The University of the State of New York

The State Education Department
State Review Officer
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No. 20-095

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

Appearances:
The Law Firm of Tamara Roff, PC, attorneys for petitioners, by Lauren A. Goldberg, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Nathaniel R. Luken, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Ha'Or Beacon School (Ha'Or Beacon) for the 2018-19 school year. Respondent (the district) cross-appeals from the IHO's determination that the parents demonstrated that the student's unilateral placement at Ha'Or Beacon was appropriate for that year. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

As a preschooler the student had difficulty transitioning in playgroup and his teacher recommended that the parents seek an evaluation (Tr. p. 287-88). He was evaluated by the district; however, "not approved" for services (id.). When the student turned five, his parents enrolled him in a private, mainstream school (Tr. p. 288-89). There, the student fixated on small objects, was disruptive and did not want to listen to authority (Tr. p. 289). The student's teachers suggested that he needed help, which the parents sought from the district (Tr. p. 289). By parent report, during the 2015-16 school year the district agreed to provide the student with special education itinerant teacher (SEIT) services three hours per week (Tr. pp. 289-90). In January 2016, the

student was diagnosed as having an autism spectrum disorder by a physician who recommended that he receive applied behavior analysis (ABA) services (Parent Ex. B at p. 2).[1] The student began first grade (2016-17 school year) at the private school, however, was "kicked out" after three or four days due to disruptive behavior (Tr. pp. 290-91). He was allowed to return to school after the parents arranged for ABA services at the school through their insurance company and the district provided the student with a paraprofessional (Tr. pp. 291-92). For second grade (2017-18), the student was found eligible for special education services as a student with an other health impairment (OHI) and recommended to receive the support of a paraprofessional and the related services of counseling and occupational therapy (OT) pursuant to an individualized education services plan (IESP) (Parent Exs. A at p. 2; C at p. 1; Dist. Ex. 2 at p. 1).[2]

In a notice dated February 1, 2018, the district advised the student's mother that the CSE required an evaluation of the student and requested that the student attend a psychoeducational evaluation to be conducted on February 27, 2018 (Dist. Ex. 1 at p. 1). The evaluation took place as scheduled and a psychoeducational evaluation report was completed on March 4, 2018 (Dist. Ex. 2 at pp. 1, 4). By notice dated March 13, 2018, the parents were invited to attend a CSE meeting scheduled for April 9, 2018 (Dist. Ex. 3 at p. 1). On March 20, 2018, a classroom observation was conducted at the student's second grade classroom at the NPS (Tr. pp. 297-98; Dist. Ex. 4 at p. 1). By notice dated April 9, 2018, the parents were invited to attend a CSE meeting scheduled for April 16, 2018 (Dist. Ex. 5 at p. 1). On April 17, 2018, the district sent a third notice inviting the parents to attend a CSE meeting scheduled for April 26, 2018 (Dist. Ex. 6 at p. 1). By email dated May 4, 2018, the student's father contacted the district school psychologist who conducted the student's classroom observation to inform her that the student's NPS had determined that the student would "not be able to continue to attend their program for the 2018-19 school year," noting that "[t]he school was not able to meet his pervasive behavioral needs" (Parent Ex. B at p. 1; see Parent Ex. C). The student's father also requested a public school placement for the 2018-19 school year and asked that the student be considered for a special education program (id.). The student's father attached an undated "recent" progress report completed by the student's board certified behavior analyst (BCBA) to his email to be reviewed at the upcoming CSE meeting (id.). In the undated progress report, the student's BCBA indicated that the student received intense ABA therapy to address his problematic behaviors, as well as his communication and social deficits (id. at p. 2). The student's BCBA reported that the student received 15 hours per week of direct intervention by a paraprofessional and six hours per month of supervision from a "certified BCBA" (id.). The student's BCBA stated that the student "would benefit from the added support of a small classroom, and more individualized setting" (id.). She noted that the student "require[d] frequent redirection and cueing from the classroom teacher in order to remain focused and engaged throughout the day" (id.).

By email dated May 4, 2018, the district school psychologist replied to the student's father that "[b]ased on our phone conversation, you stated that you fired [], the ABA specialist? Speaking about the para, on 3 occasions, I witnessed no para working in the classroom" (Parent Ex. P at p. 1). The school psychologist further wrote "[m]ore than that, your child tried his best to keep up

[1] The student's mother reported that the student was diagnosed with "high functioning Asperger's" in or around September 2016, at the beginning of first grade (Tr. p. 292).

[2] The student's 2017-18 IESP was not offered as an exhibit in the hearing record.

with the rest of the students - in the mainstream class, again without a para. He followed the rules, participated, transitioned quietly, asked permission, spoke to his teacher" (id.). The school psychologist concluded, "[n]ot receiving any services and having the scores so high, it rather tells that your child is gaining academic progress and is able to work independently for the most part" (id.). The student's father replied on May 4, 2018, stating, "[n]o, we did not fire anyone. I don't believe I even mentioned [the BCBA] in our conversation. Perhaps there was some misunderstanding. As far as what you observed, he may have been having a good day or moment then" (id.). The student's father further stated that "[n]o one who works with him would describe that as his usual/regular conduct" (id.). In a reply dated May 4, 2018, the district school psychologist stated, "[i]t is in event, my memory is in the right place" (id.).

An undated letter written by the principal of the NPS characterized the student as a "bright child" who attended a "mainstreamed" second grade class with a total of 22 students (Parent Ex. C at p. 1). The principal of the NPS reported that the student "ha[d] a full time health [p]ara[professional] to deal with his many disturbing behaviors" which included biting, destroying others' projects and school property, and demonstrating defiance and becoming physical with authorities (id.). The letter indicated that the student "does not know how play appropriately with his peers. … He does not understand well or tolerate authority. He gets defiant and physical to said authority" (id.). The principal further stated that the student exhibited these behaviors on a weekly basis and he "strongly" recommended that the student be "placed into a special needs program with a higher teacher to student ratio to better facilitate his progress. He needs constant redirection, social awareness and more 1 to 1 learning" (id.). The principal then reported that based on "an agreement with [the student's] parents," the student would "not be accepted back into [the] school for the upcoming school year 2018-2019" (id.).

By meeting notice dated May 7, 2018, the parents were invited to attend a CSE meeting scheduled for May 17, 2018 (Dist. Ex. 8 at p. 1). By letter dated May 8, 2018, the occupational therapist who had provided services to the student from February 2015 through June 2017 reported that the student had been recommended to receive OT due to extreme fluctuations in his behavior, his inability to regulate his emotions, and his profound difficulties interacting appropriately with his peers (Parent Ex. D at p. 1). The student was described as presenting with severe sensory integration dysfunction, hypotonia with weakness in proximal and distal upper extremities, kyphotic posture with rounded shoulders, weak gross motor coordination skills, delayed fine motor coordination skills and delayed activities of daily living (ADLs) (id.). The student's therapist also indicated the student exhibited "severe hypo-response to auditory, visual, tactile, oral, olfactory, proprioceptive, kinesthetic, and vestibular awareness" in the domain of sensory integration (id.). The student's therapist "recommend[ed] that [the student] would benefit from a small class size in an educational setting that c[ould] address his behavioral and social difficulties" (id.). The occupational therapist further stated that due to the student's severe sensory integration dysfunction, it was "crucial that he receive [OT] services in a school setting that contain[ed] a sensory gym" (id.).

A CSE convened on May 17, 2018 and determined that the student was eligible to continue receiving special education and related services as a student with a speech or language impairment (Dist. Ex. 12 at pp. 1, 18). The May 2018 CSE recommended that the student attend a regular education classroom in a community school with the related services of individual counseling once per week for 30 minutes, group counseling (in an unspecified ratio) twice per week for 30 minutes each session, and individual OT twice per week for 30 minutes each session (id. at pp. 14, 17, 18).

The May 2018 CSE further recommended that the student receive a full time, daily "[g]roup service" crisis management paraprofessional (id. at p. 14). The May 2018 CSE also completed a functional behavioral assessment and developed a behavior intervention plan (FBA/BIP) during the meeting (Dist. Exs. 9; 10). By prior written notice dated June 28, 2018, the district reiterated the May 2018 CSE's recommended program and placement and indicated that in making its recommendation it considered a September 2016 pediatric report, a June 2017 OT evaluation, a March 4, 2018 psychoeducational evaluation, a March 20, 2018 classroom observation, a May 2018 FBA, and a May 2018 teacher report (Dist. Ex. 13 at p. 1).[3, 4]

By "school placement request letter" dated June 28, 2018,[5] the district indicated the student would be assigned to one of the district's non-specialized schools (Dist. Ex. 14 at p. 1). In a 10-day notice letter dated August 21, 2018, the student's father advised the CSE that he had a number of concerns about the student's recommended program and placement (Parent Ex. E at p. 1). The student's father stated that the student "attended a general education program with a paraprofessional and an ABA therapist (who was supervised by a BCBA) for the 2017-2018 school year. However, this setting was not supportive enough" (id.). The student's father noted that the student's behaviors were so explosive that he would not be allowed to return to the NPS for the 2018-19 school year (id.). The student's father then indicated that the IEP and the BIP did not accurately describe the student's behavioral needs or his educational history and further noted that the IEP incorrectly stated that the student's BCBA had been fired and without her input the BIP was inappropriate (id.). The student's father also stated that the present levels of educational performance (PLEPs), management needs and annual goals failed to describe and address the student's pervasive social/emotional and behavioral needs (id.). Next, the student's father reported that "all educators and professionals who ha[d] worked directly with [the student] in the 2017-18 school year fe[lt] he require[d] a special education placement" (id.). Regarding the particular public school site to which the student was assigned, the student's father indicated that he attempted to contact the school site to schedule a meeting and learned it was closed (id. at p. 2). The student's father also indicated he was told to contact the assigned school site "shortly before the start of the school year to arrange a meeting with the school" (id.). The student's father stated he intended to do so but would not enroll the student without visiting the site (id.). The student's father also requested a class profile, program description and information about the behavioral supports available at the school (id.). Lastly the student's father indicated that until he was able to visit the assigned school site, he needed "to secure an appropriate school placement" for the student and

[3] The June 30, 2017 OT evaluation was not offered as an exhibit into the hearing record. The September 22, 2016 pediatric report was offered as an exhibit but excluded from evidence as the district failed to disclose it to the parents in advance of the hearing (Tr. pp. 66-71).

[4] According to the prior written notice "[t]he classroom Rabbi stated that [the student's] behaviors dissipated to none" (Dist. Ex. 13 at p. 2). The notice further stated that the student had been observed in the classroom on three occasions without a paraprofessional during which time he worked independently, with "slight need" for redirection (id.). The notice characterized the student's frustration tolerance as being in the "good range," even when the student worked on advanced items or was redirected (id.). The May 2018 IEP stated that because the teacher showed flexibility the student's behaviors had dissipated to none and at the time of the CSE meeting "there were no incidents that occur" because they could be prevented(Dist. Ex. 12 at pp. 5, 6)

[5] The IHO described District Exhibit 14 as a "request letter" (Tr. p. 64).

intended to enroll him at Ha'Or Beacon School "Yeshiva Ohr David" (Ha'Or Beacon) for the 2018-19 school year and seek public funding for the student's placement (id.).

On September 1, 2018, the parents entered into a letter of agreement with Ha'Or Beacon for the 2018-19 school year, which provided that the parents could accept a public school placement until September 30, 2018 and receive a prorated refund of any tuition paid (Parent Ex. K at p. 1). By letter dated September 27, 2018, the student's father reiterated nearly verbatim the content of the August 21, 2018 letter with an additional section setting forth the parents' objections to the assigned school site based on a recent visit (Parent Ex. F). Specifically, the parents indicated that the individual who showed them the school site stated that irrespective of the student's IEP recommendations, he would be placed in 12:1+1 special class and the school "would work up to integrating him into a general education setting over the course of a few years" (id. at p. 2). The student's father also reported that the assigned school site was too large and would overwhelm the student, lacked sensory equipment and that the school yard was adjacent to the street which was unsafe for the student, and the IEP did not provide for door-to-door busing (id.). In closing, the student's father again requested a class profile, program description and information about behavioral supports available in the school (id.). There is no indication that the CSE responded to either of the parents' letters.

A. Due Process Complaint Notice

By due process complaint notice dated March 26, 2019, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (Parent Ex. A at p. 1).[6] The parents also asserted that the district failed to offer a timely, procedurally valid and substantively appropriate IEP and placement recommendation for the 2018-19 school year (id.). Additionally, the parents contended that the district failed to conduct and consider sufficient evaluative and educational information, failed to provide prior written notice and denied the parents an opportunity to meaningfully participate in the development of the IEP (id. at pp. 1, 3). The parents challenged a number of aspects of the May 2018 CSE's process including that the student's classification of speech or language impairment did not appropriately describe the student's primary special education needs, the CSE failed to evaluate the student in all areas of suspected disability, failed to conduct a social history update, failed to consider information provided by the student's then-current providers at the NPS, relied inadequate evaluative information, failed to include the student's then-current providers in the May 2018 CSE meeting, failed to include a qualified district representative at the May 2018 CSE meeting, predetermined its recommendations based on district "policy" and standard practice rather than on the student's individual educational needs, failed to consider the full continuum of services, and failed to discuss the student's progress on his previous annual goals or develop new goals during the May 2018 CSE meeting (id. pp. 1, 2-3). In addition, the parents alleged, "upon information and belief," that the student had not been evaluated in more than three years in the areas of "sensory/motor needs" and speech and language needs. (id. at p. 2). In particular, the parents alleged that the district failed to assess the student's "sensory/motor needs" and "pragmatic

[6] The parents also alleged that the district failed to comply with section 504 of the Rehabilitation Act of 1973 but do not assert a particular violation thereof with any specificity (Parent Ex. A at p. 1).

language skills" despite known delays in this area, failed to conduct an adequate data-based FBA, and developed a wholly inappropriate BIP (id. at p. 2).

The parents next argued that the May 2018 CSE recommended the same program from the prior school year despite the student having been expelled from the NPS. The parents also asserted that the May 2018 IEP contained inaccurate information about the supports that were in place during the prior school year and that the IEP was insufficient and inappropriate to address the student's needs (Parent Ex. A at p. 2).

With regard to the substance of the May 2018 IEP, the parents contended that the recommended general education classroom with related services did not provide special education classroom support or "the level of individualized attention, support, and instruction" the student required (Parent Ex. A at p. 3). Additionally, the parents asserted that "upon information and belief," the recommended general education classroom could not provide a suitable functional peer group and the IEP failed to mandate the small school environment the student required (id.). The parents further alleged that the present levels of performance were insufficient to provide an adequate baseline from which to guide the student's parents and teachers and to determine progress, and the annual goals were "insufficient, inappropriate, vague and unmeasurable" (id.).

The parents next argued that the May 2018 IEP did not include sufficient supports including, but not limited to, management needs to appropriately address significant behavioral, social/emotional and sensory processing needs (Parent Ex. A p. 3). The parents further asserted that the May 2018 CSE failed to create an appropriate BIP and that the IEP failed to appropriately address the student's behavioral needs (id.).

Regarding the public school site to which the district assigned the student, the parents contended that the district offered a specific school location in July, while the school was closed, thereby depriving the parents of the opportunity to visit and consider the school prior to the beginning of the school year (Parent Ex. A at p. 4). The parents initially argued that the proposed school site was not recommended based on the student's unique special education needs (id.). The parents further contended that after visiting the public school site, they were told that the May 2018 IEP would not be implemented and that the school would place the student in a 12:1+1 special class "and work over the course of the year to mainstream him" (id.). The parents also alleged that the assigned school site did not offer a suitable functional peer group, or an appropriate academic curriculum and manner of instruction (id.). Lastly, the parents raised various contentions relating to the school's large physical environment and lack of equipment available in the school for the student to benefit from OT and to meet his sensory processing needs (id.). As relief, the parents requested a declaratory finding that the district did not offer the student a FAPE for the 2018-19 school year, "[f]unding/reimbursement for unilateral placement" at Ha'Or Beacon and reimbursement for transportation costs for the 2018-19 school year (id.).

B. Impartial Hearing Officer Decision

Following several prehearing and status conferences held between May 20, 2019 and December 9, 2019 while the parties explored the possibility of settlement, the parties convened for the evidentiary phase of the impartial hearing on December 19, 2019, which concluded on March 19, 2020, after three additional days of proceedings (Tr. pp. 1-359).

In a final decision dated April 20, 2020, the IHO first addressed the parents' contention that the student was not properly classified (IHO Decision). The IHO acknowledged that neither the classification of autism nor the classification of speech or language impairment precisely described the student and that he displayed characteristics associated with both classifications (IHO Decision at p. 8). The IHO stated that the elements that most significantly affected the student's education were his rigidity and inflexibility which were "not listed as the main characteristics of either classification" (id. at p. 9). The IHO determined that classification of the student to enable him to obtain services as a student with a speech or language impairment was not inappropriate given that "[o]f greater import [wa]s that he was classified and that the services recommended must meet his unique needs" (id.). Concerning the parents' challenges to the composition of the May 2018 CSE, the IHO found that a district representative, the student's general education classroom teacher and a special education teacher participated in the meeting (id.). The IHO further found that the May 2018 CSE considered sufficient evaluative information and that a speech-language evaluation was not required (id.). In finding that the May 2018 IEP offered the student a FAPE for the 2018-19 school year, the IHO discussed that the student did not receive the full mandate of recommended services during the prior school year at an NPS or implementation of an appropriate BIP, and as such, she could not conclude that a general education program with supports would be inappropriate (id. at p. 10). The IHO concluded that the evidence before her demonstrated that during the 2017-18 school year, the student did not receive all of his recommended services and that the NPS did not provide appropriate support during morning classes and unsupervised periods (id. at p. 11). With regard to the parents' argument that the district failed to implement the student's program in the three prior school years, the IHO determined that those claims were not raised in the parents' due process complaint notice and the parents did not request compensatory education for those school years (id.). The IHO further found that the May 2018 IEP and BIP addressed the student's needs with appropriate goals (id. at pp. 11-12). Additionally, the IHO determined that the student did not require access to a sensory gym and that his needs in this area could be met with counseling and the BIP (id. at p. 12). Finally, the IHO found that the student did not have any academic needs and that a general education program with supports represented the student's LRE (id.).

Next, the IHO addressed the parents' claim that the recommended school site would not implement the May 2018 IEP. The parents argued that the district should be precluded from demonstrating that the public school site to which the student had been assigned was capable of implementing the May 2018 IEP. The IHO rejected the parents' argument and determined that it was not impermissible retrospective evidence for the district to demonstrate that the program set forth on the May 2018 IEP was available and capable of being implemented (IHO Decision at pp. 12-13). The IHO further found that the parents' allegation that the assigned school site would not implement the IEP, rather than could not implement the IEP was impermissibly speculative (id. at p. 13). The IHO also indicated that the parents waited until September 27, 2018, "well into the new school year" before informing the district of their disagreement with the assigned school and beyond the time for the district to correct any "misimpressions prior to… when the tuition at Beacon would be locked in for the entire school year" (id.). The IHO next determined that the testimony of the assistant principal of the assigned school on its capacity to implement the May 2018 IEP was credible and that the testimony of the parent that the assigned school would not implement the May 2018 IEP was "unconvincing" (id.). The IHO found the parents' remaining claims to be without merit and determined that the district offered the student a FAPE for the 2018-19 school year, and that the assigned school was capable of implementing the May 2018 IEP (id.

at pp. 13,14, 15). The IHO also made alternative findings and determined that Ha'Or Beacon was an appropriate unilateral placement (id. at pp. 14-15).

IV. Appeal for State-Level Review

The parents appeal the IHO's determination that the district offered the student a FAPE for the 2018-19 school year. The parents allege that the IHO erred by finding that the student was properly classified as having a speech or language impairment and argue that the student should have been classified as a student with autism. The parents further assert that the IHO erroneously found that the May 2018 CSE was properly composed, misstating the parents' challenge to the qualifications of the district representative by only addressing the district representative's presence at the May 2018 CSE meeting. The parents also contend that the IHO erred by finding that the May 2018 CSE was not required to include the student's special education providers, and by failing to rule on the parents' claims that they were precluded from participating in the May 2018 CSE, that they did not receive adequate prior written notice, and that the student's social history was not updated. Additionally, the parents claim that the IHO referenced the opinion of the May 2018 CSE without acknowledging the parents' disagreement with the recommendation and that the parents are also members of the CSE.

The parents further allege that the May 2018 CSE failed to evaluate the student in all areas of suspected disability, failed to "possess[] sufficient evaluative material," failed to evaluate the student's speech and language needs prior to changing the student's classification, failed to consider the sufficiency of the FBA and erroneously found that the BIP could address the student's behavioral needs without citing to any support in the hearing record (Req. for Rev. ¶¶ 20, 22, 27, 28, 33). The parents also argue that the IHO failed to consider the cumulative impact of these procedural violations.

The parents also contend that the IHO failed to consider "the effects and implications of the CSE's failure to implement" the special education and related services recommended for the student in prior school years, holding that the issue was not before her (Req. for Rev. ¶ 21). The parents argue that the IHO further compounded this error by blaming the parents and the prior NPS for failing to meet the student's needs in prior school years. The parents further claim that the IHO narrowly read the due process complaint notice to avoid assigning liability to the district for its failure to implement the student's mandated services in prior school years and that it was not necessary for the parents to request compensatory education or relief for prior school years. Additionally, the parents allege that the district first raised the issue of the student not receiving the full mandate of services in prior school years, thereby opening the door for the parents to present evidence on the lack of services to demonstrate the totality of the student's needs rather than to seek relief. The parents argue that the IHO erred by finding that she could not address the effects of the district's failure to provide services in prior school years. As a result, the IHO failed to consider all of the factors that led to the student's expulsion from the prior NPS.

Next, the parents allege that the IHO erred by finding the May 2018 IEP offered the student a FAPE in the LRE and that a general education classroom with a group paraprofessional, BIP, and related services was appropriate. The parents further contend that the IHO erred by finding that the parents' assigned school claims were speculative and by incorrectly applying the legal standard to allow the district to present evidence of the availability of the recommended placement. The parents also claim that the IHO only cited testimony offered by the district concerning the

May 2018 CSE meeting, found the parents' testimony about the assigned school site to be "unconvincing" and did not make any credibility determinations about the parents' testimony regarding the May 2018 CSE meeting. Further, the parents allege that the IHO incorrectly and unfairly discredited the parent's testimony due to "obvious spelling and transcription errors" (Req. for Rev. ¶ 59). The parents contend that the IHO failed to consider all of the parents' arguments, failed to address the parents' claims that the district did not respond to their letters objecting to the assigned school site and improperly dismissed their request for additional information about the assigned school site. The parents assert that the IHO erroneously credited a pediatric report not included in evidence as the district's justification for recommending a general education classroom and failed to consider all the parents' evidence concerning the student's behavioral needs.

Lastly, the parents assert that the IHO failed to consider the equities and that given the district's failure to provide the student's mandated services in prior school years and its dismissal of the parents' concerns, a balancing of the equities "cannot favor the district" (Req. for Rev. ¶¶ 61, 62). For relief, the parents request reversal of the IHO's finding that the student was offered a FAPE in the LRE for the 2018-19 school year. The parents further request that the IHO's determination that the parents' unilateral placement of the student at Ha'Or Beacon was appropriate be affirmed, a finding that equitable considerations favor the parents, and an award of "funding/reimbursement" for the 2018-19 school year.

In an answer with cross-appeal, the district responds to the parents' claims with admissions and denials. The district first alleges that the parents' request for review fails to comply with the practice regulations by stating their disagreement with the IHO's findings and conclusions without specifying the reasons for challenging the IHO's decision. The district further argues that the arguments raised and discussed in the parents' memorandum of law cannot substitute for a pleading. Next, the district asserts that the parents' claims regarding implementation of the student's IESPs during the prior school years were not raised in the due process complaint notice. For those reasons, the district argues that the parents' request for review should be dismissed. In the alternative, the district contends that the IHO's determination that the district offered the student a FAPE in the LRE for the 2018-19 school year should be upheld. In a cross-appeal, the district alleges that the IHO erred by determining that Ha'Or Beacon was an appropriate unilateral placement. With regard to the issues that the parents allege the IHO did not address, the district contends that the IHO did address their claims and/or that the claims are without merit.

In a reply with an answer to the cross-appeal, the parents assert that their request for review is sufficiently compliant with the practice regulations and should not be dismissed. The parents further argue that the IHO did not err by determining that Ha'Or Beacon was an appropriate unilateral placement. The parents reiterate their requested relief for "funding/reimbursement" for the 2018-19 school year (Reply at p. 10).

V. Applicable Standards

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

T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v.

Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[7]

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

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

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

Tuning first to the answer with cross-appeal, the district asserts that the parents' request for review fails to conform with the practice regulations by stating their disagreement with the IHO's findings and conclusions but failing to specify their reasons for challenging the IHO's decision. The district also contends that the parents' arguments set forth in their memorandum of law should

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

not be considered because a memorandum of law cannot substitute for a pleading. As such, the district argues that the parents' appeal should be dismissed.

State regulation requires that a request for review "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" (8 NYCRR 279.4[a]). Further, section 279.8 of the State regulations requires that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number

(8 NYCRR 279.8 [c][1]-[3]). The regulation further states 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][4]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Although, I generally agree with the district's characterization that much of the parents' argument is contained in their memorandum of law, the parents' request for review, although not particularly well-pled, does allege specific errors committed by the IHO. As such, I decline to dismiss the parents' request for review because it adequately complies with the practice requirements of Part 279 and, given that the district was able to respond to the parents' allegations that are contained within the request for review, the district has not suffered undue prejudice to the extent that outright dismissal is warranted and I will consider the parents' claims as further discussed below.

2. Scope of Impartial Hearing and Review

Next, I must determine which claims are properly before me. The parents argue that the IHO failed to consider "the effects and implications" of the district's failure to implement the

student's IESPs the school years prior to the 2018-19 school year and erred by finding that the issue was not before her (Req. for Rev. ¶ 21). The parents assert that the IHO further compounded this error by blaming the parents and the prior NPS for failing to meet the student's needs in prior school years. The parents further claim that the IHO "narrowly read[]" the due process complaint notice "to avoid assigning liability to the district for its prior failure to implement mandated services for [the student]" and that it was not necessary for the parents to request compensatory education or relief for prior school years (Req. for Rev. ¶¶ 46, 47). Additionally, the parents allege that the IHO erred by failing to consider that the district "first raised the issue that [the student] was not receiving his mandated special education services at the time of the May 2018 IEP review" (Req. for Rev. ¶ 48). As such, the parents argue that they should be allowed "to present arguments and testimony about this issue; and [] this issue was appropriately before the IHO" (Req. for Rev. ¶ 49). The parents argue that the IHO erred by finding "that she could not address the effect of the district's previous failure to provide [the student] with mandated special education services" (Req. for Rev. ¶ 50). As a result, the parents further argue, the IHO failed to consider all the factors that led to the student's expulsion from the prior NPS (Req. for Rev. ¶ 51).

The district asserts that the IHO correctly determined that the parents' due process complaint notice was limited to claims related to the 2018-19 school year. The district further argues that the school psychologist who served as the district representative at the May 2018 CSE meeting and conducted a classroom observation testified that the student was not receiving the full mandate of related services recommended for the 2017-18 school year when describing why the student's related service providers did not participate in the CSE meeting. The district also asserts that the context of the school psychologist's testimony cannot "be seen as opening the door for unpled allegations that the [district]'s purported failure to provide services for three previous school years established the [district] failed to provide a FAPE for the school year in question" (Answer ¶ 15).

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b], 300.508[a]; 8 NYCRR 200.5[j][1]; Application of a Student with a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013], aff'd, 553 Fed. App'x 65 [2d Cir. Jan. 30, 2014]; DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]).

In this instance, the parents—as the party requesting the impartial hearing—had the first opportunity to identify the range of issues to be addressed at the impartial hearing. The parents' due process complaint notice clearly challenges the May 2018 IEP as improperly designed, but it does not include any claims alleging that the district failed to implement an IESP for one or more school years prior to the 2018-19 school year (see Parent Ex. A).

The parents assert that they should be permitted to present arguments and evidence that the student was not receiving his mandated recommended services during the 2017-18 school year because the student's educational history was "key to understanding his needs in May 2018" (Req. for Rev. ¶ 49). The IHO determined that the parents did not challenge the implementation of the student's IESPs during the prior three school years in the due process complaint notice (IHO Decision at p. 11). The IHO further found that the parents did not request compensatory education for those school years and that she could "not address those years, or draw factual conclusions when the [district] was not given notice in the hearing request that those years were at issue" (id.).

The Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H. v. New York City Department of Education, (685 F.3d 217, 250-51 [2d Cir. Jun. 29, 2012]; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018], appeal dismissed [2d Cir. Aug. 16, 2018]). In this case, the district school psychologist testified that the student was not receiving OT or counseling, which was reportedly recommended in an IESP for the 2017-18 school year, that was not included in the hearing record (Tr. pp. 87-88). The district correctly argues that the school psychologist's testimony was in response to a question about the participation of the student's related services providers for the 2017-18 school year during the May 2018 CSE meeting (id.). The hearing record reflects that the district did not subsequently agree to add issues related to a failure to implement the student's IESPs from prior school years and the parents did not attempt to amend the due process complaint notice to include these issues. I find that the IHO correctly limited the scope of the impartial hearing to those claims raised in the due process complaint notice and that the district did not through the questioning of its witnesses "open[] the door" to unpled implementation claims under the holding of M.H., (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]). Accordingly, this issue was raised for the first time on appeal and is outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]". To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"];

M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011] [internal quotations omitted]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the SRO because it was not raised in the party's due process complaint notice]).

Despite the parents' failure to assert violations of the IDEA arising from the district's alleged failure to implement the student's 2017-18 IESP, the IHO did consider the fact that the student did not receive the full mandate of services recommended for the 2017-18 school year when assessing his needs and in determining the appropriateness of the May 2018 IEP. The IHO carefully parsed the district's responsibility, noted conflicting testimony and was hesitant to "support the program recommended by the [district] based upon any possible failure of the [district] to fully implement the previously recommended services" (IHO Decision at pp. 10-11). The parents' argument is particularly unavailing because the hearing record demonstrates that they were permitted to and did present evidence of the student's lack of services during the 2016-17 and 2017-18 school years (see Tr. pp. 290-92, 293-95) and further they have failed to proffer any specifics on appeal of what evidence they believe was excluded or that the IHO failed to consider in support of their claim that the IHO failed to appreciate the effect on the student of a lack of services during the 2017-18 school year.

Given that the due process complaint notice was filed on March 26, 2019, the parents could have raised claims arising from IDEA violations that occurred during the 2017-18 school year but chose not to do so. Contrary to the parents' claim that the IHO narrowly read the due process complaint notice to avoid assigning liability to the district for its failure to implement mandated services, it is the parents' responsibility to assert all viable claims in the due process complaint notice in the first instance and, when necessary, to timely seek to amend it. Unfortunately as indicated below, the parents did not raise any claims that the district failed to implement the 2017-18 IESP in their due process complaint notice at all, while the procedural violations asserted in the due process complaint notice do not rise to the level of a denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Accordingly, because it is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Hawaii Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]), the parents may not pursue claims in their appeal that they failed to raise in the due process complaint notice.

B. CSE Process

1. CSE Composition

The parents argue that the IHO erroneously found that the May 2018 CSE was properly composed, that she misstated the parents' challenge to the qualifications of the district representative by only addressing the district representative's presence at the May 2018 CSE meeting.[8] The parents also contend that the IHO erred by finding that the May 2018 CSE was not required to include the student's "special education providers ([] his paraprofessional or ABA therapists)" (Req. for Rev. ¶ 36). The IHO did not address the qualifications of the district representative, finding that the district representative was present.

A district representative member of the CSE is described as a representative of the district who "(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency" (20 U.S.C. §1414[d][1][B][iv]; 34 CFR 300.321[a][4]; see 8 NYCRR 200.3[a][1][v]). State regulations additionally provide that the district representative may be the same individual appointed as the special education teacher or the school psychologist provided that such individual meets the above qualifications (8 NYCRR 200.3[a][1][v]).

The hearing record indicates that the district representative at the May 2018 CSE meeting also served as a school psychologist during the meeting (Tr. pp. 85, 87; Dist. Ex. 11 at p. 1). The district representative testified that she was a certified school psychologist, conducted evaluations, case management and participated in the development of IEPs (Tr. pp. 84, 86). She further testified that she conducted the case management and a classroom observation for the student (Tr. p. 86). In her testimony, the district representative also described what recommendations along the continuum of services were discussed and considered by the May 2018 CSE (Tr. pp. 110-11, 126, 128, 141, 166). During the impartial hearing, the parents' attorney did not pursue this claim during cross-examination of the school psychologist or otherwise refute the school psychologist's direct testimony (Tr. pp. 129-164). The parents' attorney reserved her opening statement until the district rested, arguing at that time that the district representative was not qualified and "as such, failed to consider the full continuum of services" without offering any rebuttal evidence of how the school psychologist was not qualified to participate as the district representative (Tr. p. 224). Accordingly, the available evidence in the hearing record supports the district's argument that the district representative at the May 2018 CSE meeting was qualified to serve as a district representative.

The parents also argue that the IHO erred by finding that the May 2018 CSE was properly composed without the participation of the student's paraprofessional or "ABA therapists" (Req. for Rev. ¶ 36. Both the IDEA and State and federal regulations specify the individuals required to fully compose a CSE (see 20 U.S.C. § 1414[d][1][B]; 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]). Under State regulations, a CSE is required to include the parents of the student; one regular

[8] In the due process complaint notice, the parents alleged that the May 2018 CSE did not include a district representative who was aware of the full range of services available to the student and imbued with the authority to recommend such services (Parent Ex. A at p. 3). The request for review does not allege how the district representative's qualifications were lacking.

education teacher of the student if the student is, or may be, participating in a general education environment; one special education teacher of the student or, where appropriate, not less than one special education provider of the student; a school psychologist; a district representative; an individual capable of "interpret[ing] the instructional implications of evaluations results"; a school physician if requested "in writing . . . at least 72 hours prior to the meeting"; an additional parent member if requested "in writing . . . at least 72 hours prior to the meeting"; "other persons having knowledge of special expertise regarding the student"; and "if appropriate, the student" (8 NYCRR 200.3[a][1]; see 8 NYCRR 200.1[xx] [defining "special education provider" as an "individual qualified . . . who is providing related services . . . to the student"]; 8 NYCRR 200.1[yy] [defining "special education teacher" as a "person . . . certified or licensed to teach students with disabilities"]).

On March 13, 2018, the district sent the parents a notice scheduling a CSE meeting for April 9, 2018 at 11:00 A.M. (Dist. Ex. 3 at p. 1). It identified the names and titles of the meeting participants, including a special education teacher/related service provider, a school psychologist who would also serve as the district representative, and the parent (id.).[9] The meeting notice indicated that the parents could invite "other individuals who you determine to have knowledge or special expertise about your child" (id.). On April 9, 2018, the district sent the parents a notice scheduling a CSE meeting for April 16, 2018 at 10:45 A.M. (Dist. Ex. 5 at p. 1). It identified the names and titles of the meeting participants, including a special education teacher/related service provider, a district representative, and the parent (id.). The meeting notice indicated that the parents could invite "other individuals who you determine to have knowledge or special expertise about your child" (id.). On April 17, 2018, the district sent a third CSE meeting notice to the parents scheduling a meeting for April 26, 2018 at 9:00 A.M. (Dist. Ex. 6 at p. 1). The meeting notice listed a special education teacher/related service provider, a school psychologist who would also serve as the district representative, and the parent as participants (id.). As in the previous notices, the parents were advised that they could invite "other individuals who you determine to have knowledge or special expertise about your child" (id.). In a fourth meeting notice dated May 7, 2018, the parents were invited to participate in a CSE meeting scheduled for May 17, 2018 at 9:00 A.M. (Dist. Ex. 8 at p. 1). It identified the names and titles of the meeting participants, including a special education teacher/related service provider, a district representative, and the parent (id.). Once again, the parents were advised that they could invite "other individuals who you determine to have knowledge or special expertise about your child" (id.).[10] None of the meeting notices included a regular education teacher.[11]

[9] On each meeting notice the student's mother was identified as the parent (Dist. Exs. 3 at p. 1; 5 at p. 1; 6 at p. 1; 8 at p. 1).

[10] Each of the CSE meeting notices stated that the student's "IEP Meeting must be held no later than: 05/12/2018" (Dist. Exs. 3 at p. 1; 5 at p. 1; 6 at p. 1; 8 at p. 1). The hearing record does not indicate why the CSE meeting was rescheduled three times.

[11] The lack of notice of a regular education teacher at the May 2018 CSE meeting may have been problematic from a procedural standpoint, given that the student was recommended to be placed in a regular education classroom; however, the parents did not raise this in their claim of missing participants in the due process complaint notice and, moreover, a classroom teacher from the student's then-current NPS participated in the CSE meeting (Dist. Ex. 11).

Participants at the May 17, 2018 CSE meeting included the individuals identified in each of the meeting notices, as well as both parents and the student's 2017-18 classroom teacher (Dist. Ex. 11 at p. 1). On appeal, the parents assert that the CSE should have included the student's paraprofessional and private ABA therapist. The parent testified that an attempt was made during the May 17, 2018 CSE meeting to reach by telephone the student's BCBA who provided a written report to the CSE, however that attempt proved unsuccessful (Tr. pp. 302-03). The parent further testified that she spoke to the BCBA after the CSE meeting and the BCBA told the parent that she could have participated if she had received notice of the meeting (Tr. p. 303). The parent was asked on cross-examination whether the student's classroom teacher told the BCBA about the student's CSE meeting (Tr. p. 313). The parent testified that she did not know and did not believe it was the teacher's job to invite the BCBA (Tr. pp. 313-14). The parent was not asked about her knowledge of the content of the meeting notices or whether she had invited anyone to the May 17, 2018 CSE meeting.

In view of the evidence above, the parents' claim that the CSE was improperly composed due to the absence of the parents' privately obtained BCBA is insufficient to find a procedural violation. The student's private BCBA and/or ABA therapists are not members of the CSE that are specifically identified in State regulation and further the district was not in a position to compel them to respond or participate in the CSE meetings, quite unlike a school district's obligation to include public or state approved school personnel who are or may become be responsible for implementing the student's public school IEP. Instead, as the meeting notices above indicted, the parents were free to invite the private BCBA and/or ABA therapists as individuals that they deemed to have knowledge or special expertise about the student, and the district would have been required to consider any input they offered during the meeting, had the parents secured their attendance. The student's paraprofessional is also not a required member of the CSE, but certainly could have been invited by the district representative had the parents made the request, which they did not. Accordingly, the parents' claims that the district violated the requirements for including the requisite members of the CSE are without merit. Even assuming that a missing member did amount to a procedural inadequacy, it would not support a finding that the district denied the student a FAPE unless it impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

The hearing record does not contain sufficient evidence upon which to base a finding that the student was denied a FAPE based upon the composition of the May 2018 CSE, especially since the absence of the regular education teacher is not actionable because it was not raised in the due process complaint notice, the parents did not request that the CSE include additional members, and the CSE ultimately included both parents as well as the student's general education classroom teacher from the NPS. Additionally, there being no evidence in the hearing record that the parents were precluded from inviting any participants that the parents deemed to have knowledge or special expertise about the student, and the CSE being otherwise properly composed, the IHO correctly dismissed these claims.

2. Classification

The parents allege that the IHO erred by finding that the student was properly classified as speech or language impaired and argue that the student should have been classified as a student with autism.

Once again, I must note that the due process complaint notice does not specifically allege that the student was improperly classified, and a change in classification is not among the parents' requested relief in the due process complaint notice, opening statement or closing brief (Tr. pp. 222-27; Parent Ex. A at pp. 1, 4; IHO Ex. II at pp. 5-6, 30). Nevertheless, the IHO addressed the student's classification as it related to the parents' contention that the district did not conduct appropriate evaluations of the student, noting that the relevant inquiry is whether the district addressed the student's unique needs rather than the student's disability classification (IHO Decision at pp. 8-9; see 20 U.S.C. § 1412[a][3] ["Nothing in this chapter requires that children be classified by their disability so long as each child . . . is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111; M.R., 2011 WL 6307563, at *9 [finding that once a student's eligibility is established "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" (emphasis in original)]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]). The parents' claims related to the evaluative information considered by the May 2018 CSE will be discussed below. Notwithstanding whether the issue of the student's classification was sufficiently raised (see Req. for Rev. ¶ 18), the hearing record supports the IHO's determination that the student was not inappropriately classified.

3. Predetermination and Parent Participation

In their due process complaint notice, the parents alleged that "it became evident that decisions and recommendations were predetermined, and made pursuant to district policy and standard practice, rather than based on [the student's] individual educational needs" (Parent Ex. A at p. 3). The parents further assert that by failing to convene a "validly constituted IEP team" (addressed above), failing to consider the full continuum of services, predetermining recommendations, making recommendations based on district policy, and failing to fully discuss the student's progress and future objectives, the CSE precluded the parents from fully participating in the May 2018 CSE meeting (id.). On appeal, the parents specifically assert that the IHO failed to rule on their participation claim (Req. for Rev. ¶ 38).

The request for review does not reassert claims that the May 2018 CSE predetermined its recommendations or based its recommendations on district policy. The regulations governing practice before the Office of State Review 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]). Although the parents contend in their request for review that "[t]he IHO erred by failing to consider the cumulative impact of the CSE's procedural failures" (Req. for Rev. ¶ 37), the use of broad and conclusory statements or allegations within a pleading does not

act to revive any and all procedural violations the parents believe the IHO erroneously addressed or failed to address without the parents specifically identifying which procedural violations meet this criterion (M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [finding that "the phrase 'procedural inadequacies,' without more, simply does not meet the state's pleading requirement"]). While I suspect that after completing the March 2018 observation of the student the school psychologist developed some pre-formed opinion about an appropriate setting for the student (see District Ex. 4), district personnel are permitted to "'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., 12 F. Supp. 3d at 358-59 [holding that "active and meaningful" parent participation undermines a claim of predetermination]).[12] Thus that suspicion of a preformed opinion is not enough, especially without some indication from the parents about what information the CSE refused to consider. Accordingly, I find the parents' claim of predetermination has been abandoned and will not be further discussed, and instead I will turn to the related area of parental participation.

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

[12] The parents' memorandum of law alleges that "the IHO ignored clear evidence that the district engaged in predetermined decision making" (Parent Mem. of Law at p. 16). However, it has long been held that a party is required to set forth the challenges to the IHO's decision in their pleading and that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see, e.g., Application of a Student with a Disability, Appeal No. 19-021; Application of the Bd. of Educ., Appeal No. 16-080). Therefore, as this claim was not raised in the request for review, it will not be further discussed.

participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

According to the May 2018 IEP, the CSE was composed of both of the student's parents, the district school psychologist/district representative, a related service provider/special education teacher, and the student's classroom teacher from the NPS (Dist. Ex. 11 at p. 1). The district school psychologist testified that the student's classroom teacher provided most of the information used to create the FBA and that the teacher was very knowledgeable in that regard (Tr. p. 104). The school psychologist also testified that the parents were very active and that they gave the impression to the rest of the CSE members that they "kn[e]w their child very well" (id.). The school psychologist further testified that the parents' concerns were memorialized on the student's May 2018 IEP (Tr. pp. 104-06; see Dist. Ex. 12 at pp. 5-6). When asked if all the members of the CSE were given the opportunity to participate, the school psychologist testified that "we had a lot of information …every input was an addition to the information we had. And we discussed any information in there, and integrating [sic] this IEP" (Tr. pp. 112-13). During cross-examination, the school psychologist was asked whether the parents had provided written recommendations from the student's providers and teacher from the NPS during the 2017-18 school year (Tr. p. 140). The school psychologist testified that the May 2018 CSE discussed those recommendations and that she read everything the parents had provided (Tr. p. 141). The school psychologist confirmed that she received a report from the student's BCBA from the student's father prior to the May 2018 CSE meeting and testified that she had attempted to obtain information from "an ABA" herself but was unsuccessful (Tr. pp. 147, 149, 151-56).[13] The student's mother testified that she provided the May 2018 CSE with copies of a report from the student's BCBA (Parent Ex. B), a letter from the student's principal during the 2017-18 school year (Parent Ex. C), and a letter from the student's occupational therapist (Parent Ex. D) (Tr. pp. 303-05). The student's mother was not asked any questions about her participation in the May 2018 CSE meeting during her testimony. The student's father testified about the student's enrollment and cost of attendance at Ha'Or Beacon (Tr. pp. 320-24). The student's father was not asked any questions about his participation in the May 2018 CSE meeting during his testimony.

The hearing record reflects that the district provided the parents the opportunity to participate in the May 2018 meeting. The district school psychologist testified that she reviewed the reports provided by the parents of the May 2018 CSE meeting and the parents' concerns were discussed and incorporated into the May 2018 IEP. Although the hearing record reflects parental disagreement with the school district's proposed IEP and placement recommendation that does not amount to a denial of the parents' 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).

[13] The school psychologist testified that she attempted to obtain reports from "the ABA" (Tr. p. 147). She further testified "the ABA" refused to provide a report to the CSE and that a report from the student's BCBA was later provided by the student's father (Tr. pp. 147-49, 151; see Parent Ex. B at p. 2).

4. Sufficiency and Consideration of Evaluative Information

The parents next allege that the May 2018 CSE failed to evaluate the student in all areas of suspected disability, failed to "possess[] sufficient evaluative material," failed to evaluate the student's speech and language needs prior to changing the student's classification, failed to consider the sufficiency of the FBA and erroneously found the BIP could address the student's behavioral needs without citing to the hearing record (Req. for Rev. ¶¶ 20, 22, 27, 28, 33).[14] In their due process complaint notice the parents contend that the district failed to assess the student's sensory/motor needs, speech-language needs and failed to conduct a social history update. The parents did not expressly request evaluations in the areas of OT or speech-language as relief in their due process complaint notice or request for review.

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

The IEP and prior written notice indicate that the CSE considered the following reports: a September 2016 pediatric report, a June 2017 OT evaluation, March 2018 psychoeducational

[14] Although the request for review includes the parents' substantive challenges to the FBA/BIP within its procedural violation arguments, whether the FBA/BIP addressed the student's needs will not be discussed in this section and will be addressed below with the parents' other challenges to the appropriateness of the May 2018 IEP.

evaluation, a March 2018 classroom observation, a May 2018 FBA, and a May 2018 teacher report (Dist. Exs. 12 at pp. 1-7; 13 at p. 1).

According to the March 20, 2018 classroom observation report, the district school psychologist observed the student in a classroom with one teacher and 21 students during morning activities, which included a transition from gym class, snack time and prayer, and a lesson involving word translation and writing (Dist. Ex. 4 at p. 1). The school psychologist noted that when the student was approached by the teacher during prayer, his book was opened to the wrong page (id.). When prompted by the teacher through writing on "his chart," the student corrected his posture and joined the others in singing (id.). The observation report indicated that when the teacher verbally prompted the student to "[t]ry your best," the student replied, "I am" (id.). The school psychologist noted that the student was off task for one minute, but soon looked in his book and was able to follow along with his finger, moving in rhythm with everyone else (id.). The student next participated in a class lesson involving word translation in which the teacher provided directives and asked him questions (id.). During the time the teacher interacted with the student, he was able to complete one sentence while one of his classmates had written three sentences (id.). According to the school psychologist, after 30 minutes of observing the student, he raised his hand and asked to leave the room (id.). The teacher asked him not to take long before coming back to the classroom (id.). After the student had been absent from the room for five minutes, the school psychologist reported that she left the classroom to look for the student (id.). She reported that she "accidentally" found him in a room with someone who presented herself as his "ABA specialist" (id.).[15] The school psychologist opined in her report that the "ABA specialist" seemed to be disconnected from the classroom teacher, as the classroom teacher directed the student to come back to the classroom but the ABA provider felt that it was "ok" for the student to stay in the room (outside the classroom) as long as he wanted (id.). The school psychologist concluded that the student appeared to try his best to perform in the classroom, was cooperative and responded well to the teacher's incentives and reminders, had a clear idea of what was expected of him, but sometimes withdrew and needed prompting (id.). During the observation, the student was not disruptive to others and did not demonstrate frustration or difficulty regulating his emotions (id.). However, in the opinion of the school psychologist, the fact that the student left the classroom to be with his "ABA specialist" on his terms, seemed disruptive to his learning, because the teacher expected him to come back, while the "ABA specialist" encouraged him to stay in the room for no evident reason (id.). The school psychologist noted that when she asked the "ABA specialist" what target behaviors she was working on, the ABA specialist indicated "tantrum or control of emotions, difficulty dealing with changes, has few friends and touched/stayed too close to people" (id.). According to the classroom observation

[15] It is not clear from the hearing record who this individual was. According to the undated progress report provided by the student's private BCBA, the student received "15 hours of direct intervention (by a paraprofessional)" (Parent Ex. B at p. 2). The student's father indicated that during the 2017-18 school year, the student "attended a general education program with a paraprofessional and an ABA therapist (who was supervised by a BCBA)" (Parent Ex. E at p. 1). The student's mother testified that the student received a district paraprofessional and the parents continued to provide a private ABA therapist for the 2017-18 school year (Tr. p. 293). The hearing record suggests that the "ABA specialist" described by the district school psychologist in her classroom observation and testimony was most likely the private ABA therapist described by the parents, who worked with the student in a separate room and was neither the student's district paraprofessional nor his private BCBA (compare Tr. pp. 136-37; with Tr. p. 295; see also Parent Ex. E at p. 1; Dist. Ex. 4 at p. 1).

report, the "ABA specialist's" interventions occurred outside the classroom and she was not able to recount to the school psychologist when the student had his last incident (id.).[16]

According to the March 4, 2018 psychoeducational evaluation report, the student was assessed as part of a mandated three-year evaluation; at the time of the evaluation he was "mandated" to receive counseling, OT, and a full-time 1:1 crisis paraprofessional pursuant to an IESP (Dist. Ex. 2 at p. 1). The report noted that the student's mother showed the evaluator the student's then-current report card which indicated that there were no academic concerns (id.).[17] The psychoeducational evaluation report indicated that the student received ABA therapy privately and reflected that during the student interview portion of the evaluation, rapport was established, although adequate eye contact was inconsistent (id.). Reportedly, the student was easily distracted, required redirection, and volunteered to the evaluator that he could read at an eighth-grade level (id.). The student was described as being cooperative for the most part, attempting all tasks presented to him (id.). According to the evaluator, the student made random comments throughout testing such as "[i]t's really challenging," and "[i]t's so hard," but he continued to work and responded positively to her prompting and encouragement (id.). The student worked well in the 1:1 structured situation (id.).

Cognitively, administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) yielded a Full Scale IQ standard score (SS) of 125 which placed the student in the 95th percentile and within the very high range as compared to his same-aged peers (Dist. Ex. 2 at pp. 1, 4). Administration of the five indices of the WISC-V, yielded the following results: verbal comprehension IQ SS of 113 (81st percentile/high-average range); visual-spatial IQ SS of 132 (90th percentile/extremely-high range); fluid reasoning IQ SS 128 (97th percentile/very-high Range); working memory IQ SS 107 (68th percentile/average range), and processing speed IQ SS of 119 (90th percentile/high-average range) (id. at pp. 1-2, 4). The evaluation report indicated there was "interest [sic] scatter," suggesting higher potential than demonstrated at that time (id. at p. 1).

Administration of the Wechsler Individual Achievement Test-Third Edition (WIAT- III) revealed the following academic achievement scores: word reading SS of 114 (82nd percentile/average); reading comprehension SS of 106 (66th percentile/average), early reading skills SS of 94 (34th percentile/average); numerical operations SS of 117 (87th percentile/above average); math problem solving SS of 131 (98th percentile/superior); listening comprehension SS of 105 (63rd percentile/above average), and spelling SS of 118 (88th percentile/above average) (Dist. Ex. 2 at pp. 2-4).

In a section entitled "Social/Emotional Assessment Results," the March 2018 psychoeducational evaluation report indicated, "Projectives and clinical interview reveal a verbal youngster who doesn't like school. He says because 'it's boring'. He enjoys playing 'Angry Birds'

[16] The hearing record does not indicate whether the district school psychologist who observed the student asked the classroom teacher whether the student's behavior on the day of the observation was typical for him.

[17] According to the parent, at the time of the evaluation, the student was not receiving counseling or OT services (Dist. Ex. 2 at p. 1).

games on the phone. He knows how to swim. He likes playing with his friends" (Dist. Ex. 2 at p. 3).

With regard to the student's cognitive strengths and challenges, the March 2018 psychoeducational evaluation report indicated the student's cognitive functioning fell within the very high range (Dist. Ex. 2 at p. 4). Areas of relative strength were in understanding part-whole relationships, verbal concept formation, verbal reasoning, deductive reasoning, and visual discrimination (id.). Concerning the student's academic skills strengths and challenges, the same report indicated most of the student's academic skills were at or above grade and age expectancy (id.). Areas of relative strength were in listening comprehension, reading comprehension, math problem solving, decoding, computations and spelling (id.). With regard to the student's social/emotional functioning strengths and challenges, the report noted the student was a second grade youngster who did not like school but liked playing with his friends (id.). In conclusion, the evaluator noted that academically, most of the student's skills were at or above age and grade expectancy and reported that the student was left-handed and had an adequate handwriting (id.).

As indicated above, the September 22, 2016 pediatric report and the June 30, 2017 OT evaluation were not included in the hearing record but portions of each were incorporated into the May 2018 IEP (Dist. Ex. 12 at pp. 4, 6). The student's classroom teacher from the NPS did not contribute a written report to the CSE, however he participated by telephone and his input was also incorporated into the May 2018 IEP (id. at p. 5). The district school psychologist testified that the student's NPS classroom teacher provided "most of the information" that was used to develop the FBA (Tr. p. 104).

With respect to the parents' assertions that the district failed to evaluate the student's speech-language needs prior to changing his classification, failed to conduct a social history update, and failed to assess his sensory/motor needs, the evaluative information the May 2018 CSE considered provided details regarding the student's cognitive abilities, sensory regulation, social/emotional functioning, academic achievement, and functional communication skills (Dist. Exs. 2; 4; 9; 10; 12 at pp. 1-7). I agree with the IHO that it was not axiomatic for the student's diagnosis of autism spectrum disorder to result in an autism classification and that the purpose of classification is to enable the student to receive services and "[o]f greater import is that he was classified and that the services recommended must meet his unique needs" (IHO Decision at p. 9). Federal and State regulations require the district to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA and obtain information that will enable the student be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]; W.W. v. New York City Dep't of Educ., 2014 WL 1330113, at *13 [S.D.N.Y. Mar. 31, 2014] [finding that the "absence of an explicit mention" of a particular diagnosis in a student's annual goals was not fatal to the IEP because the goals were adequately designed to address the student's learning challenges as a whole and related to the particular diagnosis]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *10 [S.D.N.Y. Oct. 12, 2011]).

Based on the above, the evidence in the hearing record supports the IHO's determination that the CSE obtained and considered sufficient evaluative information, which included input from the student's parents and NPS classroom teacher, about the student and his individual needs (including his sensory deficits) to develop an IEP (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-30 [S.D.N.Y. 2013]).

5. Prior Written Notice and Cumulative Procedural Violations

In their request for review the parents assert that the IHO failed to issue a determination regarding the district's failure to issue a sufficient prior written notice, which listed all documents considered and relied upon by the district and listed the district's reasons for refusing to consider a special education classroom "though one was requested by his parents and educators" (Req. for Rev. ¶ 40). The parents also contend that the IHO failed to consider the cumulative impact of the CSE's procedural failures; by failing to collect and consider sufficient information, and failing to consult with all appropriate educators, the CSE was unable to create an appropriate educational program for the student.

Under some circumstances, the cumulative impact of procedural violations may result in the denial of a FAPE even where the individual deficiencies themselves do not (L.O. v. New York City Dep't of Educ., 822 F.3d 95, 123-24 [2d Cir. 2016]; T.M., 752 F.3d at 170; R.E., 694 F.3d at 190-91 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541 [2d Cir. 2017] [noting that it will be a "rare case where the violations, when taken together," rise to the level of a denial of a FAPE when the procedural errors do not affect the substance of the student's program]).

In this matter, the IHO did not find any procedural violations, and accordingly did not err in failing to address the cumulative impact of such non-violations (see IHO Decision at pp. 9-10). The IHO found and I concur that the district did not violate the procedural requirements for conducting a CSE meeting and the CSE obtained and considered sufficient evaluative information to develop the student's programming. While the IHO did not address the parents' claim that the district's prior written notice was inadequate, the hearing record does include a prior written notice dated June 28, 2018 that lists the documents considered by the May 2018 CSE, lists the programs considered by the May 2018 CSE and documents the reasons for rejecting other programming options as too restrictive or too unsupportive as well as the reasons for the selection of the program ultimate selected (Dist. Ex. 13 at pp. 1-3). Thus, the parents' claim that the district's prior written notice was a procedural violation that amounted to a denial of a FAPE is without merit. Further, as I do not find any of the remaining alleged violations to constitute a procedural violation, there is no basis on which to find that they cumulatively rose to the level of a denial of a FAPE (see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *18 [S.D.N.Y. Feb. 14, 2017]).

C. May 17, 2018 IEP

1. Consideration of Special Factors—Interfering Behaviors

In their appeal, the parents argue that the IHO failed to consider the sufficiency of the FBA, failed to consider the parents' evidence of the student's behaviors, and erroneously found the BIP could address the student's behavioral needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 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]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. 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.).

In advance of the May 2018 CSE meeting, the parents provided an undated progress report prepared by the student's BCBA (Parent Ex. B at p. 2). As noted above, the student's BCBA reported that the student had received a diagnosis of autism spectrum disorder and a recommendation for ABA services in January 2016 from a physician (id.). The student received 15 hours per week of direct intervention by a paraprofessional, and six hours per month of supervision provided by a BCBA (id.). According to the BCBA, the student presented with significant delays which inhibited his ability to function at an age-appropriate level across various settings (id.). His difficulty communicating and interacting with others "properly obstruct[ed] him from reaching age appropriate milestones" (id.). The BCBA reported that the student did not "learn naturally from his environment, and therefore, [wa]s in need of intensive 1:1 teaching to learn how to overcome the many obstacles he experience[d] and teach him the skills he need[ed] to function in daily life" (id.). The student's BCBA also reported that at the start of the year, the student had many language deficits, and had a very hard time expressing his needs and wants (id.). Specifically, "[w]hen he was feeling upset or frustrated, he had a very difficult time identifying with his emotions" (id.). The student's BCBA stated that the student was "now able to express his emotions more effectively, but he still g[ot] overly frustrated when things don't go his

way, or is told 'no' to something" (id.). According to the BCBA, the student had "made big strides socially, but there [we]re many areas that need to still be worked on" (id.). The BCBA further noted the student's progress from the beginning of the year, describing the student as usually seen sitting by his desk by himself, not interacting with peers at all, to the time of the report when the student was now able to communicate more with his peers and have a functional conversation for a short amount of time (id.). The student's BCBA indicated that the student could not insert himself in a large group of boys and demonstrated difficulty with collaborative play activities (id.). The student required prompting to approach boys, and to play/interact appropriately (id.). In conclusion, the student's BCBA opined that the student would benefit from the added support of a small classroom, and a more individualized setting (id.). She also indicated that the student required frequent redirection and cueing from the classroom teacher in order to remain focused and engaged throughout the day (id.).

The parents also provided an undated letter from the principal of the NPS the student attended for the 2017-18 school year, which described the student as exhibiting disturbing behaviors on a weekly basis such as biting, destroying other student's projects and school property, failing to tolerate authority and becoming defiant and physical toward authority (Parent Ex. C at p. 1).

According to the May 2018 IEP, the student's classroom teacher at the NPS during the 2017-18 school year who participated in the CSE meeting indicated that the student might engage in outbursts when a demand was put on him and that to show he was not interested in an activity he would make faces and scream (Dist. Ex. 12 at p. 5). In addition, the student resisted when the teacher tried to redirect him (id.). The teacher indicated that he should be working more with the student but let him do what he wanted and that at the time the IEP was drafted there were no incidents that occurred because they were preventable (id.). The student's classroom teacher indicated that the student's behavior was worse during morning classes and was likely to occur after a return from vacation (id.). The parents concurred that the student's behavior was different in the afternoon (id.).

With respect to the adequacy of the FBA, the May 2018 FBA identified "[t]antrum - scream, agitated, when upset; refusal to follow directions; [and] fight with a peer when there is no teacher (provoked and not flexible)" as the targeted problem behaviors (Dist. Ex. 10 at p. 1).

The May 2018 FBA included the formulation of a hypothesis regarding the general conditions under which the student's targeted behavior usually occurred and probable consequences that served to maintain the behavior (Dist. Ex. 10 at pp. 1-3). The functional hypothesis stated that when the student had to navigate a social situation he would misinterpret social skills and display inflexible behavior by being overly agitated and screaming, within a few minutes, as long as he was under pressure (Dist. Ex. 10 at p. 4). The functional hypothesis indicated that the behavior occurred once or twice to no times per week and the student engaged in the behavior to maintain control of the situation (id.). The behavior was most likely to occur in the morning classroom (Jewish studies, prayer) or when the student was in conflict with a peer (id. at pp. 2, 4). The behavior also occurred when demands were placed on the student and there was no close monitoring by adults (id. at p. 3). According to the FBA, consequences of the student's behavior included the teacher insisting on the request and redirecting the student and calling the student's parents or taking the student out of the classroom (id.). The May 2018 FBA also identified the following influencing factors that increased the likelihood of problem behaviors;

"[the student] has difficulty redaing [sic] social cues that leads to lack of flexibility; has sensory issues that leads to overreaction to sensory overloud [sic]" (id. at p. 2).

In addition to gaining control over the situation, the FBA indicated that the student the student's behaviors allowed him to avoid and escape teacher or adult attention; sensory overstimulation; a nonpreferred activity/nonacademic task like a conversational exchange or writing sheets; or a difficult task that caused the student to become upset when feeling unsuccessful (id. at p. 4). Lastly, the functional hypothesis indicated that pragmatic skill deficits might also contribute to the student's targeted behavior, as the student had difficulty maintaining conversation on a given topic, and difficulty maintaining focus when not interested (id.). The FBA included described possible reinforcers for the student (reading, video games, recognition, candy) and indicated that the student was not reinforced or motivated by being pulled out of the classroom or not feeling in control (id. at p. 5). Recommended replacement behaviors included having the student identify his emotions and triggers of his discomfort, improve his ability to read social cues, understand perspective taking to improve his relationship with authority and improving his functional communication skills (id.).

The May 2018 FBA indicated that the FBA data was based upon parent interviews, staff interviews, student records review, summary of evaluations, testing data and a verbal report (Dist. Ex. 10 at pp. 1-2). The May 2018 FBA included baseline data of the problem behavior including frequency (at worst occurred two times per week, now dissipated to not at all due to teacher flexibility with demands) and occurring after a return from vacation (id. at p. 4).

Based on the evidence above, the May 2018 FBA included the required information as set forth in the standard above and therefore the parents' contention that the FBA was insufficient is without merit.

I will turn next to the parents claim that the IHO did not consider evidence of the student's behaviors and that the BIP could not address the student's behaviors.

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]).[18] 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]).

[18] 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]).

A review of the May 2018 BIP reveals that it identified the baseline measure of the problem behavior, including the frequency (one-two times per week after vacation to none per week), but did not identify the duration or intensity (Dist. Ex. 9 at p. 1). The May 2018 BIP included intervention strategies to be used to alter the antecedent events in order to prevent the occurrence of the target behavior including: counseling, sensory exercises, breaks, avoid direct demands, use of positive reinforcements only, providing recognition, guidance to navigate social situations, preparation after the vacation break via counseling and other therapies, monitoring and flexibility in demands, and set clear expectations (id. at p. 2).

The May 2018 BIP included intervention strategies to be used to teach replacement behaviors such as recognizing emotions and triggers of discomfort, improving his ability to read social cues, showing flexibility adjusting to a variable situation, understanding perspective taking to improve his relationship with authority, and improving functional communication skills (Dist. Ex. 9 at p. 2). Intervention strategies to be used to teach new behaviors included a therapeutic approach, and teachers educating themselves about the student's deficits and challenges (id.).

In addition, the May 2018 BIP included intervention strategies to be used to provide consequences for the targeted inappropriate behavior (Dist. Ex. 9 at p. 2). In response to a new behavior, the BIP provided for increased reinforcers such as praise and recognition (id.). In response to a problem behavior, the BIP indicated reducing reinforcers such as giving choices and praise the student's first success and reminding him about expected behavior (id.). The May 2018 BIP also recommended monthly progress monitoring to assess the student's use of appropriate behaviors to deal with a conflict situation after the implementation of the BIP (Dist. Ex. 9 at p. 3). In addition to the FBA and the BIP, the five of the student's IEP goals (which are described further below) targeted the factors that influenced the likelihood of the student's problem behaviors, identified here as the student's difficulty reading social cues, lack of flexibility, and sensory "issues" (Dist. Ex. 12 at pp. at pp. 9-12).

Accordingly, as described above, a review of the May 2018 FBA shows that it accurately identified the student's interfering behaviors, and the May 2018 BIP addressed the student's problem behaviors. Furthermore, because the IEP includes additional strategies to address the student's behaviors, any deficiency in the FBA or BIP would not likely to lead to a denial of a FAPE (E.E. v. New York City Dep't of Educ., 2018 WL 4636984, at *4 [S.D.N.Y. Sept. 26, 2018] [explaining that although the failure to conduct an adequate FBA or implement a BIP is a "serious procedural violation," it "does not rise to the level of a denial of a FAPE if the IEP adequately identifies the problem behavior and prescribes ways to manage it"]). Overall, the evidence supports the IHO's finding that the May 2018 FBA and BIP were appropriate.

2. Least Restrictive Environment

The parents contend that the IHO erred by finding the May 2018 IEP offered the student a FAPE in the LRE and that a regular education classroom with a group paraprofessional and related services was appropriate. The parents argue that the student was unable to return to his NPS for the 2018-19 school year due to his behaviors and that all of the student's then-current providers recommended a smaller class setting with individualized support (Parent Exs. B at p. 2; C at p. 1; D at p. 1). The district disputes these allegations, arguing that the May 2018 IEP was reasonably calculated to provide the student with educational benefit. In particular, the district emphasizes that the student does not have any academic needs and exhibited social/emotional and behavioral

deficits. Upon review, the evidence in the hearing record does not support the parents' contentions that the IHO's decision should be reversed.

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., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North 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 300.114; 300.116).

This is not a case where the parents contend that the recommended class was overly restrictive; indeed, the parents requested "that the CSE locate a full-time special education placement" for the student, "as he was not allowed to return to his then-current school for the 2018-19 school year" (Parent Ex. A at p. 2). Contrary to the parents' arguments, the evidence in the hearing record supports the conclusion that a regular education setting with individual and group counseling services, individual OT, a full time group crisis management paraprofessional, and the FBA/BIP was appropriate to meet the student's needs in the LRE for the 2018-19 school year.

The student's mother testified that during the preceding 2017-18 school year, the district recommended OT, counseling, and a paraprofessional for the student; and that she continued to provide private ABA therapy for the student (see Tr. pp. 293-94). The parent further testified that the district provided authorization for a non-district occupational therapist, but the parent was unable to obtain one (Tr. p. 293). The parent further testified that counseling was available at the NPS from the same provider she had contacted for OT, but she was told by the principal of the NPS that "the student would not benefit at all from seeing this counselor, [the student] needs more specialized attention" (Tr. p. 294). As a result, the student did not receive OT or counseling during the 2017-18 school year (id.). The parent also testified that the student was not permitted to attend the NPS without a paraprofessional and the student missed the first six-to-eight weeks of school during the 2017-18 school year because the district failed to provide a paraprofessional (Tr. p. 295). The parent further testified that the paraprofessional was unreliable and when she was not in attendance, the NPS would require the parent to pick the student up from school (Tr. p. 294). The parent averred that the student missed approximately four months of school due to the lack of a paraprofessional (Tr. p. 295). The parent also explained that the ABA therapist that they privately obtained was not permitted in the student's regular classroom at the NPS and would work with him in a separate room (id.). The student's classroom teacher who participated in the May 2018 CSE meeting did not testify at the hearing. The student's mother was asked about his input at the CSE meeting and she testified that according to the teacher, the student "did whatever he wanted and [the teacher] was just waiting for the school year to end" (Tr. p. 300). The student's

mother further testified that the classroom teacher let the student leave the classroom if he wanted and did not engage in any confrontation with the student (id.).

The district school psychologist who conducted the student's classroom observation and acted as the district representative at the May 2018 CSE meeting testified that during her observation, the classroom teacher "was on top of the students" and that the student appeared distracted occasionally but was generally "following along" with the class (Tr. pp 99-100; see Dist. Ex. 4 at p. 1). The student responded to "slight" prompts provided by the teacher (Tr. p. 100). The school psychologist stated that her impression was that the student was "a little bit slower than others" (Tr. p. 100).

In addition to the letter from the student's principal and the report from the student's BCBA, the parents also provided a letter from the student's occupational therapist who provided services from February 2015 through June 2017.[19] The student's occupational therapist reported that the student presented with severe sensory integration dysfunction in addition to generalized hypotonia with weak proximal and distal upper extremities, kyphotic posture with rounded shoulders, weak gross motor coordination skills, delayed fine motor coordination skills, and delayed activities of daily living skills (Parent Ex. D at p. 1). In the area of sensory integration, the student "presented with a severe hypo-response to auditory, visual, tactile, oral, olfactory, proprioceptive, kinesthetic, and vestibular awareness" (id.).

The occupational therapist stated that the student's sensory deficits affected his ability to modulate himself and described the student's presentation as: having trouble completing tasks if there was any kind of noise in the room; the student would fixate repetitively on the source; he would scream if a noise was unexpected or louder than he would like; the student had difficulty with body scheme awareness and would stand too close to others; he had difficulty tolerating movement on the swings and would ask to come off after five minutes; the student had a weak grasp; the student would gag on foods he felt he did not want or like; the student would become frustrated when trying to find objects in competing backgrounds; the student would wander off without regard for personal safety, including walking out of the office building; the student had difficulty paying attention to requested tasks, as he was often self-directed in his focus (Parent Ex. D). The occupational therapist also reported that the student spoke about subjects that were only of interest to him, without regard to the interest of the other party, and he would not stop himself once he started (id.). The "self directedness" required frequent, moderate supervision during all tasks for the student to complete the task correctly according to the instructions given (id.). In addition, the student frequently had emotional outbursts, specifically when he felt unsuccessful at a task or had difficulty with a change or expectation (id.). The occupational therapist opined that the student would benefit from a small class size in an educational setting that could address his behavioral and social difficulties (id.). In addition, she noted that due to his severe sensory integration dysfunction, it was crucial that the student received OT services in a school setting that

[19] The June 30, 2017 OT evaluation considered by the May 2018 CSE was not included in the hearing record, however the letter provided by the parents appears to be consistent with those portions of the evaluation included in the body of the May 2018 IEP (compare Parent Ex. D at p. 1; with Dist. Ex. 12 at p. 6; see Dist. Ex. 13 at p. 1).

contained a sensory gym, so that the student could modulate and regulate his ability to process sensory stimuli in the academic setting (id.).

The district school psychologist testified that she reviewed the reports from the student's BCBA, occupational therapist and the letter from the student's principal (Tr. pp. 141-42). In her email reply to the student's father on May 4, 2018, she noted that on the three occasions she was observing students at the NPS, the student in this matter was without the support of his paraprofessional and was able to function in the classroom (Parent Ex. P at p. 1). This is consistent with the private BCBA's report that the student had made progress from the beginning of the year (compare Parent Ex. B at p. 2; with Parent Ex. P at p. 1). The district school psychologist further testified that the evaluative information relied on by the CSE and listed in the prior written notice conflicted with the opinions of the student's BCBA, occupational therapist from the 2016-17 school year and the student's principal that the student required a smaller class (Tr. pp. 141-42, 166). She further testified that the evaluations reviewed and conducted by the CSE did not yield data that supported the need for a smaller class (id.).

The May 2018 IEP reflected that the parents wanted the student to learn to read social cues and be more flexible in conflicts (Dist. Ex. 12 at pp. 5, 6). The parents were also concerned that the student's paraprofessional during the 2017-18 school year was not always present, "especially when a situation occur[ed]," and they wanted to know the trigger for the student's frustration (id.). The May 2018 IEP also included social development concerns of the parents related to the student fighting with other students when not supervised in the mornings, and his difficulty approaching peers and engaging in appropriate conversations (id. at p. 6). The parents did not have any concerns related to the student's academic performance (id. at p. 5).

Regarding the student's participation in the general education curriculum, the May 2018 IEP indicated that the student exhibited mild symptomatic behaviors associated with his diagnosis of autism spectrum disorder (Dist. Ex. 12 at p. 7). The May 2018 IEP reflected that the student's cognitive abilities and academic skills were superior to his peers and that the student found school boring (id.). Weaknesses included difficulty regulating his reactions to sensory stimuli and functional communication skills (id.). The IEP noted that the student "may show outbursts and become defensive if he feels that he is unsuccessful at a task or the teacher demands are direct, creating a discomfort situation for him" (id.). The student was known to like recognition and praise for his efforts (id.). The May 2018 IEP stated that "[o]verall, [the student] [wa]s benefitting from a mainstream environment, yet he require[d] a therapeutic approach to address his areas of weaknesses" (id.).

For related services, the May 2018 CSE recommended that the student receive individual OT two times per week for 30 minutes per session and individual counseling one time per week for 30 minutes and group counseling two times per week for 30 minutes each session (Dist. Ex. 12 at p. 14). The May 2018 CSE further recommended supplementary aids and services of a full-time group crisis management paraprofessional (id.). The May 2018 IEP included six annual goals to address the student's social/emotional, behavioral and sensory needs (id. at pp. 8-12). The first goal addressed the student's needs in the areas of ADLs, and motor planning through targeted sensory motor activities designed to improve the student's participation and attention to classroom activities during instructional and noninstructional times (id. at p. 8). The first goal also stated that the student would be able to complete tasks by following the necessary sequential steps and thereby reduce the student's frustration (id.). The second goal reflected that the student would improve

auditory and tactile "processing/integration" as it related to body awareness and attention (id. at p. 9). The second goal also stated that the student would refrain from getting too close to a person and respect social boundaries; maintain focus and continue working in the presence of distractions and "tolerate noise, touch etc.., [sic] without becoming agitated or stressed out" (id.). The second goal also required the student to increase his awareness of triggers of his discomfort and "talk it through" (id.). The third annual goal also addressed motor planning, by requiring the student to increase eye contact, attention to directions and the ability to move around the environment without "over touching others and various textures" (id. at p. 10). The third goal also stated the student would increase his ability to learn techniques for self-calming "for greater success in school and home environment" (id.). The fourth annual goal directed that the student would improve coping skills by planning and implementing at least two strategies to facilitate greater tolerance of frustration and two strategies to respond non-aggressively to anger and maintain self-control "in the face of failure or disappointment" (id.). The fifth annual goal provided that within one year, the student would improve school performance with "[p]araprofessional support during school day" (id. at p. 11). The fifth goal also required the student to demonstrate the ability to comply with the teacher's directions and transition smoothly between activities by responding to redirection (id.). The student was further required to refrain from negative behaviors that were disruptive to the classroom (id.). The student would show decreased frequency and intensity of outbursts, by responding to "efficient strategies created for him," and self-advocate when he needed a break (id.). The sixth annual goal reflected that within one year, the student would demonstrate improved communication skills by staying on topic in a conversation that was not of his interest, engage in turn taking exchanges by asking questions using cues and prompts, and "[] make requests and [] protest and comment on activities and observation" (id. at p. 12). The sixth goal also stated that the student would engage in problem solving and efficiently communicate his ideas, follow and interpret social cues in various situations and adjust his behavior as necessary, and engage in conversations about what makes a good friendship (id.).

The IHO reasoned that because the student's teachers, BCBA and paraprofessional were uncoordinated in their approach and the related services that had been recommended for the student for the 2017-18 school year were not consistently provided, she could not find that the May 2018 CSE's recommendation of a regular education class with related services was inappropriate (IHO Decision at pp. 10, 11). The IHO noted that the student had difficulties with behavior when he was unsupervised and during morning classes (id. at p. 9). The student did not have difficulty in the afternoon and was described as respectful, engaged and considered one of the favorite students (id.). The IHO also highlighted that despite not receiving recommended OT services during the 2017-18 school year and experiencing significant sensory challenges, the student was still able to function well in the afternoons (id. at p. 10). The IHO also recognized that the student's district paraprofessional and private ABA provider did not coordinate their efforts with the student's teachers and took what she characterized as "a haphazard approach to addressing his social/emotional needs" (id.). The IHO found that the May 2018 IEP "was well constructed to meet the [s]tudent's needs in the least restrictive environment" (id. at p. 10). The IHO further found that the IEP with the BIP "t[ook] a sensitive approach to improving the [s]tudent's ability to respond to authority and participate in class appropriately" (id. at p. 11).

Consistent with the IHO's findings, review of the May 2018 IEP and May 2018 FBA/BIP reflected that although the May 2018 CSE did not recommend the smaller classroom requested by the parents, their concerns as well as the social/emotional, sensory and behavioral needs outlined

by the parents' private BCBA, occupational therapist, and providers from the NPS were identified on the IEP and further addressed by the annual goals.

While I sympathize with any perception that the parents may have had that the district or the IHO were faulting them for service delivery problems during the preceding 2017-18 school year, I do not believe that was the IHO's point. I believe the point to be made is that if there has been a failure to deliver the IESP services in a general education setting, when designing an IEP that calls for more restrictive setting, it is appropriate correct the service delivery problems, at least for the public school programming being considered, before moving toward a more restrictive setting such as a special class. The parents certainly should not be faulted for any implementation failure that the district may be responsible for. It may well be that the district fell down in its responsibilities while the student was attending the NPS, but as I explained above, the district was not required to defend its actions for the 2017-18 school year, at least in this particular proceeding. In this proceeding, the planning shifted significantly toward designing an IEP for student to be implemented in the public school, and there is significant evidence supporting the student's strong academic abilities, therefore, if the supports are implemented in the public school in the regular education environment, as they should be, the evidence of his ability to function and make progress with nondisabled peers with appropriate positive behavioral supports is reasonably strong. Once the May 2018 CSE determined that the student could be educated in a regular education classroom with related services and supplementary supports, it was not obligated to consider a more restrictive setting (E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013]). The remaining question in this case is whether the public school was capable of implementing the IEP as designed, and I will turn to that issue next.

D. Challenges to the Assigned School Site

The parents allege that the IHO erred by finding their concerns about the school site to which the student was assigned were speculative and further argue that the IHO erred by allowing the district to present evidence of the recommended placement (Req. for Rev. ¶ 24). The parents also contend that the IHO failed to consider all of their arguments about the assigned school site, improperly discredited the testimony of the student's mother and "inaccurately applied binding precedent concerning the use of retrospective testimony" (Req. for Rev. ¶¶ 54, 58, 59, 60).

In their due process complaint notice, the parents asserted that the assigned school site was not capable of implementing the student's May 2018 IEP or providing the student with an appropriate program (Parent Ex. A at p. 4). The parents further alleged that the assigned school site would not implement the student's IEP because during a visit to the assigned school site, they were told that the student would be placed in a 12:1+1 special class and the school would "work over the course of the year to mainstream him" rather than provide him the services in his IEP (id.). Next, the parents contend that a 12:1+1 special class could not provide the student with a suitable and functional peer group, or an appropriate academic curriculum and manner of instruction (id.). Additionally, the parents argued that the large physical environment of the school site was not appropriate for the student and the school lacked a sensory gym (id.). Lastly, the parents alleged that the CSE did not respond to their letters on August 21, 2018 or September 27, 2018 (Parent Exs. E; F).

Initially, the parents' assertion that the IHO failed to consider all of their arguments is unsupported by the hearing record. As discussed below, the IHO devoted nearly three pages of her 15-page decision to the parents' assigned school claims, weighing the parents' claims against the controlling case law (IHO Decision at pp. 12-14).

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).[20] However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 2016 WL 4470948, at *2 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 2016 WL 4470948, at *2). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not

[20] The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

The IHO determined that the parents' allegations that the assigned school site would not implement the program set forth on the May 2018 IEP to be speculative and further found the parents' evidence related to their visit of the school site unpersuasive (IHO Decision at p. 12). The IHO initially dispensed with the parents' argument that the district was foreclosed from offering evidence that the recommended program set forth on the May 2018 IEP was capable of being implemented at the assigned school site, noting that the parents' reliance on D.C. v. New York City Dep't of Educ., was misplaced (950 F. Supp. 2d 494, 512 [S.D.N.Y. 2013]; IHO Decision at p. 12; see IHO Ex. I at pp. 1-13). Citing M.O., the IHO explained that unlike the family in D.C., at the time the parents in this matter toured the assigned school site, the school was capable of implementing the May 2018 IEP (793 F.3d at 244; IHO Decision at pp. 12-13). The IHO further held that the parents' assertion that the assigned school would simply refuse to implement the May 2018 IEP was an impermissible speculative challenge (id. at p. 13).

The IHO further credited the testimony of the assistant principal of the assigned school site who averred that the school would never disregard the recommendations written on an IEP (Tr. pp. 343-45), while finding the testimony of the student's mother to be "unconvincing" (IHO Decision at p. 13). Specifically, the IHO found that the student's mother was unclear in her recollection of events and in her recollection of the individual who provided the tour (id. at pp. 13-14). There is no reason on this basis to depart from the IHO's conclusion that the parents' claim was impermissibly speculative (see, e.g., N.M. v. New York City Dep't of Educ., 2016 WL 796857, at *8 [S.D.N.Y. Feb. 24, 2016] ["[A] claim based on what a school 'would not have' done—as opposed to a claim based on what the school could not do—is speculative and barred under R.E. and M.O."]).

Next the IHO addressed the parents' claims that the CSE failed to respond to their requests for a class profile, a program description and information about the behavioral supports finding the information was not necessary for the parents to make a determination about the program (IHO Decision at p. 14).

Regarding the parents' claims that a 12:1+1 special class could not provide the student with a suitable and functional peer group, or an appropriate academic curriculum and manner of instruction; that the large physical environment of the school site was not appropriate for the student and the school lacked a sensory gym, these are impermissible challenges to the appropriateness of the May 2018 IEP because they were not sufficiently tethered to the requirements of the IEP (see N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *6 [S.D.N.Y. Feb. 11, 2016] [noting that "[t]o be a cognizable claim, i.e., one that triggers the school district's burden of proof, the 'problem' with the placement cannot be a disguised attack on the IEP; in other words, if the student ought to be placed in a school with particular characteristics, programs or services, then they should be set forth in the IEP and may not be raised as a challenge to the school placement"]). The May 2018 IEP recommended a regular education classroom with related services and did not recommend a sensory gym. Because they were not written elements required under the proposed May 2018 IEP, these claims are not permissible challenges to the assigned school site's capacity to implement the IEP under M.O. (see Y.F., 2016 WL 4470948, at *2). Based on the foregoing, I find the IHO properly dismissed the parents' claims.

E. Remaining Claims

The parents' remaining requests do not present any cognizable claims for relief, and it is therefore unnecessary to address them on the merits. In its cross-appeal, the district offers no valid authority for its argument that the IHO erred in making alternative findings that the parents' unilateral placement for the 2018-19 school year was appropriate after finding that the district offered the student a FAPE for the 2018-19 school year. While the IHO's unilateral placement findings were not required after determining that the district offered the student a FAPE, if an SRO or a reviewing court were to later reach a different conclusion than the IHO with regard to her FAPE determination in the Burlington-Carter analysis, the unilateral placement findings could become central in resolving the case. Accordingly, the district's cross-appeal must be dismissed.

VII. Conclusion

Having found that the district offered the student a FAPE for the 2018-19 school year, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 24, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER