided an update on the student's skills following four OT diagnostic sessions (Dist. Ex. 25 at pp. 3-4). The occupational therapist detailed the skills she addressed in the sessions and reported that the student had demonstrated improvement in his ability to write numbers but continued to have difficulty with writing letters, and with drawing shapes and basic pictures (id.).

⁹ The resultant report was dated January 13, 2016 (Parent Ex. 10a at p. 1).

The occupational therapist noted that the student worked hard during OT sessions but was distractible and benefitted from clear directions and visual cues (id. at p. 4). She recommended that the student receive an additional four sessions of OT in order to review all of the uppercase letters and focus on drawing shapes and pictures (id. at p. 3).

In an email dated May 23, 2016, the parents advised the district that the student had been "formally evaluated" and the evaluators "concluded that [the student]" had an obsessive compulsive disorder and a generalized anxiety disorder (Dist. Ex. 66 at p. 1). The parents further informed the district that the student would be starting "behavioral therapy every two weeks" (Dist. Ex. 66 at p. 1).

In a report dated June 21, 2016, the occupational therapist who was treating the student summarized his progress in the diagnostic sessions that occurred between January and May 2016 (Parent Ex. 10b). The occupational therapist reported that the student had made "great progress throughout the school year, demonstrating many of the fine motor skills expected for the end of kindergarten" (id. at p. 3). However, she also noted that the student needed to continue to work on using mature finger movements to guide his pencil/crayon, drawing a triangle independently, expanding his ability to put together lines and shapes to illustrate his ideas, and consistently placing letters on the baseline when writing (id.). The occupational therapist provided a list of suggested activities to improve the student's manipulation and dexterity skills as well as his handwriting development (id. at pp. 1-4).

The student's final report card for the year indicated that his third term work habits were satisfactory but that his social emotional efforts were inconsistent (Parent Ex. 24a at p. 1). Specifically, the student had difficulty using strategies to manage his emotions and behavior, as well as with establishing and maintaining positive peer relationships (id.). According to the report card, the student was progressing toward or meeting all of the grade level standards for mathematics; however, often got confused between addition and subtraction (id. at pp. 1-2). In literacy, the student was progressing or progressing with support toward grade level standards for the majority of skills (id. at p. 2). The report card stated that the student had learned all upper and lower-case letters and most sounds (id.). In addition, he could recognize 24/25 sight words (id. at p. 1). Still, the student required support to read with understanding and apply grade-level phonics to unknown words, and he read slightly below grade level (id. at p. 2). The report card noted that the student was becoming more independent as a writer (id.). The student's teacher reported that the student had "made great academic progress, although he often required assistance with focus and attention, as well as with following directions" (id. at p. 1). The student was passed to first grade (see id.).

During the impartial hearing, the director of special education testified that the IST was a building level team that teachers could refer a student to if they had concerns and felt that additional supports might be necessary (Tr. pp. 73-74; see Tr. pp. 572-73). The team consisted of building staff, including teachers (Tr. p. 73). The director testified that the student was not classified when he entered kindergarten but did receive building level supports (Tr. pp. 72-73). She confirmed that the IST referral indicated that the student was having greater difficulty following directions than his classmates and that he seemed unaware of what was going on around him (Tr. p. 75). The director agreed that at the time of the referral the student was doing "pretty well" with academics but having some minor behavioral and social/emotional concerns (Tr. p. 77).

She indicated that the interventions that had been attempted by the classroom teacher were "typical" and that it was typical for classroom teachers to differentiate instruction when students needed something a little different from their peers (Tr. p. 77). She further indicated that the intervention plan developed for the student contained interventions that were typical for a kindergarten student with the type of concerns the student displayed (Tr. p. 79). She characterized the student's needs at the time as "beyond typical" but "not significant" (Tr. pp. 79-80). The director stated that an IST would not typically refer a student to the CSE based on this level of concern and the recommended interventions (Tr. p. 80). With respect to the guidelines the district used to make a CSE referral, the director explained that the IST teams recommended interventions that could be delivered in the general education classroom by the teacher and then tracked the student's progress in terms of how they responded to the interventions (id.). "If over a period of time a student does not respond to interventions within a classroom, then the IST would consider making a referral to the CSE" (id.). According to the director, the IST process could include other service providers working with a student in the general education setting and counseling, OT, and speech-language therapy were all available interventions at the "general education IST level" (Tr. p. 81). The director explained that the IST built-in scheduled follow-ups in order to assess how a student responded to the recommended interventions (id.). She opined that going through the IST was the appropriate course of action for the student at this time (id.).

The director further opined that the January 2016 IST intervention plan was appropriate for the student and suggested that the student's needs were not significant at this time (Tr. p. 86). She explained that the interventions identified in the plan reflected skills that the teacher was focusing on with the student and that the use of visual reminders was a typical intervention for a kindergartener (Tr. p. 87). The director confirmed that the June 21, 2016 summary by the student's occupational therapist indicated that the student made great progress and responded to the OT interventions he received (Tr. p. 88). She opined that it was typical for kindergarteners to have some fine motor things they needed to work on (Tr. pp. 88-89). The director testified that the student's end of the year report card showed that with the exception of a couple areas he was mostly on grade level in terms of his social/emotional skills (Tr. p. 91). In addition, the student was progressing or meeting his grade level standards with the exception of two foundational reading skills for which he required and received support (Tr. pp. 92-93). The director opined that the student's marks were fairly common for the end of kindergarten and the student was mostly an average learner at that time (Tr. p. 93). She testified that the student's greatest needs at the end of kindergarten were that he needed support with reading and was inconsistent with managing his emotions and maintaining positive peer relationships; however, she indicated that the student's needs were not significant and that he was "doing pretty well" (Tr. pp. 93, 366-67).

The director testified that the district's IST process was "loosely speaking" the district's RtI process (Tr. p. 473). She explained that IST was the process by which teams got together to problem solve around a student (id.). She further indicated that the IST meeting could "be formally RTI or it c[ould] be regarding other topics" (id.). When asked if she would characterize the IST process as response to intervention for the student, the director replied that she would characterize it as "problem-solving through general education" (id.). The director confirmed that the district had processes and procedures related to RtI but clarified that they did not fall under her domain (Tr. p. 474). She indicated that the RtI process within the district included the IST as one component but also included grade-level data reviews for reading and noted that there was a separate decision-making process around reading support (Tr. p. 475). According to the director,

the district did not have a structured RtI process around behavioral concerns (Tr. p. 475). She indicated that reading was the most clearly defined RtI process in the district (id.).

The teacher who eventually became the student's second grade teacher also testified that she was a standing member of the IST (Tr. p. 572). During the impartial hearing, she recalled when the student was referred to the IST in October of his kindergarten year due to concerns regarding his ability to listen, play with peers and complete fine motor tasks (Tr. p. 576). The teacher testified that kindergarten students have difficulty with transitions and attending, but that "to stand out and for all of this information, it definitely [wa]s different than what the general population would be" (Tr. p. 577). She reported that the two biggest areas of focus for the IST were the student's difficulty attending and the anxiety behind it (Tr. p. 578). The teacher indicated that the interventions found in the student's October 2015 intervention plan were typical interventions that the IST would recommend for a kindergarten student (Tr. p. 579). She suggested that student's repeated questioning reflected his anxiety and need for reassurance (Tr. pp. 579-81). The teacher testified that the student's plan was revisited throughout the entire school year (Tr. p. 584). She noted that the team had concerns about the student going into first grade but there was never a question that he would (Tr. p. 584). She noted that the student was purposely placed with the strongest first grade teacher (Tr. pp. 584-85).

From the standpoint of the RtI multi-level approach, what is most notable about the level of support and intervention recommended and implemented during the student's kindergarten year is that the RtI plan developed by the IST, and subsequently revised, called for an individualization and intensity that somewhat resembles Tier 3 of the RtI process in the example in State guidance. As per the example in State guidance, Tier 3 is the most intensive level of intervention available through RtI (Response to Intervention, Guidance for New York State School Districts," Office of Special Educ., at p. 1 [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf>). Tier 3/tertiary interventions related to behavioral systems typically are utilized with individual students, are assessment-based and consist of intense, durable procedures (id. at p. 4). Similarly, Tier 3/tertiary Interventions for academic systems are typically utilized with individual students, are assessment-based and high intensity (id.). According to the guidance, it is anticipated that only 1-5% of RtI interventions in a classroom will occur within the Tier 3 model (id.). State guidance also contemplates that "[t]his tier provides greater individualized instruction in a small group setting (generally one to two students at a time) anywhere from 30 to 60 minutes at a minimum of four days per week" and "[t]he progress of students at Tier 3 is monitored more frequently, at least once a week, to determine the student's response to intervention (id. at 14). In addition, State guidance further anticipates that students receiving Tier 3 interventions will spend a minimum of 15-20 weeks at that level of intervention (id. at 16).

However, in this case, although mandated by State regulation, given the lack of any specified set of levels in the district's RtI policy (sometimes referred to as "tiers" in RtI parlance), the dearth of specific data collection procedures and the lack of evidence in the record demonstrating what data, if any, was collected with respect to the student, any attempt to match the district's RtI policies to State guidance is imperfect and merely serves to highlight the deficiencies in the district's policies and processes for determining when a referral to the CSE is required.

Here, the student was evaluated in the area of OT, received consistent interventions on an individual basis in the classroom, as well as individual OT and push-in counseling services, and from all indications remained at this level of intervention for the remainder of his kindergarten year post-IST referral. Although, at first blush, the level of intervention utilized with the student prior to first grade looks intensive enough to be at the upper-end of an RtI multi-level approach, without data collection concerning the student's response to the interventions put into place or more specific information concerning the duration of different interventions, there is little objective guidance even in the kindergarten school year to determine when the student would have been considered to have exhausted the interventions available pursuant to the RtI process and a referral to the CSE for evaluation was warranted. As discussed below, the deficiencies in the district's RtI policy, and its application to the student during the period of time at issue in this matter prior to referral of the student to the CSE in November 2017, resulted in the district's failure to meet its child find obligations.

2. 2016-17 School Year

While the parents did not make claims that the student should have been found eligible for special education during his kindergarten school year, based on the student's experiences in kindergarten, the parents argue that the district denied the student a FAPE by the time he was in his first grade school year. The hearing record also contains additional information regarding the continuation of RtI strategies during the student's first grade year. The student entered first grade in September 2016. Between October 18, 2016 and January 9, 2017, the student's teacher reported to the parents that the student struggled to follow directions, exhibited control issues, and demonstrated unusual behavior that included acting and talking in an aggressive and harmful way (Parent Ex. 43a at pp. 6, 15-17).¹⁰

On January 11, 2017, the student's first grade teacher referred him to the IST (Tr. p. 94; Parent Ex. 35e). The completed referral form noted that the student had been diagnosed as having an ADHD, OCD and anxiety and that multiple medication trials had occurred throughout the 2016-17 school year to date (Tr. pp. 94-95, 345; Parent Ex. 35e). The referral indicated that the student had struggled all year with behavioral issues that were "significantly impacting his ability to learn and grow," and further, that these "struggles" were carrying over into his social interactions with peers (Parent Ex. 35e). According to the referral, the student had difficulty attending for any amount of time during large group, small group, and even 1:1 instruction (id.). In addition, the student perseverated on certain topics and any change in routine caused him to have significant behavioral problems (id.). According to the referral, the student's academic performance in reading and written language were below grade level (id.). The IST referral detailed the interventions that had been attempted with the student including use of a sticker chart and daily emails, which had been unsuccessful; preferred seating, which had been somewhat successful; and daily reading instruction, which was successful (id.). Additional interventions included extra support from the adults in the classroom and constant communication with home, for which the

¹⁰ In an email dated August 30, 2016 the parent advised the district that the student attended behavior therapy once a week during the summer and trialed medication for OCD/anxiety (Parent Ex. 43a at p. 1). In subsequent emails the parent informed the district that the student might have an attention deficit hyperactivity disorder in addition to OCD and anxiety (Parent Ex. 43a at pp. 2, 4).

IST failed to note their duration or degree of effectiveness (id.). According to the referral, the teacher had just begun providing the student with his own workspace (id.; 43a at p. 23).

The occupational therapist met with the student in January 2017 to reassess his fine motor skills (Parent Exs. 10c; 10d). In a summary dated January 11, 2017, the occupational therapist indicated that the student had retained his drawing, cutting, and coloring skills but continued to struggle with letter size and placement of letters on writing lines, and he required dots to draw a triangle and verbal prompts to slow down his writing speed (Parent Ex. 10c at pp. 1-3). The occupational therapist recommended continued monitoring of the student's pencil grasp and letter formation and size (id.). In a second summary dated January 12, 2017, the occupational therapist reported that the student's teacher noted several behavioral and sensory concerns when reviewing the student's fine motor progress; the occupational therapist indicated that additional information would be gathered regarding the student's sensory motor functioning and summarized in a sensory report (Parent Ex. 10d at pp. 1-2).

Between January 30, 2017 and May 24, 2017, the student's teacher continued to advise the parents of the student's behavioral difficulties at school via email (Parent Ex. 45a at pp. 23-29, 33-34, 37, 40-43). On different days the teacher described the student's behavior as random, overly animated, destructive, overly silly and overly emotional, and erratic (id. at pp. 24, 26, 33). She noted that the student sometimes appeared to be in his own world, made random statements, laughed and growled at the teacher when she was correcting him, made loud noises, and engaged in attention seeking behavior (id. at pp. 24, 33, 34, 41). She also noted that the student had difficulty attending, and completing class work (id. at pp. 26, 27, 34). In March 2017 the teacher noted that some of the student's behavior seemed out of his control while some of it seemed intentional (Parent Ex. 45a at p. 34; see Parent Ex. 45a at p. 43). On a difficult day in April 2017, the teacher reported that the student was unresponsive to intervention (Parent Ex. 45a at p. 41). Toward the end of May 2017, the teacher reported that the student told her that "his brain [wa]s out of control" (id. at p. 43).

In a report dated June 21, 2017, the occupational therapist shared the results of questionnaire checklists completed by the student's mother and teacher that indicated the student demonstrated over-responsiveness to auditory input, perhaps related to ADHD, and under-responsiveness to visual and vestibular input (Parent Ex. 10e at p. 2). According to the occupational therapist, the student demonstrated sensory-seeking behaviors such as making sounds, toe-walking, and engaging in constant motion (id.). The therapist opined that the student's sensory response patterns had a moderate to significant impact on his functioning (id.). Based on her screening, the occupational therapist recommended strategies to assist the student that included reducing auditory distractions to improve attending skills, providing heavy work and calming strategies to improve regulation, and providing intensive movements and alerting activities to meet vestibular needs (id.).

A third period progress report indicated that beginning on September 15, 2016 and continuing through the school year the student received reading resource instruction five days per week for 25 minutes in a group of two (Parent Ex. 25 at p. 1). The progress report indicated that, as of the end of the third period of the 2016-17 school year, the student had improved from identifying 10/150 to identifying 150/150 first grade sight words and improved from reading nine

sounds in one minute to reading 49 sounds in one minute (*id.* at pp. 1-2). He continued to have difficulty distinguishing between long and short vowels in text (*id.* at p. 2).

The student's first grade report card indicated that his third term work habits were satisfactory and he had grown tremendously in this area (Parent Ex. 24b at p. 1). In addition, the student's social/emotional effort was rated as satisfactory/high and the report card noted the student's growth in this area as well (*id.*). Specifically, the teacher commented that the student had "grown so much" in first grade, wanted to be successful and had worked "so hard" (*id.*). According to the report card, the student was progressing toward or meeting all of the grade level standards for mathematics and had developed a good understanding of place value, number sense, and addition and subtraction (*id.* at p. 2). The student continued to need support to be able to solve word problems and explain his thinking (*id.*). In literacy, the student was also progressing toward or meeting all of the grade level standards and was working on applying the lessons learned during phonics instruction (*id.*).

During the impartial hearing, district staff testified that the prereferral supports provided to the student in first grade were appropriate and that the student's behavior difficulties did not warrant a referral to the CSE during the 2016-17 school year. The director of special education testified that the student's referral to IST in first grade on January 11, 2017 indicated more "significant behavioral and social concerns in first grade as compared to kindergarten" (Tr. pp. 94-95; *see* Parent Ex. 35e). The director discussed the interventions that were being used at the time of referral including reading support, preferential seating, communication with home, extra support from the adults in the room, a sticker chart, daily emails and noted that the teacher had just started to provide the student with his own workspace (Tr. p. 95). The director confirmed that the "building" was continuing to support the student's needs through the IST at that time (Tr. p. 96). She opined that the recommendations in the January 11, 2017 OT screening to monitor the student's pencil grip and provide him materials to reinforce shape formation and lowercase letter size indicated that the occupational therapist believed the student's needs did not rise to the level where a full evaluation was required (Tr. pp. 96-97). With respect to the student's first grade report card, the director noted that, as with kindergarten, the student's work habits were all "satisfactory," that the student ended first grade demonstrating improvement in social/emotional skills as compared with kindergarten, and that in the student's core academic areas, he performed in the average range (Tr. pp. 98-99). Based on the student's first grade report card, the director testified that the student ended first grade "with an improvement from how he ended kindergarten" and opined that the interventions that were being used for the student at that time were working for him (Tr. p. 99).

The district behavior consultant testified that although the January 11, 2017 IST referral indicated that the student struggled all year with behavioral issues that were significantly impacting his ability to learn and grow, she was not "called in" at that time (Tr. pp. 1037-038). She further testified that the fact that she was not called in did not necessarily mean the student's behaviors were manageable in the classroom but rather that she knew the student "was working with building level support like the school counselor who provided a pretty high level of intervention without needing to call us" (Tr. p. 1038).

The occupational therapist who performed the student's June 2017 OT sensory diagnostic screening testified that she had performed sensory screenings on other first graders (Tr. pp. 1543-

544). Further, she noted that she had done sensory screenings for other students and provided general recommendations such as the reduction of distractions and incorporating heavy work; and testified that most of the classrooms incorporated "a lot of those kind of learning tools for all of their students" (Tr. p. 1550). The therapist explained that at the time of the June 2017 screening, she did not think the student required a referral to CSE because he was still making progress within the RtI model and, further, that the school tried to provide general education supports for students before moving them to special education (Tr. p.1544). She opined that following the sensory screening, even though "there was an indication that there were concerns," they were "not to the level that we would necessarily move on to an evaluation at this point" (Tr. p. 1550).

The student's second grade teacher who was a member of the IST confirmed that the IST monitored and supported the student in kindergarten and first grade but did not believe that his needs rose to the level of requiring a referral to the CSE (Tr. p. 601). She noted that the student was "moving through the process" and explained that students all develop at different times and the district wanted to give the student more time (*id.*). The teacher testified that once the IST had "exhausted what appears to be what was needed, then" the district would switch to "the PST process" (Tr. pp. 650-51).

3. 2017-18 School Year

The evidence in the hearing record shows that the RtI process continued into the following school year. The student entered second grade in September 2017 (*see* Parent Ex. 24c). Based on a referral from the student's second grade teacher, the IST met once again on September 21, 2017 (Tr. pp. 101-03; Parent Ex. 35f at p.1). The IST referral form noted that the student's family had been working with a doctor to address the student's focus, anxiety, OCD and medications, and that the student had, in the past, attended behavior therapy every two weeks (Parent Ex. 35f at p. 2). Further, the referral indicated that through the IST, the student had a speech/language screening, which he passed, and an OT screening, which led to OT diagnostic sessions (*id.*). The IST referral form detailed strategies that had helped the student at the end of the previous year, such as having "[b]est [w]ork office space," staff use of common language when the student was off-task, and implementation of OT strategies such as the use of a seat cushion, lap pad, and weighted vest (*id.* at pp. 1-2). The new intervention plan developed by the IST indicated that the student received reading and Pittsford Youth Counseling (PYC) as support services (*id.* at p. 1). The stated goal of the plan was to target the student's attention, motivation, "blurring," and work independence (*id.*). The plan identified several areas of concern including attention, following directions independently, completing routines, and interacting with peers (*id.*). According to the intervention plan, the team determined it would provide counseling to the student, perform a motivation inventory, create a "Best Self Office " visual and set up an office in a corner of the classroom, and provide the student with a cushion seat for his desk and a padded chair with a back for the floor (*id.* at pp. 1-2). The plan indicated that a follow-up meeting was scheduled for November 2, 2017 (*id.* at p. 1).

Following the IST meeting district staff worked with the parents to develop a reward system for the student (Parent Ex. 45a at pp. 54, 62-67). Emails between the parent and district indicated that the student would growl and make loud noises in the classroom, needed 1:1 support to complete his work, and consistently sought validation that he was being "good" (*id.* at pp. 62-67).

On November 8, 2017, the PST met at the request of the student's second grade teacher (Parent Ex. 36a at p. 2). The teacher expressed concern that the student's self-regulation issues and tendency to hyper-focus were negatively impacting his learning and that of others (*id.*). According to the student's teacher, the student had recently scored 25 out of 25 on an assessment, however, it was administered over 12 days and the student was "giv[en] two questions per day" (*id.*). The student's reading teacher indicated that the student struggled to apply what he had learned and had recently earned a 53 percent on a unit test (*id.*). The reading teacher reported that, often, the student would only work when someone directly prompted him; however, he was capable of writing and doing math if he was "in a good place" (*id.*; *see* Parent Ex. 26). With respect to the student's social and behavioral functioning, the student's second grade teacher indicated that the student often required the support of a classroom paraprofessional, and if a paraprofessional was unavailable, the student required the teacher's "undivided attention" (Parent Ex. 36a at p. 3). The student struggled to get through a lesson without 1:1 support and demonstrated inappropriate behaviors including standing up and shouting out during instructional time; at times the student talked about inappropriate and/or violent topics (*id.*). Additionally, the PST meeting minutes noted that the student was fixated on a girl in the class and constantly sought her approval (*id.*). The school counselor suggested that placement with older peers might be an option for the student as he could likely "handle it" academically, and socially it would provide the student with "better behavior to mimic" (*id.*). The PST meeting minutes indicated that the school counselor would talk with the parents about the benefits of an evaluation (*id.*). The team recommended that the evaluation include psychological, academic, OT/sensory, and speech-language testing as well as a FBA (*id.*). The team also recommended consideration of the following accommodations: a standing desk and a weighted vest (*id.*).

Around this same time that the PST met in November 2017, the second-grade teacher informed the parents that she noticed the student having more frequent conversations with himself and with his dog, who was not present (Parent Ex. 43a at p. 69). In addition, the teacher reported that the student was barking, laughing and singing out loud in class (*id.*).

On November 9, 2017, the district referred the student to the committee on special education (CSE) for an evaluation (Parent Ex. 4a at p. 1; *see* Dist. Ex. 4). The parents consented to the evaluation on November 15, 2017 (Dist. Ex. 6).

The student's second grade teacher explained why she did not refer the student to the CSE earlier in the 2017-18 school year. She testified that she was concerned about the student's mental health needs as he was talking to people and things that weren't there (Tr. pp. 1496-97). She indicated that the student told stories that were not typical of a seven year old boy and that it was hard for her to know if he told the stories out of anger or in order to get a response out of his peers (Tr. p. 1522-23). She further testified that the student's behavior was interfering with her ability to teach the whole class (Tr. p. 1498). The teacher reported that she did not refer the student to the CSE in September (Tr. 1499). She explained that she emailed the student's parents "more than I emailed any other parents" and that she and the parents were "working together" (Tr. p. 1499; *see* Tr. p. 1509; Parent Ex. 43a at pp. 62-67). The teacher testified that she was getting input from the parents and they were supportive of everything she was doing (Tr. p. 1499). The teacher suggested that the idea of referral to the CSE was first brought up when the parents sent an email asking for more support for the student (Tr. p. 1509). The teacher testified that she tried a lot of different strategies with the student including using language to describe his behavior as

"unexpected" so it wouldn't be perceived as bad, providing the student with a classroom schedule he could check off, and assigning the classroom educational assistant to work with the student (Tr. pp. 1510-11, 1513-14). However, the teacher indicated that in order to support the student she ended up being almost a 1:1 teacher for him while the educational assistant "was pretty much the classroom teacher" (Tr. p. 1511). The teacher agreed that she spent an inordinate amount of time with the student but that the situation did not resolve (Tr. pp. 1511-12). She indicated that she did not make a CSE referral because the parents "really wanted to try this" (Tr. p. 1512). She noted that the parents were giving the student different medications and wanted her to see how things went for "like ten days" (*id.*). In addition, she explained that she did not know the student in September (Tr. pp. 1512, 1514, 1526-27). She suggested that the emails from the student's father indicated that he wanted the student to remain in her classroom (Tr. p. 1513). The student's father testified that before the CSE process began he did not know anything about it (Tr. p. 1895).

With respect to the 2016-17 and portion of the 2017-18 school year leading up to the November 2017 referral to the CSE, the evidence shows student had been in an RtI process for a long period of time, but that the district's RtI process and policy did not comport with State regulation. While the hearing record contains evidence of IST intervention plans for the student and periodic meetings by the IST to reassess those plans and the district's RtI policy makes specific reference to positive behavioral supports and the collection of behavioral data (see, e.g., Dist. Ex. 79 at pp.1-2), there is little evidence of any formal data collection or the objective criteria by which the IST evaluated the student's progress or determined whether or not he required a referral to the CSE. Rather, the evidence of the student's progress is contained in report cards and progress reports, as well as testimony from school staff that largely amounts to staff impressions and perceptions that he was making adequate progress with RtI interventions and did not need a referral to the CSE during his first grade year or prior to his referral to the CSE in November 2017. However, without any written formal criteria by which the student's progress through a system of multi-level interventions could be gauged and no evidence of formal data collection or guidance concerning how long the student should remain at each level of intervention before progressing to the next level or, alternatively, to a CSE referral, the district did not establish that it complied with its child find obligations. The lack of guidance in this respect is particularly troubling where, as here, the student received individualized interventions at the outset of the RtI process and remained at that level of intervention over an extended period of time, and the next level of intervention, for which no formal "triggering" criteria had been established in the district's policy, would presumably be referral to the CSE for evaluation. But without formalized criteria and guidance presented in a multi-level format of intensifying interventions as contemplated by State regulation and guidance, a student who is actually eligible for special education all the while can be left to teeter at the edge of CSE referral indefinitely while a district continues to rely on RtI interventions. The district's policy contemplates that the IST is responsible for collecting academic, achievement, and behavioral data for the student, developing a hypothesis concerning the function of the academic or behavioral difficulty the student is experiencing, creating a plan using research-validated interventions, implementing the plan, evaluating the interventions and modifying the support plan as needed. However, this wholesale delegation to the IST of the responsibility to create, monitor and implement prereferral interventions, including RtI, without complete standards that clearly dictate when referral to the CSE is contemplated based on established criteria, does not comport with State regulation. Moreover, the dearth of any evidence of formal data collection by the IST demonstrates that the IST also failed to comply with the district's own policy that the IST was responsible for collecting academic, achievement and behavioral data. Accordingly, the

district's failure to promulgate and adhere to RtI policies and processes compliant with State regulation and responsive to State guidance compromised its ability to identify whether the student should have been referred to the CSE prior to his referral for evaluation in November 2017. Thus although I have different reasons than that of the IHO, based in part on additional evidence that was not before him, the conclusion is the same, namely that the district failed to fulfill its child find obligation during the student's first and second grade school years, prior to the district's eventual referral of the student to the CSE in November 2017. Accordingly, I will not disturb the IHO's child find determination.

C. January 2018 IEP

1. Present Levels of Performance

In the parents' cross-appeal, the parents argue that the IHO erred by finding that the January 2018 IEP was appropriate and provided the student with a FAPE. Specifically, the parents argue that the IEP failed to accurately describe the student and further that it failed to address the student's sensory, auditory, pragmatic language, social/emotional and behavioral needs.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

Based on a review of the information considered by the January 2018 CSE and the resultant January 2018 IEP, the hearing record shows that the IEP accurately described the student at the time it was developed.

A review of the January 2018 IEP indicates that the following evaluations and reports were available to the CSE: a November 2017 report card, a November 2017 psychological evaluation, a December 2017 social history update, a December 2017 medical checklist, a December 2017 educational evaluation, a December 2017 FBA, a January 2018 speech-language evaluation, a January 2018 occupational therapy evaluation, a January 2018 teacher report, and parent report (Parent Ex. 3a at p. 2).¹¹ In addition, the hearing record indicates that the January 2018 CSE had available a January 2018 student needs/paraprofessional planning document and the January 2018 PST meeting minutes (Tr. p. 194 see Parent Exs. 14 at pp. 1-7; 36c at pp. 1-3).¹² Also, the director

¹¹ The November 2017 report card is not included in the hearing record.

¹² While the January 2018 PST meeting minutes were not included in the list of evaluations and reports on the January 2018 IEP, a review of the documents reveals that at least seven members of the PST were also members of the January 2018 CSE and that the January 2018 IEP indicated that the PST would review the management needs in six weeks (Parent Ex. 3a at p. 8; compare Parent Ex. 3a at p. 1, with Parent Ex. 36c at p. 2).

of special education testified that the CSE considered a December 2017 behavioral observation summary (Tr. pp. 152-53, 157-58; see Parent Ex. 16 at pp. 1-2).

The November 2017 psychological evaluation report indicated that the student was referred for an evaluation by the PST due to his behavioral challenges as well as academic struggles in the classroom (Parent Ex. 7 at p. 1). Administration of the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) yielded a full-scale IQ of 96, which fell in the average range (id. at pp. 2-3, 4). According to the evaluator, the student demonstrated a strength in verbal comprehension and a relative weakness in fluid reasoning (id. at pp. 4-5). With regard to the student's social/emotional functioning, the evaluator indicated that the student was asked to supply endings to incomplete sentences and to complete pencil/paper drawings; and the student's teacher and parent completed the Behavior Assessment System for Children – Third Edition (BASC-3) rating scales (id. at pp. 5-6).¹³ Responses provided by both the teacher and parent yielded ratings that suggested the student's adaptive and problem behaviors were clinically significant or at-risk on all composite scales and the evaluator noted that the behaviors that fell in the clinically significant range suggested a high level of maladjustment (id. at pp. 3-6). According to the evaluator, overall, the results of her evaluation revealed that the student struggled to generate adequate self-esteem and to maintain positive peer relationships, and that when frustrated, he easily became overwhelmed and unable to control his impulsivity (id. at p. 6). In addition, at times the student's behavior became argumentative and oppositional (id.). The evaluator reported that the student displayed considerable motor restlessness during the testing sessions but also that he appeared to enjoy the individual adult attention received during the evaluation (id. at p. 2). She recommended that special education support, including a smaller classroom setting be considered and stated that based on his diagnoses, the student would qualify for special education as a student with an other health impairment (id. at p. 6).

The December 2017 social history update completed by the parents stated that the student saw a psychiatrist and therapist two to four times a month; had the diagnoses of anxiety, obsessive compulsive disorder, and attention deficit hyperactivity disorder; and was currently taking medications (Parent Ex. 12 at pp. 1-2).¹⁴ The parents noted that they believed the student was struggling to focus and to follow lessons (id. at p. 2). The parents further noted that the student could not complete his work independently, which made him feel inferior and anxious, and lead to him making noises and becoming overbearing which resulted in peers not wanting to play with him (id. at p. 2). The parents reported that most of the time the student was upset about school because he knew he was not doing the work as expected, even though he was trying very hard, and that he got "very upset" when he saw that the other kids did not want to play with him (id. at p. 3). The parents reported that they knew the student was very smart, had a great memory, and was creative and imaginative and that many of his positive characteristics were "buried" by his inability to focus (id.). The parents expressed their hope that the student could get the support he needed

¹³ The evaluator described the BASC-3 as a comprehensive measure of both adaptive and problem behaviors, the results of which can be used to gather adults' perceptions of behavioral problems or social/emotional problems a student may be experiencing (Parent Ex. 7 at pp. 5-6).

¹⁴ While the social history update was undated, testimony from the director of special education indicated this was conducted as part of the initial evaluation and the January 2018 IEP indicated the update was completed on December 1, 2017 (Tr. p. 158; Parent Ex. 3a at p. 2).

so that he could learn, focus, and "show us how well he can do" and that this would help his self-esteem and in turn help him socially (id.).

The December 2017 health appraisal indicated that the student had received a medical diagnosis of anxiety disorder and that the student took medication for behavioral health (Parent Ex. 11).

The December 2017 educational evaluation report indicated that the student's academic skills were assessed using the Woodcock-Johnson IV Tests of Achievement (WJ IV ACH) (Parent Ex. 8 at p. 2). According to the learning specialist who evaluated the student, the student performed in the average range on most subtests of the WJ IV ACHs except for the applied problems (mathematics) subtest where he performed in the low average range) and writing samples subtest where he performed in the superior range (Dist. Ex. 35 at pp. 2-4). The learning specialist observed that the student liked working alone and in a quiet place and that he was capable of doing the work, paying attention, and working hard on a task (id. at p. 5). She suggested that the next step with recommendations would be to provide the student with "more 1:1 assistance throughout the day," including in the general education classroom setting (id.). She opined that this would allow district staff to see what the student would be able to accomplish with "those" peers and that the 1:1 person could give the student undivided attention, provide him with breaks, and be available to take him to another setting when he needed additional time to be removed from the class for quiet work time (id.). The learning specialist stated that while the student used academic knowledge and language/vocabulary that was advanced compared with other students in self-contained settings, he would benefit socially and academically from being in a smaller setting for part of his day (id. at p. 5). She opined that it might help the student stay organized, focused, and follow directions and ultimately help him stay in a general education setting for longer periods of time (id.). The learning specialist also noted that the student would benefit from counseling on a regular basis and learning to regulate his feelings/emotions and understanding how they affected others (id.). The learning specialist further suggested a meeting to see if the student would benefit from a setting that was therapy based or whether a program at the student's elementary school would best meet the student's needs (id.) The learning specialist also recommended future consideration of fading the paraprofessional support so that the student did not become dependent on the person (id.).

In December 2017 the district conducted an FBA, discussed in detail below, which defined the student's target behavior as disruptive behavior ranging from off-task, imaginary, talk to yelling at peers and engaging in behaviors that could be considered unsafe (Parent Ex. 15 at pp. 1-8).

The December 2017 behavioral observation summary, completed by the behavioral consultant and psychology intern, indicated that the student was observed on two different occasions using the Behavior Observation System for Students in Schools (BOSS) to measure his levels of academic engagement and off-task behavior during instruction (Parent Ex. 16 at p. 2). The evaluators reported that across the observations, the student was rated as being engaged in the instruction for approximately half of the time and that his off-task behaviors were most often verbal (e.g.; talking about his dog, shouting out, and making noise) and motor (e.g.; getting out of his seat and fidgeting with something on his desk) (id. at pp. 1-2). Overall, the evaluators noted that

the student's pattern of engagement was an area of concern and his teacher had reported that the student's off-task behaviors were impacting his peers as well (id. at p. 2).¹⁵

A January 2018 speech language evaluation report indicated that the student's speech and language skills had been informally assessed through the use of various screening tools in kindergarten and first grade, that he exceeded all criterion scores demonstrating no speech and/or language concerns in the past, and that he did not receive any speech and language supports at the time of the evaluation (Parent Ex. 9a at p. 1). The evaluating speech-language pathologist noted that the student was attentive to all visual and auditory stimuli and put forth his best effort but that it was more challenging for the student to attend to auditory information of increased length and complexity, that he demonstrated lack of attention to detail, and that he moved around in his seat and was observed to play with his sneakers during the evaluation sessions (id.). The speech-language pathologist explained that as part of the assessment the Clinical Evaluation of Language Fundamentals-5 (CELF-5) was administered to assess the student's receptive (measures of listening and auditory comprehension) and expressive language (syntax, morphology, and semantics) skills, language content (various aspects of semantic development including vocabulary, concept and category development, comprehension of associations, interpretation of factual and inferential information presented orally, and the ability to create meaningful semantically and syntactically correct sentences), and language structure (interpreting and producing sentence structures) (id. at pp. 2-3). In addition, according to the speech-language pathologist, the Montgomery Assessment for Vocabulary Acquisition (MAVA) was administered to assess the student's understanding (receptive) and use (expressive) of tier one, tier two, and tier three vocabulary words; the Social Emotional Evaluation (SEE) was administered to evaluate various aspects of emotional and social awareness; and the Pragmatic Profile from the CELF-5 was completed by the student's classroom teacher to identify verbal and nonverbal pragmatic deficits that may negatively influence the student's social and academic communication (id. at pp. 4-5).

The speech-language pathologist found the student's receptive language skills to be within the average range and his expressive language skills to be above the average range with demonstrated strengths in expressive language skills such as: formulating sentences, using various morphological structures, and answering literal and inferential comprehension questions pertaining to a verbally presented paragraph (Parent Ex. 9a at pp. 2-3, 6). The speech-language pathologist noted that based on the student's performance on the assessments, the student demonstrated average to above average aspects of emotional and social awareness in isolation during evaluation sessions, however, the speech-language pathologist also noted that the student did not demonstrate these skills during daily activities (id. at pp. 4-6). In addition the speech-language pathologist noted that the student's pragmatic language skills, on a daily basis, were considered to be well below the average range for a student his age and that he demonstrated difficulty with participation, giving/asking for information, understanding/expressing complex intentions, awareness/use of prosodic cues, sharing/responding to reactions, and reading/using body language, all of which were greatly impacting his ability to establish relationships with peers and adults in a variety of social contexts (id. at p. 6). The speech-language pathologist stated that

¹⁵ The director of special education noted that the observation summary was a classroom observation with a standardized data collection tool to measure student behavior and compare it against a typical peer in the classroom (Tr. p. 153).

based on his performance the student did not present with a speech and/or language impairment, however, did present with deficits in his ability to effectively use verbal and nonverbal pragmatic language skills on a daily basis across academic and social contexts (id. at p. 7).

The January 2018 OT evaluation was conducted by a BOCES occupational therapist who was familiar with the student (Dist. Ex. 37). The resultant report stated that the student was referred for evaluation because of sensory motor concerns and was assessed in the areas of fine motor precision, fine motor integration, manual dexterity, and upper limb coordination using the Bruininks-Oseretsky Test of Motor Proficiency – Second Edition (BOT-2) (Dist. Ex. 37 at p. 1). The occupational therapist also assessed the student's visual perceptual skills using the Motor Free Visual Perception Test – Third Edition (MVPT-3) and the student's sensory processing using the Sensory Profile (Tr. Pp. 1554-55; Dist. Ex. 37 at pp. 2-4). In sum the occupational therapist found that the student demonstrated many functional fine motor skills, while his visual perceptual and coordination skills were below average (Dist. Ex. 37 at p. 5). The occupational therapist also found that the student demonstrated under-responsiveness to movement input and demonstrated "inattention distractibility" as well as dysregulation emotionally and behaviorally (id.). She recommended that the student receive direct OT twice a cycle, once in the therapy room to practice specific skills and strategies and once a cycle in the classroom to transfer the skills/strategies learned (id.).

The January 2018 student needs/paraprofessional planning document indicated that with paraprofessional support the student would be better able to recognize his behavior and take breaks from the classroom when necessary, and that the paraprofessional could support the student with transitions, organization, and completing his school work (Parent Ex. 14 at p. 1). The January 2018 document noted that it would be important for the student to develop the ability to regulate his emotions/behavior and to independently complete schoolwork, and that a plan to fade the adult support should be included (id. at p. 1). According to the January 2018 paraprofessional planning document the student presented with serious behavior problems with ongoing (daily) incidents in which the student could become aggressive toward both peers and adults in the classroom when he was frustrated and/or overwhelmed (id. at p. 2). The paraprofessional planning document noted that an FBA had been completed and a BIP was being developed and that a paraprofessional would support the implementation of the BIP, including the student's removal from the classroom when necessary (id.). The paraprofessional planning document stated that the student required a "significant" level of additional support for "Behavior/Social/Emotional" and "Instruction" during transitions, academics, and specials/electives and included a recommendation for additional 1:1 adult support six hours per day (id. at pp. 2-4).

The January 2018 PST meeting minutes included staff reports that the general education class was not "the right fit" for the student, that the student had regular outbursts, that his behavior was escalating and other students were scared, and that without adult support, the student completed minimal work in the classroom (Parent Ex. 36c at p. 2). The PST recommended that the student receive special education as a student with an other health impairment, OT, counseling, a BIP, a full-time paraprofessional daily and a 12:1+1 special class for 2 1/2 hours daily (id. at p. 2-3).

The January 11, 2018 second grade classroom report, completed by the student's general education teacher, indicated that math concepts were challenging for the student and problems

often needed to be broken apart for the student to complete his work (Parent Ex. 13a at pp. 1-2). In addition, while the student enjoyed writing in his weekend journal and worked to complete that each week, he had a more difficult time writing to a specific prompt (id.). The student's teacher stated that during whole class instruction it was very challenging for the student to focus and often he talked to himself, shouted out or mimicked teacher's language and movement (id. at p. 1). In addition, the teacher noted that it was difficult to assess the student academically because he was not able to perform any work independently and that in the classroom even a simple task required one to one support in order for the student to complete the task (id.). The teacher stated that the student needed one to one support from either the educational assistant or herself to get ready for the day (e.g.; reminders to get his folder out of his backpack, make his lunch choice, get his supplies ready) and if the student was not with an adult—including during transitions, recess, lunch—he would approach peers and strike up a conversation that could lead to talk of violence or inappropriate conduct (id.). The teacher stated that the student had a difficult time engaging in appropriate conversations with peers and got upset when a particular student played with others and he called the student names and shouted in her face, talked about ways to "destroy her" so no one else could be her friend, and reportedly his actions scared and were upsetting to his peers (id. at p. 2). The teacher reported that the student had a rich vocabulary and was engaging in a one to one conversation but believed that the classroom of 25 students was overwhelming for him and that the student would benefit from a smaller learning environment as well as a paraprofessional (id.).

The director of special education stated that the evaluation results were consistent with the district's knowledge that social/emotional skills were the student's greatest areas of need (Tr. pp. 143-44, 185-86). She explained that when drafting the present levels of performance for a student, the CSE focused on the description of the strengths, present levels, and needs as they relate to a school environment and that the present levels of performance in the student's IEP described the student's needs related to his anxiety, his ADHD, and his OCD (Tr. pp. 186-87). She opined that the January 2018 IEP addressed the parents' concerns and that the most important needs identified in the IEP were the student's social/emotional difficulties (Tr. p. 186).

On January 18, 2018, a CSE convened to conduct an initial eligibility determination meeting and develop an IEP for the student (Parent Ex. 3a at pp. 1-13). Consistent with the November 2017 psychological evaluation, the January 2018 IEP present levels of performance stated that the student's scores on cognitive assessments were in the average range compared to age mates and that verbal comprehension was found to be an area of significant strength for the student (compare Parent Ex. 3a at p. 5, with Parent Ex. 7 at pp. 4-5). The present levels of performance indicated that the student's math abilities mostly fell within the average range and identified needs in applied problems and abstract concepts (Parent Ex. 3a at p. 5). In the area of reading, the January 2018 present levels of performance stated that the student was performing in the average range and noted the student experienced some trouble with blends and some words with ending sounds of f, l, and s (e.g., wall, fall, stuff, mass) (id.). In addition, the present levels of performance noted that the student was a good reader but at times made substitutions for other words that have the same initial letters and had difficulty with abstract concepts (id.). The January 2018 IEP indicated that the student was an excellent writer (id.). It further stated that when working alone or in a small group the student showed interest in academic work, used good manners, and was friendly and outgoing; however, it was also noted that he was often dysregulated, showed signs of aggression and emotional distress, and struggled with attention and staying on-

task (id.). The January 2018 IEP noted that the parents felt that math was the student's weakest academic area (id. at p. 6).

Consistent with the speech-language evaluation conducted by the district that same month, the January 2018 present levels of performance reflected that the student's receptive and expressive vocabulary skills and his receptive language skills were considered to be within the average range (compare Parent Ex. 3a at p. 5, with Parent Ex. 9a at p. 6). The January 2018 IEP stated that the student's expressive language skills were found to be above average with strengths in formulating sentences, using various morphological structures and in answering literal and inferential comprehension questions pertaining to a verbally presented paragraph (Parent Ex. 3a at p. 5). The present levels of performance indicated that the student demonstrated average to above average aspects of emotional and social awareness in isolation during evaluation sessions but that he did not demonstrate those skills during daily activities and noted that the student's pragmatic skills, on a daily basis, were considered to be well below the average range (id.). The January 2018 IEP stated that the student demonstrated difficulty with participation, giving and asking for information, understanding and expressing complex intentions, awareness and use of prosodic cues, sharing and responding to reactions, and reading and using body language; and noted that these deficits greatly impact the student's ability to establish relationships with peers and adults in a variety of social contexts (id.).

Regarding social development, the January 2018 present levels of performance stated that the student had difficulty functioning in a large group and did not seem to fully understand or know how to deal with his emotions, showed aggression toward peers on a regular basis, and struggled to use social and emotional awareness skills and appropriate language to respond to unexpected situations with peers and adults (Parent Ex. 3a at p. 6). The IEP noted that when working alone with an adult the student was very attentive, friendly and focused and was proud of his work and seemed to thrive when given attention often, regularly, and consistently (id.). The present levels of performance indicated that the student needed to build his confidence and his understanding of emotions and learn how they affected others and what he could do about his feelings (id.). Further the present levels of performance stated that the student demonstrated a lack of reciprocity with others in the school environment and would benefit from visual social/behavior mapping to improve his social thinking skills and that he would continue to benefit from weekly contact with the town youth counselor at school, as well as his private therapist (id.). The IEP reflected the parents report that they had seen the student become easily upset, distracted and unable to perform, overly anxious, and stubborn at times, and had also seen displays of "unexpected behaviors" in public (id.). The parents indicated that they were having the student's medications adjusted and "looked at carefully" to see how that could help the student with his performance at school (id.).

In the area of physical development, the present levels of performance stated that with respect to fine motor ability the student was able to manipulate small objects quickly and effectively, demonstrating average dexterity skills (Parent Ex. 3a at p. 6). In addition, the present levels of performance indicated that the student demonstrated legible handwriting skills with consistent spacing between words but inconsistent letter size (id.). Also the January 2018 IEP noted that it was likely that the student's perceptual skills were weak based on his performance across different assessment tools, but it was noted that some of this may have been due to his fatigue and attention to task (Parent Ex. 3a at pp. 6-7; see Dist. Ex. 37 at pp. 1, 3). The present levels of performance indicated that coordination was the most challenging skill area for the

student and that he was unable to catch a tossed ball with one hand or accurately throw at a target given five trials, and that dribbling a tennis ball was challenging (Parent Ex. 3a at p. 7). The January 2018 IEP indicated that the student exhibited typical functioning in the sensory areas of registration, modulation, sensory sensitivity, vision and touch input, endurance/tone and oral sensitivity and noted that elevated scores in the areas of registration and sensitivity appeared to be related to the student's distractibility rather than sensory functioning (*id.*). The January 2018 IEP noted "Probable to Definite Differences" in the area of sensory seeking (related to seeking movement input as well as fiddling with objects) and "Definite Differences" in the areas of inattention/distractibility (related to auditory and visual distractibility, missing oral/visual directions, appears not to hear, makes noises, and is inefficient when completing tasks); and emotional and behavioral responses (related to emotional outbursts, difficulty with changes in routines, anxiety, low frustration tolerance, and being sensitive to criticism/feeling like a failure) (*id.*).¹⁶ The parents reported that they had seen the student try too hard at times with gross motor activities and then not perform as well and also noted that he did extremely well with archery (Parent Ex. 3a at p. 6).

To the extent that the parents assert that the January 2018 IEP failed to address the student's sensory, auditory, pragmatic language, and social/emotional/behavioral needs, the hearing record does not support their claim. With regard to the student's sensory needs, the January 2018 occupational therapy evaluation indicated that the student demonstrated sensory seeking behavior, struggled with inattention and distractibility, and demonstrated difficulty with emotional regulation (Dist. Ex. 37 at pp. 4-5). The evaluating occupational therapist recommended that the student receive OT two times per cycle and also recommended the following to address the student's management needs: movement breaks and sensory tools to meet the student's sensory seeking/under-responsiveness; strategies to reduce auditory and visual distraction and maximize the student's attending skills; and adult assistance to improve the student's ability to self-regulate emotionally and behaviorally (*id.* at p. 5). The January 2018 IEP reflected the student's sensory needs as detailed in the OT evaluation and included a recommendation by the CSE that the student receive OT two times per six-day cycle (*id.* at pp. 7, 10). In addition, the IEP afforded the student personal space within the classroom, movement breaks and access to sensory tools, and the assistance of a 1:1 aide (*id.* at pp. 7-8). The hearing records shows that the student's sensory needs were intertwined with his social/emotional/behavioral needs. The January 2018 IEP described the student's social development in a manner that was consistent with the evaluations completed by the district (compare Parent Exs. 7, 12, 13a, 14, 15, 16, 36c, with Parent Ex. 3a at p. 6). To address the student's social/emotional/behavioral needs, the CSE recommended that the student attend a 12:1+1 special class for 2 1/2 hours per day, developed a BIP (that targeted the student's disruptive behavior) to be implemented throughout the school day, and recommended that the student receive individual counseling weekly (Parent Ex. 3a at pp. 10-11; see Parent Ex. 17a). The CSE further recommended a behavioral consultation for the student's team 10 times per year (Parent Ex. 3a at p. 11). The January 2018 IEP included numerous environmental, human and material resources to address the student's management needs and also included goals that targeted the student's ability to identify his emotions and their intensity and to complete work independently and lessen the need for 1:1 attention (*id.* at pp. 7-8, 10). Turning to the student's pragmatic language, the

¹⁶ The January 2018 occupational therapy evaluation report stated that "Probable Difference" indicated questionable areas of sensory processing abilities and "Definite Difference" indicated sensory processing problems (Dist. Ex. 37 at p. 3).

January 2018 speech-language evaluation indicated that the student presented with deficits in his ability to effectively use verbal and nonverbal pragmatic language skills (Parent Ex. 9a at p. 6). The January 2018 IEP reflected the student's deficits in this area and noted that they were "greatly impacting" the student's ability to establish relationships with peers and adults (Parent Ex. 3a at p. 5). The January 2018 IEP included a recommendation for speech-language therapy in a small group and a goal that targeted the student's ability to initiate, maintain, and terminate conversations (*id.* at pp. 9-10). Lastly, with regard to the student's auditory needs, information considered by the January 2018 CSE indicated that the student was distracted by noise, appeared not to hear, did not respond to his name, and enjoyed making noise (Dist. Ex. 37 at p. 5). The January 2018 IEP listed several management resources to address the student's auditory weaknesses including providing the student with a "small" teacher to student ratio and a quiet, structured predictable approach to instruction (Parent Ex. 3a at p. 7). In addition, the IEP noted the need for strategies to reduce auditory distractions and included a goal that targeted the student's ability to follow directions when given visual and verbal prompts (*id.* at pp. 8, 9).

Therefore, based upon a review of the information discussed in detail above, I find that the January 2018 IEP present levels of performance adequately reflected the student's strengths and weaknesses at that time and provided sufficient information upon which to develop the remainder of the student's IEP. In addition, contrary to the parent's claim, the January 2018 IEP identified the student's sensory, auditory, pragmatic language, and social/emotional/behavioral needs.

2. Consideration of Special Factors—Interfering Behaviors

On appeal, the district argues that although the IHO correctly found that the FBA did not deprive the student a FAPE, the IHO erred in finding that the FBA did not include all required legal components. In the parents' cross-appeal, the parents agree with the IHO that the FBA and BIP were deficient; however, the parents argue that the IHO erred in failing to find that the deficient FBA and BIP deprived the student of a FAPE.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149-50). 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]; Gavity 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. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

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

include[s], 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 regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

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

The hearing record shows that the parents hired a school consultant to review the FBA and BIP completed by the district in December 2017 and January 2018, respectively (Tr. pp. 1796-97, 1803, 1853-54; see Parent Exs. 15; 17a). Based on her review of the December 2017 FBA, the school consultant testified that standard or best practice would dictate that the district should have collected data about the student's behavior in contexts other than math, which she noted was the student's least preferred subject (Tr. pp. 1805-06, 1812-13). She further indicated that an FBA should include variables such as who was present at the time the behavior occurred, the level of structure, and the teacher's reinforcement approach (Tr. pp. 1813-14, 1815-16). The school consultant indicated that based on the district's FBA it was not clear if the student's behaviors were in response to academic or nonacademic demands (Tr. p. 18-14). The school consultant questioned the district's use of the "umbrella term" "disruptive behavior" and opined that the student's off-task behaviors, imaginary talk, and self-injurious or aggressive behaviors should have been defined and measured separately as they could potentially serve different functions (Tr. pp. 1806-09, 1817-18, 1822, 1831). The school consultant indicated that the antecedents in the FBA were "fairly well defined" (Tr. p. 1822). She testified that she would not characterize the FBA as inappropriate, rather opined that for a student with complex behaviors it was "not very informative" (Tr. p. 1825).

With respect to the adequacy of the FBA, the December 2017 FBA identified disruptive behavior as the problem behavior and defined the behavior as ranging from off-task, imaginary talk during instruction to yelling at peers and engaging in behaviors that could be considered unsafe (e.g.; running around the room, using materials unsafely, threatening peers and adults) (Parent Ex. 15 at p. 3).

The December 2017 FBA identified contextual factors (cognitive and affective) that contributed to the student's behavior and noted attentional deficits including difficulty sustaining attention particularly during non-preferred activities (Parent Ex. 15 at p. 4). The December 2017 FBA also noted affective deficits such as difficulty in demonstrating self-regulation skills (monitoring his thoughts and behaviors, thinking flexibly, adapting behaviors to fit a given situation); and social thinking deficits including difficulties consistently initiating and maintaining positive interactions with peers and recognizing how others may view his behaviors (*id.* at pp. 4-5).

The December 2017 FBA included the formulation of a hypothesis regarding the general conditions under which the student's disruptive behavior usually occurred and probable consequences that served to maintain the behavior (Parent Ex. 15 at pp. 7-8). The functional hypothesis stated that there were many antecedents that might trigger the student's behavior such as receiving a non-preferred direction, having to transition, being asked to wait to receive adult attention or set aside a problem that may not be fixed immediately, being unable to sit near a preferred peer, being told that he could not do something he wanted to do, or having his attention pulled off-task by something a teacher or peer said during instruction (*id.* at p. 7). The functional hypothesis explained that when these antecedents occurred (most often during unstructured times, large group instruction, independent work time, cooperative learning tasks, in the mornings, during physical education, and in large crowded settings) the student might engage in disruptive behavior ranging from off-task, imaginary talk to yelling at peers and engaging in behaviors that could be considered unsafe (*id.*). The functional hypothesis stated that this behavior was likely maintained by adults increasing their proximity in an attempt to prompt/redirect/rephrase directions, peers looking at the student, and the student being asked to leave the group to regulate (*id.* at pp. 7-8). Further the functional hypothesis in the December 2017 FBA suggested that the student might be more likely to engage in disruptive behavior when he had a substitute paraprofessional or teacher, was experiencing changes in routine, was fatigued, or was perseverating on a negative interaction with a peer (*id.* at p. 8). Lastly, the functional hypothesis indicated that attentional, affective, and social thinking deficits might also contribute to the student's disruptive behavior, as the student had difficulty sustaining attention during non-preferred tasks, accessing self-regulation skills when his emotions were elevated, and initiating and maintaining positive social interactions with peers and recognizing how others may view his behaviors (*id.*).

The December 2017 FBA indicated that the FBA data was based upon observation, record review, and information from the student's teacher, service provider, and parent (Parent Ex. 15 at p. 1). The December 2017 FBA included baseline data of the problem behavior including frequency (average of eight times per period with a range of two to twelve times per period), duration (average of 12 minutes per incident with a range of five to 30 minutes per incident), and intensity (three percent of occurrences rated as mild-using off-task imaginary talk, 91 percent of occurrences rated at moderate-shouting out and making loud noises, six percent of occurrences were rated as severe-engaging in unsafe behaviors and threatening peers and adults) (*id.* at p. 3). Although the parents' school consultant asserted that the FBA indicated that the baseline data was collected only during math lessons and that this was not "best practice," the December 2017 FBA identified this fact and noted that while the specific data was a snapshot summary of the student's math performance, anecdotal teacher reports and direct observations indicated that these behaviors were consistently occurring throughout the day and across a range of activities and settings (Tr. p. 1805; Parent Ex. 15 at p. 3).

Based on the evidence above, the December 2017 FBA included the required information as set forth in the standard above and therefore the parents' contention that the IHO erred in finding that the FBA did not include all required legal components must be dismissed.

Turning to the parents' claims that the FBA failed to determine why the student was engaging in the behaviors that impeded his learning, how the student's behavior related to the environment, and failed to provide the information necessary to develop an appropriate BIP, the district consultant suggested that the description of the student's behavior in the FBA was lengthy and possibly hard to understand (Tr. p. 1262; Parent Ex. 15 at pp. 7-8). However, as detailed above, the FBA hypothesized that the reason the student engaged in disruptive behaviors, including those that could be considered unsafe (running around the room, using materials unsafely, making threats), was to gain adult attention and at times to avoid a non-preferred or difficult task, transition, or setting (Parent Ex. 15 at p. 7). In addition, the FBA identified how the student's behavior related to the environment, noting that he was more likely to engage in disruptive behaviors when he student had a substitute paraprofessional or teacher, was experiencing changes in routine, was fatigued, or was perseverating on a negative interaction and that the behaviors were likely to occur during unstructured times, large group instruction, independent work time, cooperative learning tasks, in the morning, during physical education and in large crowded settings (*id.* at pp. 7-8). The functional hypothesis was included in the January 2018 BIP (Parent Ex. 17a at p. 3).

With respect to the adequacy of the student's BIP, State regulation requires that the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).¹⁷ However, neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]).

With respect to the district's January 2018 BIP, the parents' school consultant testified that to the extent implementation of the "zones of regulation" was mentioned as a specific intervention for the student, it was an appropriate tool as long as it included pre-teaching (Tr. pp. 1826-27). She suggested that the BIP should include teaching the student to be aware of what his body was doing and that functional communication related to the student's thoughts and feelings would be helpful (Tr. pp. 1827-28). The school consultant acknowledged that the BIP included an antecedent strategy that allowed the student time to talk about his day, which she interpreted to be a "debriefing morning check in" and potentially helpful for the student (Tr. p. 1829). She indicated

¹⁷ The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

that other antecedent strategies used for coping or regulation, such as counseling, were not clearly delineated in the behavior plan (Tr. p. 1829). She noted two reinforcement strategies in the plan, the first related to praising the student two times as often as criticizing him (for unexpected behaviors) and, second, rewarding the student with positive notes and tickets when he had done something well (Tr. p. 1830). The school consultant indicated that she could not review the progress monitoring and know what interventions were effective as the student's behaviors were lumped together (Tr. pp. 1834-35). The school consultant testified that the district's BIP met the requirements of the law but that in her opinion other things could have been in there as well (Tr. pp. 1859-60, 1867-68).

A review of the January 2018 behavioral intervention plan (BIP) reveals that it identified the baseline measure of the problem behavior, including the frequency (an average of eight times per math period with a range of two to twelve), duration (an average of 12 minutes per incident with a range of five to 30 minutes), and intensity (mild/imaginary talk = 3% of occurrences, moderate/shouted out or made loud noises = 91% of occurrences, severe/unsafe behaviors = 6% of occurrences) (Parent Ex. 17a at p. 2).

The January 2018 BIP included intervention strategies to be used to alter the antecedent events in order to prevent the occurrence of the target behavior including: access to a visual schedule that outlined the student's activities for the day; time to talk about the details of the upcoming day with an adult; a designated work space/"office" in the classroom to serve as a place with limited distractions; visual supports such as visual cues for paying attention and checklists; assurance of full attention through calling the student's name, eye contact, a calm/neutral/direct voice, and checks for understanding; a clear understanding of the adult acting as the "primary" teacher who delivers all directions and answers any initial questions; preparation for transitions with clear and specific expectations of what is coming next and what the expected behavior "looks like"; allowing for movement breaks throughout the day to assist in maintaining regulation with use of helpful sensory strategies; and providing proactive opportunities for attention in a positive manner (Parent Ex. 17a at pp. 4-7). The January 2018 BIP included intervention strategies to be used to teach individual alternative and adaptive behaviors to the student such as exploring the use of a visual framework (Zones of Regulation) to help the student scale and communicate his feelings and regulatory state; taking advantage of opportunities to help the student understand that others wanted to be with him more often when he was engaged in expected behaviors and that this would lead to other responding kindly and allowed more access to meaningful rewards; adult modeling of appropriate social exchanges and problem-solving language in response to naturally occurring problems in the classroom; and scaffolding and in the moment coaching for particularly complex social situations (*id.* at pp. 4-5).

In addition, the January 2018 BIP included intervention strategies to be used to provide consequences for the targeted inappropriate behavior (Parent Ex. 17a at pp. 4-6). In response to mild behaviors (imaginary talk) the BIP called for increased adult proximity, reminders referencing visual supports, hurdle help, brief breaks to reset, and calming and sensory strategies; for moderate behaviors (making loud noises or yelling) the BIP included strategies such as setting firm limits while maintaining a calm, neutral tone of voice and facial expression; and for severe behaviors (taunting, threatening) the BIP called for asking the student to leave the group immediately and providing a "higher-level consequence" (*id.*).

The January 2018 BIP also included response strategies for alternative acceptable (desired) behavior such as acknowledging the positive behaviors at least two times as often as unexpected behaviors were criticized and sending home intermittent, positive notes/tickets that highlighted moments when the student had done something particularly well (Parent Ex. 17a at p. 4).

In addition, the January 2018 BIP included a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (every eight weeks) (Parent Ex. 17a at pp. 7-9). The January 2018 BIP included progress monitoring data from March 5 through March 9, 2018 and April 30 through May 3, 2018 which tracked the frequency (average of 13 times per day and 29 times per day respectively) and the duration (average of eight minutes per incident and average time spent away from setting per incident of 57 minutes¹⁸ respectively) for the two monitoring periods (Parent Ex. 17a at pp. 8-9). The progress monitoring data also tracked the intensity of the target behaviors for the period March 5 through March 9 (45% of occurrences mild/imaginary talk behaviors, 38% moderate/shouting out and making loud noises behaviors, and 17%t severe/unsafe behaviors);and the period April 30 through May 3 (56% mild/imaginary talk behaviors, 38% moderate/shouting out and making loud noises behaviors, and 6% severe/unsafe behaviors) (*id.* at p. 8-9).

Accordingly, as described above, a review of the December 2017 FBA shows that it accurately identified the student's interfering behaviors, and the January 2018 BIP addressed the student's problem behaviors and included progress monitoring data that tracked the student's frequency, intensity and duration of behaviors. Therefore, the hearing record supports the IHO's finding that the December 2017 FBA and January 2018 BIP did not contain any inadequacies sufficient to constitute a denial of a FAPE.

D. May and August 2018 IEPs

1. CSE Process—Predetermination and Parental Participation

The parents allege on appeal that the district denied them the opportunity to meaningfully participate in the development of the student's August 2018 IEP because the district made determinations regarding the student's program without including the parents in the decision-making process. The parents also argue that the district impermissibly predetermined the student's program by recommending Bird/Morgan prior to the August 2018 CSE meeting.

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

¹⁸ The April 30 through May 3, 2018 progress monitoring data set stated that the student's disruptive comments last only several seconds but if adults were unable to redirect the student after multiple disruptive comments or prevent the student from engaging in unsafe behaviors, the student might be asked to leave the setting to calm (Parent Ex. 17a at p. 9). According to the progress monitoring data the student was leaving the setting two times a day (Parent Ex. 17a at p. 9).

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] [noting that "[a] professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful 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). Moreover, "the 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]).

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 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]).

According to the August 2018 IEP, the CSE was composed of both of the student's parents, the CSE coordinator, a secretary, a school psychologist, a general education teacher, a behavioral consultant, a learning specialist, two speech language-therapists, the student services teacher, an intake coordinator and the principal (Parent Ex. 3e at p. 1). According to the transcript of the August 2018 CSE meeting, the CSE coordinator started off the CSE meeting by explaining that the CSE was at a point where the student's IEP needed to be amended and the student's program needed to be discussed (Parent Ex. 3eiii at p. 1). The intake coordinator continued the CSE meeting and expressed that during the first week of July 2018, the student and his parents participated in an intake meeting at Bird/Morgan (id. at pp. 1-2). The intake coordinator expressed that she knew the parents had questions and concerns about the program and proceeded to describe the proposed program at Bird/Morgan (id.). Next, the CSE coordinator inquired to the parents, "so why don't we talk through some of your concerns"? (id.). The parents proceeded to express their concerns

as to why they thought Bird/Morgan was not appropriate for the student (id. at p. 3). The parents explained that a general education program with a teaching assistant for the student would be appropriate for the student (id. at p. 7). The parents explained that if the student exhibited signs of anxiety, the teacher could remove the student to a separate room (id. at pp 7-8). In response, the CSE coordinator explained that the district could not provide that in the district and how it was much more "restrictive" than a 12:1+1 special class (id. at p. 8). The CSE coordinator further explained that the student went from a general education setting to a 12:1+1 program, which didn't work (id. at pp. 8-9). The CSE coordinator also explained that the district didn't have another program in the district to meet the student's needs which is why the CSE was recommending Bird/Morgan (id. at p. 9). The parents also expressed that they disagreed with the student's classification and felt that the student should be classified as a student with an other health impairment (id. at p. 3). The CSE coordinator stated the "parents have asked that we consider OHI over ED, so can we talk a little bit about what the difference is between those two classifications from our psychologists in the room"? (id. at p. 20). The CSE coordinator further stated, "... let's talk about [the student], and if we want to change the classification." (id.). The CSE team explained the differences between the two classifications and explained how the student's behaviors presented more as a student with and emotional disturbance (id. at pp 20-25). The CSE coordinator stated, "I propose staying with ED until we see a little bit more data to support maybe that it's mostly anxiety" (id. at p. 25). Ultimately, the CSE recommended the 6:1+1 program at Bird/Morgan and maintained the student's classification as a student with an emotional disturbance (Parent Ex. 3e at pp. 1, 11).

Here, the district provided the parents the opportunity to participate in the August 2018 meeting. The hearing record reflects that the CSE listened to a number of the parents' concerns and explained the reasons why the parents' suggestions would not be appropriate for the student. Although the hearing record reflects parental disagreement with the school district's proposed IEP and placement recommendation that 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 & Commc'n Dev., 2006 WL 2792754 at *7).

Furthermore, with respect to the parents' allegations that the district predetermined the student's placement at Bird/Morgan prior to the August 2018 CSE meeting, the hearing record reveals that an informal meeting took place on August 13, 2018 between district staff and the parents (Parent Ex. 37 at pp. 1-2). The parents felt that the Bird/Morgan program would not be a good fit and the district responded that if the parents did not want the student at Bird/Morgan or an other out-of-district placement, then the district would recommend home instruction (Parent Ex. 37 at p. 1; see Tr. pp. 1914-15). A draft IEP was created on August 22, 2018 which reflected the 6:1+1 program at Bird/Morgan (Parent Ex. 3d at p. 1). However, districts are permitted to develop draft IEPs prior to a CSE meeting "[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process" (DiRocco, 2013 WL 25959, at *18, quoting M.M., 583 F. Supp. 2d at 506). In this case, as stated above, the parents were afforded an opportunity to participate at the CSE meeting and expressed their concerns related to Bird/Morgan and the CSE responded to their concerns. Thus, the parents' allegations that the CSE discussed and identified Bird/Morgan as a potential placement for the student prior to the August 2018 CSE meeting, does not rise to the level of impermissible predetermination.

2. Present Levels of Performance

In the parents' cross-appeal, the parents argue that the IHO erred in failing to find that the August 2018 IEP was inappropriate. Specifically, the parents argue that the IEP failed to accurately describe the student and failed to address the student's sensory, auditory, pragmatic language, social emotional and behavioral needs.

The CSE convened in May 2018 to develop the student's IEP for the 2018-19 school year and the IEP reflected present levels of performance for the student similar to those included in the January 2018 IEP (Parent Ex. 3b at pp. 1-13; 3bi at pp. 1-5; see Parent Ex. 3a at pp. 2-8).

On August 29, 2018 the CSE reconvened for a requested review to discuss the process for intake at BOCES and parental concerns and the present levels of performance remained the same as those included in the May 2018 IEP (Parent Exs. 3e at pp. 1-13; 3ei at pp. 1-7, 5e at pp. 1-2; see Parent Ex. 3b at pp. 2-8).

Turning to the parents' claim that the August 2018 IEP failed to address the student's sensory, auditory, pragmatic language, social emotional and behavioral needs, similar to the analysis of the January 2018 IEP, the hearing record shows that the district appropriately assessed the student's needs in these areas.

The August 2018 IEP present levels of performance identified and included updated information regarding the student's growing needs in the areas of behavior and socialization not included in the January 2018 IEP (compare Parent Ex. 3e at pp. 2-8, with Parent Ex. 3a at pp. 2-8). With regard to pragmatic language, the August 2018 IEP reflected an update from the student's spring 2018 progress report regarding his speech-language annual goal in noting that the student was able to identify expected vs. unexpected behaviors when given pictures or situational examples, however, he did not show these same expected behaviors across settings (Parent Ex. 3e at p. 5; see Parent Ex. 27 at p. 3). The August 2018 IEP also indicated that the student needed to develop social skills for working with peers, his language use to improve his communications with peers, skills in the area of social-emotional wellness for coping in the classroom setting, and independence with working on academic assignments (Parent Ex. 3e at p. 5). Additionally, the August 2018 IEP also stated that the student had been observed to exhibit some physical aggression towards adults (id. at p. 6).

Further, the August 2018 IEP included information from a March 2018 behavioral consultation update which stated that the student's ability to successfully navigate the academic and behavioral demands of the school setting were significantly limited due to the magnitude of his social needs (Parent Ex. 3e at p. 6). The August 2018 IEP indicated that in a quiet room working individually with one adult, the student was often able to follow directions and complete work in an expected manner and that often during these times the student expressed a desire to make connections with his peers (id.). However, the August 2018 IEP noted that as soon as the group size increased, the student appeared overwhelmed and quickly began engaging in unexpected behaviors that disrupted the learning of those around him (e.g.; calling out inappropriate phrases, using unkind words toward other students, threatening and, recently, becoming physical with both peers and adults) (id.). According to the IEP, a BIP had recently been developed to help support the student through some of these challenging situations and

strengthen his skills in the areas of emotional regulation and social problem-solving, however, the IEP noted that these interventions had not yet made a meaningful impact for the student (*id.*). The updated August IEP indicated that the student's social-emotional needs continued to significantly limit his ability to participate in group activities and navigate the academic and social expectations of second grade (*id.*).

Moreover, the August 2018 IEP adopted the description of the student's sensory and auditory needs found in the January 2018 IEP, and the August 2018 CSE recommended that the student receive OT and be provided with various resources (sensory tools, additional adult assistance, movement breaks) to address the student's needs in these areas (compare Parent Ex. 3e at pp. 7-8, 10, with Parent Ex. 3a at pp. 5, 7-9, 11)

In light of the above, the hearing record shows that the August 2018 IEP adequately described the student's needs, reflected the student's strengths and weaknesses and addressed the student's sensory, auditory, pragmatic language, and social/emotional/behavioral needs.

3. Annual Goals

In the parents' cross-appeal, the parents argue that the IHO erred in finding that the district satisfied its obligation to make changes to the goals or services to the May 2018 IEP to enable the student to make progress. To the extent the parents are contesting the adequacy of the annual goals in the May 2018 IEP, an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; *see* 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

A review and comparison of the May 2018 amended IEP with the January 2018 IEP reveals that the two include the same annual goals (compare Parent Ex. 3a at pp. 9-10, with Parent Ex. 3c at pp. 9-10).

The May 2018 IEP, which was described as "Amendment - Agreement No Meeting," contained eight annual goals (Parent Ex. 3c at pp. 9-10). The May 2018 IEP included one reading annual goal addressing the student's ability to independently read and answer comprehension questions about character, setting and plot; one mathematics annual goal involving solving addition and subtraction problems up to 100, with minimal prompting and highlighter and manipulative use, with attention to directions, operations, and checking for errors; and one speech-language annual goal involving initiating, maintaining and terminating conversations using expected verbal and nonverbal communication skills with peers and adults across a variety of settings (*id.* at p. 9). The May 2018 IEP included three social/emotional/behavioral annual goals addressing the student's ability to follow directions and instructions; complete assignments independently; and accurately identify his own emotions/feelings, their intensity, and strategies for dealing with those emotions/feelings (*id.*). The May 2018 IEP included two motor skills annual

goals involving improving coordination skills by completing two-step motor tasks (dribbling and throwing at a target) and completing visual perceptual tasks using visual memory, visual closure, and visual spatial skills and printing two sentences using correct letter size (id. at p. 10).

The student's 2017-18 second term report card stated that while the student had made the transition to the new (12:1+1) classroom setting, the staff had seen inconsistencies and noted difficulty in assessing where the student "really perform[ed]" with academic, social, or behavioral skills, as the student had a hard time staying regulated and getting his work accomplished (Parent Ex. 24c at p. 1). In addition, the 2017-18 report card stated that the student did not seem to have all of his math facts memorized, was not able to stay regulated during math lessons, often took more than one class period to complete his assignments, and that when he was in a quiet space he would sometimes "show us what he knows" (id.). In the area of reading, the 2017-18 report card stated that the student had a hard time staying in class and participating in a group and that he was not staying regulated enough at school to have "a full picture of what he knows" (id.). Regarding physical education the 2017-18 report card stated that staff was continually working on the student's ability to work cooperatively with his peers and his ability to use appropriate physical and verbal communication during class activities (id.).

The 2017-18 progress report stated that for the first marking period, during which the student was evaluated on his progress toward his January 2018 IEP annual goals, the student was making inconsistent progress toward his reading, mathematics, and speech-language annual goals (Parent Ex. 27 at pp. 1-2). Regarding the student's social/emotional/behavioral annual goals, the 2017-18 progress report stated that the student was not always able to follow directions and succeed in completing tasks throughout the day and had an extremely difficult time completing any assignments on his own, but that he was able to listen to a social story about expected school behaviors and identify expected versus [un]expected[sic] behaviors during a game (id. at p. 3). Regarding motor skills annual goals, the 2017-18 progress report stated that OT sessions were focused on learning routines and expectations and that coordination skills would be the focus during the next marking period (id. at p. 4). In addition, the 2017-18 progress report stated that the therapist reviewed letter sizes and provided the student with a visual cue card to reinforce correct letter size and that when regulated the student demonstrated legible handwriting with correct letter size (id.).

In explaining why the student's annual goals included on the May 2018 IEP remained the same as those created for the January 2018 IEP, the director of special education stated that annual goals were developed on an annual basis and were intended to be worked on over the course of a year (Tr. p. 246). She indicated that it had been a much shorter time than that when the May 2018 IEP was developed (Tr. p. 246). In addition, the special education director noted that the student had not achieved any of his annual goals at that point (Tr. p. 246). Also, notwithstanding any changes to the annual goals, the CSE did recognize the student's increasing needs. The May 2018 CSE minutes indicated that the student's IEP was amended to add one hour daily of tutoring to replace some of the hours the student was spending in the 12:1+1 special class, and specifically as an interim support while waiting to refer the student to a 6:1+1 special class with counseling (Parent Exs. 3bi at p. 5; 3ci; 4c).

Therefore, in light of the above, the annual goals in the May 2018 IEP were appropriate to address the student's identified needs. Additionally, given that the May 2018 CSE meeting took

place four months after the January 2018 CSE meeting, it was not unreasonable for the CSE to continue the same annual goals in this instance when there was evidence that the student had not yet achieved any of the annual goals in what amounted to a little over three months.

4. Least Restrictive Environment

In their cross-appeal, the parents argue that the CSE failed to apply the Newington analysis when recommending an out-of-district placement at Bird/Morgan for the student and also failed to fully consider supplementary aids and services or program modifications or any less restrictive placement option.

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (T.M., 752 F.3d at 161-67 [applying Newington two-prong test]; Newington, 546 F.3d at 119-20; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a

disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to:

- (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom;
- (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class;
- and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class

(Newington, 546 F.3d at 120; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with nondisabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).¹⁹

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In order to apply these standards to the recommended placement at Bird/Morgan, it is relevant to consider the student's previous placements, given that the evidence in the hearing record in this case reveals that there were three CSE meetings which occurred in relatively short succession prior to the Bird/Morgan recommendation and information gleaned at each meeting contributed to the development of the district's placement recommendation for the 2018-19 school year.

Beginning with the January 2018 IEP, the student was provided special education support in the 12:1+1 special class known as the Intermediate Developmental Program (IDP) for two hours and 30 minutes daily and received related services of one 30-minute session per week of individual counseling, one 30-minute session per six-day cycle of OT in a small group in both the special class and the therapy room, one 30-minute session per six-day cycle of speech-language therapy in a small group in a special class, and two 15-minute sessions per six-day cycle of speech-

¹⁹ The Second Circuit left open the question of whether costs should be considered as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

language therapy in a small group in the therapy room (Tr. p. 663; Parent Exs. 3a at pp. 1, 10; 6a).²⁰

The January 2018 IEP provided the student with the support of environmental and human or material resources including a calm environment with clear expectations and a high degree of structure with predictable routine, personal space when having strong feelings, access to a break area and scheduled breaks, choice among academic tasks when struggling, wait time when feeling frustrated, easy access to materials needed, movement breaks and sensory tools, strategies to reduce auditory and visual distraction, support getting started on tasks and through academic tasks, support with social/emotional regulation, a 1:1 paraprofessional, weekly counseling, manipulatives for math and ELA, visual schedule, times and other audible signals for transition times, and fidget and therapy putty (Parent Ex. 3a at pp. 7-8). The January 2018 IEP indicated that the student required a BIP and provided ten 30-minute sessions per year of behavioral intervention consultation for the team (id. at pp. 8, 11). The January IEP noted that the PST would review in six weeks (id. at p. 8).

District email communications from January and February 2018 show that the staff was working on implementing student supports and utilizing additional strategies to support the student including visual schedules, social stories, zones of regulation²¹, calm music, reduction in transition times, use of a work room across from the office, utilizing consistent language/approaches, daily behavior plan, and planned ignoring (Parent Ex. 43b at pp. 159-170, 186, 188-190, 192-207, 210-215, 218, 227). In addition, February 2018 emails detailed attempts made by the district staff to coordinate with the student's outside therapist (id. at p. 187, 229-31).

BIP data recordings and district emails from January, February and March 2018 show that the student was exhibiting disruptive behaviors during the morning²² such as shouting in class, yelling and screaming at other students and adults, telling peers to say inappropriate words, pushing peers, pulling his pants down, slamming and throwing chairs, kicking the heating vent, grabbing a student by the arm, and threatening to hit another student or throw a chair (Parent Ex. 43b at pp. 168, 174, 176, 179, 184, 219, 224, 227, 239-44; Dist. Ex. 60 at pp. 1-22).

The pupil services team (PST) convened on March 14, 2018 for a "six week check" to discuss the student's program (Parent Exs. 36d at pp. 1-2; 36e at pp. 1-3). The special education teacher stated that the student's emotions needed to be addressed for the student's own safety, for the safety of others, and so he would be available for learning and reported that the student "falls apart" when he has an audience, targeted his peers and amplified his peers' struggles (Parent Ex. 36e at p. 2). She further explained her concerns regarding the student's statements that he wanted

²⁰ The director of special education testified that the student spent the other half of his day in his second-grade classroom, which allowed for mainstreaming in the general education setting (Tr. p. 181).

²¹ The district consultant testified that the zones of regulation was a program that taught children about their regulated state, emotional state and physical state (Tr. p. 1289). She continued in explaining that the program ranges from the blue zone (underregulated, e.g.; tired, sleepy, not feeling that great), to a green zone (regulated, e.g.; ready to work and receive instruction), to a yellow zone ("amping up stage," e.g.; silly, excited, anxious, frustrated), and to the red zone (extremely dysregulated) (Tr. pp. 1289-90).

²² The record indicated that the student attended the 12:1+1 special class in the morning (Parent Ex. 10g at p. 1).

to be bad, "like[d] the red zone," and tendency to repeat inappropriate movie quotes with dark overtones (*id.*). The special education teacher stated that at times, with no audience, she was able to get the student to calm down and be productive (*id.*). However, the behavior consultant added that the student often needed to be removed from this smaller classroom (*id.*). The second-grade teacher stated that the student at times ran into her class and confronted her students and that she felt that the student needed additional emotional supports which "we" could not offer (*id.*). Additional district staff noted that the student could be "delightful" 1:1 when he was in a "good place" but that he did not always see the connection between his behavior and his peer relationships, made statements such as "I'm going to have a bad day tomorrow," and that there were concerns about the student's daily struggles and his emotional needs (*id.* at pp. 2-3).

According to the parents, in mid-March 2018 there were also discussions with the district regarding an out-of-district placement for more supports and that an 8:1+1 special class came up in the discussion (Tr. pp. 1902, 1905, 2118). The March 2018 PST meeting minutes and a follow-up email stated that the team considered a placement in the district 8:1+1 special class, however staff with direct experience with the classroom reported that the emotional support in that program (this year or the next) would not be sufficient for the student's needs (Parent Exs. 36e at p. 3; 43b at p. 245).

To address the student's increased needs the March 2018 PST recommended an increase in paraprofessional support to full day for the remainder of the year, proposed actions to include a new arrival procedure where the student would be escorted off the bus by his paraprofessional and led into the building through the side door and a new classroom procedure "[f]or the safety and peace of [the student's] IDP peers," where the student would work in an independent work area within his classroom (Parent Exs. 36e at p. 3; 43b at p. 245). The meeting minutes also indicated that a 1:1 special education tutor or shortened school day might need to be considered if another placement was not available, that a parent/team meeting would be set-up, and that the PST recommended the CSE schedule a meeting and a 6:1+1 special class at an outside placement for the student (*id.*).

In spite of these additional supports and interventions, the hearing record demonstrates that the student continued to struggle in school leading up to the May 2018 CSE meeting.

A March 29, 2018 teacher report stated that the student scored in the average range for all academic areas but that he needed to "be regulated" to show what he knew (Parent Ex. 13b). Reportedly the student had not been in class consistently enough to show growth in academic areas; was not able to fully calm himself, stay in his own space and complete work; got very dysregulated around other students and often said or did things to agitate them; often vocalized outwardly toward others in a negative way and sometimes got physical with others; and could be unsafe with choices for himself and others (*id.*). Further, it was noted that the transitions made in class did not help the student with his day and caused outbursts from the student whether physical, verbal or gestural, and that his social-emotional wellness was much more important than any academic concerns (*id.*). The March 2018 teacher report stated that the student worked well when alone with an adult, but that that did not help with his social skills and practice (*id.*).

Additionally, BIP data recordings taken during March, April and May of 2018 show that the student's disruptive behaviors, including using inappropriate language, yelling in class,

"making fun of" other students, running around the room and up and down the hall, pushing other students, threatening adults, throwing chairs and knocking over desks, and "abusing" computer equipment, continued on a nearly daily basis (Parent Ex. 18c at pp. 20-58).

Emails leading up to the May 2018 CSE meeting further detail the continuing struggles the student was having at school and the supports provided by the district staff (Parent Ex. 43b at pp. 247-268). In an April 8, 2018 email the special education teacher indicated that the student was "a high risk to others," had caused problems for the other students in the classroom, and "did physically go after" both students and adults and she advised that the students 1:1 paraprofessional should not be left alone with the student when he was escalating (id. at p. 268).

According to the April 2018 introduction to the CSE, initially the smaller 12:1+1 special class setting was beneficial for the student, however, the student reportedly became increasingly resistant to the academic and behavioral demands of the classroom (Parent Ex. 6a). The April 2018 introduction to the CSE noted that the BIP, which was developed with many proactive strategies, had "not yet made a meaningful impact" and recommended a setting for the student where emotional/behavioral support was more readily available (id.).

In April and early May 2018 the student was suspended for behaviors considered a "continuing danger to persons or property, or an ongoing threat of disruption to the academic process" and included the student leaving the building, running onto school grounds without permission, hitting peers and adults, and using inappropriate language toward peers and adults (Parent Exs. 19b at pp. 1-2; 19c at pp. 1-2).

At the May 2018 CSE meeting the district staff stated that even with supports the student was still struggling and spent very little time in the 12:1+1 special class as he was distracted and distracting to others, was missing therapy because he was emotionally unavailable, was not able to stay in the classroom to access academic growth, showed aggression toward peers, and that "people were pulled from all over to help manage" (Parent Ex. 3bi at pp. 1-2). The parents stated that they did not want an outside program and wanted to trial an 8:1+1 special class in-district before making an out of district referral (id.). According to the May 2018 CSE meeting minutes and staff testimony, the district considered the parents' request and district staff explained that they did not see enough difference between an 8:1+1 special class and the student's 12:1+1 classroom, that the emotional support was not to the level that he would need, and that part of the problem was that when the student's behavior was so disruptive he would still have to be removed which could be an issue because of space and staffing (Tr. p. 235; Parent Ex. 3bi at p. 3). The parents also opined that the student could be successful if the district could provide a 1:1 teacher, however the district explained that one to one tutoring was only an interim program and that the district could not provide a permanent one to one teacher in a public school (Parent Ex. 3bi at p. 2). In addition, the CSE discussed tutoring for part of the day and the idea of a shortened school day (Parent Ex. 3bi at p. 4). The CSE made the determination to make a referral to a smaller class setting and felt that a 6:1+1 special class placement with a counseling component was appropriate (id.; 4b at p. 1).

In planning for the remainder of the 2017-18 school year at the May 2018 CSE meeting, the second grade teacher questioned the benefit of the student staying in the 12:1+1 special class since the student was not actually "there that much" (Parent Ex. 3bi at p. 4).

The May 2018 CSE amended the student's January 2018 IEP (for the 2017-18 school year,) by adding one hour of tutoring per day to replace part of the time that the student would be in the 12:1+1 special class (Parent Ex. 3ci; see Parent Ex. 3c at pp. 1-13). The May 2018 CSE meeting minutes and July 2018 prior written notice indicated that the tutoring was an interim support while waiting for the referral to a program with a smaller 6:1+1 special class, with a counseling component (Parent Exs. 3ci; 4c at p. 1). The director of special education confirmed that the May 2018 amended IEP reflected changes for the remainder of the 2017-18 school year (Tr. p. 237-38).

On May 15, 2018 a referral packet including the student's then-current IEP, psychological report, and FBA/BIP was sent to BOCES (Parent Ex. 32 at pp. 1-48).

Again, BIP data recordings showed that the student's disruptive behaviors (using inappropriate language, yelling in class, "making fun of" other students, pushing/ hitting adults) continued through the end of the school year (Parent Ex. 18c at pp. 1-19).

Based on the meeting minutes, BIP data, and communications detailed above, as well as subsequent testimony, the student was not making progress in his then-current program. According to the occupational therapist the student was moved from the second-grade classroom because he was having significant difficulty and went into a 12:1+1 special class (Tr. p. 1628). She noted that in the 12:1+1 special class the student also had significant difficulty and that by the end of the year he was being seen by an "individual education person" because he could not function in that classroom (Tr. p. 1628). The parent recalled that in May of the student's second grade year (2018) the district implemented a combination of the 12:1+1 and 1:1 teaching and it was explained to him that it was to "get us through the rest of the year" (Tr. pp. 1917-18). According to the parent the situation did not seem to improve, and he stated that based on district reports, "it seemed like it got worse " (Tr. p. 1918).

According to notes kept by the parent from an August 13, 2018 informal meeting with district staff, the parents shared that the student was doing much better and had successful playdates, and they desired to see the student in general education "with a 1:1" (Parent Ex. 37 at pp. 1-2). The notes indicated that the parents shared that they did not feel that the Bird/Morgan program would be a good fit and that the district responded that if the parents did not want the student at Bird/Morgan or another out of district placement, then the district would recommend home instruction (Parent Ex. 37 at p. 1; see Tr. pp. 1914-15). The district staff shared that they believed the student's behavior was severe and that his peers were afraid of him (Parent Ex. 37 at p. 1; see Tr. pp. 1914-15).

On August 29, 2018 the CSE reconvened for a requested review to discuss the process for intake at BOCES and parental concerns (Parent Exs. 3e at pp. 1-13; 3ei at pp. 1-7, 5e at pp. 1-2). According to the August 2018 CSE meeting minutes the intake coordinator indicated that an intake meeting was held at an out-of-district BOCES program in July 2018, and BOCES recommended that the student attend the Bird/Morgan 6:1+1 special class with wrap around counseling support (Parent Ex. 3ei at p. 1). According to the inclusion coordinator the student would be the fourth student in the room and there would never be more than six students in the class (Parent Ex. 3ei at p. 1). In addition, the intake coordinator explained that the students were in the program for extra support because they struggled in a general education setting and the goal was to work the students back into general education (Parent Ex. 3ei at p. 1).

The Bird/Morgan assistant principal testified that Bird/Morgan was a center-based program (all special education) whose 6:1+1 enhanced model included one teacher, a paraprofessional, and an associate teacher in the classroom (Tr. pp. 1749-50). The assistant principal stated that within the Bird/Morgan enhanced model if the student needed some type of mental health support during the day all he would need to do is ask (Tr. p. 1764). The assistant principal further stated that there were enough staff to provide individualized attention to the students and explained that with six students and three adults in the classroom all the time, plus the support team, plus the mental health person (who was often available and in the room,) plus the behavior specialist (who was often in and out of the room), there was "quite a bit of access to adults" (Tr. p. 1764).

The director of special education explained at the August 2018 CSE meeting that the IEP identified a small teacher to student ratio, which previously looked like a 12:1+1 program in district, but when that did not work, the district looked at other options within the district (Parent Ex. 3ei at p. 2). Since the district did not have another option that could support the student's needs, the CSE made the recommendation to BOCES (Parent Ex. 3ei at p. 2). The director of special education testified that there were discussions about other placement options for the student both in preparation for the August 2018 CSE meeting and at the meeting itself in terms of considering what other options would be appropriate, and that the final recommendation was the 6:1+1 special class at Bird/Morgan (Tr. p.263).

In an August 2018 prior written notice for the proposed continuation of special education, the district indicated that the student required the level of service provided in the BOCES 6:1+1 special class, as the programs and services that had been provided by the district had not been able to appropriately meet the student's needs in the way required for him to be successful (Parent Ex. 4d at p. 1). The August 2018 notice detailed how the district provided the student with a variety of supports along the special education continuum within its in-district programs including a 1:1 paraprofessional in the general education setting, small groups within the general education classroom, a BIP implemented with fidelity by trained staff, social thinking support, individualized counseling, additional reading and math small group support, classroom accommodations (minimize distractions and support sensory needs, behavior needs, anxiety needs and learning), a 12:1+1 program with additional adult support and more access to differentiation and smaller settings with less students, and individual tutoring (*id.*). The August 2018 notice continued in explaining that despite all of the programs and services implemented to support the student, he was unable to access the general education classroom setting and was unable to successfully access the 12:1+1 setting (even with 1:1 paraprofessional support and a BIP) and in addition the student's behaviors put the safety of others around him at risk (*id.*). The occupational therapist testified that she believed that the district had exhausted "all of those options" within the district (Tr. pp. 1580-81).

According to the August 2018 CSE meeting minutes and the August 2018 prior written notice the district acknowledged the parents' concerns and requests for continuation of an in-district program but rejected the request because the severity of the student's behaviors in school could not be safely managed within that setting (Parent Exs. 3ei at p. 2-6; 4d at p. 1).

Finding that the student remained eligible for special education and related services as a student with an emotional disturbance, the August 2018 CSE recommended the student for an out-of-district 6:1+1 special class in Bird/Morgan, one 30-minute session per week of individual

counseling, two 30-minute sessions per week of OT in a small group, two 30-minute sessions per week of speech-language therapy in a small group, a BIP daily across all settings, and 20 one-hour behavioral intervention consultations for the team per year across all school settings (Parent Exs. 3e at pp. 1,11; 4d at pp. 1-2).

While a school district "must provide a continuum of alternative placements that meet the needs of the disabled children that it serves," the Second Circuit has held that "a school district need not itself operate all of the different educational programs on this continuum of alternative placements. The continuum may instead include free public placements at educational programs operated by other entities, including other public agencies or private schools" (T.M., 752 F.3d at 165). This is consistent with State law, which allows districts to "[c]ontract[] with other districts for special services or programs" (Educ. Law § 4401[2][b]).

In addition,, State and federal regulations provide that a district must "ensure" that a student attend a placement "as close as possible to the [student's] home" and "[u]nless the IEP of a [student] with a disability requires some other arrangement, the [student] is educated in the school that he or she would attend if nondisabled" (34 CFR 300.116[b][3], [c] [emphasis added]; see 8 NYCRR 200.1[cc], 200.4[d][4][ii]). In weighing this provision, numerous courts have held that, while a district remains obligated to consider distance from home as one factor in determining the school in which a student's IEP will be implemented, this provision does not confer an absolute right or impose a presumption that a student's IEP will be implemented in the school closest to his or her home or in his or her neighborhood school (see White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380-82 [5th Cir. 2003]; Lebron v. N. Penn Sch. Dist., 769 F. Supp. 2d 788, 801 [E.D. Pa. 2011] [finding that "though educational agencies should consider implementing a child's IEP at his or her neighborhood school when possible, [the] IDEA does not create a right for a child to be educated there"]; Letter to Trigg, 50 IDELR 48 [OSEP 2007]; see also R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 1191 n.10 [11th Cir. 2014]; A.W. v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; McLaughlin v. Holt Pub. Sch. Bd. of Educ., 320 F.3d 663, 672 [6th Cir. 2003]; Kevin G. v. Cranston Sch. Comm., 130 F.3d 481, 482 [1st Cir. 1997]; Flour Bluff Ind. Sch. Dist. v. Katherine M., 91 F.3d 689, 693-95 [5th Cir. 1996]; Urban v. Jefferson Cnty. Sch. Dist. R-1, 89 F.3d 720, 727 [10th Cir. 1996]; Poolaw v. Bishop, 67 F.3d 830, 837 [9th Cir. 1995]; Murray v. Montrose Cnty. Sch. Dist. RE-1J, 51 F.3d 921, 929 [10th Cir. 1995]; Schuldt v. Mankato Indep. Sch. Dist. No. 77, 937 F.2d 1357, 1361-63 [8th Cir. 1991]; Barnett v. Fairfax Cnty. Sch. Bd., 927 F.2d 146, 152-53 [4th Cir. 1991] [holding that a district must "take into account, as one factor, the geographical proximity of the placement in making these decisions"]; H.D. v. Cent. Bucks Sch. Dist., 902 F. Supp. 2d 614, 626 [E.D. Pa. 2012]; Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1177-79 [S.D.N.Y. 1992]).

In sum, based on the evidence described above, the overall result of the three successive CSE meetings—and the discussions held therein—were sufficient to support the conclusion that the August 2018 CSE's decision to recommend an out-of-district public school to implement the student's IEP was appropriate and, furthermore, that the district was not required to create a program to meet its LRE obligations. The evidence in the hearing record demonstrates that there was not a 6:1+1 special class program located in the district, but that the student needed such a class to appropriately address the his needs at the time of the August 2018 meeting (see Tr. p. 233; Parent Ex. 4d at p. 1). Thus, the student's IEP provide for "another arrangement" of a special class placement at a school other than a school located within the district and it was not a violation of

the IDEA's LRE requirement to make that arrangement (R.L., 757 F.3d at 1191 n.10; White, 343 F.3d at 380 [finding that "it was not possible for [the student] to be placed in his neighborhood school because the services he required are provided only at the centralized location, and his IEP thus requires another arrangement"]; Lebron, 769 F. Supp. 2d at 801; see, e.g., Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] [noting that districts need not place students in the closest public school to the student's home if "the services identified in the child's IEP require a different location"]; Letter to Trigg, 50 IDELR 48). There was no violation of the Newington test. Given the foregoing, the August 2018 CSE's recommendation of a 6:1+1 special class placement at an out-of-district school (BOCES) offered the student a FAPE in the LRE for the 2018-19 school year.

5. Functional Grouping

In the parents' cross-appeal, the parents argue that the CSE failed to group the student with peers of similar needs. The district denies the parents' allegations and asserts that students at Bird/Morgan had similar profiles to the student. Upon review, the evidence in the hearing record does not support the parents' contention.

Neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]).

State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]).²³ State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

As mentioned above, Bird/Morgan is a BOCES center-based program that houses 6:1+1 special classes staffed by a teacher and a paraprofessional (Tr. pp. 1749-50). The school also

offers an "enhanced model" for grades three through six that includes an associate teacher in addition to the classroom teacher and paraprofessional (Tr. pp. 1749-50). The Bird/Morgan assistant principal testified that based on meeting the student, the conversations with the parents about how the student was struggling within the district, and the documentation from the district regarding what the student was struggling with behaviors and difficulty receiving instruction) she concluded that the student's profile was similar to the profile of the students at Bird/Morgan (Tr. p. 1762). The assistant principal confirmed that there were other students in the class who displayed explosive or aggressive behaviors and had BIPs (Tr. pp. 1785-87). In addition, the assistant principal stated that it was a classroom of "social kids" and that since the student presented as a social child, she felt this was a classroom where he could have opportunities to interact (Tr. p. 1763). The assistant principal continued and explained that Bird/Morgan staff knew the student would need a more academically challenging class because he had some good academic skills and good cognition and she felt that Bird/Morgan had a "very good cohort for him" (Tr. pp. 1762-63). The assistant principal also stated that the classroom included students with "pretty solid" cognitive abilities and some growing academic skills (Tr. p. 1763). According to the assistant principal, the classroom the student was in had five third graders (Tr. p. 1777). She testified that while the staff believed they had a good cohort for the student, they did make switches after students entered the program and if the staff saw there was a better fit and there was space, they would make a switch to a different classroom (Tr. pp. 1779-80).

The parent testified that approximately during the second week of September 2018, the student attended Bird/Morgan for one day (Tr. p. 1939). The parent further testified that after attending the school for one day, the student described Bird/Morgan as a "scary school" and that the student was very upset (Tr. p. 1940). The parent explained that after witnessing an incident with another student in the school, the student began having nightmares (Tr. pp. 1491-492). The parent also testified that the student was very upset by the situation and based on his experience, the parents thought that Bird/Morgan was an "awful fit" for the student (Tr. p. 1942).

Based upon the foregoing, the evidence does not support the parents' contentions that the student would not be appropriately grouped with similar peers at Bird/Morgan. While the incident described by the parent regarding the student's experience at Bird/Morgan was undoubtedly upsetting, there is not enough support in the hearing record to find that the student would not be grouped with similar peers consistent with State regulation.

E. Relief

While the parents largely argue to uphold the IHO's award of relief, the district contends that the relief ordered by the IHO was not appropriate. The district further contends that the IHO erred by ordering prospective placement in a state-approved program of the parents' choice. In addition, the district argues that the IHO erred in ordering compensatory education in the form of 150 hours of parent counseling and training as the award was not appropriate because the purpose of compensatory education was to provide services to the student and not the parent.

In the instant case, the IHO awarded the following relief: (1) the district shall facilitate the student's placement at a public or state approved non-public school of the parents' choice; (2) the district shall conduct updated evaluations from all service providers, including updated behavioral observation within 60 days; (3) the matter shall be remanded to the CSE to consider programming

options for the future (including placement at a public or state approved non-public school); and, (4) the district shall set-up and maintain a bank of 150 hours of parent counseling and training (IHO Decision at p. 31).

1. Prospective Placement at a School of the Parent's Choice

As noted above, The only denial of a FAPE that the IHO found was that the district violated its child find obligation to the student for the period preceding its referral of the student to the CSE in November 2017. Typically, relief awarded for a child find violation would be an order directing the district to evaluate the student and make a determination whether the student is eligible for special education. However, in this instance, the January 2018 CSE evaluated the student and found the student eligible for special education services long before the due process complaint notice was filed by the parents. Furthermore, multiple IEPs were developed subsequent to the student's referral to the CSE, including the January 2018 IEP, the May 2018 IEP and the August 2018 IEP, all of which the IHO found were appropriate to address the student's needs at the time they were drafted and thus provided the student with a FAPE. Thus, the IHO's award of a prospective placement of the parents' choice to remedy the district's child find violation where, as here, there have been intervening appropriate recommendations would not be appropriately related to redress the initial child find violation. Furthermore, the IHO's award of prospective placement had the effect of circumventing the statutory process that had already begun to right itself, under which the CSE—the panel of experts who know the child best—is tasked with reviewing all of the 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"]). Similarly, the IHO's award ordering the district to conduct updated evaluations from all service providers runs the risk of usurping the CSE's role in determining whether the student requires updated evaluations, and which evaluations in particular are needed most. Moreover, the parents may request updated or additional evaluations from the CSE at any time and the CSE must at least consider those requests. With respect to the IHO's order that this matter be remanded to the CSE to consider programming options for the future (including placement at a public or state approved non-public school), at this point, the CSE should be meeting shortly in the upcoming months to develop a new IEP for the student for the 2020-21 school year (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). Therefore, the more appropriate course is to limit the remedy in this matter to the remediation of past harms that have been explored through the development of the underlying hearing record. If the parents continue to disagree with the CSE's recommendation for the student's program for the 2020-21 school year, they may obtain appropriate relief by challenging the district's determinations regarding that school year at that time (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]).²⁴

In light of the above, the more appropriate relief to remedy a child find violation in this case would be compensatory education that is designed to address that period of time that the student was not receiving services under the IDEA during the 2016-17 and 2017-18 school years as further discussed below. Accordingly, the IHO's award of prospective relief, including prospective placement, updated evaluations and remand to the CSE are not appropriate and must be overturned.

2. Parent Counseling and Training

Next, the IHO ordered that the district set-up and maintain a bank of 150 hours of parent counseling and training. The district argues that 150 hours of parent counseling and training is not appropriate when the purpose of compensatory education is to provide services to the student and not to the parents.

In the instant case, the IHO awarded 150 hours of parent counseling and training based on the recommendation of the education specialist who evaluated the student (Parent Ex. 22 at p. 25). The purpose of parent counseling and training is intended as a service to support a student's education "by ensuring that the parents are equipped with the skills and knowledge necessary to continue and implement the student's IEP at home" (M.W. v. New York City Dep't of Educ., 725 F.3d 131, at 141 [2d Cir. 2013]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]).

A review of the hearing record reveals that the student could benefit from parent counseling and training services. The IHO awarded 150 hours of parent counseling and training to be provided by a Board Certified Behavioral Analyst (BCBA) or "like credentialed training expert" to be used by the parent at their discretion during the next three years (IHO Decision at pp. 29-30). The IHO explained that these hours could be used to coordinate evaluations and school interface opportunities, assist the parents in understanding the CSE process or any topic the parents deemed appropriate (*id.* at p. 30). Given the student's social and behavioral needs, and the parents' concerns regarding the student's anxiety, the IHO's award of 150 hours of parent counseling and training is appropriate. Therefore, the IHO's order of 150 hours of parent counseling and training will not be disturbed.

3. Compensatory Education

Given the conclusion that the district violated its child find obligation and denied the student a FAPE for the 2016-17 school year up until referral of the student to the CSE in November

²⁴ I agree with the IHO that the recommendations of the independent behavioral consultant and related service providers would be helpful in understanding the student's needs when developing the student's IEP (IHO Decision at p. 26 fn. 13).

2017, the next inquiry focuses on the appropriate form of compensatory educational services the student should be awarded as a remedy based upon the nature of the child find violation.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & n.12 [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, 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 in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E. Lyme Bd. of Educ., 790 F.3d at 456; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't of Educ., Appeal No. 11-075). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30, 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an

inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE") [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

Given that an award of compensatory education should be guided by the overarching goal of placing a student in the same position that he or she would have occupied but for the school district's violations of IDEA (see Puyallup, 31 F.3d at 1497), it is helpful to review the hearing record for evidence of what type and amount of special education services would make up for the district's failure to refer the student to the CSE prior to November 2017. In the instant case, the January 2018 and August 2018 IEPs recommended that the student receive OT and speech-language therapy services (Parent Exs. 3a at p. 10; 3c at p. 11). To the extent the student would likely have been eligible to receive these services in IEPs that would have been developed prior to January 2018, make-up services designed to address his OT and speech-language needs are an appropriate equitable remedy. The January 2018 and August 2018 IEPs indicate that the student received one hour of OT per week and approximately one hour of speech-language therapy per week (id.). I have also taken into account that the district was already providing services at or approaching Tier 3 RtI interventions as behavioral supports that were not unlike what one might find on a student's IEP with needs similar to the student in this case. After finding the student eligible for special education, the district's CSE met numerous times to try to address the student's changing needs and, as noted above, began to right itself in the IDEA's processes. Accordingly, the award of compensatory education services to the student above is an appropriate level of relief in this instance and shall be calculated based on a 40-week school year (which totals 40 hours for each related service for purposes of this calculation). Therefore, the district is ordered to provide 40 hours of OT and 40 hours of speech-language therapy to the student as compensatory education due to the child find violation over the course of two years.

VII. Conclusion

In summary, the evidence in the hearing record establishes that the district failed to fulfill its child find obligation for the 2016-17 school year through the referral of the student to the CSE in November 2017. The evidence also supports the IHO's determination that the district offered a student a FAPE for the 2017-18 and 2018-19 school years. However, the relief ordered by the IHO was not commensurate with the violation of FAPE and unduly hampered the CSE process on a going-forward basis.

I have reviewed the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED IN PART.

THE CROSS-APPEAL IS SUSTAINED IN PART.

IT IS ORDERED that the IHO decision dated February 19, 2020 is modified, by reversing those portions which directed (1) the district to facilitate the student's placement at a public or state approved non-public school of the parents' choice; (2) the district to conduct updated evaluations from all service providers, including updated behavioral observation within 60 days; and (3) that the matter shall be remanded to the CSE to consider programming options for the future (including placement at a public or state approved non-public school).

Dated: **Albany, New York**
 May 15, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER